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Client Alert

NKF

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Update on Proposed Amendments to the Draft FIDLEG/FINIG

1. Introduction

The ongoing process of introducing the new Federal Financial Services Act (*Finanzdienstleistungsgesetz/ FIDLEG*) and the new Federal Financial Institutions Act (*Finanzinstitutsgesetz/FINIG*) by the Swiss legislature is among the most controversial and most prominent topics in the history of Swiss financial market law. The Federal Council published final drafts of each act (along with his explanatory notes) on 4 November 2015. On this basis, the Economic Affairs and Taxation Committee of the Swiss Federal Council of States (WAK-S) has been debating these new acts intensively since spring 2016. While it was anticipated that the WAK-S may propose some substantial amendments thereto, its press releases of 17 October and 4 November 2016 which came along with a 302-page overview and a list of more than 100 suggested amendments, still came as a (small) surprise.

While the Council of States as a *plenum* and the National Council have yet to enter into respective discussions, the content of the WAK-S' press releases seems to provide for such fundamental deviations from the FIDLEG as proposed by the Federal Council that we would like to provide you with a very rough outline of certain key points from WAK-S' proposals in this Client Alert.

2. Key Points

- **Carve-out for insurance institutions and insurance intermediaries**
  Under the FIDLEG as proposed by the Federal Council, redeemable life insurance policies with an investment component would have been qualified as financial instruments. Thus, insurance institutions and insurance intermediaries would potentially have had to observe the FIDLEG's code of conduct duties and product requirements, and not only the respective requirements under insurance regulation. However, the WAK-S proposes to entirely carve-out insurance institutions and insurance intermediaries and to delete the reference to redeemable life insurance policies within the definitions section.

- **Revised client segmentation and opting-in and opting-out regime**
  The WAK-S proposes a few extensive amendments to the contemplated client segmentation regime of the FIDLEG, including the introduction of a new professional client category of "large undertakings" – with a concept and content similar as the related category under MiFID. In addition, it is proposed to define the relevant requirements and financial thresholds for high-net worth individuals within the FIDLEG itself; a notable difference to the current CISA regulation is that the upper financial threshold, where no additional experience or know-how is required, shall already be set at CHF 2m (as opposed to CHF 5m as per the current CISA implementing regulation). The WAK-S further recommends to heavily restrict the opting-in (opting-down) as well as to liberalize the opting-out (opting-up) possibilities. Finally, the WAK-S suggests that the entire set of code of conduct duties under the FIDLEG shall not apply in relation to institutional clients, while professional clients may explicitly waive the application of certain duties.

- **Reduction and liberalization of code of conduct duties**
  Furthermore, the WAK-S generally aims to reduce and liberalize the prudential code of conduct duties

contained in the FIDLEG. Proposed amendments refer to, *inter alia*, the education requirements of client advisers, the duties of care and loyalty, the information duties, the documentation and accounting duties (including the question of whether the basic information sheet needs to be handed over to the client in advance of a transaction), etc. To the extent that the regulatory code of conduct applies and is complied with, the WAK-S suggests integrating a wording pursuant to which a financial services provider would also be deemed compliant with "identical" civil law duties. If adopted, it will be very interesting to see how civil courts will effectively deal with such a rule.

- **Appropriateness & suitability**
  While the Federal Council proposed that a financial services provider shall advise against the purchase of certain financial instruments if such are considered not appropriate or suitable for the client, the WAK-S suggests stipulating a mere warning requirement.

- **Carve-outs regarding criminal offences under the FIDLEG**
  Prudentially licensed financial services providers being supervised within the meaning of the FINMAG shall explicitly be carved-out from being subject to the criminal offences stipulated under the FIDLEG.

- **Specification of requirements for asset managers and trustees under the FINIG**
  Finally, the WAK-S suggests certain specifications concerning the regulatory minimum requirements for asset managers of individual client assets as well as trustees. In particular, their management shall generally consist of at least two qualified persons. In exceptional cases, a single person may be sufficient (if continuous business operations can be ensured). Further specific requirements have been suggested with respect to risk management, internal control systems, compliance, minimum capital and own funds.

3. Conclusion

In conclusion, the WAK-S proposes far-reaching amendments to FIDLEG (and a few specific amendments to FINIG) which generally provide for a further liberalization when compared to the drafts of these acts originally published by the Federal Council. One of the key questions in the upcoming discussions in Swiss Parliament will likely be whether the adoption of these proposals will endanger the much hoped for EU equivalency attestation and the original aim of providing a level playing field (same business, same rules). Further, in the light of the numerous proposals made on parliamentary level, it will be important to ensure that coherence and consistency of the draft laws can be maintained.

The NKF-Banking, Finance & Regulatory Team is happy to continue to advise clients with regard to ongoing regulatory developments or specific questions to specific regulatory issues going forward.

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