瑞士新法规监管跨领域金融产品
New Swiss acts to regulate cross-sector financial products

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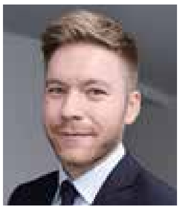

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瑞士联邦委员会于2015年11月4日通过了《金融服务法》和《金融机构法》。这两部法规是跨领域监管金融产品和服务及其销售立法项目的成果。新法规通过跨领域方式对现行的监管规定进行了合并整合及补充。

除了加强对客户的保护之外，该立法项目旨在促进瑞士金融服务提供者进入国际市场。

立法草案由瑞士联邦财政部主导，瑞士联邦司法与警政部和瑞士金融市场监督管理局(FINMA)共同合作起草。瑞士联邦议会有望于明年审议这两部法规。

这些法规一旦生效将会对瑞士所有的金融服务提供者或瑞士境内客户产生重大的影响。同时这些法规与中国金融服务提供者也息息相关。以下是这些新法规重要方面的概述：

金融服务法

《金融服务法》对提供金融服务和金融工具的要求进行了规定。《金融服务法》以现有的监管法规为基础，拟在以下方面进行变革：

向瑞士客户提供专业金融服务的外国金融服务提供者必须与瑞士金融服务提供者遵守相同的行为准则(见下述)。未在瑞士取得牌照的外国金融服务提供者的相关咨询顾问必须登记为顾问。因此，该部监管在瑞士进行跨境活动的新法规预期将比现行的法规都更加严格。

> *[新法规]将会对瑞士所有的金融服务提供者……产生重大的影响*

《金融服务法》引入了客户分类制度。《金融服务法》有意将客户划分为零售客户、专业客户和机构客户，该等分类与保护水平相对应，并规定了在各分类之间进行转换的动态要素(选择制度)。根据客户的个案情况，金融服务提供者负有不同的通知和披露义务。金融服务提供者负有的澄清义务程度(了解你的客户)从无需评估(仅需执行，以及反招揽交易)到合适性评估，最后到进行适当性评估(标准化结构)。

只有拥有充分基础培训和持续专业培养的个人才能成为金融服务领域的顾问和中介。此外，相关法规对从第三方收取的报酬(特别是退还报酬)也进行了规定。有关招股书的要求延伸至所有的股票和债务工具，并与国际标准对接；有意简化对中小型企业的有关要求。在向零售客户提供金融工具时，信息渠道应当另附一份关键的信息文件。新法规规定的招股书要求例外有助于瑞士强化其金融科技中心的地位，该等例外也适用于公众集资贷款融资方式。

从程序角度来说，新法规拟免除诉讼的预付费用和担保，从而达到加强权利主张的执行力的目的。征求意见草案中受到颇多争议的金融工具被一并删除。集体法律执行的有关规定不得限定于金融服务提供者，这是此法律的执行必须以单独及概括的方式进行评估的原因。

金融机构法

《金融机构法》规定了金融机构运营的有关要求，是对从事资产管理业务的金融服务提供者进行监管的统一法规。

《金融机构法》规定了不同类型的受监管金融机构应适用不同的监管(授权链)。法规根据金融机构的情况规定了不同的监管强度类型和程度以及监管要求。

新法规加入了有关个人财富经理(独立财富经理)、集体资产经理(集体投资计划经理)以及证券公司(此前为证券交易商)的规定。

《金融机构法》将独立财富经理纳入适当的监管中，因此会导致受到监管的实体和个人大量增多。该等实体和个人必须由一个或多个有授权和进行惩罚权力的半官方监管机构进行监管。在立法征求意见中，有人提出可以由瑞士金融市场监督管理局(FINMA)直接进行监督。如果财富经理执业超过15年并且不再接受新的客户，那么目前未受到监管的财富经理将不受到监管(祖父条款)。

与立法征求意见稿草案相反，银行应继续受到《瑞士银行法》的监管。《瑞士银行法》必须根据《金融机构法》的先决条件进行调整。

民众第一反应

瑞士民众对该等法规的第一反应各不相同。大多数意见对废除有争议的金融工具表示支持。也有部分保留意见认为这将不利于中小服务提供者以及客户需承担更多的费用。

只有议会对上述法规进行了商讨之后才会有最终定论。该等法规必须遵守国际标准的引导，而不要再附加另外的“瑞士约束”。

另外的一个政治性问题是通过这两部新法规瑞士是否能获得国际市场准入。■

On 4 November 2015, the Swiss Federal Council adopted the dispatch on the Financial Services Act (FinSA) and on the Financial Institutions Act (FinIA). Both acts are the result of a project to prepare cross-sector regulation of financial products and services and their distribution. In those acts, existing supervisory provisions are being merged and aligned in a cross-sector manner supplemented by new regulations.

The aim of the regulation project is, in addition to the improvement of client protection, to facilitate international market access for Swiss financial service providers. The principal actors of the draft legislation are the Federal Department of Finance in co-operation with the Federal Department of Justice and Police, and the Swiss Financial Market Supervisory Authority FINMA. The Swiss Federal Assembly is expected to deal with both acts next year.

Once entered into force, these acts will have a substantial impact on all actors providing financial services in Switzerland or for clients in Switzerland. As a consequence, it will also be relevant for Chinese financial service providers. The following summarizes the central aspects of the new regulation.

The FinSA

The FinSA governs the requirements for providing financial services and offering financial instruments. The FinSA builds on existing supervisory legislation. Changes are intended in the following areas:

Foreign financial service providers who provide financial services on a professional basis for clients in Switzerland must observe the same code of conduct for their activities in Switzerland as is observed by Swiss providers (see below).

The relevant client advisers of foreign financial service providers that are not licensed in Switzerland must be entered into a register of advisers. Thus, this new regulation of cross-border activities into Switzerland is expected to be more restrictive than the rules currently in force.

The FinSA introduces client segmentation. The intention is a threefold division of retail clients, professional clients and institutional clients – aligned with the protection level – in connection with a dynamic component that would provide the possibility of switching between the segments (opting system). Dependent on the qualification of the client, differentiated duties to inform and to disclose are imposed on the providers of financial services. The extent of the financial service providers' clarification duty (know your customer) ranges from no assessment (execution only – as well as reverse solicitation transactions), through assessment of appropriateness, up to execution of a suitability assessment (modular structure).

Only individuals with sufficient basic training and continuing professional development shall be admitted as advisers and intermediaries in the financial services sector. Further, legislative regulation concerning remuneration received from third parties (especially retrocessions) is provided. Prospectus requirements are extended to all equity securities and debt instruments and are adapted to international standards; simplifications are intended for SMEs. When financial instruments are offered to retail clients, the information channels should be supplemented by a key information document. The planned exceptions from the prospectus requirements, which also apply to the crowd lending method of financing, could help strengthen Switzerland as a financial tech centre.

From a procedural perspective, the dispensation of advance costs of litigation and securities is provided to improve the enforcement of claims. Very controversial instruments which had been provided in the consultation draft are eliminated altogether. The regulation of collective legal enforcement must not be limited to the financial services providers, which is why its implementation must be assessed separately and in a general manner.

The FinIA

The FinIA governs the requirements for operation as a financial institute and is a uniform law for all the financial services providers that are involved in the asset management business.

The FinIA introduces various categories of supervised financial institutes that are subject to differentiated regulation (authorization chain).

Different types and degrees of supervisory intensity as well as regulation requirements are provided for – depending on the status of the financial institute. New terms to be introduced are managers of individual assets (independent asset managers),

> *"These [new] acts will have a substantial impact on all actors providing financial services in Switzerland"*

managers of collective assets (managers of collective investment schemes) as well as securities firms (formerly securities dealers).

The FinIA will make independent asset managers subject to appropriate supervision and thus will result in a significant increase in the number of supervised entities and persons. The supervision must be executed by one or several semi-governmental supervisory organizations which will have the powers to grant authorization and pass sanctions. During the consultation, it was suggested that alternatively FINMA could directly execute that supervision. Asset managers that have not been supervised so far are not subject to supervision if they have been carrying out their activities for at least 15 years and do not accept new clients (grandfathering clause).

As opposed to the draft consultation paper, the banks shall continue to be governed by the Swiss Banking Act. The latter shall be adjusted to the prerequisites of the FinIA.

First reactions

The tenor of the first reactions in Switzerland is divided. The majority particularly welcomes the elimination of the controversial instruments of legal enforcement. One of the concerns is, inter alia, a disadvantaging of small- and medium-sized providers and higher costs for the clients.

A final assessment will only be possible after the parliamentary consultation. This should essentially be guided by the international standards without introducing an additional "Swiss finish". A political question is whether Switzerland will be able to achieve international market access by introducing the two new acts. ■

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