

# **Federal Act on Financial Services**

## **(Federal Financial Services Act, FinSA)**

of ...

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*The Federal Assembly of the Swiss Confederation,*

based on Articles 95, 97, 98 and 122 paragraph 1 of the Federal Constitution<sup>1</sup>, and having considered the Federal Council Dispatch of .....

*decrees:*

### **Title 1: General Provisions**

#### **Article 1** Purpose and subject matter

<sup>1</sup> This Act seeks to protect the clients of financial service providers and to establish comparable conditions for the provision of financial services by financial service providers.

<sup>2</sup> To this end, it establishes the requirements for honesty, diligence and transparency in the provision of financial services and governs the offering of financial instruments and the enforcement of civil-law claims brought by clients of financial service providers.

<sup>3</sup> This Act also governs the organisation and authorisation of:

- a. the registration body for client advisers;
- b. reviewing bodies for prospectuses;
- c. ombudsmen.

#### **Article 2** Scope of application

This Act applies to all of the following, irrespective of their legal form:

- a. financial service providers;
- b. client advisers;
- c. securities providers and issuers of financial instruments.

#### **Article 3** Definitions

For the purposes of this Act:

- a. *assets* are financial instruments and other financial investments;

<sup>1</sup> SR 101

- b. *financial instruments* are:
1. equity securities:
    - securities in the form of shares including share-like securities allowing for participation or voting rights, such as participation certificates and dividend rights certificates
    - securities that, on conversion or execution of the rights embedded in them, allow for acquisition of equity securities, as set forth above, of the same issuer or the same corporate group,
  2. debt instruments: securities not classified as equity securities,
  3. units in collective investment schemes in accordance with Article 7 of the Federal Act of 23 June 2006 on Collective Investment Schemes<sup>2</sup>,
  4. structured products, i.e. capital-protected products, capped return products, certificates,
  5. derivatives within the meaning of Article 2 letter b of the Financial Market Infrastructure Act of ...<sup>3</sup>,
  6. redeemable life insurance policies,
  7. deposits whose redemption value or interest is linked to the risk embedded or the rate;
- c. *securities* are standardised intermediated securities, certificated securities, uncertificated securities and derivatives suitable for mass trading;
- d. a *financial service* is any of the following activities carried out for clients:
1. acquisition or disposal of financial instruments,
  2. reception and transmission of orders in relation to financial instruments,
  3. administration of assets (portfolio management),
  4. giving personal recommendations on transactions with financial instruments (investment advice),
  5. custody of assets on behalf of clients,
  6. keeping accounts,
  7. granting loans to finance transactions with financial instruments;
- e. *financial service providers* are any persons who provide financial services on a professional basis in Switzerland or for clients in Switzerland;
- f. *client advisers* are natural persons who perform financial services on behalf of a financial service provider or in their own capacity as financial service providers;
- g. an *issuer* is a person who issues or intends to issue securities;
- h. a *public offer* is [a?] notification to the public containing sufficient information on the terms of the offer and the securities themselves for the purchase or subscription of said securities.

<sup>2</sup> SR 951.31

<sup>3</sup> SR ...

**Article 4** Client segmentation

<sup>1</sup> *Client* means any person for whom a financial service provider provides financial services.

<sup>2</sup> *Retail client* means a client who is not a professional client.

<sup>3</sup> *Professional client*<sup>4</sup> means:

- a. financial intermediaries as defined in [the Banking Act of 8 November 1934], the Financial Institutions Act of [...] and the Federal Act of 23 June 2006 on Collective Investment Schemes<sup>5</sup>;
- b. insurance companies as defined in the Insurance Supervision Act of 17 December 2004<sup>6</sup>;
- c. foreign clients subject to an equivalent form of prudential supervision as the persons listed under *a* and *b* above;
- d. central banks;
- e. public entities with professional treasury operations;
- f. occupational pension schemes with professional treasury operations;
- g. companies with professional treasury operations.

<sup>4</sup> *Institutional client*<sup>7</sup> means professional clients as defined in paragraph 3 letters a–d as well as national and supranational public entities with professional treasury operations.

<sup>5</sup> The Federal Council may designate additional client categories as professional.

**Article 5** Opting out and opting in

<sup>1</sup> High-net-worth retail clients may declare in writing that they wish to be treated as professional clients (opting out). The Federal Council may set certain conditions for the suitability of such persons opting to be treated as professional clients, such as professional qualifications.

<sup>2</sup> Professional and institutional clients may declare in writing that they wish to be treated as retail clients (opting in).

<sup>3</sup> Institutional clients may declare in writing that they wish to be treated only as professional clients.

<sup>4</sup> Before providing any financial services, financial service providers shall inform their clients, where these are not classified as retail clients, and explain to them the possibility of opting in.

<sup>4</sup> As professional clients are primarily legal entities, they are referred to herein as “it”.

<sup>5</sup> SR 951.31

<sup>6</sup> SR 961.01

<sup>7</sup> As institutional clients are primarily legal entities, they are referred to herein as “it”.

## **Title 2: Requirements for the Provision of Financial Services**

### **Chapter 1: Code of Conduct**

#### **Section 1: Principle**

##### **Article 6**

<sup>1</sup> Financial service providers must comply with the supervisory duties set out under this title in the provision of financial services.

<sup>2</sup> They shall act in the best interests of their clients and with the required level of skill, care and diligence.

<sup>3</sup> Additional provisions and requirements set out in other financial market legislation are reserved.

#### **Section 2: Duty of Information**

##### **Article 7**      Content and form of information

<sup>1</sup> Financial service providers shall inform their clients of the following:

- a. their name and address, their supervisory status and their field of activity;
- b. the financial service offered;
- c. their business affiliations with third parties in connection with the financial service offered;
- d. the financial instruments offered;
- e. the form and manner of the custody of financial instruments;
- f. the risks associated with the financial service, the financial instruments and their custody;
- g. the costs associated with the financial service offered and the acquisition, disposal and holding of the financial instruments offered;
- h. the possibility of bringing mediation proceedings before an ombudsman in accordance with Title 4.

<sup>2</sup> When providing investment advice and portfolio management, financial service providers shall also inform their clients as to whether or not:

- a. the service is provided independently;
- b. the financial instruments' suitability is assessed on an ongoing basis; and
- c. a market analysis is conducted in association with the service.

<sup>3</sup> The information may be provided to clients in a standardised form.

<sup>4</sup> Advertising must be indicated as such.

**Article 8**      Timing of information

<sup>1</sup> Financial service providers shall inform their clients in a timely and easily understood manner before the signing of the contract or provision of the service.

<sup>2</sup> When offering financial instruments for which a key information document is required (Articles 58–60), financial service providers shall make this document available to their retail clients free of charge prior to subscription or conclusion of the contract.

<sup>3</sup> When offering financial instruments for which a prospectus is required (Articles 37–39), financial service providers shall make this prospectus available to their retail clients free of charge upon request.

<sup>4</sup> If the value of a financial instrument is calculated based on the development of one or more other financial instruments and if a key information document exists for these instruments, the duty under paragraph 2 applies by analogy for this document.

**Article 9**      Independence

<sup>1</sup> Financial service providers shall designate a service as independent only if:

- a. they consider a sufficient range of financial instruments offered on the market; and
- b. in association with the provision of third-party services, no benefits are accepted or the benefits that are accepted are passed on to the clients.

<sup>2</sup> Financial service providers shall designate themselves as independent only if they fulfil all of the requirements set out in paragraph 1 for all financial services offered.

**Section 3: Suitability and Appropriateness of Financial Services****Article 10**      Assessment of suitability

A financial service provider that provides financial services as defined under Article 3 letter d number 3 or 4 shall enquire about its clients' financial situation and investment objectives and their knowledge and experience in relation to the financial instruments or services offered before recommending suitable financial services and instruments.

**Article 11**      Assessment of appropriateness

A financial service provider that provides financial services other than those set out in Article 10 shall enquire about its clients' knowledge and experience in relation to the products or services offered and shall assess before providing the products or services that they are appropriate for the clients.

**Article 12** Assessment of suitability and appropriateness for professional clients

<sup>1</sup> When providing financial services to professional clients, the financial service provider may assume, unless there are indications to the contrary, that these have the required level of knowledge and experience.

<sup>2</sup> When providing financial services to professional clients in accordance with Article 4, the financial service provider may assume, unless there are indications to the contrary, that these can financially bear the investment risks associated with the financial service.

**Article 13** Lack of suitability or appropriateness

<sup>1</sup> If the financial service provider is of the opinion that a financial service or a financial instrument is not appropriate for its clients, it shall warn them accordingly before conducting the transaction.

<sup>2</sup> If the information received by the financial service provider is not sufficient for:

- a. assessing suitability, it shall not provide any investment advice or portfolio management services to the clients and shall inform them of this situation;
- b. assessing appropriateness, it shall warn the clients that it is unable to determine whether the financial services or instruments are appropriate for them.

**Article 14** Exemption from the duty to assess appropriateness

<sup>1</sup> The financial service provider is not obliged to assess appropriateness if:

- a. its service consists solely in the management of an account or security account or the execution or transmission of client orders; and
- b. the service is performed at the client's request.

<sup>2</sup> It shall inform clients that it has not assessed appropriateness or suitability before providing the service.

**Section 4: Documentation and Rendering Account****Article 15** Documentation

<sup>1</sup> Financial service providers shall keep a written record of:

- a. the services agreed with the clients and the information collected about them;
- b. the information or warning given to clients in accordance with Article 13 or 14;
- c. the services provided for clients.

<sup>2</sup> When providing portfolio management and investment advice, they shall also document the clients' needs and the grounds for each recommendation leading to the acquisition or disposal of a financial instrument.

**Article 16** Duty to render account

<sup>1</sup> Financial service providers shall give their clients a copy of the documentation mentioned in Article 15.

<sup>2</sup> They shall inform their clients of the services provided. Specifically, they render account of:

- a. the transactions conducted;
- b. the composition, assessment and development of the portfolio;
- c. the costs associated with the services.

<sup>3</sup> The Federal Council shall govern the timing and minimum content of the information specified under paragraph 2.

**Section 5: Transparency and Care in Client Orders****Article 17** Handling client orders

<sup>1</sup> Financial service providers shall uphold the principles of good faith and of equal treatment when handling client orders.

<sup>2</sup> The Federal Council shall regulate how the principles under paragraph 1 are to be fulfilled, specifically regarding the procedures and systems for processing client orders.

**Article 18** Best execution of client orders

<sup>1</sup> Financial service providers shall ensure in the execution of their clients' orders that the best possible outcome is achieved in terms of cost, timing and quality.

<sup>2</sup> Regarding cost, they shall consider not only the price of the financial instrument but also the expenses incurred in execution of the order and the benefits mentioned in Article 26 paragraph 3.

<sup>3</sup> They shall issue internal directives on the execution of client orders.

<sup>4</sup> The Federal Council shall regulate how the principles under paragraphs 2 and 3 are to be fulfilled.

**Article 19** Use of clients' financial instruments

<sup>1</sup> Financial service providers may borrow financial instruments from clients' portfolios as a counterparty or act as an agent for such transactions only if the clients have given their prior and express consent to these transactions in an agreement that is separate from the general business conditions.

<sup>2</sup> The clients' consent is valid only if:

- a. they have been clearly informed in advance of the risks associated with the individual transactions;

- b. they are entitled to equalisation payments for the proceeds due from the financial instruments borrowed; and
- c. they are compensated for the financial instruments borrowed.

<sup>3</sup> Where the client is not a professional client, their consent must be given in writing.

<sup>4</sup> Short selling with the financial instruments of retail clients is not permitted.

## **Section 6: Institutional Clients**

### **Article 20**

For transactions involving institutional clients, Articles 6, 7, 8 paragraph 1, 9 and 16 paragraph 2 and the provisions of Section 5 apply by analogy. The remaining provisions of Chapter 1 do not apply.

## **Chapter 2: Organisation**

### **Section 1: Organisational Measures**

#### **Article 21**     Appropriate organisation

Financial service providers shall ensure that they fulfil their duties under this Act through internal regulations and an appropriate organisation of operations.

#### **Article 22**     Staff

<sup>1</sup> Financial service providers shall ensure that their staff possess the necessary skills, knowledge and experience to perform their work.

<sup>2</sup> They shall ensure that only persons listed in the register of client advisers (Article 30) perform an activity as client advisers.

#### **Article 23**     Call on the services of third parties

<sup>1</sup> Financial service providers may call on the services of third parties for the provision of financial services.

<sup>2</sup> They shall appoint only persons who possess the necessary skills, knowledge and experience for their work and have the required authorisations for this activity and shall carefully instruct and supervise the appointed persons.

<sup>3</sup> They shall take appropriate measures to ensure that only client advisers who are listed in the register of client advisers (Article 30) are appointed.



**Article 24** Chain of providers

<sup>1</sup> Financial service providers who mandate another financial service provider to provide a financial service for clients remain liable for the completeness and accuracy of the client information and for fulfilling the duties set out in Articles 7–16.

<sup>2</sup> If the mandated financial service provider has reasonable grounds to suspect that the client information is incorrect or that the duties under Articles 7–16 were not fulfilled by the mandating financial service provider, it shall provide its service only after it has ensured the completeness and accuracy of the information and compliance with the code of conduct.

**Section 2: Conflicts of Interest****Article 25** Organisational precautions

<sup>1</sup> Financial service providers shall take appropriate organisational measures to prevent conflicts of interest that could arise through the provision of financial services or any disadvantage to clients as a result of conflicts of interest.

<sup>2</sup> If a disadvantage to clients cannot be excluded, this possibility must be disclosed to them.

<sup>3</sup> The Federal Council shall regulate the details in this respect; in particular, it shall designate forms of conduct that is always excluded on account of conflicts of interest.

**Article 26** Acceptance of benefits

<sup>1</sup> Financial service providers may accept benefits in association with the provision of financial services only if:

- a. the clients have expressly waived such benefits in advance; or
- b. the benefits are passed on to the clients in full.

<sup>2</sup> A waiver of such benefits by a client is valid only if the type and scope of the benefits have been disclosed before provision of the financial services or conclusion of the contract. If the amount cannot be determined in advance, the financial service provider shall inform its clients of the calculation parameters and the ranges.

<sup>3</sup> Benefits are defined as payments flowing to the financial service provider in association with its provision of a financial service, such as commissions, discounts or other financial benefits.

**Article 27** Staff transactions

<sup>1</sup> Financial service providers shall take measures to monitor transactions conducted by staff for their own account, particularly measures to prevent staff from using insider information for such transactions.

<sup>2</sup> They shall specify the monitoring measures they deem appropriate and suitable in an internal directive.

### Chapter 3: Client Advisers

**Article 28** Duty to engage in basic and continuing professional education and training

Client advisers must have sufficient knowledge of the code of conduct set out in this Act and the necessary expertise required to perform their activities.

**Article 29** Duty to register

Only those listed in the register of client advisers are authorised to act as client advisers in Switzerland.

**Article 30** Requirements for registration

<sup>1</sup> Client advisers are entered in the register of client advisers if they prove that they:

- a. have taken out professional indemnity insurance or have provided equivalent financial guarantees; and
- b. are affiliated to an ombudsman (Article 75).

<sup>2</sup> Client advisers must not:

- a. have a criminal conviction for an infringement of Articles 119–121 or for offences against property under Articles 137–172<sup>ter</sup> of the Swiss Criminal Code; and
- b. have been prohibited from performing a corresponding activity in accordance with Article [33a] FINMASA or from practising a profession in accordance with Article 33 FINMASA.

<sup>3</sup> If client advisers are employed as staff with a financial service provider, the conditions set out in paragraph 1 may be fulfilled by the latter.

**Article 31** Registration body

<sup>1</sup> The registration body shall keep the register of client advisers. It requires authorisation from the Swiss Financial Market Supervisory Authority (FINMA).

<sup>2</sup> It must be organised so as to guarantee the independent fulfilment of its tasks.

<sup>3</sup> The registration body and the persons responsible for its administration and management must provide the guarantee of irrefragable business conduct. Furthermore, these persons must:

- a. enjoy a good reputation; and
- b. have the specialist qualifications required for their function.

<sup>4</sup> It shall charge fees to cover the expenses incurred in its activity. The Federal

Council shall regulate the amount of such fees, based on Article 46a of the Government and Administration Organisation Act of 21 March 1997<sup>8</sup>.

<sup>5</sup> If the registration body no longer fulfils the requirements under this Act, FINMA shall order the measures necessary to remedy the deficiencies. If, within a reasonable period, the registration body fails to remedy the deficiencies preventing it from fulfilling its tasks, FINMA shall withdraw its authorisation for the registration of client advisers.

<sup>6</sup> If the market does not establish a registration body, the Federal Council shall designate a body for this task.

### **Article 32** Keeping of the register

<sup>1</sup> The registration body shall decide which client advisers are registered and deregistered as client advisers.

<sup>2</sup> Registered client advisers and their employers are obliged to notify the registration body immediately of all changes in the circumstances underlying their registration.

<sup>3</sup> The supervisory body shall notify the registration body if it:

- a. prohibits any registered client advisers from performing an activity or practising a profession within the meaning of Article 30 paragraph 2 letter b;
- b. learns of a criminal conviction against them in accordance with Article 30 paragraph 2 letter a.

<sup>4</sup> If the registration body learns that a condition for registration is no longer met, it shall deregister that client adviser.

<sup>5</sup> The contents of the register of client advisers are public and may be viewed online on request.

### **Article 33** Procedure

The procedure for registration entries is based on the Administrative Procedure Act of 20 December 1968<sup>9</sup>.

## **Chapter 4: Cross-Border Financial Services in Switzerland**

### **Article 34** Registration duty for foreign financial service providers

<sup>1</sup> Foreign financial service providers performing an activity subject to an authorisation in Switzerland must be listed in the register of foreign financial service providers.

<sup>2</sup> There is no registration duty for foreign financial service providers who have an authorisation to perform their activity in Switzerland.

<sup>8</sup> SR 172.010

<sup>9</sup> SR 172.021

**Article 35** Requirements for registration

Foreign financial service providers are listed in the register in accordance with Article 36 if:

- a. in their registered state or the state in which their head office is located, they:
  1. have an authorisation for the activity subject to an authorisation in Switzerland,
  2. are subject to supervision that is deemed equivalent to that of Swiss financial service providers;
- b. they have professional indemnity insurance or have provided similar financial guarantees;
- c. they have agreed in writing to inform FINMA comprehensively about their business activities in Switzerland and their business relationships in Switzerland;
- d. a memorandum of understanding has been concluded between FINMA and the relevant foreign supervisory authorities about their mutual cooperation and information exchange.

**Article 36** Register for foreign financial service providers

<sup>1</sup> FINMA shall keep the register of foreign financial service providers wishing to provide cross-border financial services in Switzerland within the meaning of this chapter. It may appoint third parties for maintaining the register.

<sup>2</sup> If FINMA learns that a condition for registration is no longer met or that the code of conduct has been seriously violated, it shall deregister the foreign financial service provider.

<sup>3</sup> Foreign financial service providers must provide FINMA with all information and documents that it requires for fulfilling its tasks.

<sup>4</sup> The contents of the register are public and may be viewed online on request.

**Title 3: Offering of Financial Instruments****Chapter 1: Prospectus for Securities****Section 1: General****Article 37** Principle

<sup>1</sup> Any person who offers securities for sale or subscription in a public offer in Switzerland or any person who seeks the admission of securities for trading in a trading venue in accordance with Article 25 of the Financial Market Infrastructure Act of ...<sup>10</sup> must first publish a prospectus.

<sup>10</sup> SR ...

<sup>2</sup> The duty to publish a prospectus also applies to the resale of securities where this forms part of a public offer.

### **Article 38** Exemptions by type of offer

<sup>1</sup> There is no duty to publish a prospectus for public offers that:

- a. are addressed solely at investors classified as professional clients;
- b. are addressed at fewer than 150 investors classified as retail clients;
- c. are addressed at investors acquiring securities to the value of at least CHF 100,000;
- d. have a minimum denomination per unit of CHF 100,000;
- e. do not exceed an overall value of CHF 100,000 over a 12-month period.

<sup>2</sup> Each public offer for the resale of securities that were previously the subject of an offer mentioned in paragraph 1 shall be regarded as a separate offer.

<sup>3</sup> A firm operating in the financial sector is not obliged to publish a prospectus for securities that are offered or definitively placed at a later stage;

- a. as long as a valid prospectus exists; and
- b. if the issuer or the persons who have assumed responsibility for the prospectus have consented in writing to its use.

### **Article 39** Exemptions by type of security

There is no duty to publish a prospectus for public offers for the following types of securities:

- a. equity securities issued outside the scope of a capital increase in exchange for previously issued equities of the same class;
- b. securities offered for exchange in connection with a takeover, provided that written information exists that is equivalent in terms of content to a prospectus;
- c. securities offered or allocated in connection with a merger, division, conversion or transfer of assets, provided that written information exists that is equivalent in terms of content to a prospectus;
- d. equity securities that are distributed as dividends to holders of equity securities of the same class, provided that written information exists on the number and type of equity securities and on the reasons for and details of the offer;
- e. securities that employers or affiliated companies offer or allocate to current or former members of the board of directors or management board or their employees, provided that written information exists on the number and type of securities and on the reasons for and details of the offer;
- f. shares in the capital of central banks;

- g. securities issued by non-profit institutions for raising funds for non-commercial purposes;
- h. medium-term notes;
- i. securities with a term of less than one year (money market instruments);
- j. derivatives that are not offered in the form of an issue.

**Article 40** Prospectus requirements in trading venues

Trading venues may only admit securities for trading that meet the prospectus requirements for public offers.

**Article 41** Information beyond the scope of the prospectus requirement

If there is no requirement to publish a prospectus, the main information addressed to investors should be furnished in such a manner that guarantees their uniform treatment.

## **Section 2: Requirements**

**Article 42** Contents

<sup>1</sup> The prospectus shall contain the essential information for the investor's decision on:

- a. the issuer and the guarantor, specifically:
  - 1. the board of directors, management board, auditors and other governing bodies,
  - 2. the most recent annual account or, where these are not yet available, information on assets and liabilities,
  - 3. the business situation,
  - 4. the main prospects, risks and litigation;
- b. the securities to be offered publicly or admitted for trading on a trading venue, specifically the associated rights, obligations and risks for investors;
- c. the offer, specifically the type of placement and the estimated net proceeds of the issue.

<sup>2</sup> The information shall be provided in one of the official languages of the Swiss Confederation or in English.

<sup>3</sup> The prospectus shall also contain a clearly understandable summary of the essential elements.

<sup>4</sup> If the final issue price and the issue volume cannot be stated in the prospectus, it must then indicate the maximum issue price and the criteria and conditions used to determine the issue volume. The information on the final issue price and the issue volume shall be filed with and published by the reviewing body.

**Article 43** Inclusion by reference

<sup>1</sup> The prospectus may contain references to one or more previously or simultaneously published documents in all sections apart from the summary.

<sup>2</sup> The Federal Council shall specify the documents to which the prospectus may refer.

**Article 44** Summary

<sup>1</sup> The summary shall be prepared in a uniform format that facilitates a comparison with summaries for similar securities.

<sup>2</sup> The summary must clearly state that:

- a. it should be regarded as an introduction to the prospectus;
- b. the investment decision must be based not on the summary but on the information of the entire prospectus.

**Article 45** Structure

<sup>1</sup> The prospectus may consist of a stand-alone document or several individual documents.

<sup>2</sup> If it consists of two or more individual documents, it may be broken down into:

- a. a registration document with information about the issuer;
- b. a securities note with information on the securities to be offered publicly or admitted for trading on a trading venue;
- c. the summary.

**Article 46** Base prospectus

<sup>1</sup> For debt instruments issued in an offer programme, the prospectus may be drafted in the form of a base prospectus that does not contain the final terms.

<sup>2</sup> The base prospectus shall contain all the information available at the time of publication on the issuers and the securities to be offered publicly or admitted for trading on a trading venue.

<sup>3</sup> If the final terms of the offer are not set out in either the base prospectus or a supplement in accordance with Article 57, they must be published as soon as possible and filed with the reviewing body in accordance with Article 53.

**Article 47** Implementing provisions

Taking account of the specific characteristics of the issuer and securities, the Federal Council shall issue implementing provisions on:

- a. the format of the prospectus and the base prospectus, the summary, the final terms and the supplements;
- b. the content of the summary;

- c. the minimum information to be contained in the prospectus.

### Section 3: Relief of Requirements

#### Article 48 Principle

<sup>1</sup> The Federal Council may grant a relief from the prospectus requirements for securities issuers that have not exceeded two of the following volumes in the preceding financial year:

- a. balance sheet total of CHF 20 million;
- b. turnover of CHF 40 million;
- c. 250 FTEs on average for the year.

<sup>2</sup> It may also grant relief from the requirements for:

- a. companies with low market capitalisation on a trading venue;
- b. issues of subscription rights.

<sup>3</sup> It shall grant relief from requirements uniformly and, in particular, with respect to:

- a. the type of securities issued;
- b. the scope of the issue;
- c. the market environment;
- d. the investors' specific requirements for transparent information;
- e. the business activities and the size of the issuers.

### Section 4: Collective Investment Schemes

#### Article 49 Open-ended collective investment schemes

<sup>1</sup> For open-ended collective investment schemes as defined in Title 2 of the Federal Act of 23 June 2006 on Collective Investment Schemes (CISA)<sup>11</sup>, the fund management company and the SICAV (Article 13 paragraph 2 letters a and b CISA) shall produce a prospectus.

<sup>2</sup> The prospectus shall include the fund regulations in cases where interested persons are not notified as to where such regulations may be separately obtained prior to an agreement being concluded or prior to subscription.

<sup>3</sup> The Federal Council shall decree which information must be set out in the prospectus apart from the fund regulations.

<sup>4</sup> The prospectus and its amendments must be submitted to FINMA without delay.

<sup>11</sup> SR 951.31



**Article 50** Closed-ended collective investment schemes

<sup>1</sup> The limited partnership for collective investment under Article 98 of the Federal Act of 23 June 2006 on Collective Investment Schemes<sup>12</sup> shall produce a prospectus.

<sup>2</sup> Specifically, this shall contain the information contained in the partnership agreement in accordance with Article 102 paragraph 1 of the Collective Investment Schemes Act on:

- a. the investments;
- b. the investment policy;
- c. the investment restrictions;
- d. the risk diversification;
- e. the risks associated with the investments;
- f. the investment techniques.

<sup>3</sup> For the prospectus of an investment company with fixed capital (SICAF) in accordance with Article 110 of the Collective Investment Schemes Act, Article 49 applies by analogy.

**Article 51** Exemptions

FINMA may exempt Swiss collective investment schemes under the Federal Act of 23 June 2006 on Collective Investment Schemes<sup>13</sup> from all or some of the provisions of this chapter provided that they are open only to professional clients and the protective purpose of the law is not thereby affected.

**Section 5: Review of the Prospectus****Article 52** Principle

<sup>1</sup> The prospectus must be reviewed prior to publication to ensure it is complete, coherent and understandable.

<sup>2</sup> The Federal Council may designate debt instruments whose prospectus must be reviewed only after publication if a bank or a securities firm guarantees that the main information on the issuers and the securities is known at the time of publication.

<sup>3</sup> Prospectuses for collective investment schemes do not have to be reviewed, with the exception of the approval requirement for the documentation of foreign collective investment schemes under Article 15 paragraph 1 letter e and Article 120 of the Collective Investment Schemes Act<sup>14</sup>.

<sup>12</sup> SR 951.31

<sup>13</sup> SR 951.31

<sup>14</sup> SR 951.31

**Article 53**      Reviewing body

<sup>1</sup> The reviewing body verifies the prospectuses. It requires authorisation from FINMA.

<sup>2</sup> It must be organised such as to guarantee the independent fulfilment of its tasks.

<sup>3</sup> The reviewing body and the persons charged with its administration and management must provide a guarantee of irreproachable business conduct. Furthermore, these persons must:

- a. enjoy a good reputation; and
- b. have the specialist qualifications required for their function.

<sup>4</sup> It shall charge fees to cover the expenses incurred in its activity. The Federal Council shall regulate the amount of such fees, based on Article 46a of the Federal Act of 21 March 1997 on the Organisation of the Government and the Administration<sup>15</sup>.

<sup>5</sup> If the reviewing body no longer fulfils the requirements under this Act, FINMA shall order the measures necessary to remedy the deficiencies. If, within a reasonable period, the reviewing body fails to remedy the deficiencies preventing it from fulfilling its tasks, FINMA shall withdraw its authorisation for reviewing prospectuses.

<sup>6</sup> If the market does not establish a reviewing body, the Federal Council shall designate a body for this task.

**Article 54**      Procedure and deadlines

<sup>1</sup> The procedure followed by the reviewing entity is based on the Federal Act of 20 December 1968 on Administrative Procedure<sup>16</sup>.

<sup>2</sup> The reviewing body shall decide within 10 days of receiving the prospectus whether to approve it.

<sup>3</sup> This period amounts to 20 days for new issuers.

<sup>4</sup> Should the reviewing body fail to issue its decision within the deadlines set out in paragraphs 2 and 3, this shall not constitute approval of the prospectus.

<sup>5</sup> Where the reviewing body suspects that the prospectus is incomplete or requires additional information, it shall notify the person responsible for the prospectus within 10 days of receiving it and ask them to revise it.

<sup>6</sup> The period for reviewing the revised prospectus commences as soon as the revised version is received by the reviewing body.

**Article 55**      Foreign prospectuses

The reviewing body may approve a prospectus produced under foreign legislation for a public offer or for admission for trading on a trading venue if:

<sup>15</sup> SR 172.010

<sup>16</sup> SR 172.021

- a. it was prepared under international standards established by international organisations of securities regulators; and
- b. the duty to inform, including providing financial information, is equivalent to the requirements set forth in this Act.

### **Article 56**      Validity

Prospectuses shall be valid for 12 months after approval for public offers or admission for trading on a trading venue.

### **Article 57**      Supplements

<sup>1</sup> A supplement to the prospectus must mention any new circumstances that:

- a. occur or are established between the time of approval of the prospectus and final completion of the public offer or opening of trading on a trading venue; and
- b. could affect the assessment of securities.

<sup>2</sup> The supplement must be reported to the reviewing body immediately upon occurrence or establishment of the new circumstances. It must be reviewed according to the same provisions as the original prospectus within no more than seven days and published after approval. The information contained in the supplement must be added to the summaries.

<sup>3</sup> Investors who had already agreed to purchase or subscribe for the securities prior to publication of the supplement may withdraw their acceptance within two days following its publication if:

- a. the prospectus concerns a public offer of securities;
- b. the new circumstances occurred prior to final completion of the public offer and delivery of the securities;
- c. the new circumstances are likely to affect the investment decision.

<sup>4</sup> This deadline may be extended by the issuer or the provider.

## **Chapter 2: Key Information Document for Financial Instruments**

### **Article 58**      Principle

<sup>1</sup> Where a financial instrument is offered to retail clients, the producer must first produce a key information document.

<sup>2</sup> If the offer takes the form of an issue:

- a. at least a draft version with indicative information must be produced prior to subscription of the financial instrument;
- b. the key information document must be published.

**Article 59** Exemptions

There is no duty to prepare a key information document for offers of securities in the form of shares including share-like securities allowing for participation rights, such as participation certificates and dividend rights certificates.

**Article 60** Insurance

<sup>1</sup> Where a redeemable insurance policy encompasses another financial instrument, a key information document must be prepared that covers both the life insurance and the other financial instrument.

<sup>2</sup> The insurer's duty to inform under Article 3 of the Insurance Contracts Act of 2 April 1908<sup>17</sup> is reserved.

**Article 61** Contents

<sup>1</sup> The key information document shall be written in one of the official languages of the Swiss Confederation and shall contain the essential information for making a well-founded investment decision and a comparison of different financial instruments by investors.

<sup>2</sup> In particular, the information shall cover:

- a. the name of the financial instrument and the identity of the producer;
- b. the type and characteristics of the financial instrument;
- c. the risk/return profile of the financial instrument, specifically the probability of a capital loss;
- d. the costs of the financial instrument;
- e. the minimum holding period and the liquidity profile of the financial instrument;
- f. information on the authorisations and approvals associated with the financial instrument.

**Article 62** Requirements

<sup>1</sup> The key information document must be easy to understand.

<sup>2</sup> It is a stand-alone document that is clearly distinguishable from advertising materials.

<sup>3</sup> The producer of the financial instrument shall regularly verify the information contained in the key information document and revise it as necessary.

**Article 63** Implementing provisions

The Federal Council shall introduce implementing provisions on the key information document. It shall decree, in particular:

<sup>17</sup> SR 221.229.1

- a. its content;
- b. its scope, language and layout;
- c. details on how it is to be made available.

## **Chapter 3: Common Provisions**

### **Section 1: Publication**

#### **Article 64** Prospectus for securities

<sup>1</sup> Following approval of the prospectus, the provider must:

- a. file the prospectus with the reviewing body;
- b. publish the prospectus as soon as possible, in any case at a reasonable time before and no later than the beginning of the public offer or admission of the securities in question for trading.

<sup>2</sup> In the case of an initial public offer for a class of equity securities to be admitted for trading on a trading venue for the first time, the prospectus must be made available at least six working days before the end of the offer.

<sup>3</sup> The prospectus may be published:

- a. in one or more newspapers with a distribution corresponding to the issue or in the SOGC;
- b. through free-of-charge distribution in printed form at the issuer's registered office or from the offices involved in the issue;
- c. in electronic form on the website of the issuer, the trading venue or the offices involved in the issue; or
- d. in electronic form on the website of the reviewing bodies.

<sup>4</sup> If the prospectus is published electronically, a paper version must also be made available free of charge.

<sup>5</sup> The reviewing body shall place the approved prospectuses on a list and make this list available for 12 months.

<sup>6</sup> If the prospectus is prepared in several stand-alone documents or if it is incorporated by reference, the information and documents constituting the prospectus may be published separately. The individual documents shall be made available to the public free of charge. Each individual document must indicate where to obtain the other individual documents that, together with that one, constitute the complete prospectus.

<sup>7</sup> The text and format of the prospectus and supplements that are published or made available to the public must at all times be identical to the original version approved by the reviewing body.

**Article 65** Prospectus for collective investment schemes

<sup>1</sup> The prospectus must be published before the collective investment scheme is offered.

<sup>2</sup> For publication, Article 64 paragraphs 3, 4 and 6 apply by analogy.

**Article 66** Key information document

For publication of the key information document, Article 64 paragraphs 3 and 4 apply by analogy.

**Article 67** Changes to the rights associated with securities

<sup>1</sup> Changes to the rights associated with securities shall be announced sufficiently early to guarantee that investors can exercise their rights.

<sup>2</sup> Investors must be informed of intended changes to the rights associated with securities such that they may exercise their rights.

<sup>3</sup> Article 64 paragraphs 3 and 4 apply accordingly.

<sup>4</sup> Special legal provisions remain reserved.

**Section 2: Advertising****Article 68**

<sup>1</sup> Where a prospectus or key information document is published for a financial instrument, reference to this must be made in the advertising. Investors should also be informed about the supplying office.

<sup>2</sup> Advertising must be clearly indicated as such.

<sup>3</sup> Other information on financial instruments must correspond to the details given in the prospectus and the key information document, even if it does not constitute advertising.

**Section 3: Liability****Article 69**

Where information that is inaccurate, misleading or that in violation of statutory requirements is given or disseminated in prospectuses, key information documents or similar communications, any person involved is liable to the acquirer of a financial instrument for the resultant losses unless they can prove that they were not at fault.

## Chapter 4: Offering of Structured Products and Creation of In-house Funds

### Article 70 Structured products

<sup>1</sup> Structured products may be offered in or from Switzerland to retail clients without a discretionary portfolio management agreement only if these are issued, guaranteed or secured in an equivalent manner by:

- a. a bank as defined in [...];
- b. an insurance company as defined in the Insurance Supervision Act of 17 December 2004<sup>18</sup>;
- c. a securities firm in accordance with the Financial Institutions Act of ...<sup>19</sup>;
- d. a foreign institution that is subject to equivalent prudential supervision.

<sup>2</sup> The issuing of structured products to retail clients by special purpose entities is permitted if:

- a. they are offered by:
  1. a financial service provider in accordance with Article 4 paragraph 3 letters a and b, or
  2. a foreign institution that is subject to equivalent prudential supervision; and
- b. financial guarantees are ensured corresponding to the requirements under paragraph 1.

<sup>3</sup> The Federal Council shall regulate the requirements of such financial guarantees.

### Article 71 In-house funds

<sup>1</sup> In-house funds of a contractual nature for the purpose of collectively managing the portfolios of existing clients may be created by banks under [...] and securities firms under the Financial Institutions Act of ...<sup>20</sup> only if the following requirements are met:

- a. Clients participate in such in-house funds exclusively on the basis of a written discretionary management agreement.
- b. No unit certificates are issued.
- c. Participation is not offered to the public and no advertising is undertaken.

<sup>2</sup> A key information document according to the provisions of Chapter 2 must be prepared for in-house funds.

<sup>3</sup> The creation and dissolution of in-house funds must be notified to the auditors appointed under the relevant supervisory law.

<sup>18</sup> SR 961.01

<sup>19</sup> SR ...

<sup>20</sup> SR ...

<sup>4</sup> In the event of bankruptcy of the bank or securities firm, assets and rights that form part of in-house funds shall be segregated in favour of the investors.

## **Title 4: Enforcement of Civil Claims**

### **Chapter 1: Provision of Documents**

#### **Article 72** Claim

<sup>1</sup> The client is entitled at all times to receive a copy of their client file and all other client-related documents that the financial service provider has prepared within the context of their business relationship.

<sup>2</sup> With the client's consent, the financial service provider may provide the copy in electronic form only.

#### **Article 73** Procedure

<sup>1</sup> Any person who wishes to assert a claim must submit a corresponding request in writing.

<sup>2</sup> The financial service provider shall provide the client with a copy of the documents in question within 30 days after receipt of such request.

<sup>3</sup> It is not entitled to any compensation or reimbursement of expenses.

<sup>4</sup> If it fails to comply with such a request, the client may apply to the court.

<sup>5</sup> In any subsequent legal dispute between the client and the financial service provider, a refusal by the financial service provider to issue the requested documents may be taken into account by the competent court in the decision on procedural costs and on assumption of procedural costs by the Procedural Costs Fund in accordance with Chapter 3. In particular, the unsuccessful client may be awarded party costs.

#### **Article 74** Burden of proof for compliance with the financial service provider's information and disclosure duties

<sup>1</sup> The financial service provider bears the burden of proof for meeting its legal information and disclosure duties.

<sup>2</sup> If the financial service provider does not fulfil its legal information and disclosure duties, the client is deemed not to have performed the transaction in question.



## Chapter 2: Ombudsmen

### Section 1: Mediation

#### Article 75 Principles

Disputes regarding the client's claims against a financial service provider should be settled if possible by an ombudsman in mediation proceedings.

#### Article 76 Procedural principles

<sup>1</sup> The proceedings before the ombudsman must be straightforward, fair, quick and inexpensive or free of charge to the client.

<sup>2</sup> The proceedings are confidential, with the exception of the proposals by the ombudsman for mediation. The parties' statements may not be used in other proceedings.

<sup>3</sup> The parties are not entitled to view the ombudsman's correspondence with the other party.

<sup>4</sup> A request for mediation is permissible at any time if:

- a. it has been submitted in accordance with the ombudsman's rules of procedure or using the form provided by the ombudsman;
- b. the client has previously informed the financial service provider of their point of view and attempted to reach an agreement;
- c. it is not obviously an abuse of the procedure, and mediation proceedings have not already been conducted in the same matter; and
- d. the case is not being dealt with by a conciliation authority or by a court or court of arbitration.

<sup>5</sup> The proceedings may be conducted in the client's choice of an official language of the Swiss Confederation or in English. Alternative agreements are permitted, provided that they adhere to the ombudsman's rules of procedure.

<sup>6</sup> The ombudsman shall take the necessary measures to settle the dispute.

<sup>7</sup> If no agreement can be reached, the ombudsman shall publish its own factual and legal assessment of the dispute based on the information available to it and make an appropriate proposal for conflict settlement.

#### Article 77 Relationship to conciliation proceedings and other proceedings

<sup>1</sup> Filing a request for mediation to an ombudsman does not rule out civil action and does not prevent such from being initiated.

<sup>2</sup> After bringing proceedings before an ombudsman, the plaintiff may unilaterally waive a conciliation procedure under the Civil Procedure Code<sup>21</sup>.

<sup>21</sup> SR 272

<sup>3</sup> The ombudsman shall terminate the procedure once a conciliation authority, a court or a court of arbitration assumes the case.

## Section 2: Duties of Financial Service Providers

### Article 78 Affiliation duty

Financial service providers must affiliate to an ombudsman, at the latest on assuming their activity.

### Article 79 Participation duty

<sup>1</sup> Financial service providers that are affected by a conciliation request to an ombudsman must participate in the proceedings.

<sup>2</sup> They must respond promptly to the summonses, requests for comments and any information enquiries from the ombudsmen.

### Article 80 Duty to provide information

<sup>1</sup> Financial service providers shall inform their clients about the possibility of mediation proceedings through an ombudsman before entering into a business relationship, before signing a contract for the first time and at any time if requested to do so.

<sup>2</sup> The information shall be given in an appropriate form and contain the name and address of the ombudsman with which the financial service provider is affiliated.

### Article 81 Financial participation

Financial service providers shall make financial contributions to the ombudsman with which they are affiliated. The contributions are determined according to the ombudsman's schedule of contributions and costs.

## Section 3: Recognition and Exchange of Information

### Article 82 Recognition and supervision

<sup>1</sup> The Federal Department of Justice and Police is responsible for recognising and supervising the ombudsmen.

<sup>2</sup> Organisations meeting the following criteria shall be recognised as ombudsmen:

- a. they agree that they and all persons entrusted by them with mediation fulfil their task independently in organisational and financial respects, impartially, transparently and efficiently and shall not accept instructions;
- b. they ensure that the persons entrusted by them with mediation have the necessary specialist skills;
- c. they have organisational regulations;

- d. they have rules of procedure, on which basis the procedural principles under Article 76 are specified.
- e. they have a schedule of contributions and costs in accordance with Article 81.
- f. they publish an activity report annually.
- g. they render account of their activities to the recognition and supervisory authority at periodic intervals.

<sup>3</sup> The recognition and supervisory authority shall publish a list of ombudsmen.

<sup>4</sup> The Federal Council shall decree the necessary implementing provisions.

### **Article 83** Exchange of information

<sup>1</sup> The ombudsmen shall keep lists of the financial service providers and client advisers affiliated to them and of those to whom they have declined affiliation.

<sup>2</sup> They shall inform the recognition and supervisory authority and the registration body of these lists and of any changes to them.

### **Article 84** Withdrawal of recognition

<sup>1</sup> If an ombudsman no longer fulfils the requirements of Article 82, the recognition and supervisory authority shall set an appropriate period for rectification.

<sup>2</sup> If the necessary rectifications are not made within this period, it shall withdraw its recognition.

## **Variant A**

### **Chapter 3: Court of Arbitration**

#### **Article 85** Principles

<sup>1</sup> Financial service providers shall ensure that retail clients can assert their claims against a financial service provider before a permanent court of arbitration.

<sup>2</sup> They shall inform their clients, before entering into a business relationship, before signing a contract for the first time and at any time upon request, about the possibility of applying to either a court of arbitration in accordance with paragraph 1 or the civil court judge in the event of a dispute.

#### **Article 86** Organisation and procedure

<sup>1</sup> The court of arbitration is chaired by an independent person and in addition consists of joint representation from the financial service providers and retail clients.

<sup>2</sup> The procedure shall be laid down in a set of rules of arbitration. These must ensure fair, straightforward and prompt proceedings, and ensure the right to a fair hearing.

<sup>3</sup> The proceedings must be inexpensive or free of charge to the retail client. Where clients initiate proceedings that are obviously an abuse of process or which were already initiated in a previous case, a charge may be made.

<sup>4</sup> The FDJP shall validate the composition of the courts of arbitration and the rules of arbitration.

<sup>5</sup> Where there is no court of arbitration or if a court of arbitration does not meet the requirements of this chapter, the Federal Council shall designate the court of arbitration and lay down its procedure and organisation in an ordinance. It shall specify the affiliated financial service providers and determine their contributions.

#### **Article 87** Relationship to other proceedings

Retail clients may apply to a court of arbitration only if they have submitted a request for mediation to a recognised ombudsman in the same matter and have participated in the proceedings.

#### **Article 88** Pendency

<sup>1</sup> Arbitration proceedings are deemed to be pending from the time the retail client applies to the court of arbitration.

<sup>2</sup> If actions concerning the same matter in dispute between the same parties are pending before both a state court and a court of arbitration, the court last seised shall stay its proceedings until the court first seised has ruled on its competence.

#### **Article 89** Settlement between the parties

If the parties resolve the matter in dispute in the course of the arbitration proceedings, the court of arbitration shall on request record the settlement in the form of an arbitral award.

#### **Article 90** Effects of the arbitral award

On notice thereof being given, the arbitral award has the effect of a legally binding and enforceable court decision.

#### **Article 91** Objection and review

Decisions by courts of arbitration are final on notice thereof being given. Objections and review under Title 7 of Part 3 of the Civil Procedure Code<sup>22</sup> are reserved.

<sup>22</sup> SR 272

## **Variant B**

### **Chapter 3: Procedural Costs**

#### **Section 1: Procedural Costs Fund**

##### **Article 85** Establishment

Under the name “Procedural Costs Fund for Disputes regarding Financial services”, a special federal fund shall be established in accordance with Article 52 of the Financial Budget Act of 7 October 2005<sup>23</sup> (Procedural Costs Fund).

##### **Article 86** Purpose

The Procedural Costs Fund shall cover the finally authorised payments against the entitled persons in accordance with Section 3 of this chapter.

##### **Article 87** Financing

The Procedural Costs Fund shall be financed through:

- a. the contributions from financial service providers (Art. 90 and Art. 91);
- b. any party costs to be paid by financial service providers in procedures, where these are payable to the fund (Article 100 paragraph 4);
- c. third-party contributions;
- d. interest income and other portfolio management income.

##### **Article 88** Portfolio management and administrative expenses

<sup>1</sup> The Procedural Costs Fund is managed by the Federal Department of Finance.

<sup>2</sup> All expenses for portfolio management and organisation of the Procedural Costs Fund are covered by the fund itself.

#### **Section 2: Contributions from Financial Service Providers**

##### **Article 89** Duty

Financial service providers are obliged to pay annual contributions to finance the Procedural Costs Fund, unless the latter has sufficient assets to settle expected payments under Article 93 for at least two consecutive financial years.

##### **Article 90** Calculations of contributions

<sup>1</sup> The Federal Council shall define in an ordinance the rates for the contributions to be paid by financial service providers. In doing so, it shall take account of the following in particular:

<sup>23</sup> SR 611.0

- a. the value of the financial services provided by the financial service providers to retail clients;
- b. the number of retail clients that the financial service provider has;
- c. the number of client advisers working for the financial service provider;
- d. the number of actions and proceedings for mediation filed before a specialised ombudsman that concern the individual financial service providers.

<sup>2</sup> The Federal Department of Finance shall determine annually the contributions of financial service providers, based on the Federal Council ordinance, and shall demand payment in two half-yearly instalments.

#### **Article 91**      Duty to make additional contributions

<sup>1</sup> If the contributions under Article 90 do not cover the costs of the Procedural Costs Fund, the financial service providers are obliged to make additional extraordinary contributions to cover such costs.

<sup>2</sup> Article 90 applies by analogy to calculating the additional contributions.

### **Section 3: Assumption of Procedural Costs**

#### **Article 92**      Entitlement

<sup>1</sup> Retail clients have the right to have an appropriate portion of their procedural costs assumed by the Procedural Costs Fund for actions against financial service providers if:

- a. they have filed a request for mediation to the competent ombudsman in the same case and have participated in the proceedings;
- b. their request for a legal remedy does not appear futile;
- c. the amount at issue in the action does not exceed CHF 1 million; and
- d. they are not in an extraordinarily sound financial situation.

<sup>2</sup> There is no right to any assumption of procedural costs if an approved group settlement exists for the matter in dispute and the party has exercised its right to opt out (Article 111).

<sup>3</sup> Associations and organisations that are entitled to file a representative action under the provisions of Chapter 4 of this title have the right to the assumption of procedural costs if they meet the requirements of paragraph 1 letters b and d.

#### **Article 93**      Extent of payments

<sup>1</sup> The following payments may be accepted and settled by the Procedural Costs Fund:

- a. court costs;
- b. any party costs due to the counterparty;

- c. the costs of appropriate legal representation by an attorney authorised for professional representation and any experts up to the legally approved amount.

<sup>2</sup> Where the procedural costs are accepted by the Procedural Costs Fund, there is no obligation to pay an advance towards or provide security for procedural costs.

#### **Article 94** Request and procedure

<sup>1</sup> The request to have procedural costs assumed by the Procedural Costs Fund may be made before or after the action becomes pending before the competent court.

<sup>2</sup> The request shall indicate:

- a. the names of the parties and any representatives they may have;
- b. the details of their claims or any pending requests for legal remedy as well as the corresponding allegations and the evidence;
- c. the disputed amount;
- d. the details of the income and asset situation of the person submitting the request;
- e. if applicable, an application for the assumption and settlement of the probable costs of appropriate legal representation, stating the amount concerned.

<sup>3</sup> The court may interview the counterparty before making its decision.

#### **Article 95** Decision

<sup>1</sup> If the request is fully or partially approved, the decision shall indicate, in particular:

- a. the payments to be assumed and settled by the Procedural Costs Fund;
- b. the amount that was approved for the costs of legal representation and any experts used.

<sup>2</sup> In exceptional cases, the payments may be approved retroactively.

#### **Article 96** Costs

<sup>1</sup> If the request is approved, the costs of the proceedings shall also be assumed by the Procedural Costs Fund.

<sup>2</sup> If the request is rejected, no costs shall be charged, except in the case of bad faith or improper conduct.

<sup>3</sup> Where an action is pending, the decision on costs may be made together with the primary matter.

<sup>4</sup> The counterparty is not entitled to party costs.

**Article 97** Legal remedies

If the request is fully or partially rejected or approval is withdrawn, the decision may be challenged by objection by the person submitting the request.

**Article 98** Communication of the decision

The court shall communicate its decision to the Procedural Costs Fund.

**Article 99** Increase and withdrawal of the decision to assume procedural costs

<sup>1</sup> On request, the court may increase the authorised amount and approve the assumption of other costs of legal representation or of any experts used.

<sup>2</sup> The court may reject approval *ex officio* or at the request of the Procedural Costs Fund or the counterparty if the entitlement thereto no longer exists or never existed.

**Article 100** Settlement of procedural costs by the Procedural Costs Fund

<sup>1</sup> The Procedural Costs Fund shall cover the procedural costs of retail clients up to the approved amount.

<sup>2</sup> To this extent, the Procedural Costs Fund shall settle the court costs, costs of legal representation and any party costs. These costs may be directly awarded against the Procedural Costs Fund in the proceedings.

<sup>3</sup> The Procedural Costs Fund is exclusively liable to the creditors for the payments. These have the right to assert a claim directly against the Procedural Costs Fund. They are not entitled to advances, payment of security or cover of their debts.

<sup>4</sup> The Procedural Costs Fund is subrogated to the rights of the retail client to the extent of its payments against the financial service provider, particularly the right to payment of party costs. Any party costs may be awarded directly to the Procedural Costs Fund.

<sup>5</sup> In other respects, the settlement of costs is governed by the business regulations of the Procedural Costs Fund.

**Chapter 4: Representative Action and Group Settlement Procedure****Section 1: Representative Action****Article 101** Associations and organisations entitled to file an action

Associations, societies and other organisations are entitled to file a legal action in their own name against financial service providers for a violation of civil-law obligations in providing financial services to clients, provided that:

- a. they are not profit-driven; and



- b. they are authorised by their articles of association or by-laws to safeguard the interests of certain groups of individuals, specifically retail clients or consumers.

#### **Article 102** Permitted actions

A representative action may be filed so as to:

- a. prohibit an imminent violation of duty;
- b. eliminate an existing breach of duty;
- c. establish a violation of duty, if this entails an interest that requires protection.

#### **Article 103** Use of the Procedural Costs Fund

Associations, societies and organisations entitled to file an action may seek to have the procedural costs for their representative action accepted by the Procedural Costs Fund in accordance with Chapter 3 of this title.

#### **Article 104** Suspension of the limitation period

A representative action to determine a violation of duty under Article 102 letter c shall suspend the limitation period under Article 135 of the Swiss Code of Obligations<sup>24</sup> for claims by persons covered under the representative action.

### **Section 2: Group Settlement Procedure**

#### **Article 105** Principle

<sup>1</sup> Associations, societies and organisations may settle the financial consequences of a violation of the financial service provider's civil-law duties in providing financial services to clients with one or more financial service providers in a group settlement, provided that they are entitled under Article 101 to file a representative action (entitled associations, societies and organisations).

<sup>2</sup> At the joint request of the parties, a group settlement may be declared binding by the cantonal supreme court on all of the clients concerned by the violation of duty and their legal successors. The possibility of opting out under Article 111 is reserved.

#### **Article 106** Group settlement agreement

<sup>1</sup> The group settlement must be recorded in an agreement and signed by the parties and their legal representatives.

<sup>2</sup> The group settlement agreement shall contain at least:

<sup>24</sup> SR 220

- a. a description that is as precise as possible of the financial service provider's violation of its civil-law duties in providing the financial services and the loss thereby occasioned;
- b. a description that is as precise as possible of the group of clients concerned and how many they are, differentiated if applicable by type and severity of the violation of duty or the damage sustained;
- c. the compensation to be paid by the financial service provider to the clients concerned, overall and broken down by the clients concerned;
- d. the requirements for the clients concerned to receive compensation;
- e. provisions on the further procedure for claiming and determining the compensation, and paying it to the clients concerned;
- f. the name and address of the representative of the entitled association, society or organisation to which the opting-out declaration in accordance with Article 111 should be made; and
- g. rules on how the costs will be borne, particularly those for the approval procedure.

#### **Article 107** Approval application

<sup>1</sup> The parties' joint application for approval of the group settlement shall be submitted to the competent cantonal supreme court together with an original of the group settlement agreement.

<sup>2</sup> This shall contain at least:

- a. the names and addresses of the parties;
- b. precise information on the content and formation of the group settlement and its main details and elements, particularly the financial service provider's violation of duty and the clients concerned;
- c. the names and addresses of all clients concerned who are known to the parties and are to be declared binding for the group settlement; and
- d. details on the public notices and information about the content and effects of the group settlement sent to the clients concerned, particularly on their right to opt out.

<sup>3</sup> Submission of the application shall have the effect of suspending the limitation period under Article 135 of the Swiss Code of Obligations<sup>25</sup> for claims covered by the group settlement.

#### **Article 108** Approval procedure

<sup>1</sup> The cantonal supreme court shall summon the parties to attend a hearing. This hearing is public.

<sup>25</sup> SR 220

<sup>2</sup> Together with the summons, the cantonal supreme court shall order the parties to give appropriate notice and at their own expense to all of the known clients concerned in accordance with Article 107 paragraph 2 letter c and to the public of:

- a. the place and date of the public hearing;
- b. the possibility of attending; and
- c. the content and subject of the group settlement agreement.

<sup>3</sup> It may order all participants to make their submissions in writing before the hearing.

<sup>4</sup> It may obtain evidence *ex officio*, in particular from experts or in the form of written information.

<sup>5</sup> Before announcing its decision, it shall give the parties an opportunity to amend or add to the group settlement agreement.

<sup>6</sup> In other respects, the provisions of the Civil Procedure Code<sup>26</sup> apply.

#### **Article 109** Relationship to other procedures

At the request of the financial service provider, other proceedings in which the financial service provider was sued for the same violation of its civil-law duties in providing financial services and for which it compensates the clients concerned after the settlement shall be suspended for the duration of the approval procedure for the group settlement agreement.

#### **Article 110** Approval

<sup>1</sup> The cantonal supreme court shall approve a group settlement agreement where it meets the requirements of Article 106.

<sup>2</sup> It shall declare it binding on all clients concerned by the violation of duty and their legal successors if:

- a. the compensation is appropriate in relation to the violation of duty, the type and severity of the loss sustained, and the procedure for claiming and determining the compensation, and paying it to the clients concerned;
- b. the financial guarantee set aside for payment of the agreed compensation is sufficient;
- c. an independent instance has been designated to calculate the compensation for the clients concerned in the event that the amount and type of compensation is not directly set out in the group settlement agreement;
- d. the group of clients concerned by the settlement is sufficiently large for the validation to appear justified for all clients concerned;
- e. the entitled association, society or organisation can adequately represent the clients concerned and another organisation entitled to file representative action does not appear more suitable to represent them; and

<sup>26</sup> SR 272

- f. the interests of the clients concerned by the group settlement appear to be safeguarded and guaranteed as a whole.

<sup>3</sup> Through the final approval, the group settlement attains for all clients concerned by it the effect of a settlement under Article 241 of the Civil Procedure Code<sup>27</sup>, unless a client concerned effectively declares their decision to opt out.

<sup>4</sup> Challenges to the legally approved group settlement and a review of the approval decision are excluded.

<sup>5</sup> Together with the approval, the cantonal supreme court shall request the parties to the group settlement to inform the clients concerned and the public, appropriately and at their own expenses, of the approval decision, of the possibility of opting out of the procedure under Article 111.

<sup>6</sup> If the group settlement is not approved, the parties must immediately inform all known clients concerned in accordance with paragraph 2 letter c in an appropriate manner.

#### **Article 111**    Opting out

<sup>1</sup> Each client concerned by the group settlement shall have the right to declare, within the specified period and before the representation of the entitled association, society or organisation designated in the group settlement, that

- a. they wish to opt out of the group of clients concerned; and
- b. the group settlement is not binding on them.

<sup>2</sup> The client concerned must declare their opting-out within the deadline set by the cantonal supreme court of at least three months from the time of its decision on approval of the group settlement, in writing or using the form jointly published by the parties to the group settlement.

<sup>3</sup> If a client learns only after expiry of the opting-out deadline that they are concerned by the group settlement, they may also validly declare their opting-out after this deadline expires if they prove to the designated representation of the entitled association, society or organisation immediately on discovery that they could not have previously known that they were concerned.

#### **Article 112**    Withdrawal

<sup>1</sup> The entitled association, society or organisation as well as the financial service provider have the right to withdraw from the legally approved group settlement by giving notice to the cantonal supreme court within 30 days of expiry of the opting-out deadline if more than one-third of the clients concerned have effectively declared their decision to opt out.

<sup>2</sup> The withdrawing party must also immediately and appropriately inform all clients concerned of its withdrawal.

<sup>27</sup> SR 272

**Article 113** Legal remedies

<sup>1</sup> The decision of the cantonal supreme court on the approval of a group settlement may be challenged only by associations, societies and organisations that are authorised to file an action in accordance with Article 101.

<sup>2</sup> If a group settlement is not approved, each of the parties to the group settlement may challenge this decision.

**Article 114** Costs

The cantonal supreme court is not bound by the parties' agreements in its decision on procedural costs and may award fully or partially to specific parties, independently of any such agreements.

**Article 115** Fulfilment

<sup>1</sup> With the legally binding court approval, the parties and all clients concerned who are bound by this may demand fulfilment.

<sup>2</sup> If a client concerned demands fulfilment, the possibility of opting out under Article 111 is excluded.

<sup>3</sup> Apart from the client concerned, the entitled association, society or organisation may also demand fulfilment and compensation unless the client concerned objects or declares their opting-out.

**Article 116** Compensation

<sup>1</sup> A decision taken by the competent body in accordance with the group settlement on compensation to a client concerned is binding unless the compensation is obviously disproportionate or unfair.

<sup>2</sup> If so agreed, the right to compensation of a client concerned lapses on expiry of a period of three years from the time at which the client concerned learns of the possibility of asserting their claim for compensation.

<sup>3</sup> If it emerges in fulfilment of the group settlement that the overall compensation provided for therein is not sufficient to cover all claims for compensation, the individual compensation payments shall be reduced proportionately. Any deviating agreement and payments already made shall be reserved.

<sup>4</sup> If there are any indications that not all claims for compensation can be met in full, payment may be temporarily refused.

**Title 5: Supervision and Exchange of Information****Article 117** Supervision

<sup>1</sup> The supervisory authority shall monitor compliance with the requirements for the provision of financial services and the offering of financial instruments by the finan-

cial service providers under its supervision. It may issue orders to remedy or prevent violations in this respect.

<sup>2</sup> Contentious civil matters between different financial service providers or between financial service providers and clients are settled by the competent civil court.

#### **Article 118** Exchange of information

FINMA, the supervisory organisation, the registration body for client advisers, the reviewing entities for prospectuses, the ombudsmen and the recognition and supervisory authority for the ombudsmen may exchange information that is not in the public domain if they require this to fulfil their tasks.

### **Title 6: Criminal Provisions**

#### **Article 119** Violation of the regulations on prospectus and key information documents

<sup>1</sup> Any person who wilfully does the following shall be liable to a custodial sentence not exceeding three years or a monetary penalty:

- a. in the prospectus or the key information document under Title 3 or in other information:
  1. gives false information or omits important facts,
  2. does not include all of the prescribed details;
- b. in relation to the prospectus or the key information document under Title 3:
  1. does not prepare it at all or does not prepare it correctly,
  2. does not publish it at all or does not publish it within the prescribed deadlines.

<sup>2</sup> Any person who commits the foregoing acts through negligence shall be liable to a monetary penalty not exceeding 180 daily penalty units.

#### **Article 120** Unauthorised offering of financial instruments

<sup>1</sup> Any person who wilfully does the following shall be liable to a fine not exceeding CHF 500,000:

- a. offers in-house funds to the public or advertises for such funds;
- b. offers retail clients who are not subject to a discretionary management agreement a structured product without adhering to the conditions of Article 58 paragraph 1.

<sup>2</sup> Any person who commits the foregoing acts through negligence shall be liable to a fine not exceeding CHF 150,000.

**Article 121** Violation of the code of conduct

<sup>1</sup> Any person who wilfully does the following shall be liable to a fine not exceeding CHF 50,000:

- a. violates the duty of information under Articles 7–9;
- b. violates the duty to assess suitability and appropriateness under Articles 10–13 and 14 paragraph 2;
- c. violates the duties under Article 26.

<sup>2</sup> Any person who commits the foregoing acts through negligence shall be liable to a fine not exceeding CHF 15,000.

**Title 7: Final Provisions****Article 122** Implementing regulations

The Federal Council shall issue the implementing regulations.

**Article 123** Amendment of other legislation

The amendments to existing legislation are set out in the Annex.

**Article 124** Transitional provision

For financial instruments that were offered to retail clients before this Act comes into force, a key information document must be prepared within two years after the commencement date hereof.

**Article 125** Referendum and commencement

<sup>1</sup> This Act is subject to an optional referendum.

<sup>2</sup> The commencement date shall be determined by the Federal Council.

...

On behalf of the Swiss Federal Council

The Federal President:  
The Federal Chancellor:

## Amendment of other legislation

The legislation below is amended as follows:

### 1. Swiss Code of Obligations<sup>28</sup>

*Article 652a*

*Repealed*

*Article 752*

*Repealed*

*Article 1156*

*Repealed*

### 2. Civil Procedure Code<sup>29</sup>

*Article 5 paragraph 1 letter i*

<sup>1</sup> The cantonal law designates the court that has jurisdiction as sole cantonal instance for:

- i. the procedure for approval and validation of a group settlement in accordance with Article 105 ff. of the Federal Financial Services Act of ...<sup>30</sup>;

*Article 47 paragraph 2 letter a*

<sup>2</sup> Involvement in the following, in particular, is in itself no reason for recusal:

- a. the decision on legal aid or on the acceptance of procedural costs by the Procedural Costs Fund for disputes in relation to financial services;

*Article 109 paragraph 3*

<sup>3</sup> Separate legal provisions on the bearing of procedural costs in the case of group settlements are reserved.

*Article 116a* Assumption of procedural costs by the Procedural Costs Fund

<sup>1</sup> Requests for assumption of procedural costs by the Procedural Costs Fund for disputes in relation to financial services according to the Financial Services Act ...<sup>31</sup>

<sup>28</sup> SR 220

<sup>29</sup> SR 272

<sup>30</sup> SR ....



are decided upon in summary proceedings by the competent court for handling requests for legal aid.

<sup>2</sup> Where the procedural costs are accepted by the Procedural Costs Fund, payment of advances and security cannot be demanded.

<sup>3</sup> The court costs may be imposed directly on this and the party costs imposed on or awarded to the Procedural Costs Fund.

*Article 199 paragraph 2 letter d*

<sup>2</sup> The plaintiff may unilaterally waive conciliation:

- d. if a procedure is brought before an ombudsman in disputes between a client and a financial service provider.

*Article 251a* Federal Financial Services Act of...

The summary proceedings may be brought in particular in the following cases:

- a. claim to issuance of a copy of the client file and other documents (Article 72 FinSA<sup>32</sup>);
- b. procedure for acceptance of the procedural costs by the Procedural Costs Fund (Article 2 ff. FinSA).

### **3. Collective Investment Schemes Act of 23 June 2006<sup>33</sup>**

*Article 2 paragraph 3*

<sup>3</sup> Investment companies in the form of Swiss companies limited by shares are not governed by this Act, provided they are listed on a Swiss exchange, or provided that:

- a. only shareholders as defined in Article 10 paragraph 3 and 3<sup>ter</sup> are entitled to participate in them; and

*Article 3 paragraph 1*

<sup>1</sup> The distribution of collective investment schemes within the meaning of this Act is defined as any offer or advertising of collective investment schemes that is not exclusively directed at investors as defined in Article 10 paragraph 3 in conjunction with Article 4 paragraph 3 letter a–d of the Federal Financial Services Act of ...<sup>34</sup>.

*Article 4 and 5*

*Repealed*

<sup>31</sup> SR ...

<sup>32</sup> SR ...

<sup>33</sup> SR **951.31**

<sup>34</sup> SR...

*Article 7 paragraph 3*

<sup>3</sup> The Federal Council may stipulate a minimum number of investors in accordance with the legal status and target group. It may authorise collective investment schemes for a single qualified investor (single investor fund) in accordance with Article 10 paragraph 3 in conjunction with Article 4 paragraph 3 letters b, e and f of the Federal Financial Services Act of ...<sup>35</sup>.

*Article 10 paragraph 3, 3<sup>bis</sup>, 3<sup>ter</sup>, 4 and 5 letter b*

<sup>3</sup> Qualified investors within the meaning of this Act are professional clients as defined in Article 4 paragraphs 3–5 or Article 5 paragraph 1 of the Federal Financial Services Act of ...<sup>36</sup>.

*<sup>3bis</sup> Repealed*

<sup>3ter</sup> Investors who have concluded a written discretionary management agreement as defined in Article 3 paragraph 2 letter b are deemed qualified investors unless they have declared in writing that they do not wish to be deemed as such.

*<sup>4</sup> Repealed*

<sup>5</sup> FINMA may fully or partially exempt collective investment schemes from certain provisions of this Act, provided that they are exclusively open towards qualified investors and that the protective purpose of this Act is not impaired, specifically from the provisions concerning:

*b. Repealed**Article 22 Heading and paragraph 1**Trades in financial instruments*

<sup>1</sup> Counterparties for *trades in financial instruments* and other transactions must be carefully selected. They must offer a guarantee of best execution of transactions in terms of price, timing and quantity.

*Article 24 paragraph 3**Repealed**Article 51 paragraph 4*

<sup>4</sup> The board of directors fulfils the duties under Title 3 of the Federal Financial Services Act of...<sup>37</sup>.

<sup>35</sup> SR...

<sup>36</sup> SR

<sup>37</sup> SR...

*Article 71 paragraphs 3 and 4*

<sup>3</sup> Reference must be made in the fund name, as well as in the prospectus in accordance with Title 3 of the Federal Financial Services Act of...<sup>38</sup> and advertising material, to the special risks associated with alternative investments.

<sup>4</sup> *Repealed*

*Article 73 paragraph 2*

<sup>2</sup> It may transfer responsibility for the custody of the investment fund's assets to third-party custodians and central securities depositories in Switzerland or abroad, provided this is in the interest of efficient custody. Investors must be informed in the prospectus in accordance with Title 3 of the Federal Financial Services Act of ...<sup>39</sup> about the risks associated with such transfers.

*Heading before Article 75 and Articles 75–77*

*Repealed*

*Article 102 paragraph 3*

*Repealed*

*Article 116*

*Repealed*

*Article 128 paragraph 1 letter c*

<sup>1</sup> The audit company examines whether the authorisation's holders comply with the legal, contractual, statutory and regulatory provisions, and conducts interim audits on a spot-check basis. Specifically, it examines the following on an annual basis:

- c. the prospectus and the key information document in accordance with Title 3 of the Federal Financial Services Act of...<sup>40</sup>;

*Article 148 paragraph 1 letters f and g*

<sup>1</sup> Any person who wilfully does any of the following is liable to a custodial sentence not exceeding three years or to a monetary penalty:

- f. in the annual accounts, annual report, semi-annual report or other information:
  - 1. provides false information or withholds material facts,
  - 2. does not provide all mandatory information;
- g. with respect to the annual accounts, annual report or semi-annual report:

<sup>38</sup> SR...

<sup>39</sup> SR...

<sup>40</sup> SR...

1. fails to produce them or fails to produce them in an orderly manner;
2. fails to publish them or fails to publish them by the specified deadline;
3. fails to submit them to FINMA or fails to submit them to FINMA by the specified deadline.

*Article 149 paragraph 1 letters c and e*

*Repealed*

#### **4. Financial Market Supervision Act of 22 June 2007<sup>41</sup>**

*Article 1 paragraph 1 letter i*

<sup>1</sup> The Confederation shall create an authority for the supervision of the financial markets in accordance with the following acts (financial market acts):

- i. Federal Financial Services Act of ...<sup>42</sup>

*Article 15 paragraph 2 letter c*

<sup>2</sup> The supervision charge is assessed according to the following criteria:

- c. for insurance institutions under the Insurance Supervision Act of 17 December 2004<sup>43</sup>, on the basis of their share of the total premium income for all insurance institutions.

#### **5. Insurance Companies Supervision Act of 17 December 2004<sup>44</sup>**

*Article 42*      Registration duty

<sup>1</sup> Insurance intermediaries may operate as such only if they are listed in the register of client advisers in accordance with Article 30 of the Federal Financial Services Act of...<sup>45</sup> (FinSA).

<sup>2</sup> The provisions of Chapter 3 from Title 2 and Chapter 2 from Title 4 of FinSA shall apply by analogy, insofar as the intermediaries are not already subject to these as client advisers.

<sup>3</sup> The Federal Council may provide for exemptions to the duty to register.

<sup>41</sup> SR 956.1

<sup>42</sup> SR ...

<sup>43</sup> SR 961.01

<sup>44</sup> SR 961.01

<sup>45</sup> SR ...

*Article 43* Duties of loyalty and diligence

Intermediaries are subject to the duties under Articles 6, 9, 21 and 22 of the Federal Financial Services Act of ...<sup>46</sup> by analogy, insofar as they are not already subject to these as financial service providers.

*Article 44*

*Repealed*

*Article 45* Duty to provide information

<sup>1</sup> As soon as insurance intermediaries establish contact with an insured, they shall provide him or her with at least the following information:

- a. their name and address;
- b. the service offered and the interests of the intermediary;
- c. whether the insurance products offered in a specific class come from one or several insurance companies, and the identity of the insurance companies in question;
- d. the nature of their contractual relationship with the insurance companies for which they are acting and the identity of the companies in question;
- e. whether they are basing their advice on a balanced analysis;
- f. the person with liability for negligence, errors or incorrect information relating to their activities as intermediaries;
- g. the processing of personal data, in particular the purpose, extent and recipients of these data and their retention.

<sup>2</sup> Advertising must be indicated as such.

*Article 45a* Code of conduct

<sup>1</sup> Before concluding an insurance contract, the intermediaries shall determine the objectives and needs of the insured and explain to them the reasons for each element of advice given.

<sup>2</sup> If the intermediaries agree with the insured to provide consulting on the basis of a balanced analysis, they shall base their advice on the assessment of a sufficient number of insurance contracts available on the market.

<sup>3</sup> For intermediaries who are in a relationship of trust with the clients and are acting in their interests, the duties under Article 26 of the FinSA<sup>47</sup> shall apply by analogy, insofar as they are not already subject to said provision as financial service providers.

<sup>46</sup> SR ...

<sup>47</sup> SR ...

*Article 46 paragraph 1 letter f*

<sup>1</sup> The tasks of FINMA are as follows:

- f. To protect the insured from any abuse by insurance companies.

*Article 51 paragraph 2 letter g*

*Repealed*

*Article 86 paragraph 1 letter e*

<sup>1</sup> "Any person who wilfully does the following shall be liable to a fine not exceeding CHF 500,000

- e. violates the duty to provide information pursuant to Article 45 or Article 45a;

*Article 90 paragraph 4–8*

*Repealed*

*Article 90a* Transitional provisions on the amendment of...

Persons operating as insurance intermediaries at the time of the FinSA coming into force shall be provisionally entered in the register of client advisers if they notify the registration body within six months after the date of enactment of the FinSA and prove that they fulfil the requirements under Article 30 paragraphs 1 and 2 of the FinSA by analogy.