

RVP Bulletin

More Protection for Policyholders at Point of Sale in Switzerland



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Contents

Planned Federal Financial Services Act.....	1
Purpose and subject matter of FFSA.....	1
Overlapping of FFSA with insurance legislation	2
Observance of new regulation at an early stage.....	2
Little Customer Protection under Current Law	2
Client protection under Insurance Contract Act	2
Client protection under Insurance Supervisory Act	3
Simplified dispute resolution.....	3
Insurance Companies as FS Provider	3
Life insurance companies subject to FFSA.....	3
Specific protection for private clients	3
Fiduciary duty and duty of care	3
Conflict of interests due to retrocession payment	3
Information on insurance company.....	3
Product information sheet.....	3
Prospectus in case of unit-linked life insurance	4
Product advertising.....	4
Appropriateness test	4
Documentation requirements and accountability	4
Delivery of documents.....	5
Ombudsman services.....	5
Arbitral court or legal cost fund.....	5
Union action and group settlement proceedings.....	5
Intermediaries as FS Provider or Cust. Consultant ..	5
Intermediaries subject to FFSA	5
Intermediaries as financial service provider.....	6

Intermediaries as customer consultant.....	6
Intermediaries under Insurance Supervisory Act	6
Amendment of Insurance Supervisory Act	6
Registration as customer consultant	6
Fiduciary duty and duty of care	6
Designation as „independent“	6
Conflict of interests based on retrocessions.....	6
Information on intermediary	6
Rules of conduct	7
Ombudsman services	7
Enforcement of supervisory duties	7
Abbreviations	7

Planned Federal Financial Services Act

Purpose and subject matter of FFSA

The provisions of the Swiss financial market law is intended to protect the clients, i.e. the creditors, investors and insured persons against illegal behavior of the financial service providers. The same objective is already followed by current law by means of numerous provisions. However, the current law includes disparate provisions and gaps in the area of behavioral and product rules.

The planned Federal Financial Services Act (FFSA) governs the prerequisites for providing financial services and offering financial instruments. It is intended to improve and harmonize client protection at the point of sale in the financial and insurance sector. The new regulation is geared in particular to the European financial market regulation without indiscriminately taking it over. In particular, the following enactments and projects of the EU are relevant: MiFIR and MiFID II, IMD, prospectus directive, PRIIPs, dispute settlement directive, and recommendation for collective defense and recovery procedures.

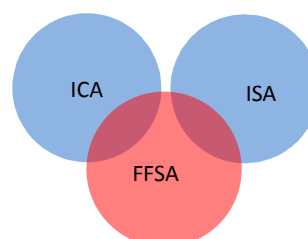
The new regulation concerns (1) the faithful, diligent and transparent provision of financial services; (2) the offering of financial instruments; and (3) the enforcement of civil claims of clients of financial service providers (Art. 1 D-FFSA).

The new regulation applies to the various service providers in the financial market in the same way. It concerns for example asset management and investment advisory services, offering of securities, shares of collective investment schemes, structured products and derivatives as well as account processing and keeping of assets for the account of the client. In particular, the new regulation also applies to redeemable life insurance products and the distribution of insurance products by intermediaries. This bulletin deals with this very subject matter.

Overlapping of FFSA with insurance legislation

Life insurance companies and insurance intermediaries may directly be subject to the FFSA according to the legislative proposal. If applicable, they must comply not only with the Insurance Contract Act and Insurance Supervisory Act but also with the client protection provisions of the FFSA. There may be overlapping in particular in the area of information duties. In case of contradiction, the special statutory rules of the Insurance Contract Act and Insurance Supervisory Act have priority.

The relation between the FFSA on the one hand and the Insurance Contract Act and Insurance Supervisory Act on the other hand may be shown as follows:



Observance of new regulation at an early stage

Although the consultation on the new FFSA was initiated only in June 2014 and it will still take some time before the FFSA enters into force, it definitely makes sense for regulated enterprises to look at the new regulation at an early stage. At first the new regulation sporadically includes client protection requirements that apply or are considered already today under supervisory law practice. Furthermore, it may be advisable for supervised enterprises for reasons of efficiency to consider future client protection requirements ahead of time when amending own client documentation.

Little Customer Protection under Current Law

Client protection under Insurance Contract Act

In the area of behavioral and product rules the current Insurance Contract Act includes only few protection provisions. It merely includes provisions regarding the duty of the insurance company to inform policyholders about the insurance product before contract conclusion (Art. 3 ICA).

The amendment of the Insurance Contract Act that was planned back in 2011 included further provisions for client protection at the point of sale (e.g. extended pre-contractual information duty, avoidance of conflicts of interests, right of rescission, duty to join recognized ombudsman services). However, these provisions did not become effective. The legislative project was rejected and sent back to the Federal Council, as is generally known.

Client protection under Insurance Supervisory Act

In the area of client protection at the point of sale, the current Insurance Supervisory Act firstly includes rules on insurance intermediation. It provides for a registration duty of independent intermediaries and requires that all intermediaries inform their clients about their own position as intermediary (Art. 40–45 ISA). Furthermore, the Insurance Supervisory Act includes general abuse prohibition for insurance companies and intermediaries as well as correspondent abuse supervision by FINMA (Art. 46 ISA and Art. 117 ISO).

Simplified dispute resolution

Regarding dispute resolution it should be mentioned that there are ombudsman services in the financial and insurance sectors already today. However, correspondent statutory rules are lacking. The joining of these ombudsman services is not legally required for insurance companies and insurance intermediaries.

Furthermore, one should mention in this context that the Swiss Code of Civil Procedure provides for a simplified procedure for additional insurance to social health insurance (Art. 243 CPA).

Insurance Companies as FS Provider

Life insurance companies subject to FFSA

Life insurance companies regularly qualify as financial service providers and as such are subject to the FFSA. This applies if they offer redeemable life insurance products in Switzerland or for clients in Switzerland (life insurance with saving process; Art. 3 D-FFSA). If applicable, they must comply with the requirements for financial service providers under the FFSA.

Specific protection for private clients

Planned client protection according to the legislative proposal applies in particular to private clients of financial service providers. Private clients are all clients who are not professional clients. Professional

clients are first of all prudentially supervised financial intermediaries and companies with professional treasury operations (Art. 4 D-FFSA).

High-net-worth individuals may announce to the life insurance company in writing that they waive the protection level for private clients and wish to be treated as professional clients (*opting out*). Vice versa professional clients may announce to the life insurance company in writing that they wish to be treated as private clients and take advantage of the respective protection level (*opting in*; Art. 5 D-FFSA).

Fiduciary duty and duty of care

Life insurance companies that offer redeemable life insurance products must act in the best interest of the insured persons and with the necessary expertise, diligence and preciseness according to the legislative proposal (Art. 6 D-FFSA). They must ensure the fulfillment of their duties under the FFSA by means of internal guidelines and an appropriate business organization (Art. 21 D-FFSA).

Conflict of interests due to retrocession payment

Life insurance companies that offer redeemable life insurance products may accept retrocession payments (commissions, discounts, etc.) according to the legislative proposal only if the policyholders have waived the forwarding of such payments in advance or such payments are fully forwarded to the policyholders (Art. 26 D-FFSA).

Information on insurance company

The clients must be provided with appropriate information on the life insurance company and its activities according to the legislative proposal. The life insurance company must inform them in a comprehensible way and in due time before contract conclusion. The new act further specifies contents and form of information (Art. 7 and 8 D-FFSA).

Product information sheet

Life insurance companies must produce and publish a basic information sheet if private clients are offered redeemable life insurance products according to the legislative proposal. In the case of unit-linked life insurance the information sheet must cover both the

life insurance and the capital investment (Art. 58, 60 and 66 D-FFSA). The basic information sheet must be provided before contract conclusion (Art. 8 D-FFSA). The new act further specifies contents and form of the information sheet (Art. 61–63 D-FFSA).

The duty to produce a basic information sheet applies in addition to the information duty pursuant to Art. 3 ICA. If the information duty pursuant to the Insurance Contract Act is more extensive it will supplement the provisions of the FFSA and has priority due to its nature as insurance specific rule (Art. 60 D-FFSA). The basic information sheet may be drafted in a way that the requirements pursuant to Art. 3 ICA are also complied with.

Prospectus in case of unit-linked life insurance

In the case of unit-linked capital insurance products the life insurance company purchases shares of collective investment schemes for the account of the policyholder within the framework of the safety part. According to the legislative proposal, shares of collective investment schemes qualify as financial instruments subject to securities prospectus requirements. The public supplier in Switzerland is generally obliged to publish a prospectus. If unit-linked capital insurance products are publicly offered the requirement to publish a prospectus applies in my opinion for reasons of consumer protection, even though the shares are “purchased” by the policyholder in an economic sense only. The same regime applies if insurance premium of a capital insurance product is invested in other financial instruments under the FFSA, for example in structured products (Art. 37–57 D-FFSA).

Product advertising

The advertising for redeemable life insurance products must be designated as such and refer to the basic information sheet according to the legislative proposal. Other information on redeemable life insurance products must not contradict information provided in the basic information sheet whether or not qualifying as product advertising (Art. 68 D-FFSA).

Appropriateness test

Life insurance companies must inquire the knowledge and experience of their private clients regarding the offered redeemable life insurance products according to the legislative proposal and verify before sale whether the product is appropriate for the clients. If the product turns out to be not appropriate in a particular case the life insurance company must warn the policyholder before carrying out the insurance transaction (Art. 11 and 13 D-FFSA).

Documentation requirements and accountability

Life insurance companies which offer redeemable life insurance products must write down various activities and the agreed benefits according to the legislative proposal. They must hand out the documentation to the policyholders and provide information on the insurance business during the contract term (Art. 15-16 D-FFSA).

Employees and third parties

Life insurance companies which offer redeemable life insurance products must ensure that their employees have the skills, knowledge and experience necessary for their tasks according to the legislative proposal. If they provide advice to clients they must be entered into the customer consultant register (Art. 22 D-FFSA).

Furthermore, life insurance companies may involve third parties for the offering of redeemable life insurance products. These third parties must have the skills, knowledge and experience necessary and hold the permits necessary for their activities. Third parties must carefully be instructed and supervised by the life insurance company. If third parties provide advice to clients the life insurance company must ensure that they have been entered into the customer consultant register (Art. 23 D-FFSA).

Customer consultant

Employees or third parties who wish to act as customer consultant for a life insurance company which offers redeemable life insurance products must first be entered into the customer consultant register according to the legislative proposal. The entry into the register requires in particular that the customer con-

sultant or the life insurance company of which the customer consultant is an employee provides financial guarantees (e.g. professional liability insurance) and in addition has jointed recognized ombudsman services (Art. 28-33 D-FFSA).

Chain of service providers

Life insurance companies which mandate intermediaries to distribute redeemable life insurance products to clients will remain responsible for the completeness and accuracy of client information as well as the performance of the appropriateness test and the compliance with documentation requirements and accountability according to the legislative proposal (Art. 24 D-FFSA).

Delivery of documents

According to the legislative proposal policyholders are entitled to ask at any time for the delivery of copies of the client file as well as all other documents that concern them and are produced in the course of the business relationship by the life insurance company that offers redeemable life insurance products (Art. 72 D-FFSA).

The life insurance company has the burden of proof regarding its compliance with the statutory duties to inform and provide explanations to clients. If the life insurance company has not complied with such duties or is unable to establish compliance it will be assumed that the client would not have made the relevant transaction (Art. 72 and 74 D-FFSA).

Ombudsman services

Disputes regarding claims of policyholders against life insurance companies offering redeemable life insurance products should be settled, if possible, by means of dispute resolution proceedings of ombudsman services according to the legislative proposal. Accordingly, the life insurance companies are required to join recognized ombudsman services in the insurance sector (Art. 75-84 D-FFSA).

Arbitral court or legal cost fund

The legislative proposal provides for two procedure alternatives regarding claims of policyholders who are private clients against life insurance companies

which offer redeemable life insurance products: According to the first alternative, policyholders may approach an arbitral court applying a cost-efficient procedure and taking final decisions. According to the second alternative, a legal cost fund is set up that takes over an appropriate part of legal costs of policyholders for their actions against life insurance companies (Art. 85-100 D-FFSA).

Union action and group settlement proceedings

According to the legislative proposal unions, associations and other organizations can bring an action against life insurance companies that offer redeemable life insurance products for breach of civil law duties in the course of providing insurance services. However, the action may only be for injunction, removal or declaration of illegality of the breach of duty but not for any payments (Art. 101-104 D-FFSA).

Furthermore, the legislative proposal provides for group settlement proceedings that allow the collective enforcement of similar or similar types of financial claims of a plurality of policyholders against a life insurance company which offers redeemable life insurance products. Counterparty must be unions, associations or other organizations that are authorized to file union actions. Restrictively, it should be mentioned that the proceedings (other than class actions) are always based on a compromise settlement and the approval by the relevant life insurance company (Art. 105-116 D-FFSA).

Intermediaries as FS Provider or Customer Consultant

Intermediaries subject to FFSA

The FFSA directly applies to insurance intermediaries who act as financial service provider or customer consultant in the sense of Art. 2 and 3 D-FFSA. If applicable, they must not only comply with client protection requirements under the Insurance Contract Act and Insurance Supervisory Act but also with client protection requirements under the FFSA.

Intermediaries as financial service provider

Insurance intermediaries qualify as financial service provider subject to the FFSA if and to the extent they distribute redeemable life insurance products (Art. 2 and 3 D-FFSA). Intermediaries must as such generally comply with the same duties like other financial service providers. Reference is made to the explanations regarding life insurance companies.

In addition, it should be mentioned that intermediaries may designate their services as *independent* according to the legislative proposal only if they take into consideration a sufficient number of insurance products offered on the market and do not accept monetary benefits from third parties without forwarding them to their clients (Art. 9 D-FFSA).

Intermediaries as customer consultant

If an insurance intermediary who acts as financial service provider is a natural person (Art. 3 D-FFSA) he or she must in addition comply with the requirements applicable to customer consultants and be entered into the customer consultant register according to the legislative proposal (Art. 28-33 D-FFSA).

The same applies to employees of an intermediary which acts as financial service provider. If they advise clients they must be entered into the customer consultant register (Art. 28-33 D-FFSA).

Intermediaries under Insurance Supervisory Act

Amendment of Insurance Supervisory Act

The Swiss Insurance Supervisory Act is intended to be amended at the same time as the introduction of the new FFSA. It follows that all insurance intermediaries will be confronted with the new rules at the time of implementing the FFSA and not only those who operate their business as financial service provider or customer consultant in the sense of the FFSA. The amended Insurance Supervisory Act includes new rules and otherwise makes reference to the provisions of the FFSA that as a consequence apply to intermediaries by analogy if they are not already sub-

ject to the FFSA as financial service provider or customer consultant.

Registration as customer consultant

According to the legislative proposal, not only independent but all insurance intermediaries are required to be registered. They must be entered in the customer consultant register. The prerequisites for the entry into the register under the FFSA apply to insurance intermediaries by analogy (reference to FFSA in Art. 42 D-ISA).

Fiduciary duty and duty of care

Insurance intermediaries must act in the best interest of the insured persons and with the necessary expertise, diligence and preciseness according to the legislative proposal. Furthermore, they must comply with the provisions of the FFSA regarding business organization and employees (reference to FFSA in Art. 43 D-FFSA).

Designation as „independent“

According to the legislative proposal, it applies to all intermediaries and not only to those who act as financial service provider that they may designate their services as *independent* only if they take into consideration a sufficient number of insurance products offered on the market and do not accept monetary benefits from third parties without forwarding them to their clients (reference to FFSA in Art. 43 D-ISA).

Conflict of interests based on retrocessions

If there is a fiduciary relationship between intermediary and client and the intermediary acts in the client's interest, he may accept retrocession payments according to the legislative proposal only if the client has waived in advance the forwarding of received payments or the received payments are fully forwarded to the client (reference to FFSA in Art. 45a D-ISA).

Information on intermediary

The current information duty of insurance intermediaries pursuant to Art. 45 ISA is supplemented according to the legislative proposal. In particular, intermediaries must in the future also inform whether

the advice is based upon the outcome of a balanced investigation (Art. 45 D-ISA).

Rules of conduct

Insurance intermediaries must before contract conclusion identify goals and needs of the insured persons and explain the reasons for the advice given to them according to the legislative proposal (Art. 45a D-ISA).

If intermediaries agree with the policyholder that the advice is to be provided based upon a balanced investigation, the intermediaries must base their advice on the investigation of a sufficient number of insurance contracts available on the market according to the legislative proposal (Art. 45a D-ISA).

Ombudsman services

Besides the entry into the customer consultant register, insurance intermediaries must join recognized ombudsman services. The relevant provisions of the FFSA apply by analogy (reference to FFSA in Art. 42 D-ISA).

Enforcement of supervisory duties

Whereas insurance intermediaries are currently subject to abuse supervision by FINMA (Art. 46 ISA and Art. 117 ISO), such supervision is planned to be abolished after the integration of the intermediary register into the customer consultant register according to the legislative proposal. Intermediaries will not any longer be subject to the prudential supervision by FINMA. This applies also to intermediaries who act as customer consultant or financial service provider subject to the FFSA.

The enforcement of the supervisory duties of the intermediaries can still be ensured, as (1) the breach of supervisory duties is sanctioned under criminal law (in particular Art. 86 D-ISA); (2) intermediaries are monitored by supervised insurance companies to a limited extent (Art. 22 and 23 D-FFSA); and (3) supervisory duties can generally influence the civil law

relationship between intermediary and client and their breach may indirectly be taken into consideration in the context of a civil law dispute.

Abbreviations

CPA:	Swiss Civil Procedure Act of 2008
D-FFSA:	Draft Federal Financial Services Act of 2014
D-ISA:	Draft Revised Insurance Supervisory Act of 2014
D-ICA:	Draft Revised Insurance Contract Act of 2011
Dispute-D.:	Directive 2013/11/EU of the European Parliament and the Council of May 21, 2013 regarding Alternative Dispute Resolution for Consumers
EU:	European Union
FS:	Financial Service
ICA:	Insurance Contract Act of 1908
IMD:	Directive 2002/92/EG of the European Parliament and the Council of December 9, 2002 regarding Insurance Intermediation
ISA:	Insurance Supervisory Act of 2004
ISO:	Insurance Supervisory Ordinance of 2005
MiFID I:	Directive 2004/39/EG of the European Parliament and the Council of April 21, 2004 on Markets for Financial Instruments
MiFID II:	EU-Directive as amendment of MiFID I
MiFIR:	EU-Ordinance as amendment of MiFID I
PRIPs:	Proposal for Ordinance of the European Parliament and the Council regarding Basic Information Sheet for Packaged Retail and Insurance Based Investment Products of April 4, 2014
Pros.-Direc.:	Directive 2003/71/EG of the European Parliament and the Council of November 4, 2003 regarding the Prospectus that needs to be published in the event of a public offer of securities or in the event of their admission for trading

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