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Financial Services Act (FFSA)

Key thrusts of potential regulation

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Key thrusts

Change to scope of supervised entities

1. The requirements to which asset managers are subject must be raised. In the future, they must adhere to the rules of conduct that apply to financial service providers and should be subject to prudential supervision.
2. The object of discussion is the form of supervision that should apply to asset managers. The following alternatives are conceivable:
 - a. Subjection to the rules of conduct set out in the FFSA and supervision by one or several self-regulating organisations yet to be created;
 - b. Subjection to the rules of conduct set out in the FFSA and supervision by FINMA;
3. The licensing requirement that applies to distributors of collective investment schemes and the existing registration obligation that applies to insurance intermediaries should be replaced by requirements for client advisers and the associated registration obligation.

Documentation of product characteristics

4. Securities offered in or from Switzerland should be subject to the obligation to publish a prospectus. Prospectuses should be drawn up in accordance with a standardised template and contain details on the product, the issuers, and any other obligated persons. Furthermore, prospectuses should provide information on the risks associated with the relevant product(s).
5. For complex financial products offered in or from Switzerland, the issuers should produce a Key Investor Document (KID). The KID should clarify the key product characteristics, risks and costs, and facilitate a comparison between different financial products.
6. As a general rule, the prospectus and the KID should be available to the investor at the point the investment decision is made. Advertising should be identifiable as such, as well as truthful. Rules on follow-up publicity should ensure the transparency of a product even after an investment has been made.
7. The prospectus and the KID should be submitted to an authority for formal scrutiny. The issuer must publish product documentation as soon as clients have been made aware of the possibility of acquiring the product.

Conduct and organisation of financial service providers

8. Financial service providers must inform their clients of the content and costs of the service they are providing, as well as the characteristics, costs and risks of products offered, before they provide any financial service.
9. Before executing a transaction, financial service providers should establish the knowledge and experience of the client with respect to the transaction in question. If they consider a transaction to be inappropriate, they should make this known to the client. Prior to issuing a recommendation, as well as in the context of asset management mandates, financial service providers must assess whether a transaction is suitable for the client.
10. Financial service providers must document the scope and object of the agreed service as well as their efforts to establish the suitability and appropriateness of the transaction for the client. They must also account for the services in question in a transparent manner.
11. In particular, financial service providers should take measures to avoid conflicts of interest between themselves or their staff on the one hand and their clients on the other.
12. Remuneration received from third parties should be disclosed, and should only be permissible if the interests of the client are preserved and the payment has the effect of increasing the quality of the service in question.

Training of client advisers

13. Client advisers should have sufficient knowledge of the rules of conduct. Their knowledge of the rules of conduct should be ensured through regular further training.
14. Client advisers should have the necessary specialist knowledge to provide the services they are offering. This specialist knowledge should also be ensured through regular further training.
15. Client advisers should only be entered in a public register if they can prove that they have had sufficient initial and ongoing training in the area of expertise in question and with respect to the prevailing rules of conduct. Anyone who does not have an entry in the corresponding register should not be allowed to operate as a client adviser.

Enforcing the claims of retail clients

16. If a client claims that a financial service provider has violated the rules of conduct, a reversal of the burden of proof under civil law should apply. Moreover, clients should be able to demand a copy of their client dossier from their financial service provider at any time.
17. The ombudsman system should be strengthened. This could be achieved through the introduction of a requirement to be affiliated with an ombudsman with the authority to issue recommendations. An alternative being discussed is the establishment of a governmental ombudsman with decision-making competencies.
18. After reviewing the case, the ombudsman would issue a recommendation or a ruling. If the ombudsman concludes that the client's claim is probably justified, the financial service provider – insofar as they continue to contest the claim – would be obligated to make the trial costs, court costs for the submission of a complaint, and the costs of any subsequent procedures available to the client (without the client incurring any obligation to repay in the event of losing the case).

Cross-border activity into Switzerland

19. Foreign financial service providers should have to comply with the same rules of conduct as Swiss providers if they are providing services in Switzerland on a cross-border basis.
20. Foreign providers of financial services should have to register in Switzerland insofar as their activities are subject to supervision in Switzerland. An entry in the register should be tied to the fulfilment of certain conditions.
21. Instead of a registration obligation, the requirement to establish a branch in Switzerland could be introduced for foreign financial service providers who are active on a cross-border basis.
22. The regulation of cross-border financial services provided in Switzerland should not be any more rigorous than is needed to ensure client protection and the smooth functioning of markets.

1 Background situation

1.1 Why is a Swiss Financial Services Act needed?

Insufficient client protection under existing legislation

The provisions of Swiss financial market law should protect clients – i.e. creditors, investors, and insured persons – from impermissible conduct on the part of other market participants, and strengthen their confidence in a stable and functioning market. Various measures are already in place under existing law with the aim of meeting this objective. For example, the approval process that applies to certain financial service providers and the supervision to which they are subject makes the Swiss financial market more robust, while the potential to intervene with supervisory instruments ensures that illegal situations within supervised entities are either avoided in the first place or rapidly and effectively remedied. In addition to this prudential supervision, however, the conduct of financial service providers towards their clients and a sufficient level of transparency with respect to the services and products offered are further key elements in ensuring a sufficient level of client protection. It is precisely in this area of conduct and product regulations that gaps exist under existing law. In particular, the existing asymmetry of information and power between clients and financial service providers is only addressed in isolated places by existing legal provisions.

Unequal conditions for providers of financial services

In addition to improving client protection, the new regulation should also establish the same conditions for all participants in the Swiss financial market. An important prerequisite for strengthening competition among Swiss providers is the standardised design of regulatory requirements that cover the provision of financial services. This should not only cover technical aspects such as the complexity of products and the level of protection required by clients, but should also apply generally to all providers to the same extent, with the necessary degree of differentiation. With this kind of level playing field, distortions in the competition between providers can be reduced.

The key thrusts outlined in this report should therefore be viewed from a cross-sectoral perspective, as well as in relation to one another. For example, the introduction of greater transparency at product level is only meaningful if financial service providers are obliged to pass on the corresponding information to their clients and enquire as to the requirements and expectations of their clients. The conduct obligations will in turn only have the effect of improving client protection if client advisers are aware of these obligations and possess a sufficient level of specialist knowledge. Only the coherent regulation of transparency, conduct, supervision, and legal enforcement is capable of achieving the objectives of the new regulation effectively.

International developments

The harmonisation of Swiss financial market law with prevailing international standards is crucial for both clients and financial service providers themselves. For their part, clients benefit in particular from the high quality of Swiss financial services and enhanced protection of their interests. Swiss financial providers benefit from the advantages of the Swiss financial centre's strong reputation abroad, which results from the fulfilment of international requirements. Many Swiss financial service providers have an international outlook and are reliant on access to foreign markets. Although different regulations apply in different parts of the world to market access for cross-border financial service providers, a key prerequisite for the provision of cross-border services is typically for certain regulatory minimum standards to be in force and adhered to in the country of domicile of the provider in question. In the EU in particular, numerous regulatory projects have sprung up in the financial market area since 2008. One element of this European package of measures is the creation of standardised market access provisions for third countries.

The measures proposed in this hearing report were drawn up after taking into account international requirements in the regulation of financial product development and distribution. Internationally valid standards, such as those of the EU, should essentially be adopted by Switzerland. Any deviation from these standards for political or economic motives should only occur in exceptional cases. In such cases, a credible alternative should exist.

1.2 Economic background

With a 10.3% share of GDP and a 6.2% share of national employment, the financial sector makes a significant contribution to the Swiss economy (figures as at 2011). A significant proportion of this contribution is generated in connection with the provision of cross-border services to foreign clients. The Swiss financial centre is the world's leading player in the area of private banking, for example. As Switzerland is a small, open economy with an internationally significant financial centre, it is crucial that Swiss financial service providers have access to the international financial markets in the future too. Against this backdrop, it would also appear important for Switzerland to shape its parameters around international developments in this area.

All financial market participants and financial products are affected by the cross-sector regulation of financial services which is currently planned. A large number of financial service providers in Switzerland are subject to the prudential supervision of FINMA, including 306 banks, 212 insurance companies, and 100 managers of collective investment schemes (figures as at 2012). Insurance brokers, distributors of collective investment schemes, and the institutions of the Swiss financial market infrastructure are also subject to FINMA oversight. But the financial centre is also home to several thousand financial service providers not subject to supervision, including asset managers, investment advisers, and foreign financial service providers active in Switzerland.

As part of the further concretisation of regulatory initiatives, regulatory proposals are also being scrutinised with respect to their economic repercussions. Of particular interest here are behavioural adjustments (orientation of business model, access to services and products) of those involved (financial industry, clients, supervisory bodies, etc.) and the financial repercussions of the new regulation on market participants. As part of an assessment of the impact of regulation, the benefits of enhanced client protection, market access, and improved competition are being weighed up against the costs of the new regulatory requirements, which for the most part will be borne by financial service providers.

2 The Financial Services Act project

On 28 March 2012 the Federal Council instructed the Federal Department of Finance (FDF), in cooperation with the Federal Department of Justice and Police (FDJP) and FINMA, to commence work on a project to prepare the legal basis for the creation of a cross-sector regulation of financial products and services and their distribution, and to submit a consultation draft to the Federal Council by the autumn of 2013. The new guidelines should result in a strengthening of client protection within the Swiss financial market and enhance the competitiveness of the financial centre. Furthermore, the same conditions should be set for all market participants, thereby creating a level playing field and reducing distortions in competition between providers.

The Financial Services Act (FFSA) project currently involves five working groups focusing on different thematic areas: distribution, product, authorisation and supervision, cross-border and enforcement. The individual working groups are made up of members from different authorities. All working groups include representatives of FDF Legal Services, the State Secretariat for International Financial Matters (SIF) and FINMA. Depending on the area in question, other representatives in the working groups have been drawn from the Federal Department of Foreign Affairs (FDFA), the Federal Office of Justice (FOJ), the Federal Social Insurance Office (FSIO), and the State Secretariat for Economic Affairs (SECO). In addition, a number of working groups also include external experts, primarily from the academic side. The project Steering Group is comprised of one representative from each of the FDF, SIF, FINMA and the FOJ.

This hearing report puts forward the first proposals for how gaps in existing financial market legislation can be closed. The proposals are aimed at achieving the greatest possible transparency for all market participants and setting out the rights and obligations of clients and financial service providers clearly. Based on this report, a discussion on the key thrusts proposed should be initiated. With this in mind, the hearing report also raises a number of different questions. These too are intended to stimulate discussion. Interested parties are invited to submit their written opinions on the proposed key thrusts to the FFSA Project Secretariat for the attention of the Steering Group by 28 March 2013. In addition to the written hearing procedure, a panel event will take place at the beginning of March 2013.

3 Cross-sector regulation of financial services

The regulatory implementation of the written proposals is to be effected through a Financial Services Act. As things stand, the Act would set out cross-sector rules of conduct for all financial service providers and minimum requirements for the training of client advisers in the areas of rules of conduct and expertise. Furthermore, the Act would set out rules for product documentation and possibly prospectus requirements for financial products. Other aspects that would be covered by the Financial Services Act include the strengthening of the ombudsman system and measures to facilitate the enforcement of claims at civil court level. Finally, the Act would also contain provisions on the cross-border business of foreign financial service providers in Switzerland.

The introduction of the new regulations will also involve an adjustment to existing financial market legislation. In particular, all provisions for which cross-sector regulation is to be developed will be transferred from sector-specific decrees to the new Financial Services Act. For example, this would include rules of conduct such as those covered by the corresponding provisions of Article 11 of the Federal Act on Stock Exchanges and Securities Trading (SESTA) and Article 20 of the Collective Investment Schemes Act (CISA). In addition, the introduction of formal prospectus requirements under financial market legislation would also entail an adjustment to the prospectus guidelines set out in the Swiss Code of Obligations.

It has not yet been determined where new regulations for asset managers should be enshrined.

Question

1. What is your opinion on strengthening investor protection in accordance with the proposals of this report?

Question

2. Should the regulatory provisions that apply in the EU be taken over into the FFSA project with their content unchanged, or should Swiss regulation be designed in a different way? If the latter, in which areas?

4 Scope of the new guidelines

4.1 Product documentation

Where the scope of guidelines on financial product documentation is concerned, a distinction should be made between provisions for drawing up a prospectus and the requirements that relate to so-called "Key Investor Documents" (KIDs).

The prospectus regulations should essentially apply to all securities sold either in or from Switzerland. The existing definition of the Stock Exchange Act should be used as the basis for the term "securities". In other words, securities are deemed to be standardised certificates which are suitable for mass trading, book-entry securities and derivatives. Basic savings products are excluded from this scope.

A KID should be offered to retail clients free of charge for all complex financial products prior to the signing of an agreement. Complex financial products are products for which a change in value does not derive solely from the credit standing and profitability of the issuer. Examples of complex financial products include in particular all compound financial products, i.e. those that involve different building blocks, such as structured products, shares/units in collective investment schemes, and insurance products with an investment aspect. Bonds and participation rights are considered to be complex financial products if their valuation is particularly complex as a result of an unusual capital structure (e.g. mandatory convertible bonds) or due to the calculation of coupon payments or dividend entitlement. Irrelevant to the question of whether a financial product is a complex product is the issue of whether or not it has been issued in standardised form or customised in line with individual client requirements.

4.2 Rules of conduct

The new Act will introduce cross-sector regulations governing the conduct of market participants. Unlike existing regulations, these future provisions will start from the principle that all financial service providers – irrespective of their licensing status – are subject to the same minimum requirements with respect to conduct vis-à-vis their clients. All financial service providers who provide professional financial services to clients should therefore be covered by the scope of these regulations.

The term "financial service" is to be broadly defined, and should cover all activities that could lead to the acquisition of a financial product by a client. In particular, the guidelines should apply to investment advisory services, the management of client assets, and the acceptance and execution of orders to acquire or sell financial products. Financial products in this sense are deemed to be all products of an investment nature issued and offered in or from Switzerland, as well as certain insurance products. This includes, in particular, equities, bonds, derivatives, structured products, collective investment schemes, and certain insurance products.

Financial service providers are deemed to be all persons who provide financial services professionally. The new guidelines will therefore cover supervised market participants on the one hand, such as banks, securities dealers, insurers, fund management companies, and from now onwards all asset managers too. The obligations entailed by the legislation are aimed at supervised entities themselves, and not directly at their staff and contracting partners. However, the institutions covered by these provisions will have to ensure that their employees, as well as any third parties they use to provide a financial service, comply with the new rules of conduct. In particular, all natural persons who have relevant contact with clients, and act as employees or in any other capacity on behalf of supervised institutions involved in the business of providing financial services, should be obliged to provide proof of their knowledge of the applicable rules of conduct (Section 8). On the other hand, market participants not subject to supervision will also be subject to the new rules if they provide financial services to their clients. However, for these persons the regulations should essentially have an impact solely under private law.

4.3 Client segmentation

The asymmetry of power between financial service providers and clients is particularly pronounced when it comes to retail clients. Retail clients are essentially deemed to be all natural persons, irrespective of their financial circumstances. In addition, companies with no specific knowledge of the financial sphere are also retail clients. Professional clients, by contrast, encompass institutional clients, investors subject to prudential supervision, and major companies. These clients regularly have the opportunity to obtain the information relevant to a transaction. Consequently, it should not be mandatory for a prospectus or a KID on a financial product to be made available to professional clients. The regulations on product documentation should therefore only apply if the products in question may be acquired by retail clients. Clients must be informed of the client segment to which they are to be assigned.

A distinction between retail clients and professional clients should be made when it comes to the rules of conduct too. In the case of clients classified as professional clients, the financial service provider should typically assume that they have sufficient knowledge and experience to evaluate the risks of a particular transaction. In addition, when it comes to informing the client about the characteristics and risks of a service or financial product, here too financial service providers should consider whether they are dealing with a retail client or a professional client.

Professional clients should at all times be able to "opt in" to the protection that applies to retail clients. By contrast, retail clients with a certain level of assets and sufficient specialist qualifications in the market segment in question should be able to opt out of the enhanced level of protection. The criteria for this kind of client segmentation should be set out in a standardised way by the legislator for all financial products. Opting out should only be possible if the client in question possesses sufficient assets, specialist knowledge and experience to understand the financial products in question and evaluate the risks involved.

Question

3. In the area of client segmentation, should Swiss law adopt the provisions on client segmentation that apply under EU regulation¹ without changes, or should Swiss regulation be designed in a different way? For example, should proof of a certain level of freely disposable assets or the appropriate specialist qualifications – or a combination of the two – be the key criteria?

¹ According to the Markets in Financial Instruments Directive (MiFID), a retail client is entitled to opt out if he or she fulfils two of the three following criteria: i) the client has executed an average of ten transactions of a significant size per quarter for the last four preceding quarters, ii) the investment portfolio of the client is in excess of EUR 500,000, iii) the client has been or was active in the financial sector for at least a year in a position requiring knowledge of the transactions or services envisaged.

5 Scope of supervised entities

Key thrusts

1. The requirements to which asset managers are subject must be raised. In the future, asset managers must comply with the rules of conduct that apply to financial service providers and should be subject to prudential supervision.
2. The object of discussion is the form of supervision that should apply to asset managers. The following alternatives are conceivable:
 - a. Subjection to the rules of conduct set out in the FFSA and supervision by one or several self-regulating organisations yet to be created;
 - b. Subjection to the rules of conduct set out in the FFSA and supervision by FINMA;
3. The licensing requirement that applies to distributors of collective investment schemes and the existing registration obligation that applies to insurance intermediaries should be replaced by requirements for client advisers and the associated registration obligation.

5.1 Extended supervision of asset managers

Under existing law, the asset management business in Switzerland is conducted on the one hand by institutions subject to prudential supervision, namely banks and securities dealers, as well as fund management companies and managers of collective investment schemes. These institutions require a licence from FINMA, which supervises their activity on an ongoing basis. On the other hand, the asset management business is also conducted by unsupervised financial service providers. To differentiate themselves from asset managers subject to prudential supervision, these asset managers regularly describe themselves as "independent" or "external" asset managers. However, both these adjectives are capable of leading to client misunderstandings (cf. comment on the term "independent" on page 16). From this point onwards, therefore, only the term "asset manager" is used, with no preceding adjective added.

Asset managers make their decisions as to where to invest client assets independently after having agreed investment targets and an investment strategy together with the client. The comprehensive nature of these competencies means that asset management clients need special protection. In order to provide better protection to clients of asset managers who are not yet subject to supervision, new regulations need to be introduced for these market participants. The following alternatives in particular are conceivable:

1. Subjection of asset managers to the rules of conduct set out in the FFSA and supervision by one or several self-regulating organisations yet to be created;
2. Subjection of asset managers to the rules of conduct set out in the FFSA and supervision by FINMA;

In addition, it is also being reviewed whether the subjection of asset managers to the FFSA's rules of conduct would be conceivable without any supervision by FINMA or third parties. A solution of this kind was not pursued further, however, as in particular it would fail to take sufficient account of the improvement of investor and client protection that forms an objective of the current regulatory project.

Finally, it is also conceivable that asset managers could be subject to the rules of conduct of the FFSA while at the same time being indirectly supervised by the banks. This solution too would see asset managers subjected to the new rules of conduct. In addition, the banks with which asset managers maintain business relationships would be entrusted with the task of overseeing their compliance with these obligations. Any infringements would be subject to sanctions by the banks under private law –

e.g. conventional fines – and reported to FINMA. In the event of serious violations of these rules of conduct, FINMA could take supervisory measures against the asset manager in question as part of an enforcement procedure. By contrast, no licensing would be required, nor would asset managers be subject to direct supervision by FINMA. FINMA would merely review the monitoring activity of the banks. For various reasons, this solution alternative was also rejected. In particular, there would be a danger of imputation difficulties, duplications, and a lack of standardisation in the requirements set by the various banks, as well as conflicts of interests for the supervising banks, as in some areas these institutions would be in direct competition with the asset managers subject to their oversight. Last but not least, the supervision of asset managers by private entities would not conform to international standards, in particular the requirements for asset managers by the European Union.

In the paragraphs that follow we set out the advantages and disadvantages of the two proposed supervisory approaches (Option 1 and Option 2). With the introduction of the new rules of conduct (Section 7) clear and standardised provisions for conduct towards clients will apply to all asset managers. The two proposed options differ greatly with respect to the type of supervision that would apply to asset managers previously not subject to supervision.

Option 1: Licensing and supervision by self-regulating organisations

Option 1 envisages asset managers being licensed and continuously supervised by one or more self-regulating organisations (SROs) yet to be created. In order to receive a licence, an asset manager would have to possess sufficient financial assets or other equivalent security, an operational organisation that is "fit for purpose" with the corresponding control functions, as well as expert bodies with the necessary integrity led by qualified staff. Moreover, the asset manager would have to observe established rules to ensure a fair and transparent market presence.

Under this option, asset managers would be subject to compulsory membership of an SRO. The SRO would itself require a licence from FINMA prior to commencing activity. Given the importance of the task in question, the barriers to obtaining a licence would be set high. In particular, the SRO would have to display a sufficient degree of independence, possess an operational organisation that is "fit for purpose" with the corresponding control functions, and have expert bodies with the necessary integrity led by qualified personnel. Supervision of the SRO itself would be undertaken by FINMA.

Option 1 has the following arguments in particular in its favour:

- Supervision by one or several SROs could have certain advantages compared to a system of state supervision, namely greater market proximity and flexibility, together with a higher level of acceptance by market participants.
- Clients could choose whether they want to hold their asset management mandate with a provider supervised by FINMA (e.g. a bank or securities dealer) or with a financial service provider supervised by an SRO.
- The numerous new asset managers that would now be subject to supervision would take up fewer state resources than would be the case under Option 2, as FINMA would only be responsible for supervising the SRO itself.

The drawbacks of Option 1 may be described by the following in particular:

- A model whereby asset managers are supervised by an SRO would not conform to international standards, and runs the risk of not being sufficiently accepted either in Switzerland or abroad.
- Under EU law, investment firms that provide investment services (i.e. asset management services) must always be subject to supervision by state authorities. Accordingly, the SRO model would make it difficult, if not impossible, for Swiss financial service providers to gain market access to the EU.

- The SRO model does not resolve the question of necessary independence in a problem-free way, as it would be intrinsically more susceptible to conflicts of interest than a state supervisory model.
- It is not clear whether the SRO supervisory model would create a sufficiently "catch-all" framework that would encompass pension fund managers in accordance with Article 48f of the OPO 2.

Option 2: Prudential supervision by FINMA

Option 2 envisages the prudential supervision of all asset managers by FINMA. This option would correspond to today's supervisory model as it applies to banks, insurers, securities dealers, fund management companies, and managers of collective investment schemes. In keeping with the dual supervisory tradition, FINMA would not exercise its supervisory activity directly, but via specially authorised audit companies. Moreover, FINMA would be authorised to enforce compliance with the law, combat abuses, and impose penalties.

Option 2 has the following arguments in particular in its favour:

- Higher supervisory standards contribute to the further professionalization of the asset management industry. Client protection would be strengthened under the state supervisory model.
- An extension of FINMA's remit to cover the asset management business would close an existing supervisory gap, and create a level playing field for asset managers and those financial service providers already subject to prudential supervision.
- The regulatory gap that exists between competing international financial centres would be further diminished. Thanks to this alignment with international standards, Switzerland would give itself a better chance of ensuring market access for Swiss companies abroad.
- Unacceptable and damaging market conduct on the part of asset managers would be rapidly identified and penalised.
- A sufficiently "catch-all" framework would be created in accordance with Article 48f of the OPO 2.

The drawbacks of Option 2 may be described by the following in particular:

- Asset managers do not hold client funds. These are held in the accounts and custody accounts of supervised banks and securities dealers.
- Financial service providers subject to supervision and financial service providers not subject to supervision are currently in open competition with one another. The client should be free to make his or her own decision with respect to a specific business model. This option deprives the client of such decision-making freedom.
- This prudential supervision leads to higher regulatory costs than Option 1, and this could squeeze smaller asset managers in particular out of the market.
- This option would result in numerous new asset managers being subjected to supervision, which in turn would lead to a substantial increase in the level of state resources required to implement that supervision.

Question

4. Which of the two proposed regulatory options for asset managers do you prefer? What are the decisive arguments? Do you see any other options?

5.2 Replacement of existing licensing requirement for distributors of collective investment schemes

Some 365 distributors of collective investment schemes currently require a licence from FINMA. These distributors are not subject to prudential supervision by FINMA. This situation is unsatisfactory. The requirement to obtain a license without ongoing supervision leads to misunderstandings among clients, and essentially results in misplaced confidence that the activity of these licensed organisations is being supervised. This problem is compounded by the fact that all financial service providers may describe themselves as "supervised by FINMA" if they are "required to be licensed, recognised, or registered by the Federal Financial Market Supervisory Authority under financial market legislation" (Art. 3 of the Financial Market Supervision Act).

On the other hand, however, subjecting these distributors to prudential supervision would not appear to be justified, as these market participants are already subject to formal supervision at a self-regulatory level. Furthermore, in the area of collective investment schemes, it is not only the issuers who are subject to national supervision, but also the products themselves. Given this backdrop, the introduction of a requirement for distributors of collective investment schemes to be subject to FINMA supervision would appear disproportionate. It would be much more logical to dispense with the need to seek official approval for this activity. Distributors of collective investment schemes must – just like all other financial service providers – comply with the new rules of conduct (Section 7). Moreover, the existing supervisory activity that covers distributors should be incorporated into the requirements for a sufficient level of knowledge on the part of client advisers and the associated registration obligation (Section 8).

5.3 Replacement of existing registration obligation for insurance intermediaries

There are currently more than 13,000 registered insurance intermediaries in Switzerland. As client advisers, they too will have to comply with the rules of conduct set out in the FFSA in the future. Making insurance intermediaries subject to prudential supervision would therefore appear to be disproportionate, particularly as insurance institutions are themselves already subject to supervision by FINMA. The existing registration obligation of insurance intermediaries should therefore – just like the licensing obligation that applies to distributors of collective investment schemes – be incorporated into requirements for a sufficient level of knowledge on the part of client advisers and the associated registration obligation. In the future, both independent insurance intermediaries and tied insurance intermediaries should be entered into a register. The prerequisites for entry into such a register are described in Section 8.

Question

5. How do you view the proposed abolition of the licensing requirement for distributors of collective investment schemes and the abolition of the registration obligation for insurance intermediaries, while at the same time subjecting these market participants to the newly conceived registration obligation for client advisers, which would be linked to training requirements?

5.4 Abolition of directly subordinated financial intermediary (DSFI) status

According to the Anti-Money Laundering Act (AMLA), financial intermediaries in the quasi-banking area must either affiliate themselves with a self-regulating organisation or obtain a license from FINMA in order to exercise their activity. Today there are around 380 DSFIs in Switzerland, of which a good half would be regulated as asset managers in the future based on either of the two options (Option 1 or Option 2). The remainder would be subject to the rules of conduct set out in the FFSA in their capacity as client advisers. Due to the low number of these DSFIs, but also as a result of the activities they pursue, the idea of having them subjected to prudential supervision by FINMA has been ruled out

as being disproportionate. On the other hand, there is no reason to water down the preventative provisions of the AMLA, particularly as Switzerland is committed to international agreements in the area of combating money laundering and the financing of terrorism in the financial sector.

The licensing obligation that applies to DSFIs, who will continue to be exempt from prudential supervision by FINMA under the new regulation (as they are not asset managers), could be replaced by an obligation to seek affiliation with an SRO. This approach would have the advantage that the prudential supervision of financial service providers by FINMA would be clearly segregated from the AMLA monitoring of market participants. The disadvantage of this solution would be that affiliation with a self-regulating organisation would in certain circumstances not be achieved for all financial intermediaries who require supervision under the Anti-Money Laundering Act.

Question

6. How do you view the proposed abolition of the licensing requirement that applies to DSFIs under the AMLA, and the simultaneous introduction of a requirement to seek affiliation with an AMLA SRO?

6 Documentation of product characteristics

Key thrusts

4. Securities offered in or from Switzerland should be subject to the obligation to publish a prospectus. Prospectuses should be drawn up in accordance with a standardised template and contain details on the product, the issuers, and any other obligated persons. Furthermore, prospectuses should provide information on the risks associated with the relevant product(s).
5. For complex financial products offered in or from Switzerland, the issuers should produce a Key Investor Document (KID). The KID should clarify the key product characteristics, risks and costs, and facilitate a comparison between different financial products.
6. As a general rule, the prospectus and the KID should be available to the investor at the point the investment decision is made. Advertising should be identifiable as such, as well as truthful. Rules on follow-up publicity should ensure the transparency of a product even after an investment has been made.
7. The prospectus and the KID should be submitted to an authority for formal scrutiny. The issuer must publish the product documentation as soon as clients have been made aware of the possibility of acquiring the product.

In order for clients to be able to make an informed decision on the acquisition of a financial product, they require sufficient information on the characteristics and risks of the product, as well as information on the costs that they will incur through the purchase, sale, and holding of the product. Moreover, market participants who advise clients prior to the acquisition of a product also require appropriate and binding information on this financial product before they can make a recommendation. In order to meet these needs, the issuers of securities should be obliged to publish a prospectus. In addition, a so-called Key Investor Document (KID) should be drawn up for complex financial instruments.

6.1 Prospectus obligation for securities

If securities are to be offered to retail clients either in or from Switzerland, the issuer in question should be obliged to draw up and publish a prospectus. Here it is irrelevant whether the issuer is domiciled in Switzerland or abroad. If securities are subject to a foreign prospectus obligation which is equivalent to Swiss requirements, however, its issuers may be exempted from the prospectus obligation under Swiss law. Where the existence of a prospectus obligation is concerned, it is irrelevant whether the products in question are listed on the stock exchange or are the direct result of a securities issue, or whether they are offered by an existing major shareholder as part of a secondary offering.

Hard copies of prospectuses should be made available to interested clients on demand. In addition, prospectuses should be published on a central electronic platform operated by the relevant supervisory authority or by a third party mandated by that authority. Prospectuses should be published as soon as clients have been made aware of the possibility of acquiring the product.

Finally, the comprehensive documentation obligations that apply to collective investment schemes under existing law will remain in place. The structuring of these fund prospectuses is based on international standards, and is to a large extent equivalent to the provisions of EU regulation on collective investments.

Exceptions to the prospectus obligation

In keeping with prevailing EU legislation, offerings which are exclusively targeted at professional clients, as well as offerings of securities with a minimum denomination of CHF 100,000 or a minimum investment of CHF 100,000, should not be subject to prospectus obligation. In these cases, it is assumed that clients can obtain the information required for their investment decision as part of discussions and negotiations with the issuers or distributors of the products in question.

Offerings which have been designed for a restricted circle of persons – e.g. 150 clients – or those that relate to the introduction of employee participation plans should also not be subject to the prospectus obligation. As in the EU, smaller public offerings of unlisted financial instruments should also be exempt from the prospectus obligation on grounds of proportionality. For example, this exception might cover situations in which the entire issue volume over a 12-month period amounted to less than CHF 5 million.

Other exemptions from the prospectus obligation could be envisaged for the issuance of securities in connection with restructurings or takeover offers. Finally, issuers of shares may be exempt from the prospectus obligation if the shares are to be distributed to shareholders as dividends. Basic savings products should not be covered by the prospectus obligation.

Structuring and content of prospectuses

The prospectus should provide interested clients with readily understandable information which is as comprehensive as possible with respect to the product, the issuer, and any other persons taking on obligations with respect to the securities in question (e.g. the guarantor). In addition, prospectuses should contain a risk disclosure as well as a summary, and should be drawn up according to a standard format. The Federal Council should set out the minimum content requirement and the way prospectuses should be structured at Ordinance level, in a similar way as it does today for collective investment schemes. However, the Ordinance should refrain from imposing specific formulations. The requirements should be product-independent to the greatest possible degree. When it comes to the requirements for structuring prospectuses, however, the characteristics of certain product types should be incorporated. There may be certain differences here, particularly with respect to the description of the rights and obligations pertaining to the securities. The information on the securities issued should in particular provide details on the rights and obligations pertaining to the products. These should include references to the type of products being issued, the timing of the issue, and the terms and conditions that apply. In the case of derivative products, moreover, the underlying instrument should be described, and it should be made clear how fluctuations in the value of the underlying may affect the performance of the financial product being issued.

Details on the issuer should include information on the company itself (organisation, business activity, senior bodies, capital and voting rights, key shareholders, whether or not it is part of a group), on the company's operating result and financial situation, and on its commercial outlook. If equities are being issued, a status report should be obtained from senior management.

Where risk disclosure is concerned, issuers should be required to disclose specific risks in comprehensible language. By contrast, a listing of general risk factors should be excluded with a view to ensuring readability. It is envisaged that risks could be listed in order of importance.

With respect to the issuance of debt securities, issuers should be able to publish a basic prospectus instead of a stand-alone prospectus. This basic prospectus could then be used to issue a large number of similar products. For each new issue, the basic prospectus would be supplemented by the final terms designating the specific conditions that apply to the products being issued – in the case of bonds the term, interest rate or reference rate, and margin, or in the case of derivatives the underlying securities, assets or reference rate, exercise price, and expiry.

Finally, it should be ensured that any follow-up publicity for securities is appropriate. In this respect, prospectuses for structured products and derivative financial instruments should be adjusted in the event of changes to the rights associated with the product, and investors should be informed accordingly. In the case of unlisted equities and bonds, the follow-up publicity should be included in the publication of the annual report. For listed equities and bonds, as well as collective investment schemes, the provisions of existing law in the area of follow-up publicity appear satisfactory, and do not therefore need adjustment. All documents created in connection with follow-up publicity for a product should be activated on the same electronic platform on which the prospectus itself can be found.

As regards advertising for financial products, standardised regulations in line with the EU Prospectus Directive should apply to the entire financial market (Section 7.1)

6.2 Prospectus "light"

In addition to the general prospectus obligation, certain types of issuers – e.g. SMEs and companies with low market capitalisations (small caps) – and certain types of offerings (such as issues of subscription rights) could be subject to less onerous requirements regarding the form and content of prospectuses (a so-called prospectus "light"). This less onerous requirement would be justified either for issues typically aimed at persons closely linked to the issuing company (e.g. in the case of SMEs), or if it would be disproportionate to demand a full prospectus.

Less onerous requirements are envisaged above all in the areas of (a) details on the issuer and (b) risk disclosure. This information should be restricted to a reasonable minimum, since the investor is already familiar with the company. For example, lengthy detail on the management of the company and its prospects (in particular the management discussion and analysis) could be dispensed with. It should be considered whether the risk disclosure could be dispensed with entirely in the case of equity issues and non-structured bonds.

By contrast, the simplified prospectus (prospectus "light") should be compulsorily drawn up in the form of a stand-alone prospectus, and the possibility of incorporations by reference ruled out altogether.

Question

7. Should any other exceptions to the prospectus obligation be envisaged or should less onerous requirements apply in addition to those proposed above, for example with respect to issues by the Swiss confederation, cantons, communes, or other public sector entities?

6.3 Key Investor Document (KID) for complex financial products

For retail clients in particular, information in prospectuses is often too comprehensive to gain an overview of the characteristics, costs and risks of a financial product and incorporate this information into their investment decision. Issuers should therefore draw up a KID for complex financial products. Complex financial products are considered to be products for which the change in value does not rely solely on the credit standing and profitability of the issuer (Section 4.1).

The aim of the KID is to explain to clients the key properties of a financial product in a readily understandable way. In particular, the KID should set out the factors which influence changes in the product's value. In order to improve the comparability of different products, the KID should be subject to clear regulatory guidelines with respect to structure, content, sequence of information, and document length. The guidelines could be broadly shaped around the criteria on key information for investors contained in Appendix 3 of the Collective Investment Schemes Ordinance (CISO). In terms of content, the KID should provide details on the product class, its objective, as well as the financial resources and methods deployed. Furthermore, the KID should make it clear whether the product is subject to supervision or not. In addition, it should describe the risk and return profile of the product, and should explain what drawbacks would be involved in the event of the product being redeemed early. A risk disclaimer should be included which amongst others clarifies the client's potential losses and lists the market risks associated with the product. Finally, all the direct and indirect costs associated with an investment in the product should be disclosed.

The KID should be actively offered to clients by the affected financial service providers (Section 7). The issuer should be obliged to adjust the KID whenever significant changes occur. Furthermore, they should make the document available at all times in either electronic or printed form, and upload it onto the electronic platform that houses the prospectuses of the financial product in question.

Question

8. As well as complex financial products, should other financial products – such as insurance products without investment character or straightforward equities and bonds – also be covered by the obligation to produce a KID?

6.4 Review requirement and liability

The introduction of cross-sector documentation provisions for financial products will only result in an improvement of client protection if compliance with these provisions is reviewed and clients are in a position to claim against financial losses incurred as a result of deficient or incorrect information in product documentation.

Review of prospectus and KID

Both the prospectus and the KID should therefore be reviewed in advance to identify shortcomings either by FINMA or by another institution such as the Swiss Takeover Board (TOB) or (for listed financial instruments) SIX Swiss Exchange.

With the proposed preventative controls, no actual licensing of the individual product would be required, as is currently the case today in the area of collective investment schemes and certain insurance products. The prospectus review process should not mean that any bans need be introduced with respect to the distribution of certain products to retail clients. An abstract classification of financial instruments for certain client segments would appear inappropriate in the absence of knowledge as to the specific investment strategy of a client. However, issuers should already have an idea of the appropriate target market for a financial product when conceiving the product, and should describe this target market within the product documentation.

Question

9. Do you think the proposed review system for product documentation is expedient, or do you see other elements that should be taken into account? What body should undertake a review process of this kind?

Liability for missing or incorrect information in product documentation

Clients who have suffered financial losses due to insufficient or deficient product documentation should be able to claim for such losses against the issuers and other involved persons. Prospectus liability should apply to all product prospectuses and the KID, in a similar way to the liability provisions set out under Article 752 of the Swiss Code of Obligations. However, the persons responsible for the KID should only bear liability if this document reproduces details from the prospectus incorrectly, or if details required under the regulations are erroneous or missing.

It should be assumed that there is causation between an incorrect statement in the prospectus or KID and the loss suffered by the client. Missing or incorrect information would therefore be deemed to be causal the client's loss even if the client in question had not relied on these details in the prospectus or in the KID when making his/her investment decision. The circle of potential liable parties should encompass the issuers, their board of directors and executive board, any guarantor, the provider, and the person who applies for the product's admission to trading on a regulated market. These persons should be listed in the prospectus or KID. Furthermore, the prospectus should contain a declaration on the part of the persons responsible that the details in the prospectus are correct and complete.

7 Conduct and organisation of financial service providers

Key thrusts

8. Financial service providers must inform their clients of the content and costs of the service they are providing, as well as the characteristics, costs and risks of products offered, before they provide any financial service.
9. Before executing a transaction, financial service providers should establish the knowledge and experience of the client with respect to the transaction in question. If they consider a transaction to be inappropriate, they should make this known to the client. Prior to issuing a recommendation, as well as in the context of asset management mandates, financial service providers must assess whether a transaction is suitable for the client.
10. Financial service providers must document the scope and object of the agreed service as well as their efforts to establish the suitability and appropriateness of the transaction for the client. They must also account for the services in question in a transparent manner.
11. In particular, financial service providers should take measures to avoid conflicts of interest between themselves or their staff on the one hand and their clients on the other.
12. Remuneration received from third parties should be disclosed, and should only be permissible if the interests of the client are preserved and the payment has the effect of increasing the quality of the service in question.

Clients should be able to understand what rights they have vis-à-vis their providers. They should also know what private information they should be providing to the financial service provider, and what information they can expect from the provider, depending on the nature of the service or product in question. The FDF therefore considers it appropriate to amend the existing rules of conduct. The new regulations should give clients the greatest possible transparency with respect to the services offered, the transactions executed, and the financial products in question. In addition, any due diligence or fiduciary duties of the financial service provider prior to a service being provided should be clearly set out. However, the new provisions should not restrict the spectrum of services that financial service providers may execute on behalf of their clients. Furthermore, clients should not be "patronised" in their decisions for or against acquiring a financial product.

The enforcement of the new rules of conduct at supervised institutions is the task of the supervisory authority. FINMA continually monitors whether financial service providers subject to prudential supervision are complying with the applicable provisions of supervisory law, and takes measures if an institution violates the regulations. In addition, clients who have suffered financial losses as a result of the misconduct of supervised entities should be able to enforce their claims under civil law. Due to the lack of supervision, violations by unsupervised institutions can only be identified by the supervisory authority at a late stage, if at all. In the event of misconduct on the part of these financial service providers, the focus would therefore lie on enforcement of the relevant provisions by the individual client under civil law (Section 9).

7.1 Information on financial service providers, services, and products

In order for clients to be able to make informed investment decisions, they need to have sufficient information on their financial service provider and on the financial services and products on offer. This is true irrespective of the individual investment amount involved. Depending on the client segment, the individual information requirements should vary, and they should be more comprehensive for retail clients than for professional clients.

Information on financial service providers

Clients should first of all be given appropriate information on the service provider and their field of activity. In the case of retail clients, this information should contain the following in particular: name

and address, form of communication and language, licensing/approval status, and relevant supervisory authority. Providers should only be able to designate themselves "supervised" if their conduct and organisation is subject to ongoing supervision by the authority. Last but not least, the service provider should provide information on potential ways of lodging a complaint or obtaining access to out-of-court arbitration procedures.

If applicable, the provider should make it clear that they are acting via contractually or otherwise tied intermediaries, or these tied intermediaries should make it clear in what capacity they are acting and which provider they are representing.

Information on service and product

Financial service providers should provide their clients with sufficient disclosure as to the characteristics, risks, costs and expected return of the service or product in question. Information should also be provided in the appropriate form on historical performance developments and any special characteristics that may apply, such as in the case of structured products. Furthermore, financial service providers should hand the required product documentation over to the client. In particular, the KID (Section 6) should be handed over to retail clients. Detailed product prospectuses, by contrast, should only be made available on demand. In the case of exchange-related financial services, information should be provided with respect to the place of execution of client orders.

Moreover, the direct and indirect costs as well as the ancillary costs that would be incurred by the client with respect to the service/product should be disclosed in a transparent way. If the service is being offered together with another service, or if a product is being offered as part of a package, the provider should inform the client whether the various component parts could also be acquired separately, indicating the relevant costs that would apply.

If investment advisory services are being provided, clients should know whether the advice in question is independent, whether it is based on a comprehensive or limited market analysis, and whether they are being offered ongoing assessment about the suitability of the financial instrument(s) in question. Financial service providers should only be able to describe themselves as "independent" or similar if they are taking no financial or other incentives from third parties and include a sufficient number of financial instruments.

Way in which information is provided

The information described above on the provider, financial service and product should be given to clients in plenty of time for them to make their investment decision. This information must always be fair, clear, and not misleading. Any advertising material of the provider should be clearly designated as such. Advertising should also clearly state whether and where any prospectuses and KIDs on the relevant financial product are available. Information contained in advertising material should correspond with the statements set out in regulatory documentation. The information required may also – if appropriate – be passed on to the client in standardised form.

7.2 Review of appropriateness and suitability

The introduction of the information requirements described above would put the onus on financial service providers to create transparency with respect to the products offered, their services, and their vested interests. In addition, financial service providers should also align their activity with the needs of the client. The detail into which they should go to clarify these needs will depend on the type of service being provided. A distinction is made below between the obligations that arise in connection with "execution only" transactions on one hand, and the obligation to conduct an appropriateness and suitability review on the other. Moreover, where the appropriateness and suitability review is concerned, the distinction between retail clients and professional clients should also be taken into account (Section 4.3).

Appropriateness review prior to transactions involving financial products

In order for financial service providers to be able to act in the interests of a client, they should at least know the level of their client's knowledge and experience with respect to the type of transaction in question. Accordingly, financial service providers should be obliged to undertake an appropriateness review before offering any given service. Based on the knowledge and experience of a particular client, they should judge whether the type of product or service to be provided is appropriate for that client. If they consider a transaction to be inappropriate, or if the appropriateness review cannot be executed due to certain information being absent, they should make the client aware of this fact.

Suitability review for advisory and asset management business

Financial service providers can only advise clients on the investment of their assets if they know their clients' level of experience, knowledge, investment objectives, and financial circumstances. Based on the information provided by their client, the financial service provider should conduct a suitability review. Only if the service provider assesses the client to have sufficient knowledge and experience to understand the risks and characteristics of a particular transaction, and only if this transaction makes sense given the client's investment objectives and financial circumstances, should the financial services provider be able to advise a client to execute the transaction in question. The process of ascertaining the client's investment objectives should also include a review of the client's risk tolerance and risk capacity. Furthermore, the suitability review should take into account the aspect of risk diversification in a client portfolio. As a financial service provider cannot make any confident assertion about the suitability of a transaction in the absence of (complete) information on the experience, knowledge, investment targets and financial circumstances of a client, issuing a recommendation would not be appropriate in such a case. The financial service provider should make this clear to the client and refrain from formulating a recommendation.

The described proposals with respect to the suitability review should apply not just to investment advisory business, but also in the context of asset management mandates. The suitability process here relates to the concept of asset management itself: Prior to concluding an asset management agreement, a financial service provider should ensure that the client understands the concept of "asset management" services being offered, and that the selected investment strategy is in keeping with the objectives and financial circumstances of the client, i.e. is suitable for the client. Furthermore, prior to executing any transactions, the asset manager should review whether these transactions are appropriate for the client given the existing structure of the latter's portfolio. Finally, all investments in a client portfolio should be monitored on an ongoing basis.

When it comes to actually providing investment advice or implementing asset management mandates, it should be ensured that the selection of investments (e.g. funds vs. direct investments; passive vs. active products) is undertaken wholly in the client's interest from the standpoint of both quality and cost.

Limits to "execution only" transactions for retail clients

If a client makes an unsolicited approach to a financial service provider and asks it to implement a particular transaction on his or her behalf, the financial service provider may execute this "execution only" business without undertaking an appropriateness or suitability review. However, in the case of retail clients, financial service providers should only be able to undertake such "execution only" transactions in the case of straightforward financial products. Straightforward financial products are those which are readily comprehensible, do not commit the client to anything beyond the original product costs, and are either regularly sold on an open market or redeemable through the issuer.

Question

10. Do you consider the proposed criteria for the assessment of suitability and appropriateness of a transaction for any given client to be expedient, or are there other criteria that should be factored in?

7.3 Documentation and accountability

Documentation

Under the new regulation, financial service providers should document the agreement reached with a client on the provision of a financial service. Firstly, the key rights and obligations of the parties should be set out in a written framework agreement prior to the initial execution of services on behalf of a client. Secondly, all other agreements in place with the client should be set out in writing, together with the key information pertaining to the client. In the case of advisory discussions, the relevant results in particular should be summed up, such as the ascertained needs of the client and the reasons why recommendations were made. Thirdly, financial service providers should keep a record of the orders received from clients and the transactions undertaken on their behalf. Furthermore, the results of the appropriateness and suitability review should be documented with commensurate care. By contrast, the FDF does not consider it expedient to introduce an obligation to record every word in meeting minutes or to have minutes signed by the client. With an obligation of this kind, there would be a substantial risk that the signed minutes would routinely be used against the client by financial service providers looking to extricate themselves from any liability.

Rendering proper account for services provided

Financial service providers should render account to their clients for the services they have provided in the appropriate form. Among other things, this means that financial service providers should provide regular reports to their clients. In particular, reports should contain details of transactions actually executed, the direct and indirect costs of these transactions, and any services provided. Furthermore, in the context of asset management and advisory relationships, financial service providers should also make it clear to each client that they have undertaken the transactions in question in accordance with the client's profile and wishes. Moreover, financial service providers who hold financial products on their clients' behalf should provide them with an overview of the securities in their custody at least once a year, while at the same time providing information on the custodians in question and their liability. Finally, a client should be able to request at any time that their financial service provider hand over documentation created in connection with a financial service that has been provided (Section 9).

Question

11. How should the proposed documentation requirement be implemented in your view?

7.4 Organisational obligations

In order for financial service providers to comply with the rules of conduct set out above and take the interests of their clients into account appropriately when exercising their activity, they should also be subject to certain organisational obligations. For the most part, such obligations already exist for certain market participants under existing law. The new development in this area would therefore not be the obligations themselves as such, but their cross-sectoral application to all persons providing financial services to clients.

Measures to avoid conflict of interests

As part of these organisational obligations, financial service providers should in particular take measures to avoid conflicts of interest between themselves or their staff on the one hand and their clients on the other. Internal objectives with regard to sales, volumes, or profitability should not interfere with client interests or obstructing the fulfilment of the rules of conduct described earlier. Financial service providers should also take measures to prevent staff own transactions that could be to the detriment of clients.

In addition, when appointing staff, financial service providers should take care to ensure that these employees have sufficient specialist knowledge to conduct their tasks, as well as knowledge of the prevailing rules of conduct (Section 8). Additional operational precautions should be taken when outsourcing certain activities that relate to the provision of financial services. However, the obligations of financial service providers vis-à-vis their clients remain unaltered in situations like this involving delegation. Moreover, cooperation between different financial service providers, aside from purely delegation aspects, should be regulated. For example, financial service providers should only be able to accept orders from intermediaries who can themselves display sufficient expertise and knowledge of the applicable rules of conduct.

Transparency and due diligence in the processing of client orders

Financial service providers should also have to take certain organisational measures with respect to the processing of client orders. In particular, such measures should ensure that incoming orders are executed with the least possible delay, and in accordance with the sequence in which they were received. Furthermore, products held on behalf of clients may only be used for securities lending or similar purposes subject to the consent of the client in question. Any third-party remuneration that applies should also be disclosed in this context. The express approval of clients must also be obtained if any of their assets are to be held in custody together with the assets of other clients. In addition, financial service providers should issue a set of internal principles covering "best practice" execution of client instructions. When drawing up such principles, all key aspects should be taken into account – such as the price of financial products, the costs of the individual services, and the speed of order execution.

7.5 Third-party remuneration

Clients should be informed of the scope of financial incentives (e.g. retrocessions) or other incentives received by third parties. At this point in time, providers should also reach an agreement with clients regarding a waiver of claims with respect to the obligation to pass such remuneration on to the client. Such a waiver with respect to third-party remuneration should only be permissible if the client is informed about the amounts involved and the relevant calculation parameters, if the interests of the client are preserved despite the third-party remuneration, and if the remuneration in question contributes to enhancing the quality of the service provided. In addition to the waiver agreement, the client should, on request, be provided with full transparency about the actual sums that relate to third parties. Providers should likewise flag up unavoidable conflicts of interest so that clients can understand the potential repercussions of these conflicts on their relationship with the service provider. An alternative would be a ban on the acceptance of third-party remuneration, particularly with respect to independent asset managers.

8 Training of client advisers

Key thrusts

13. Client advisers should have sufficient knowledge of the rules of conduct. Their knowledge of these rules of conduct should be ensured through regular further training.
14. Client advisers should have the necessary specialist knowledge to provide the services they are offering. This specialist knowledge should also be ensured through regular further training.
15. Client advisers should only be entered into a public register if they can prove they have had sufficient initial and ongoing training in the relevant area of expertise and with respect to prevailing rules of conduct. Anyone who does not have an entry in the corresponding register should not be allowed to operate as a client adviser.

Contact with clients is typically managed by client advisers. Client advisers are considered to be all natural persons who enter into contact with clients and either offer them financial services or execute such services on their behalf. In addition to investment advisers, this also includes insurance intermediaries and distributors. Client advisers regularly act as the interface between financial service providers and their clients. In order to ensure implementation of the new rules of conduct and an appropriate advisory framework in the provision of financial services in practice, client advisers should have to prove that they possess sufficient knowledge of the rules of conduct, as well as the necessary expertise. Furthermore, client advisers ought not to commence any advisory activity before they have been accepted into a public register. The following obligations essentially apply to Swiss and foreign client advisers who are active in Switzerland.

8.1 Knowledge of rules of conduct and specialist expertise

Given the important part they play in implementing rules of conduct vis-à-vis clients, client advisers should be required to undergo sufficient initial and ongoing training. Client advisers who work as employees or on a contractual basis for supervised financial service providers should likewise fulfil all the prerequisites with respect to training requirements.

On the one hand, the training obligation should encompass the new rules of conduct. This would involve a standardised basic training module for all client advisers, who must possess the requisite knowledge of the content and significance of the rules of conduct for financial service providers. In particular, they must be aware of their information obligations vis-à-vis clients, whether or not an appropriateness or suitability review should be conducted, and how they should document their services. In addition, they should be aware of their obligation to render account to their clients for the services provided, and should also be aware that they are obliged to document both the agreements reached with clients and the advice that clients have been given.

Furthermore, initial and ongoing training obligations should also apply with respect to the specialist knowledge a client adviser must possess in his or her specific area of activity. Only on the basis of sufficient specialist knowledge can client advisers meet the rules of conduct that apply to financial service providers. Client advisers should therefore possess knowledge of the financial market, the financial products offered, and the financial advisory process. In particular, this includes knowledge of the way financial markets work, knowledge of the characteristics, costs, and risks of key financial instruments, knowledge of the regulatory provisions relating to such instruments, and knowledge of how to ascertain client needs and manage client portfolios.

8.2 Proof of training

Client advisers should have to demonstrate their knowledge of the content and importance of rules of conduct in a compulsory examination. This process should ensure that every client adviser knows how he or she should behave vis-à-vis clients. The examination could be conducted either by FINMA or by

a third party. The specific content, format and organisation of the examination could be regulated through a detailed ordinance.

With respect to specialist knowledge, this could be proved through attendance and completion of a recognised training course. The requirements that apply with respect to the content and scope of specialist knowledge training, as well as the providers that would give such training, could be regulated through a detailed ordinance. On the basis of this ordinance, the relevant body would decide whether a particular qualification could serve as sufficient proof of specialist knowledge, and would maintain a public list of recognised certifications.

8.3 Ongoing training obligations

In order for client advisers to be able to maintain and expand their knowledge, and be informed of changes in the financial markets or the regulatory environment, they should have to refresh and improve their knowledge through regular further training. It is proposed on the one hand that client advisers should have to pass a further training examination on the rules of conduct ("refresher" course) four years after passing the initial examination on the prevailing rules of conduct, and thereafter at two-yearly intervals.

On the other hand, client advisers should also have to obtain certification of sufficient further training in their specialist area every two years. The responsible body could issue a publicly available list containing the further training modules that would be acknowledged as valid.

Question

12. Do you believe that certification of completed initial and further training on the rules of conduct and in the area of specialist knowledge is necessary?

8.4 Public register of client advisers

Client advisers should only be able to exercise their activity if they have been entered into a public register for client advisers. The registration obligation should also apply to client advisers who are employed by, or work on a contractual basis for, a supervised financial service provider. For their part, supervised financial service providers should ensure that any of their employees who work as client advisers are entered in the register. Furthermore, they should only be able to collaborate with other registered advisers. However, the introduction of the new minimum standards will not release supervised institutions from their own obligation to train staff appropriately for specific tasks.

Conditions for obtaining an entry in the register should be passing the examination on the rules of conduct and demonstrating proof of sufficient specialist knowledge. Furthermore, client advisers who are not in an employment relationship with a supervised financial services provider must be able to provide proof that they have the necessary professional liability insurance, or proof of other financial guarantees. Finally, client advisers should demonstrate that they regularly refresh and improve their knowledge through further training.

The corresponding register could be managed by FINMA or by a third party. Handing over responsibility for managing the register to private providers – such as self-regulatory organisations that already exist – would make it easier for industry-specific training requirements to be taken into account, particularly in the area of specialist knowledge. The self-regulatory organisations would be supervised by FINMA, and would have to ensure that only client advisers who fulfil the described criteria on an ongoing basis retain an entry in their registers. In addition, they would have to monitor registered client advisers' compliance with their conduct obligations, and would be responsible for imposing the corresponding penalties in the event of violations. In the event of recurring or serious failures in this area, they would have to strike the offending client adviser off the register. This exclusion would be made apparent in the register.

The corresponding information should be made accessible to the public, in addition to the responsible registration unit. This would enable clients to find out whether a particular client adviser was registered and possessed the necessary minimum knowledge base at any time. The register should be generally accessible via internet search, and should function as an electronic platform. In addition to providing basic details on registered client advisers, the public register should in particular include details on their initial and further training with respect to both specialist knowledge and the rules of conduct, and disclose whether a client adviser is tied to a supervised financial service provider or not.

Question

13. Should a public register of client advisers be created?

9 Enforcing the claims of retail clients

Key thrusts

16. If a client claims that a financial service provider has violated the rules of conduct, a reversal of the burden of proof under civil law should apply. Moreover, clients should be able to demand a copy of their client dossier from their financial service provider at any time.
17. The ombudsman system should be strengthened. This could be achieved through the introduction of a requirement to be affiliated with an ombudsman with the authority to issue recommendations. An alternative being discussed is the establishment of a governmental ombudsman with decision-making competencies.
18. After reviewing the case, the ombudsman will issue a recommendation or a ruling. If the ombudsman concludes that the client's claim is probably justified, the financial service provider would be obliged – to the extent that the financial service provider continues not to recognise the claim – to make the cost required to pursue a claim, as well as the costs of the subsequent procedure, available to the client (without the client incurring any obligation to repay in the event of losing the case).

The legal relationship between financial service providers and their clients is subject to the rules of conduct set out in Section 7. Compliance with these provisions by supervised financial service providers is monitored and enforced by FINMA. Moreover, in their relationship with both supervised and unsupervised financial service providers, clients have the option of defending themselves against rule violations with instruments of enforcement under private law. In order to give clients a genuine opportunity to enforce their claims through these channels, various ways of making civil cases less onerous should be pursued. The key points of focus here would be a reversal of the burden of proof when it comes to establishing that a financial service provider has violated rules of conduct, and a strengthening of the ombudsman procedure.

9.1 Reversal of burden of proof with respect to conduct obligations

Establishing that a financial service provider has violated obligations or failed to perform due diligence is often difficult. To relieve the burden of proof for clients of financial service providers, a substantial barrier could be eliminated when investors are pursuing legal claims for losses. The proposed reversal of the burden of proof is directly linked to the rules of conduct set out in Section 7: Anyone subject to these conduct obligations should have to establish in a civil case that they actually complied with these rules in their conduct vis-à-vis a particular client. If the service provider fails to establish this, the situation will favour the client and it will be assumed that the obligations in question were not fulfilled.

This proposed reversal of the burden of proof also appears appropriate given that financial service providers – unlike their clients – should in any case be in a position to furnish the corresponding documentation of their activities. The improvement in client protection that would be effected through this measure would appear to have little potential for abuse. If financial service providers follow the rules of conduct and adhere to the proposed documentation requirement, the reversal of the burden of proof will not result in any disadvantageous consequences for them.

Alongside the jurisdiction of the Federal Court, a statutory right should be enshrined whereby financial service providers are obliged to provide a copy of their file on a particular client within 30 days of receiving a written application by that client. This would enable clients to investigate the state of evidence and to weigh up their chances of success in court before actually launching a suit.

Question

14. What is your opinion on the idea of reversing the burden of proof?

9.2 Expansion of the ombudsman system

A further barrier to the pursuit of legal claims is that of trial costs and the associated risk involved. The opportunity should therefore exist for clients to obtain advance financing for any costs that might arise in the run-up to a trial – such as when drafting their formal complaint. This could be achieved if, after assessing a case, the ombudsman were to issue a recommendation or make a decision as to how the situation should be resolved. If the ombudsman concludes that the client's claim is probably justified, the financial service provider should be obliged to advance the client's costs for the subsequent civil procedure and ultimately to bear these costs themselves, irrespective of the outcome of the case.

Two alternatives are presented for discussion: an ombudsman with an affiliation requirement and authority to issue recommendations, and a governmental ombudsman with (limited) decision-making competencies.

Option 1: Ombudsman with affiliation requirement and authority to issue recommendations

Previous experiences with the ombudsman system have shown that an ombudsman procedure has the effect of resolving the dispute in many cases, even if their opinion is not binding. Under existing law, however, financial service providers do not have to be affiliated to an ombudsman or indeed engage with any such procedure. One option for improving the existing organisation of the ombudsman system would be to commit all financial service providers to be affiliated with an ombudsman and to engage with procedures involving this ombudsman.

With this option, the ombudsman would still not have the power to make binding decisions. The ombudsman would, however, issue a recommendation at the conclusion of the procedure as to how the situation should be resolved. If the ombudsman deems the client's claim to be justified on balance, this should be set out in the recommendation. This recommendation would in turn entitle the client to request the advance financing of their trial costs under the relevant civil court by the financial service provider. At the same time, a conclusive presumption would be established that the client was entitled to pursue the claim in good faith, so that the trial costs would in any case have to be borne by the financial service provider, irrespective of the outcome of the trial (cf. Art. 107 of the Swiss Civil Procedure Code (CPC)).

Option 2: Arbitration board with decision-making powers

The second option proposed would involve the establishment of ombudsman offices as independent decision-making bodies for cases up to a particular disputed value (e.g. CHF 100,000). The informality of the procedure and the absence of costs would also apply in this option too, thereby enabling clients to pursue their claims in less onerous circumstances. If the case involved a higher disputed amount, by contrast, the ombudsman would only have power to issue a recommendation, as under Option 1.

As a result of their decision-making authority, the ombudsman would be assigned institutional independence. It should be borne in mind that the decisions of the ombudsman would lead to the resolution of civil claims, which would then be subject to legal review in keeping with the Federal Constitution and international obligations. The decisions of the ombudsman would therefore have to be appealable at civil court level.

In order to ensure the specialist expertise of the governmental ombudsman, it would make sense to establish their geographical authority as broadly as possible. The appropriate model would appear to be a set-up in which there is one point of contact per linguistic region.

The implementation of Option 2 would enable international standards to be taken into account appropriately in the area of dispute resolution. For example, in January 2012 the World Bank unveiled a publication on the resolution of conflicts between consumers and financial service providers by an ombudsman. The "High-level Principles on Financial Consumer Protection" published by the G20 in October 2011 likewise require countries to ensure fair, easily accessible, cost-effective, and efficient procedures through which retail clients can pursue claims for any financial losses suffered.

Question

15. Which of the two proposed regulatory options for expanding the ombudsman procedure do you prefer? What are the decisive arguments? Can you see any other options?

Establishment of an information and advice office for clients who have suffered losses

Irrespective of whether it is structured according to Option 1 or Option 2, the ombudsman should additionally be assigned an advisory role. Specifically, clients who have suffered losses should be able to obtain advice on the process itself and the prospects for success of their individual case. This would enable a certain proportion of disputes to be resolved through informal channels, as is already partly the case today. Here, it should be ensured that the staff issuing advice are independent of the actual arbitration authority in order to avoid a situation of legal prejudice arising due to prior advice having been given.

Moreover, the advisory office should provide interested clients with information about completed, pending, or impending cases of the arbitration body, insofar as this is desired by the plaintiffs in question. This would promote contacts and a network between aggrieved parties, which would facilitate joint lawsuits or the use of shared representatives. This in turn would have the effect of lowering legal barriers.

9.3 Class-action suits and other instruments of collective legal protection

With respect to investor losses, it is often argued that only the introduction of class-action lawsuits in line with the US model can truly remedy the situation. However, this argument does not hold in cases where erroneous advice has been given or another breach of duty is being claimed, as here the situation comes down to the individual case, and a collective approach generally is not suitable. By contrast, in the case of structural breaches of duty, for example if erroneous information had been provided in a prospectus, or if an investment adviser had systematically demonstrated a dereliction of duty on the direct instructions of his or her line manager, the case for class-action proceedings would essentially be clear.

When drawing up the Civil Procedure Code (CPC), the legislator deliberately decided against introducing class-action lawsuits and other instruments of collective legal protection. In the aftermath of the financial crisis, however, the discussion over the possible establishment of such instruments has been reinvigorated. The FOJ is currently undertaking a broad-based investigation of the suitability of institutions for the collective legal enforcement of claims relating to damages involving a large number of aggrieved parties with the same or similar claims. This also touches on the problem of investment losses. It is expected that this report will be approved by the Federal Council during the course of 2013. Given this background, this issue is not pursued further here.

9.4 Other reviewed measures for the improvement of investor protection

Another possible measure for improving the situation of clients, which was mentioned in the FINMA Distribution Report published in October 2010, is the introduction of an institutionalised review of general terms and conditions, as in certain situations this could also have the effect of protecting clients in the Swiss financial market from far-reaching disclaimers of liability or other such contractual provisions that would be to their disadvantage. The legal situation has changed greatly since then: On 1 July 2012, the revised Article 8 of the Federal Act on Unfair Competition entered into force, which is largely formulated in line with the European equivalent.² The legislator expressly wished to introduce

² Art. 3 para. 1 of the First Council Directive 93/13/EEC 5 April 1993 on unfair terms in consumer contracts.

an open system of reviewing general terms and conditions in accordance with the European model. From the legislative perspective, therefore, there is currently no need to act in this respect.

Furthermore, the question has been raised as to whether the interests of clients could be better protected by granting clients the right to withdraw from or terminate contracts. However, such a solution is not viewed as expedient, as it would not cover the actual financial market transaction but the corresponding underlying business (for example the asset management agreement or custody agreement); by contrast, a general and unconditional right to withdraw from the purchase of individual financial investments would be inconceivable, as the risk of speculation could then be transferred from the client to the salesman or adviser. For this reason, this option is not pursued further here.

10 Cross-border activity into Switzerland

Key thrusts

19. Foreign financial service providers should have to comply with the same rules of conduct as Swiss providers if they are providing services in Switzerland on a cross-border basis.
20. Foreign providers of financial services should have to register in Switzerland insofar as their activities are subject to supervision in Switzerland. An entry in the register should be tied to the fulfilment of certain conditions.
21. Instead of a registration obligation, the requirement to establish a branch in Switzerland could be introduced for foreign financial service providers who are active on a cross-border basis.
22. The regulation of cross-border financial services provided in Switzerland should not be any more rigorous than is needed to ensure client protection and the smooth functioning of markets.

If clients in Switzerland receive services from foreign financial service providers, they should essentially be just as well protected as if they were receiving the services in question from domestic providers. A service is deemed to be a cross-border service if a provider domiciled in another country has provided the service to a client in Switzerland. This may well involve the service being provided without any physical presence in Switzerland on the part of the provider, or through the provider's employees or the provider's agents physically present in Switzerland.

In order to ensure that clients enjoy an appropriate level of protection in the case of cross-border services, foreign providers should have to comply with the same or at least equivalent rules of conduct as Swiss providers. In addition, if providers are offering services that require a licence in Switzerland, they should be registered in Switzerland. An entry in the register should be tied to the fulfilment of certain conditions. One option would be to introduce a requirement for foreign providers to establish a branch in Switzerland. Where the training of client advisers is concerned, the considerations laid out in Section 8 apply.

10.1 Rules of conduct for foreign providers

Foreign providers exercising cross-border activity in Switzerland should have to comply with the rules of conduct enshrined under Swiss law. Foreign providers should therefore have to inform their Swiss clients about themselves and their services, their products and the characteristics, costs and risks of those products. They should also have to conduct an appropriateness and suitability review as well as meet their documentation and accountability obligations (Section 7). In the event that a foreign provider violates these rules of conduct, clients should be able to pursue the same claims under civil law as they would vis-à-vis a Swiss provider. However, the fact that a provider is based abroad can make the enforcement of a client's claim under civil law more difficult. This is particularly true in the case of foreign recognition and enforcement of a ruling issued in Switzerland.

Alternatively, it may suffice for foreign financial service providers from certain countries to have to comply with the conduct obligations that apply under the home jurisdiction. According to this kind of equivalency concept, Swiss conduct obligations would be deemed to be fulfilled if the foreign financial service provider adheres to the corresponding legal provisions of their country of domicile, insofar as these regulations and the corresponding supervisory mechanism are deemed by Switzerland to be equivalent. The equivalency assessment should be conducted in a results-oriented manner, and should be based on equivalent client protection in the country of origin of the service provider. In the event of recognition of equivalency, the foreign financial service provider would essentially only be subject to one supervisory regime, namely that of their country of origin. This would avoid the problem of duplications with Swiss law. On the other hand, this could result in an increased degree of legal uncertainty for the client, who would be forced to pursue any claims under foreign law. The issue of the place of jurisdiction would not be affected by this regulation.

Question

16. Should foreign financial service providers engaging in cross-border activity in Switzerland have to comply with Swiss rules of conduct or the foreign equivalent?

10.2 Registration obligation or branch establishment obligation?

In order for clients of foreign providers to be as well protected as the clients of domestic financial service providers, foreign providers who want to exercise an activity in Switzerland which requires approval should register with FINMA prior to engaging in such activity. Registration could be effected in one of the following ways:

- Approval and equivalent supervision of the foreign provider by the supervisory authority in the country of origin;
- Cooperation agreement between FINMA and the supervisory authority in the country of origin for purposes of exchanging information and enabling on-site checks by FINMA;
- The existence of professional liability insurance or the depositing of sufficient funds to satisfy any client claims;
- Obligation to provide information to FINMA.

The act of registration itself would not involve any ongoing supervision by FINMA. Registration would, however, enable FINMA to establish which foreign providers were able to pursue activity in Switzerland in the first place. Moreover, the registration requirement would ensure that clients enjoyed similar protection against violations of the rules of conduct as if a Swiss provider had provided the service. However, given the lack of supervision by FINMA, there would be no equally effective channel of supervisory enforcement as there would be with a Swiss provider. The foreign provider should inform Swiss clients about the lack of supervision by FINMA and the way in which their rights could be enforced in Switzerland under civil law with respect to the rules of conduct.

In addition to the protection measures described above, it is also conceivable that foreign providers should have to prove an ongoing physical presence in Switzerland, at least in branch office form. The branch would have to be approved and prudential requirements fulfilled, as is already the case under Swiss banking and stock market legislation. In particular, the branch would have to adhere to the relevant conditions for ensuring the proper conduct of the business operations according to Swiss supervisory law. Furthermore, the branch would have to possess a set of business regulations and ensure an appropriate management organisation. Finally, the branch would have to demonstrate an appropriate level of financial resources for its business activity.

As branches are not independent legal entities, the foreign parent company would have to show an appropriate organisation and sufficient financial resources under this model too. Moreover, the foreign provider would have to be subject to effective governmental supervision in its country of origin. In the area of regulation and supervision, equivalency with the relevant Swiss requirements would have to be demonstrated.

Introducing such a branch obligation for providers engaging in cross-border activity would ensure that Swiss clients had direct access to foreign financial service providers. The claims of clients under private law could be pursued before a Swiss court and enforced in Switzerland under Swiss law. Furthermore, as the sovereign supervisory authority, FINMA would be responsible for supervising the approved branch and could swiftly instigate any necessary supervisory measures.

Question

17. In order to ensure effective and equivalent protection of Swiss clients vis-à-vis foreign providers, should foreign providers have to establish a permanent physical presence in Switzerland, including supervision, or would the proposed registration ensure an appropriate level of protection?

The new provisions should be as standardised as possible so that they can apply to all types of cross-border financial services. Existing requirements which go beyond the described proposals should be preserved, however. In particular, the provisions for the distribution of foreign collective investment schemes and the provisions that apply to foreign insurance companies active in Switzerland should remain in place. Given the special characteristics of these types of services, particularly the long-term obligations toward clients and the interaction between supervisory and private law, the FDF considers a different form of treatment to be appropriate. Last but not least, the existing regulations are also in line with current practice in foreign jurisdictions.

Questions

Scope of the new provisions

1. What is your opinion on the proposals of this report for strengthening investor protection?
2. Should the regulatory provisions that apply in the EU be taken over into the FFSA project with their content unchanged, or should Swiss regulation be designed in a different way? If the latter, in which areas?
3. In the area of client segmentation, should Swiss law adopt the provisions on client segmentation that apply under EU regulation³ without changes, or should Swiss regulation be designed in a different way? For example, should a certain level of freely disposable assets or the appropriate specialist qualifications – or a combination of the two – be the key criteria?

Change to scope of supervised entities

4. Which of the two proposed regulatory options for asset managers do you prefer? What are the decisive arguments? Can you see any other options?
5. How do you view the proposed abolition of the licensing requirement for distributors of collective investment schemes and the abolition of the registration obligation for insurance intermediaries, while at the same time subjecting these market participants to the newly conceived registration obligation for client advisers, which would be linked to training requirements?
6. How do you view the proposed abolition of the licensing requirement that applies to DSFIs under the AMLA, and the simultaneous introduction of a requirement to seek affiliation with an AMLA SRO?

Documentation of product characteristics

7. Should any other exceptions to the prospectus obligation be envisaged or should less onerous requirements apply in addition to those proposed above, for example with respect to issues by the Swiss confederation, cantons, communes, or other public sector entities?
8. As well as complex financial products, should other financial products – such as insurance products without investment character or straightforward equities and bonds – also be covered by the obligation to produce a KID?
9. Do you think the proposed review system for product documentation is expedient, or do you see other elements that should be taken into account? What bodies should undertake a review process of this kind?

Conduct and organisation of financial service providers

10. Do you consider the proposed criteria for the assessment of suitability and appropriateness of a transaction for any given client to be expedient, or are there other criteria that should be factored in?
11. How should the proposed documentation requirement be implemented in your view?

³ According to the Markets in Financial Instruments Directive (MiFID), a retail client is entitled to opt out if he or she fulfils two of the three following criteria: i) the client has executed an average of ten transactions of a significant size per quarter for the last four preceding quarters, ii) the investment portfolio of the client is in excess of EUR 500,000, iii) the client is or was active in the financial sector for at least a year in a position requiring knowledge of the transactions or services envisaged.

Training of client advisers

12. Do you believe that certification of completed initial and further training on the rules of conduct and in the area of specialist knowledge is necessary?
13. Should a public register of client advisers be created?

Enforcing the claims of private investors

14. What is your opinion on the idea of reversing the burden of proof?
15. Which of the two proposed regulatory options for expanding the ombudsman procedure do you prefer? What are the decisive arguments? Can you see any other options?

Cross-border activity in Switzerland

16. Should foreign financial service providers engaging in cross-border activity in Switzerland have to comply with Swiss rules of conduct or the foreign equivalent?
17. In order to ensure effective and equivalent protection of Swiss clients vis-à-vis foreign providers, should foreign providers have to establish a permanent physical presence in Switzerland, including supervision, or would the proposed registration process ensure an appropriate level of protection?