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Current Issues in Insurance, Banking & Financial Services

FINMA distribution report on enhanced customer protection rules

In October 2010, the Swiss Financial Market Supervisory Authority (“FINMA”) issued its comprehensive report on the regulation of the production and distribution of financial products to retail clients - status, shortcomings and courses of action (“FINMA Distribution Report”). Based essentially on FINMA’s findings of its investigations into the Madoff and Lehman cases, the report launches a discussion on an enhanced customer protection and identifies various courses of action that could contribute to the elimination of shortcomings under the current regulation. The suggestions put forward by FINMA are strongly based on the EU-rules. The report constitutes a discussion paper only and the implementation of possible measures into applicable law will take some time.

The following is a short summary of the courses of action proposed by FINMA. A more detailed consideration (in German) of the FINMA Distribution Report can be found [here](#).

Proposed courses of action

1. Introduction of a product-neutral customer segmentation
2. Extension of the prospectus and information duties
3. Tightening of the rules of business conduct and increase of transparency at the point of sale
4. More coherent approach to the supervision of financial services providers
5. Facilitating the enforcement of claims
6. More coherent regulation of the cross-border distribution of foreign financial products in Switzerland
7. Stronger alignment with or implementation of EU distribution and product rules

Ad 1: Introduction of a product-neutral customer segmentation

The suggested segmentation into qualified and non-qualified customers would apply across the board to all types of products. With respect to qualified customers, further measures aiming at an enhanced customer protection could be implemented in a clearly reduced form.

Ad 2: Extension of the prospectus and information duties

FINMA aims at introducing coherent and essentially product-neutral prospectus requirements and notification duties for investment products. The prospectuses would need to inform in plain language on the characteristics of the product, chances of profit and loss, risks associated with the product, its legal qualification as well as the typical customer profile. FINMA does however not consider an extension of the existing product authorisation requirements to be a priority.

Ad 3: Tightening of the rules of business conduct and increase of transparency at the point of sale

The following harmonised and tightened rules of business conduct have been put up for discussion:

- Suitability or appropriateness test at the point of sale (the test requirements would vary depending on the type of services provided, i.e. asset management, investment-advisory, other services or execution-only transactions)
- Enhanced pre-contractual notification duties, in particular:
 - clear information on the service provider and its services
 - disclosure of conflicts of interest
 - more detailed information on products and investment strategies
 - increased cost-transparency
 - broadened documentation duties.

Ad 4: More coherent approach to the supervision of financial services providers

Under the current rules, the supervision of the various financial services providers at the point of sale lacks harmonisation. FINMA proposes that a duty of registration be introduced for all the “other” - i.e. not prudentially supervised - financial services providers.

Ad 5: Facilitating the enforcement of claims

In order to facilitate the enforcement of customer claims against financial services providers, FINMA puts the following measures forward:

- duty of documentation to be complied with by the services providers
- extension of the ombudsman system
- duty to create an internal customer grievance procedure
- facilitation of dispute resolution in civil law by shifting or alleviation of the burden of proof as well as a comprehensive judiciary contents' examination with respect to standard form agreements and terms and conditions.

Ad 6: More coherent regulation of the cross-border distribution of foreign financial products in Switzerland

FINMA requires a product-neutral regulation of cross-border offers from abroad, which would coherently stipulate the requirements to be satisfied with respect to all foreign investment products for their distribution in Switzerland.

Ad 7: Stronger alignment with or implementation of EU distribution and product rules

Due to the strong interconnections of the Swiss financial sector with the EU, FINMA considers that an alignment with the European rules (in particular the *Prospectus Directive* and the *Markets in Financial Instruments Directive “MiFID”*) would make sense.

Planned and considered measures

FINMA announces that it will, in the context of its supervision activity and available resources, examine in more detail – and implement by means of enforcement – the compliance of existing point of sale requirements. It considers in particular reviewing the statutory compliance of simplified prospectuses for structured products via random tests and the quality controls in financial services via mystery shopping.

Long-term regulation

FINMA's long-term objective is the introduction of a general *Financial Services Act*. A comprehensive and cross-sectorial implementation of the proposed measures is likely to only be possible on the basis of such a statutory rule.

Summary

FINMA's main focus is clearly on the point of sale where the sharpening of prospectus requirements and notification duties as well as clearly defined business conduct rules for financial services providers of all sectors - i.e. in part also for banks and insurance companies - are likely to result in an enhanced customer protection. A broader duty of registration is furthermore intended to improve the quality of the financial service provided at the point of sale. This is of concern primarily to those providers who are not subject to prudential supervision. They should, generally speaking, be the most affected by the proposed package of measures.

The current rules on production and distribution of financial products are rather confusing. A harmonisation in the context of a general, cross-sectorial regulation would therefore greatly contribute to an increase of legal certainty, and also satisfy a need of the various market participants.

FINMA has invited interested parties to share their views on the issues raised in the discussion paper by 2 May 2011.

Contacts

The content of this newsletter is for information purposes only and does not constitute a legal advice or opinion. Should you require specific advice in this matter, please get in touch with your usual contact at ALTENBURGER or with one of the below authors of this newsletter:

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