Association of Foreign Banks in Switzerland
Verband der Auslandsbanken in der Schweiz
Association des banques étrangères en Suisse
Associazione delle banche estere in Svizzera

foreign banks. in switzerland.

Financial Market Supervisory Authority FINMA
attn Isabel Grüninger
Laupenstrasse 27, 3003 Bern
by email to isabel.grueninger@finma.ch

Zürich, 10 July 2024

**draft FINMA Circular Rules of Conduct**

Dear Ms Grüninger

We thank you for the invitation to comment the draft Circular Rules of Conduct.

The AFBS fears the Circular is introducing confusion rather than clarity. It does not add new elements of regulation but further develops existing regulation that has already been clarified in law, ordinance, and current market practice.

The points the Circular is focussing on are very specific. It gives the impression that FINMA intends to provide clarity on certain issues it encountered during supervisory activity or onsite-inspections. In such a case a FINMA Guidance or an article in the annual report would be more appropriate. That would offer guidance without creating new regulation, which is not necessary.

Please find attached the detailed AFBS Comments on the draft. The comments have been elaborated in collaboration with representatives from AFBS Members in Zürich, Geneva, and Lugano. The comments have also been coordinated with SBA, whose position our Association fully supports.

We thank you for your attention and remain available for any questions.

Best Regards

ASSOCIATION OF FOREIGN BANKS IN SWITZERLAND

Raoul Würgler
Secretary General

Jonathan Deneys
Scientific Advisor

Usteristrasse 23 · CH-8001 Zürich
T +41 44 224 40 70 · F +41 44 221 00 29
www.afbs.ch · info@afbs.ch

# draft FINMA Circular Rules of Conduct under FinSA

AFBS Groups met in Zürich, Geneva, and Lugano to discuss the draft Circular and to collect input for comments.

Our Association has been in exchange with Swiss Bankers' Association SBA to whose comments it has contributed and with which it is fully aligned.

The following text the main concerns of AFBS.

## General Considerations

The draft Circular goes beyond FINMA's regulatory remit. In particular when it expands onto civil law questions of the relationship between client and financial service provider and when it transposes court decisions into supervisory text. AFBS supports SBA in stating that the legal and regulatory texts set out in the Financial Services Act FinSA and Ordinance FinSO, in connection with the Federal Council's report on FinSO dd 6 November 2019 are sufficiently exhaustive and detailed for providing clarity with regards to implementation of the related legislation. In addition, AFBS supports SBA's position with regards to wrongful confusion between supervisory activity (which belongs to the competences of FINMA) and clarification of private-law relation between client and financial services provider (which is not in scope of FINMA's tasks).

Next to legal issues, the draft Circular raises questions regarding form and content as well as regarding scope of application. As it deals with some very specific cases but not with others and does not provide generic guidance, it is unclear whether the regulation should be applied to similar cases by analogy (in what way) or not at all. This opens doors for interpretation, which inevitably will differ from case to case, and thus leads to unpredictability and uncertainty, harming transparency. This must be avoided.

Reasons for FINMA to issue this Circular are unknown and material benefits are unclear. The only justification seems to be the fact that FINMA wants to draw attention on certain instances of non-compliance encountered during supervisory reviews and in audit processes.

None of the banks participating in the aforementioned roundtables were confronted with challenges from the auditor and/or FINMA relating to the points contained in the draft Circular. Therefore, AFBS suggests that FINMA addresses such concerns on an ad hoc basis with the respective institutions individually.

AFBS welcomes FINMA's initiative to inform the industry on its observations on supervised entities' failure to comply with law and regulation. However, it considers sufficient a simple communication or a publication in the annual report or in the format of a FINMA Guidance. In the past, Swiss Federal Banking Commission used to publish Bulletins with information on incidents and non-compliant behaviour. That approach was very much appreciated as it offered clarity on the result of supervisory activity and indication on where the authority put focus on without creating new regulation and ensuing complexity.

## Specific Points

**Terminology**

Margin Number (MN) 3 of the draft Circular should be deleted. There is no need to further clarify the "M&A and Corporate Finance Advisory Services" that are exempt from the definition of financial services. In particular, the statement that services rendered primarily (primär / principalement) for industrial, strategic or business purposes shall not be in scope causes unnecessary confusion, in particular for banks that offer investment banking services and products.

**Information Duties**

It is obvious that transparent client information is essential for an advisory process to be in the interest of the client. Furthermore, it is clear, that the client needs to understand if the personal investment advice provided refers to a single transaction and no suitability assessment is performed, or to an entire portfolio. However, such principles regarding documentation of the financial services relation and related products and services (be it execution only, transaction-based advice, portfolio-based advice) are already clearly established in Art 15 FinSA. They do not need further specification.

If a financial service provider only offers personal investment advice on a portfolio, but not on a transaction basis, there is no need to specifically inform the client about the different types of advice. There is no risk that the client could be under the impression that the portfolio is considered when it is not, and suitability is always assessed when providing personal investment advice. MN 4 shall be amended accordingly.

With respect to the prescriptions for risk disclosure on contracts for difference (CFD), the requirement of MN 6 to disclose the share of clients who face calls for additional payments (Nachschussquoten / quotas de réinjection de fonds) shall be withdrawn. The EU regulation does not apply such a requirement and it must be assured that Swiss and EU standards on such topics are aligned; Swiss Finish must be avoided.

Specific thresholds (10%, 20%) regarding concentration (bulk positions) should not be defined in a text of prudential regulation but belong to private law relation between client and financial service provider. As no such threshold is defined in Law or Ordinance, there is no reason for FINMA to establish such thresholds in a Circular. Legal basis lacking, the thresholds must be withdrawn from the draft Circular. Thresholds must be left to private law contracts, which must, obviously, be based upon exhaustive client information and comply with any other prescription from supervisory law. Thresholds cannot be established once and for all, also because clients with multi-banking relations may easily exceed them with a single bank but not with their entire portfolio – and the latter element needs to be taken into account when considering diversification. Furthermore, concentration thresholds may highly depend on the characteristics of the financial instrument, the issuer, and the client's circumstances.

The draft Circular does not provide details on calculation of the concentration. For example, MN 10 refers to "Einzeltitel / titres individuels". It is assumed that this refers to financial instruments ("Finanzinstrumente" / "instruments financiers") which are in scope of FinSA. Clarity is lacking on whether * positions that are not in scope of FinSA (e.g. cash deposits) are to be taken into account for calculation of the total portfolio value; * calculation of concentration in single issuers needs to take into account counterparty risk arising from derivative contracts; * aggregation is required if several issuers belong to the same holding.

MN 12 shall be withdrawn as it leads to misunderstanding. It suggests excluding diversified collective investment schemes from the concentration risk assessment if they are subject to regulatory risk diversification requirements, without specifying what type of diversification requirements are meant.

Information duties are to be complied with in the limit of the possible and at arms-length level. Thus, in case of spot advice, agreement on transaction prior to execution is not possible as this would excessively delay the transaction. This can cause damage to the client and may result in claims against the bank. There needs to be clear distinction between advice on financial service and advice on financial product.

Requirements on information duties must not be excessive as they introduce complexity and lead to competitive disadvantage. In general banks provide documentation on individual products which are sufficiently clear. It must be avoided to introduce excessive complexity, also because this can make it difficult to understand for clients.

**Appropriateness and Suitability**

MN 13 and 14 in the draft Circular shall be deleted.

The two paragraphs do neither add value to the existing regulation nor provide guidance with regards to its implementation. The wording does not offer sufficient clarity but raises additional questions. It leads to uncertainty and contradictory application of the rules, which bears the risk of confusion and misunderstandings. There is already sufficient guidance available from existing regulation and legislation as well as from jurisprudence and general practice.

**Securities Lending**

MN 15 to 22 shall be deleted.

The explanatory report clarifies that the draft Circular replicates regulation from the FINMA Circular Repo/SLB that has been transposed into Art 19 FinSA. The report also states that dispatch on said law confirmed current practice to be maintained. Therefore, there is no reason for further regulation, which merely bears the risk of confusion and increased complexity.

**Conflicts of Interest**

MN 23 to 25 shall be withdrawn from the Circular as they do not add clarity.

These MN address one specific instance where conflicts of interest may arise. There are many other instances which are not dealt with. Again, the text of the Circular gives the impression that it has been drafted upon specific cases rather than in view of clarifying a general situation.

Prescriptions contained in MN 24 are obvious and applied currently by all banks having participated in the Roundtable discussions.

**Retrocessions**

Assessment of proposed regulation reveals numerous difficulties and inconsistencies between regulation and effective implementation. Determination of values of reference such as portfolio valuation is not obvious. As the portfolio value can evolve over time, it cannot serve as a stable reference for calculation of cost as its percentage. In addition, composition of portfolio is not in all instances known in advance; thus, disclosure of retrocessions cannot be made in advance.

If ever, disclosure should be made as percentage of transaction volume or holding volume of respective investment.

Transparency on retrocessions has raised many questions in the past and court rulings continue to deal with cases that have occurred in the past. There is no point in regulating such instances, which should no longer occur if regulation is complied with. Incidents arising from non-compliance should be investigated by other means.