

THE STRUCTURED
PRODUCTS
LAW REVIEW

THIRD EDITION

Editors

Christopher S Schell, Yan Zhang and Derek Walters

THE LAWREVIEWS

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THIRD EDITION

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CONTENTS

PREFACE.....	v
<i>Christopher S Schell, Yan Zhang and Derek Walters</i>	
Chapter 1 ARGENTINA.....	1
<i>Fermin Caride, María Victoria Funes, María Victoria Tuculet and Lucía Carro</i>	
Chapter 2 BRAZIL.....	11
<i>Tiago A D Themudo Lessa, Rafael José Lopes Gaspar and Fábio Moretti de Góis</i>	
Chapter 3 CHILE.....	23
<i>José Luis Ambrosy</i>	
Chapter 4 FINLAND.....	36
<i>Mika J Lehtimäki</i>	
Chapter 5 JAPAN.....	47
<i>Naoya Ariyoshi, Yuki Taguchi and Toshiyuki Yamamoto</i>	
Chapter 6 LUXEMBOURG.....	57
<i>Frank Mausen, Paul Péporté, Jean Schaffner, David Van Gaeve, Franz Kerger and Kristina Vojtko</i>	
Chapter 7 SWITZERLAND.....	70
<i>Dominique Lecocq and Lucile Cesareo-Hostettler</i>	
Chapter 8 UNITED STATES.....	84
<i>Christopher S Schell, Yan Zhang and Derek Walters</i>	
Appendix 1 ABOUT THE AUTHORS.....	117
Appendix 2 CONTRIBUTORS' CONTACT DETAILS.....	125

PREFACE

It is our pleasure to continue to act as the editors for this third edition of *The Structured Products Law Review*. Despite the significant growth of the global structured products market in recent years and the continuing evolution of the global regulatory framework, very few books on legal and regulatory issues related to structured products are available. Our first edition two years ago was meant to cover that gap, and we hope that this third edition will continue to further the knowledge base of legal practitioners and other structured products market participants.

For this year, we are pleased to report that this third edition adds one new jurisdiction and updates each existing geographical overview to cover its developments over the past year. One of the major developments, of course, has been the global covid-19 pandemic and the societal and governmental responses to that health risk. One of the more interesting effects of the pandemic for the structured products market was the intense volatility of the global stock markets in March and April 2020 as the world grappled with the new virus and its economic consequences. The volatility index of Chicago Board Options Exchange, known as the VIX index, reached a peak of 82.7 on 16 March 2020, which was higher than during the 2008 financial crisis and significantly higher than its long-run volatility average of approximately 20. This volatility resulted in substantial pricing movements in the structured products market. Combined with high levels of investor demand and longer marketing periods for typical structured products, and thus longer periods between the indicative pricing at launch and the final pricing at the close of the marketing, this unprecedented volatility required significant issuer and distributor efforts to appropriately price and sell structured products to those who understood the risks. Many transactions needed restructuring or repricing. At the same time, the investors saw the value of capital protection, including features such as buffers and triggers. The ultimate effects of this market dislocation, including any regulatory response, will take a long time to unravel. The near term results, however, are unambiguous: investors clearly noticed that structured products provided them with a set of investment options to capitalise on, or mitigate against, those unparalleled market conditions.

For our purposes, the term structured product refers to a pre-packaged investment that combines derivatives with other financial instruments to provide a return based on the performance of one or more underlying assets, including equity securities, indices, commodities, interest rates, currencies and, in some jurisdictions, credit risks. Typical structured products are issued as debt securities, certificates of deposit or investment certificates or units, and include embedded derivatives to provide a customised risk-return trade-off. Common issuers of structured products are financial institutions, other corporate issuers, special purpose vehicles and trusts. Structured products should not be confused with

other structured finance products, which include asset-backed securities such as collateralised debt obligations and mortgage-backed securities, synthetic loans and credit derivatives such as credit default swaps.

Structured products have been in the spotlight since the global financial crisis in 2008. In the years following the financial crisis, there was an increase in regulatory investigations into the issuance and distribution of structured products and the promulgation of new rules and regulations to govern the conduct of structured product issuers and distributors. Regulators are particularly concerned about certain risk characteristics of structured products, including credit risk, investor suitability, pricing transparency, secondary market liquidity and conflicts of interest. Global regulators have taken a range of approaches to address these issues. To enhance investor protection, the International Organization of Securities Commissions published a report on the regulation of structured products in December 2013, which provides a toolkit outlining possible regulatory options that regulators in different jurisdictions may find useful to address their concerns about structured products. The process that led to the publication of this report has helped increase regulatory consistency across different jurisdictions and is an excellent example of international collaboration. The growing popularity of complex structured products among retail investors has also caught regulators' attention. Pursuant to the EU Markets in Financial Instruments Directive legislation that came into effect in January 2018, an issuer is required to supplement offering materials with a key information document when offering structured products to retail investors in EU Member States in order to strengthen investor protection and improve their investment decision and selection process. Other jurisdictions have also implemented rules aimed at protecting retail investors.

Given its unique ability to tailor investments to investor preferences, the structured product industry continues to grow at an impressive pace, and it is estimated that the size of outstanding structured products around the world has increased to over US\$3 trillion in 2021. Technology plays an increasingly important role as the structured product market continues to grow in terms of issuance volume, innovation and broadening distribution channels. Recent examples include the growing popularity of online distribution platforms that provide an open marketplace for structured product issuers and distributors with a focus on streamlining the offering process to increase efficiency and transparency, the development of blockchain technology to facilitate securities clearing and settlement, and the use of large volumes of data from non-traditional sources, such as social media, to assess investors' financial needs and to design investment strategies. In recent years, not only have market participants embraced the rise of fintech by integrating new technology into offerings and issuances of structured products, securities regulators are also exploring the possibility of adopting new technology in structured product regulation. In Japan, online-based procedures have been permitted since November 2018 as a new know-your-customer (KYC) process to complement traditional face-to-face or mail-based KYC procedures. The US Securities and Exchange Commission (SEC) also has explored the use of big data in enforcement actions. In one recent example, the SEC used for the first time a coding technique against a broker-dealer that allows regulators to analyse data across an entire trading platform to identify potential unsuitable sales to a particular class of investors. The financial industry has historically been an early adopter of new technologies. With the onset of the remote working environment in many jurisdictions due to covid-19, the industry saw a continued investor demand for structured products throughout 2020 and 2021 and the technology was available

to deliver structured products to those investors notwithstanding the dramatic decrease in in-person interactions. There is no doubt that technological development will continue to have a profound impact on structured products markets across all jurisdictions.

The Structured Products Law Review is designed to provide an overview of recent changes and developments in legal and regulatory issues regarding structured products markets. It would not have come together without the participation of a group of top lawyers and law firms from eight jurisdictions around the world. We hope that you find this book a useful tool in navigating the ever-changing legal and regulatory landscape in a fast-growing industry.

Finally, we would like to thank our counsel, Vidal Vanhoof, and other colleagues for their contributions in editing this book and the team at Law Business Research for their patience and efforts in compiling this third edition.

Christopher S Schell, Yan Zhang and Derek Walters

Davis Polk & Wardwell LLP

New York

October 2021

SWITZERLAND

Dominique Lecocq and Lucile Cesareo-Hostettler¹

I OVERVIEW

The turnover of structured products issued or distributed by major financial institutions negotiated on the national and international markets amounts to 82 billion Swiss francs, and there are currently around 12,000 structured products in Switzerland tradable at SIX Swiss Exchange. This exceptional diversity makes it difficult for investors to compare products, which can lead to inappropriate investments due to misinformation.

Following the entry into force of the EU Prospectus Directive, MiFID II and PRIIPs regulations, and to harmonise the Swiss regulatory landscape with international standards, including OECD guidelines, Switzerland has revised its entire financial regulatory regulation. The Upper Chamber of the Swiss Federal Assembly approved, as a plenum in its 2016 winter session, draft acts for the Financial Services Act (FinSA) and the Financial Institution Act (FinIA). FinSA contains rules of conduct that financial service providers must observe with respect to their clients, including in respect of structured products. FinIA standardises the authorisations for financial service providers, including securities and issuing houses. Three ordinances, the Financial Services Ordinance (FinSO), the Financial Institutional Ordinance (FinIO) and the Supervisory Organisations Ordinance (SOO) of 6 November 2019 supplement these laws.

On 1 January 2020, both acts and the three above-mentioned ordinances (New Regulation) entered into force (subject to transitional provisions). Thus, we primarily analyse structured products in Switzerland under the New Regulation in this chapter. In addition to the New Regulation, the Swiss Financial Market Supervisory Authority (FINMA) passed a number of implementing provisions pertaining to selected, mainly technical issues. As a result, FINMA has published a new Financial Institutions Ordinance (FinIO-FINMA) as well as amendments to current FINMA ordinances and circulars. FINMA held a public consultation on the FinIO-FINMA until 9 April 2020.² On 1 January 2021, the FinIO-FINMA and amendments on FINMA ordinances and circulars entered into force to complete the New Regulation.

Switzerland has so far been a playground with a light financial regulation of certain financial sectors such as asset management and advisory services, the distribution of products (with the exception of funds, which are over-regulated) and foreign advisers. There is no

1 Dominique Lecocq is the managing partner and Lucile Cesareo-Hostettler is an associate at lecocqassociate.

2 FINMA press release dated 7 February 2020, FinSA/FinIA: follow-up regulation by FINMA.

clear obligation to inquire about a client's knowledge and experience before entering into a transaction or to warn them of the risks arising from an inappropriate transaction. The New Regulation addresses most of these concerns and codifies some of the existing practice.

Unlike investment funds, structured products are not subject to a regulatory licence upon issuance: it is securities/issuing houses that are subject to regulatory approval and supervision. Disclosure rules are newly defined in the New Regulation. A distributor of structured products is subject to a new requirement of being listed in an advisers register under the New Regulation. Foreign distributors also have to register (under certain conditions).

The Swiss regulatory system around structured products is further developed in this chapter.

II LEGAL AND REGULATORY FRAMEWORK

Financial market supervision is carried out by FINMA, which is structured as an independent, self-organised public law institution with its own legal personality.³ FINMA's role is therefore to supervise and monitor the proper application of the financial legislation, which aims at protecting creditors, investors and insured persons as well as ensuring the proper functioning of the financial market.⁴

Hence, FINMA supervises and carries out enforcement proceedings. It has jurisdiction to impose criminal sanctions when provided by law.⁵ Moreover, FINMA's mandate includes granting practice authorisations to the following financial institutions:

- a* banks;
- b* securities dealers (which will be renamed securities firms under FinSA);
- c* insurance companies;
- d* fund management companies;
- e* custodian banks;
- f* asset managers of collective investment schemes (funds);
- g* representatives of foreign collective investment schemes (funds); and
- h* portfolio managers and trustees.

These entities and actors will then be subject to ongoing prudential supervision by FINMA or by a supervisory organisation, itself authorised and supervised by FINMA (which is the case for portfolio managers and trustees).⁶

Until the entry into force of the New Regulation on 1 January 2020, structured products were governed by the Swiss Collective Investment Schemes Act of 23 June 2006 (CISA), which had already been subject to several legislative modifications since that date. They were

3 Section 5 of the Federal Act on the Swiss Financial Market Supervisory Authority.

4 Section 4 FMSA.

5 Section 50(1) FMSA.

6 <https://www.finma.ch/en/finma/activities/authorisation-licensing/>.

not per se submitted to the requirements applicable to collective investment schemes,⁷ even if there are many similarities between the two financial instruments.⁸ The only provision of CISA dealing with structured products was Section 5 CISA.⁹

In Switzerland, as in many other jurisdictions, structured products have been in the spotlight for several years. Following the 2008 financial crisis and the bankruptcy of the Lehman group, FINMA conducted a large-scale investigation into the distribution to retail clients in Switzerland of structured products that were guaranteed by the subsidiaries of Lehman Brothers Holdings Inc.¹⁰ Indeed, the fall of the Lehman group had significant repercussions on the Swiss financial centre. In particular, many retail investors had invested in products with guaranteed capital, and thus had suffered a substantial risk exposure with the insolvency of the Lehman group.¹¹

At that time, structured products were considered a fashionable alternative to collective investments schemes. Even if the risk exposure was generally known, the probability of a failure of the reputable issuers was low rated.¹² One thing led to another, and many banks were presenting structured products, including structured products with guaranteed capital, as prudent investments.¹³

Investigations revealed the existence of a big deficiency in the law: the former CISA, in force at the time, provided that a simplified prospectus was to be made available at the issuance of a structured product in the secondary market phase.¹⁴ In the case of Lehman, however, the great majority of subscriptions took place on the primary market, between the publication of the offer and the issuance (i.e., at a moment when a prospectus was not yet required under the law).¹⁵

Based on these findings, FINMA concluded that, even if structured products with guaranteed capital were, as such, adapted to retail clients, the regulations of the time, and in particular those regarding investor protection provisions, were totally ineffective.¹⁶ Following FINMA's recommendations, the revised CISA, including Section 5, entered into force on 31 March 2013.¹⁷

Despite these legislative changes in 2013, the overall financial regulations in Switzerland, including the law on structured products, were still considered to be inconsistent and incomplete, particularly with regard to behavioural rules and financial products regulation.¹⁸

7 According to Section 5(4) CISA, in all other respects, structured products are not governed by this Act.

8 Beguin, Nicolas/Richa, Alexandre, *Le mandat de gestion de fortune*, 2e Ed, Zurich, 2017, p. 2 and Gomez Richa, Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich, 2015 p. 127.

9 Section 5 CISA and Chapelain de la Villeguerin, Donatienne/Mentha, Yves, 'La distribution de fonds de placements et de produits structurés in Services financiers: Suisse et Union européenne', *DDE – Dossiers de Droit Européen Band*, No. 31, Ed Kaddous, Christine/Matthey, Sylvain, Zurich, 2016, p. 124.

10 FINMA Report of 2 March 2010, Madoff Deal and Distribution of Lehman Products: Impact on Investment Advisory and Wealth Management Activities (FINMA report of 2 March 2010), p. 4/21.

11 FINMA report of 2 March 2010, p. 14/21.

12 FINMA report of 2 March 2010, p. 15/21.

13 FINMA report of 2 March 2010, p. 15/21.

14 Official Compilation of Federal Legislation (RO) 2013 585, p. 587.

15 FINMA report of 2 March 2010, p.18-19/21.

16 FINMA report of 2 March 2010, p. 3/21.

17 RO 2013 585, p. 603.

18 Message from the Federal Council on the Financial Services Law and the Financial Institutions Act of 4 November 2015, (Message), p. 8,112.

The Swiss obligations applicable to financial product prospectuses were very divergent and incomplete, and the information contained in prospectuses was often too detailed and not clear enough for customers.¹⁹

In respect of the above, the aim of the legislator when adopting FinSA and FinSO was to provide a clear and comprehensible framework for investors through imposing disclosure requirements on financial service providers.

III OFFERING PROCESS AND POST-SALE REQUIREMENTS

Structured products are listed in the definition clause of FinSA under the definition of financial instruments, as are shares, collective investment schemes, units and debt securities.²⁰ However, FinSA does not precisely define structured products. The law only lists capital-protected products, capped return products and certificates as examples of what could be considered structured products.²¹

Section 94 (3)(a) of the Financial Market Infrastructure Act (FMIA) provides that structured products such as capital-protected products, capped return products and certificates are not considered to be derivatives in accordance with Sections 93 to 117 FMIA. The wording of Section 94 (3)(a) FMIA is based on that of former Section 5(1) CISA, which was rather vague and did not provide a real criterion for distinguishing structured products from derivatives. Thus, there is still no legal definition of structured products, and it is still possible to refer to the practice developed in the context of Section 5 CISA at the time to determine whether an instrument is a structured product.

It is generally accepted that a structured product is a forward financial instrument that incorporates or combines several financial instruments, generally a derivative, and whose maturity value varies according to one or more underlying assets.²² Another proposal is to define a structured product as ‘a securitised derivative instrument . . . of varying complexity and [that] incorporates one or more claims against the issuer’.²³ They can be listed or unlisted.²⁴

i Issuance and distribution

General conditions for distribution to retail clients

The former provisions in force under Section 5 CISA with regard to the issuance and distribution of structured products are included in FinSA with only a few terminological adaptations.²⁵

In substance, according to Section 70 FinSA, structured products can only be distributed in Switzerland or from Switzerland to retail clients without a long-term asset management or investment advisory relationship if:

19 Message, p. 8,112.

20 Section 3 (a)(4) FinSA.

21 Section 3 (a)(4) FinSA.

22 Beguin, Nicolas/Richa, Alexandre, *Le mandat de gestion de fortune*, Zurich, 2017, p. 25, Gomez Richa, Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich, 2015, p. 23 and noted references.

23 Gomez Richa, Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich, 2015, p. 88.

24 Beguin, Nicolas/Richa, Alexandre, *Le mandat de gestion de fortune*, Zurich, 2017, p. 25.

25 Messages, p. 8192.

- a they are issued by a regulated financial institution such as a bank, an insurance company or a securities house (former securities dealer), or by a foreign institution that is subject to equivalent standards of supervision;²⁶ or
- b if they are not issued by a regulated financial institution (as mentioned above in (a)), they are guaranteed or secured in an equivalent manner by it.²⁷

Thus, where an issuer is not a regulated financial institution, equivalent guarantees or securities in the form of contractual commitments or rights of pledge must be provided. Section 96(3) FinSO defines 'guaranteed or secured in an equivalent manner', as: any legally enforceable guarantee by which a supervised financial institution referred to in Section 70(1) FinSA undertakes to meet the commitments of the issuer in terms of services, and provide the issuer with financial resources;²⁸ and the provision of a security interest that is legally enforceable in favour of the investor.²⁹

Under FinSA retail clients are defined as non-professional clients³⁰ (see below for a definition of professional clients). The definition of retail clients also covers high net worth clients defined as whoever validly declares to have the necessary knowledge to understand the risks inherent in investments because of his or her personal education and professional experience, or because of comparable experience in the financial sector and wealth of at least 500,000 Swiss francs;³¹ or holding a fortune of at least 2 million Swiss francs.³²

Moreover, FinSA also provides opt-in options for professional clients. Professional clients who are not institutional clients (see below) can declare that they wish to be considered as retail clients³³ and thus be protected by Section 70 FinSA.

If an issuer is a special purpose vehicle, the distribution must be made by a regulated financial institution or a financial intermediary in addition to the guarantees mentioned above.³⁴

Finally, FinSO provides that there is an established long-term asset management or investment advisory relationship, in particular if it is concluded for an unlimited number of transactions, and in writing or in any other form of proof by means of a text.³⁵ In this case, the distribution of structured products is possible irrespective of the conditions of Section 70 FinSA.³⁶

26 Section 70(1) FinSA.

27 Section 70(1) FinSA.

28 Section 96(3)(a) FinSO.

29 Section 96(3)(b) FinSO.

30 Section 4(2) FinSA.

31 Section 5(2)(a) FinSA.

32 Section 5(2)(b) FinSA.

33 Section 5(5) FinSA.

34 Section 5(1-bis) CISA and Gomez Richa, Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich 2015, p. 104.

35 Section 96(1) FinSO.

36 Message, p. 8,192 and BSK KAG-bishop/Lamprecht/Schwob /in, Art. 5 No. 23.

General conditions for distribution to professional and institutional clients

There is no specific legal provision in the New Regulation for the distribution of structured products to professional clients and institutional clients as seen above. Section 70 FinSA only applies when structured products are distributed to retail clients. Thus, we deduce that the principles developed under the authority of Section 5 CISA remain applicable: the exclusion of the need to protect retail clients also excludes the need for regulation.³⁷

Professional clients are:

- a* financial intermediaries according to the Swiss Banking Act (BA),³⁸ or under FinIA or CISA;
- b* insurance companies;
- c* foreign clients subject to prudential supervision (such as defined under (a) and (b));
- d* central banks;
- e* public law institutions with a professional treasury;
- f* pension funds or institutions for occupational pension provision with a professional treasury;
- g* companies with a professional treasury;
- h* large companies; and
- i* private investment vehicles with a professional cash position established for high net worth clients.

Moreover, FinSA also provides opt-out options for high net worth clients, who can declare that they wish to be considered as professional clients instead of retail clients³⁹ (according to the above) and thus avoid the protection of Section 70 FinSA.

On their side, institutional clients are:

- a* clients who are financial intermediaries according to the BA, or under FinIA or CISA;
- b* insurance companies;
- c* foreign clients subject to prudential supervision (such as defined under (a) and (b));
- d* central banks (which are also professional clients); and
- e* national and supranational public law institutions with a professional treasury.⁴⁰

Accordingly, we deduce that as under the authority of Section 5 CISA, structured products distributed to professional clients or institutional clients are not required to be issued or guaranteed by a regulated financial institution.⁴¹ Of course, specific provisions relating to listing procedures remain applicable (see Section IV.ii). Within the same framework, it is interesting to note that several sector actors consider that issuers who sell their structured products to distribution partners (financial intermediaries, such as banks) do not provide financial services.⁴² In other words, such issuers are not financial service providers within

37 BSK KAG-bischoff/Lamprecht/Schwob /in, Art. 5 No. 23.

38 Swiss Banking Act of 8 November 1934.

39 Section 5(1) FinSA.

40 Section 4(3) and (4) FinSA.

41 Section 70 FinSA.

42 Swiss Structured Products Association, FinSA Q&A dated 27 January 2020, p.9.

the meaning of FinSA and are not subject to provisions of Section 23 FinSA governing the involvement of third parties unless they are themselves active as financial providers in another context.⁴³

Advisers register

The issuance of structured products is not per se subject to FINMA's authorisation and supervision. In most cases, it is the issuer that will be required to be licensed. This has not changed under the New Regulation.

The concept of distribution is integrated into the definition of client advisers' services under the New Regulation. Client advisers of non-regulated Swiss financial service providers (and client advisers of foreign financial service providers) that operate in Switzerland now have to register, personally, in the register of advisers.⁴⁴ However, for client advisers of foreign financial service providers (subject to prudential supervision abroad), this obligation to register is solely applicable to client advisers of retail clients.⁴⁵ This registration is performed by a registration body approved by FINMA.⁴⁶ FINMA authorised the first registration body for client advisers on 20 July 2020.⁴⁷ The authorisation of the first registration body marked the start of a six-month transitional period and accordingly, affected client advisers must have submitted an application to be entered in the register of advisers by 19 January 2021.⁴⁸ Consequently, from this date, each client adviser of non-regulated Swiss and foreign distributors of structured products has to register before providing financial services to clients.

Registration may be carried out only if the following conditions are met:

- a* the client advisers are sufficiently familiar with the rules of conduct set out by FinSA and have the necessary technical knowledge to perform their activity, in particular categorising their clients as retail, professional or institutional clients;⁴⁹
- b* they have concluded professional liability insurance or provide equivalent financial guarantees;⁵⁰
- c* they are affiliated with a mediation body in charge of handling disputes between clients and service providers;⁵¹ and
- d* they have not been subject to a criminal sanction or a prohibition on practising.⁵²

It shall be noted that registration of advisers is one of the major innovations of the FinSA regime.

43 Swiss Structured Products Association, FinSA Q&A dated 27 January 2020, p.9.

44 Section 28(1) FinSA.

45 Section 31 FinSO.

46 Section 31(1) FinSA.

47 FINMA press release dated 7 July 2020, Implementation of the FinSA/FinIA: FINMA authorises first supervisory organisations.

48 FINMA press release dated 7 July 2020, Implementation of the FinSA/FinIA: FINMA authorises first supervisory organisations.

49 Section 29(1)(a) and Section 6 FinSA.

50 Section 29(1)(b) and FinSA.

51 Section 29(1)(c) and Section 74 FinSA.

52 Section 29(2)(a) and (b) FinSA.

Investors' protection, information and prospectus

FinSA imposes on structured product distributors and advisers, as well as on all financial service providers,⁵³ a general obligation of disclosure in respect of themselves and their activity and proposed financial services.⁵⁴ This general obligation is completed through the key information document (KID), the prospectus and the performance in some cases of an appropriateness and suitability test.

Rules vary depending on whether the offering is made to retail clients, or to institutional or professional clients.

KID

The distribution of a structured product to retail clients requires the issuance of a KID that is provided free of charge to clients.⁵⁵ The KID is a short, easy-to-read document that a retail client can easily understand. It shall include essential guidelines for investors to make a sound investment decision and compare various financial instruments.⁵⁶ In particular, it should include:

- 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 and return profile of the financial instrument, with mention of the maximum loss;
- d* the costs of the financial instrument;
- e* the minimum holding period and the negotiability of the financial instrument; and
- f* information on authorisations and approvals related to the instrument's financials.⁵⁷

The KID is especially intended for retail clients. Distribution of structured products to professional clients and institutional clients does not require the provision of a KID.⁵⁸

Prospectus

The provisions in FinSA to issue a prospectus replace the simplified prospectus for structured products, which was impractical. The prospectus requirement under FinSA applies to all equity and debt securities, including derivatives, structured products, bonds and shares, which are offered to the public (except where the law provides for an exemption).⁵⁹

The prospectus shall contain all information on the issuer, the guarantor and the securities to enable investors to make an investment decision in full knowledge of the situation and risks.⁶⁰ FinSO provides minimum indications that a prospectus must contain:

- a* all the information on the issuer or guarantor, in particular:
 - a presentation of the main risks related to the issuer;

53 Under FinSA, financial service providers are persons who provide financial services in a professional capacity in Switzerland or to clients in Switzerland, and are therefore considered to professionally carry out any independent economic activity in order to obtain a regular income (Section 3 (d) FinSA).

54 Section 8(1) and (2) FinSA.

55 Section 8(3) FinSA and Message, p. 8,123.

56 Section 60(1) FinSA.

57 Section 60(2) FinSA.

58 Section 58(1) FinSA.

59 Message, p. 8,169.

60 Message, p. 8,172.

- a presentation of the board of directors, management, review body and other bodies; and
 - the last half-year or annual accounts or, when neither of these is available, indications on asset values and commitments, perspectives, principal disputes, capital structure and voting rights;
- b* information on transferable securities offered to the public or intended to be traded on a platform, in particular, identification number (ISIN), legal basis, type of issuance, number, type of securities, nominal value, rights and obligations, pricing history and risks to investors related to these transferable securities; and
- c* all information on the offer.⁶¹

Unlike the KID, the prospectus contains a lot of information, which can significantly hinder the level of clarity and understanding for investors. For this reason, it also includes a summary that, in a condensed form and easily understandable language, contains the essential information.⁶²

The prospectus is mandatory and applies in addition to the KID when an investor is a retail client (with a few exceptions). However, a prospectus is not required if the investor is a professional client or an institutional client.

The prospectus must be submitted to the reviewing body prior to publication. The reviewing body shall check that it is complete, coherent and understandable.⁶³ The six-month transitional period provided for in the FinSO following the licensing of reviewing bodies of prospectuses ended on 30 November 2020. From 1 December 2020, prospectuses which have been approved in advance by one of these reviewing bodies must be published before a public offer of securities or the admission of securities to trading on a stock exchange.⁶⁴

Some securities and in particular structured products need to have a rapid market access while at the same time ensuring investor protection. In that respect, FinSO and its Annex 7 allow prospectuses of structured products with a term of thirty or more days to be reviewed only after publication.⁶⁵ Investor protection is guaranteed by the KID in the event of a public offering (Section 66 FinSA in relation with 58 FinSA) and in practice, most structured products are also issued on the basis of a base prospectus whose final terms no longer need to be verified in accordance with Section 45(4) FinSA.⁶⁶

Appropriateness and suitability test

In addition to the general disclosure obligation, KID and prospectus, financial service providers providing investment advisory or wealth management services must verify the appropriateness or suitability of their financial instruments for investors,⁶⁷ except in the case of an execution-only transaction (if a financial service provider is solely responsible for

61 Message, p. 8,172.

62 Message, p. 8,173 and Section 43 FinSA.

63 Section 51(1) FinSA.

64 FINMA press release dated 28 May 2020, FinSA implementation: FINMA licenses reviewing bodies for prospectuses.

65 Section 60 FinSO and Annex 7 FinSO.

66 Comments from the Federal Department of Finance on the Financial Services Ordinance, Financial Institutions Ordinance and Supervisory Bodies Ordinance of 6 November 2019, (Comments), p. 49.

67 Section 10 FinSA.

the execution or transmission of a client's orders)⁶⁸ or a reverse-solicitation transaction (if orders are instigated by the client).⁶⁹ However, prior to providing such services, they are required to inform the client that no appropriateness or suitability test will be carried out.⁷⁰ This information does not have to be provided prior to each transaction or each time an execution-only transaction is concluded, but can also be provided once, for example in an information brochure. If the client is informed only once, the financial service provider must explicitly highlight this at the time of the initial information. The information can be provided in a standardised form.⁷¹ The provisions with respect to the appropriateness and suitability tests apply to retail clients but do not apply to institutional clients.⁷² In principle, they also apply to professional clients. However, according to the knowledge and experience of professional clients, a financial service provider shall proceed to the test only if he or she has doubts about the understanding of the transaction.⁷³

ii Post-sale responsibility

An important development under the New Regulation is a provision regarding civil liability and accountability for information contained in prospectuses and KIDs, which was not the case under Section 5 CISA (at least not in a clear manner).⁷⁴ According to the new regime, if inaccurate, misleading or non-compliant information is presented or disseminated by means of a prospectus, KID or similar communication, any person who has participated in the presentation or dissemination of such indications shall be liable for the damage suffered by an investor if he or she fails to prove that he or she has acted with the necessary due diligence.⁷⁵

Moreover, FinSA contains criminal provisions in the event of non-compliance.⁷⁶ In addition, a fine of up to 500,000 Swiss francs shall be imposed on any person who intentionally offers structured products to private clients without complying with the conditions set out in Section 70 FinSA.

IV EXCHANGE LISTING AND TRADING

Most structured products issued in Switzerland bear an ISIN code, but are generally not listed on a regulated exchange for secondary trading purposes. The first instruments labelled as structured products were listed on the SWX Swiss Exchange Ltd in 1997. Since 2014, SIX Structured Products Exchange Ltd has been operating as an exchange for the Swiss market for the trading of structured products. SIX Swiss Exchange Ltd remains responsible for the admission to listing of structured products.⁷⁷

68 Section 13(1) FinSA.

69 Section 2(2) FinSO.

70 Section 13(2) FinSA.

71 Swiss Structured Products Association, FinSA Q&A dated 27 January 2020, p.9.

72 Section 20(1) FinSA.

73 Message, p. 8,158.

74 Gomez Richa, Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich 2015, p. 261.

75 Section 69(1) FinSA.

76 Title 7 FinSA.

77 Gomez Richa Lucia, *Les produits structurés et la protection de l'investisseur*, Zurich 2015, p. 149.

Structured products are excluded from the definition of derivatives under FMIA. However, for listing purposes, structured products are assimilated to derivatives on the SIX Swiss Exchange Ltd.⁷⁸ Thus, in this chapter we do not distinguish between structured products and derivatives in the context of stock exchange listing.

The listing of derivatives is divided into three product groups:⁷⁹ capital-protection products, yield-enhancement products and participation products.

These three groups of products are broken further down into individual product types in accordance with the classification model of the Swiss Structured Products Association (SSPA).⁸⁰

There are currently around 12,000 structured products in Switzerland tradable on the SIX Structured Products Exchange Ltd. To facilitate an investor's decision to choose an appropriate product from among the wide diversity offered and to gain a proper overview of the market, the SIX Structured Products Strategy Indices enable a performance comparison of an individual product with the indexed average in the respective investment category.⁸¹

i Legal basis

The FMIA establishes the principle of self-regulation.⁸² Within this competence, SIX Swiss Exchange is responsible for issuing rules on the admission of securities for trading.

As part of the self-regulation competence, SIX Swiss Exchange has issued rules and regulations on listing securities that must be approved by FINMA.⁸³

In practice, the rules and regulations on listing securities can be divided into several hierarchical levels. At the highest level, we find the Listing Rules and Additional Rules that regulate the listing of securities on SIX Swiss Exchange, followed by the schemes that form an integral part of the Listing Rules and Additional Rules and determine the contents of the listing prospectus.

The other rules and regulations regulate, among other things, the admission to trading on the SIX Swiss Exchange. Directives, circulars and communiqués are supplements to the rules, provide more detailed explanations on their regulatory provisions, explain the practices of the Regulatory Board, and provide details on individual decisions, legal issues in the application of individual provisions of the Listing Rules and changes in practice.⁸⁴

ii Listing procedure

The listing procedure on SIX Swiss Exchange Ltd is governed by Sections 42 to 48 of the Listing Rules.⁸⁵

78 Meylan Delphine/Ben Hattar Ariel, 'Le concept de dérivé dans la LIMF', *GesKR* 2018 p. 205 ss, 209.

79 SIX Swiss Exchange Ltd, Benchmark for Investment Strategies: SIX Structured Products Strategy Indices, 2019, p. 4 ss.

80 SSPA represents, without engaging in commercial activities of its own, the shared interests of the most important members of the structured products industry: <https://www.svsp-verband.ch/en/#>.

81 SIX Swiss Exchange Ltd, Benchmark for Investment Strategies: SIX Structured Products Strategy Indices, 2019, p. 2.

82 Section 27(1) FMIA.

83 Section 27(1) FMIA.

84 The SIX Swiss Exchange rules and regulations are available on its website.

85 SIX Exchange Regulation Ltd, Listing Rules, version of 1 October 2021.

To ensure efficient processing, the listing application must be submitted by a listing agent recognised by the SIX Exchange as being competent to do so.⁸⁶ The Directive on Recognised Representation regulates both the types of recognition and the recognition procedure.

Various documents must be submitted along with the listing application, including a listing prospectus containing the information required in accordance with the applicable prospectus scheme. Each issuer must also sign a declaration of consent at the time of the initial listing of the securities.⁸⁷

If an application fulfils the requirements of the Listing Rules, the Regulatory Board will approve it. The Listing Rules set the conditions for maintaining a listing, which include that issuers are required to publish an annual report containing the audited annual financial statements.⁸⁸

Listing applications are facilitated by CONNEXOR Listing Enhancement, which allows the electronic transmission of requests issuers and their recognised representations.⁸⁹ Trading may start within one to three trading days after an application is submitted.⁹⁰ Thanks to the simplified admission process and high data reliability, issuers will realise considerable gains in cost-efficiency.

When a structured product matures, the listing will be automatically terminated by SIX Swiss Exchange without prior notice.⁹¹

iii Secondary market

On the secondary market, derivatives are traded either on an exchange or over-the-counter (OTC). In Switzerland, OTC derivatives are not regulated in terms of their characteristics and the structure of the related contracts.

The regulated secondary market is the listing on the SIX Structured Products stock exchange or trading platforms of banking institutions.

V TAX CONSIDERATIONS

In Switzerland, three different types of tax apply to structured products: income tax (collected at the cantonal and federal level), withholding tax and stamp duty. The system is extremely complex, as each tax depends on the type of structured product considered. For the purpose of this chapter, we present only a brief overview of the situation.

86 Section 43 Listing Rules.

87 Section 45 Listing Rules.

88 Section 49 Listing Rules.

89 Sections 1 and 3 of the Directive CONNEXOR Listing Enhancement of 2 May 2019.

90 SIX Swiss Exchange's website.

91 Section 39 of the Additional Rules for the Listing of Derivatives, version of 9 March 2021.

i Income tax

In general terms, income tax applies to all income of taxpayers, whether one-time or periodic payments.⁹² This includes returns on movable assets,⁹³ whether in terms of the function of the type of structured product, as periodic interest or as the difference between the purchase and sale price.⁹⁴

ii Withholding tax

Moreover, Switzerland levies a 35 per cent⁹⁵ withholding tax on income from movable capital if a debtor is domiciled in Switzerland.⁹⁶ The withholding tax is then reimbursed under certain conditions based on double taxation treaties or, when the investor is a natural person domiciled in Switzerland, at the end of the taxable benefit period.⁹⁷

iii Stamp duty

Finally, stamp duty may apply to the issuance and trade of structured products depending on the composition of the underlying derivatives or securities forming the structured product.⁹⁸ Assessing whether stamp duty applies is a very difficult exercise. In this respect, it is not advisable to self assess a product: SIX Financial Information SA issues information as to the taxability of each product, and a reliance on SIX's tax indication is accepted and recognised by the tax administration.

If stamp duty applies, the rate is 0.15 per cent (0.075 per cent for each contracting party) if the structured product is considered as a Swiss security, and 0.3 per cent (0.15 per cent for each contracting party) if the structured product is considered a foreign security.⁹⁹

VI OTHER ISSUES

In our opinion, there is no other relevant development to be addressed in Switzerland.

VII OUTLOOK AND CONCLUSIONS

The New Regulation is fresh in the industry's mind in Switzerland, given its implementation in January 2020. We will see how the entire framework plays out with the entry into force on 1 January 2021 of the amendments to the FINMA ordinances and circulars, as well as the FinIO-FINMA and the end of the transitional provisions of the New Regulation on 31 December 2021. The increase in reporting, disclosures and licensing requirements is likely to result in some players reconsidering their model, as has already been seen in the EU.

92 Section 16(1) of the Swiss Federal Direct Tax Act of 14 December 1990 (FDTA).

93 Section 20(1) FDTA.

94 Informations fiscales, éditées par la Conférence suisse des impôts CSI, Traitement fiscal des obligations, produits dérivés et combinés, p. 16 ss.

95 Section 13(1)(a) of the Swiss Withholding Tax Act of 13 December 1965 (WTA).

96 Section 1(1) and 4 (1)(a) WTA.

97 Section 22(1) WTA.

98 Section 13(2) of the Swiss Stamp Duty Act (SDA).

99 Section 16(1) SDA.

The New Regulation does not address the current lack of definition of structured product, but codifies the offering process and the disclosure requirements. To date, structured products remain excluded from the definition of derivatives in FMIA, but are nevertheless treated as such when listed on the Swiss Stock Exchange. It is too early at the time of writing to see how the courts in Switzerland will address this in light of the New Regulation.

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Mr Dominique Lecocq is an expert in the field of banking and finance law and stands out for his pragmatic approach and unparalleled legal expertise. He was admitted to practise law in Switzerland and in Malta and graduated from the School of Law of the University of Geneva in 1999. He gained a masters of law in securities and financial regulation from Georgetown University in 2005.

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