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Monthly
Newsletter
June 2021

Banking & Finance

**Schellenberg
Wittmer**



Developments in Swiss Insurance Supervision

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Key Take-aways

- 1.** Foreign reinsurance companies shall remain exempt from the scope of application of the Insurance Supervision Act (ISA).
- 2.** The new rules aim at strengthening the protection of the insured, while introducing exemptions for professional customers and aligning Swiss rules with the EU as regards products with an investment-like character.
- 3.** The new rules will introduce a new reorganization regime for insurance companies and insurance intermediaries.

1 Reform of the ISA

The Insurance Supervision Act of 17 December 2004 (**ISA**) is now subject to its most comprehensive reform to date. Following a preliminary consultation procedure, the Federal Council proposed on 21 October 2020 the ISA reform bill (**ISA Bill**). The National Council as the first chamber of the Swiss Parliament dealt with the proposal at the beginning of May 2021.

2 Cross-border activities

2.1 Insurance companies domiciled abroad

Under the ISA Bill, the **scope** of Swiss insurance and reinsurance supervision shall **remain unchanged** for insurance companies domiciled abroad which offer their insurance services in Switzerland or from Switzerland.

Consequently, reinsurance companies domiciled abroad, but active in Switzerland, shall remain excluded from Swiss regulation (art. 2(2)(a) ISA). This shall remain so even if the foreign reinsurance company has a **branch office** in Switzerland. The provisions proposed in this regard during the consultation procedure, according to which foreign reinsurance companies with a branch office in Switzerland would have been subject to the ISA, were deleted in the legislative process. However, in order to be able to respond to international demands that may call for a supervision of branch offices of foreign reinsurance companies, the Federal Council shall receive the power to supplement the secondary legislation in this respect.

The ISA Bill clarifies that foreign state-owned or state-guaranteed export risk insurance companies are excluded from the scope of Swiss insurance supervision laws.

Insurance companies shall benefit from exemptions from regulatory requirements for business with professional policyholders.

2.2 Insurance intermediaries domiciled abroad

To date, **insurance intermediaries** domiciled abroad who are registered with the insurance intermediary register are not required to establish a Swiss presence. Under the new rules, a non-Swiss untied insurance intermediary (insurance broker) will have to establish a **Swiss branch office** or, as regards a natural person not acting for an insurance broker with a Swiss branch office, have a Swiss domicile (article 41(2)(a) ISA Bill). However, FINMA may grant exceptions from this requirement in justified cases.

3 New exemptions from supervisory requirements

3.1 Business relationships with professional clients

As regards the **reinsurance business**, the exemptions from certain requirements of the ISA as already in place will continue to apply (article 35 ISA).

The revised ISA will newly allow insurance companies in the **direct insurance sector** to categorize policyholders into **professional** and **non-professional policyholders**. For their business with professional policyholders (so-called wholesale business), insurance companies shall be able to benefit from certain exemptions (article 4(2)(k) in combination with article 30a ISA Bill). To the extent an insurer conducts business with both professional and non-professional policyholders in the same legal entity, the exemptions shall apply only to business with professional policyholders.

The definition of "professional policyholder" is intended to be similar – but not identical – to that of a professional client under the Federal Act of 15 June 2018 on Financial Services (**FinSA**). Professional policyholders are persons pursuant to article 98a(2)(b–f) of the revised Federal Act of 2 April 1908 on Insurance Contracts (**ICA**), as applicable from 1 January 2022. According to the current wording this would include (i) **financial intermediaries** according to the Banking Act of 8 November 1934 (**BankA**) and the Collective Investment Schemes Act (we understand it is the intention that at least securities firms, fund management companies and managers of collective assets according to the Financial Institutions Act of June 15, 2018 (FinIA) are or will be treated as equivalent to these financial intermediaries), (ii) **insurance companies** according to the ISA, (iii) foreign companies subject to prudential supervision equivalent to the supervision of persons under (i) and (ii), (iv) **public corporations, institutions and foundations with professional risk management**, and (vii) **companies with professional risk management**. To the extent they do not have a professional risk management function, pension schemes would not be qualified as professional policyholders.

For the business with professional policyholders the insurer is exempted from the obligations to establish and maintain **tied assets** or join an **ombudsman's office**.

3.2 Captives and special purpose vehicles

Intra-group direct insurance or reinsurance companies (so-called **captives**) will be in a position to benefit from exemptions from regulatory requirements (article. 30d ISA Bill).

Moreover, according to the Federal Council's proposal, **special purpose insurance companies** (e.g. special purpose vehicles assuming insurance risks for the issuance of cat bonds) shall be excluded entirely from the scope of application of the ISA (article 2(2)(g) ISA Bill). However, the first chamber of the Swiss Parliament has now decided to leave special purpose insurance companies within the scope of the ISA (article 30e ISA Bill).

3.3 Further Exemptions

The intermediation of **annex insurance contracts** shall be newly regulated. They shall remain unsupervised, provided that the insurance intermediation relates to an insurance that is of

minor importance and complements a product or service (article 2(2) (f) ISA Bill). The ISO is expected to specify the conditions (e.g. with regard to maximum damage amount, premium or duration).

The Federal Council shall also be granted the power to supplement the secondary legislation by exempting **small insurance companies** from supervision, provided that certain conditions are met (article 2(5) ISA Bill). This could become relevant in the future, in particular in the case of innovative business models in the **insurtech** sector.

The revised ISA shall introduce rules for the reorganization of failing insurance companies and insurance intermediaries.

4 Customer protection for qualified life insurance products

The new rules introduce provisions for the protection of investors in "**qualified life insurance policies**", i.e. insurance contracts with a profile of investment products (article 39a ISA Bill). These rules aim at creating a level playing field with the investment products regulated under the FinSA and at aligning Swiss law with EU regulation.

As a result, (i) insurers will have to prepare a **key information document (KID)** (article 39b ISA Bill), which, among others, must contain information on and characteristics of the qualified life insurance product, the risk and return profile, the costs and the associated authorizations and approvals; (ii) marketing materials for qualified life insurance policies must be clearly labelled as such and include a reference to the KID (article 39i ISA Bill); and (iii) prior to recommending a qualified life insurance product and subject to certain exceptions, the insurer or the intermediary will have to check its appropriateness for the customer (article 39j ISA Bill).

5 Insurance intermediaries

The concept of **tied** and **untied insurance intermediaries** shall newly be defined at the level of the ISA as opposed to the secondary legislation (article 40 ISA Bill). An *untied* insurance intermediary has a fiduciary relationship with the policyholders and acts in their interest (broker) in contrast to a *tied* insurance intermediary (agent).

As before, untied insurance intermediaries must be **reg-**

istered with FINMA. However, contrary to the current regulation, tied insurance intermediaries shall only be able to register if they intend to start an activity abroad requiring an entry in the Swiss register (article 42(4) ISA Bill).

In order to be registered, insurance intermediaries will, inter alia, be obliged to (i) have their registered office, domicile or branch office in Switzerland (see for foreign insurance intermediaries 2.2) and (ii) enjoy a good reputation and be in a position to fulfill the obligations under the ISA.

As regards the acceptance of **inducements** by insurance intermediaries from insurance companies or other third parties, the ISA Bill will only allow untied insurance intermediaries that also are remunerated for their services by the policyholders to **receive and keep such inducements** if the policyholders provide an express waiver in this respect (after they have been informed in advance about the type and amount of the inducement as well as the calculation parameters including at least the bandwidths). Upon request, insurance intermediaries shall disclose the amounts actually received.

6 Introduction of insurance company reorganization proceedings

The ISA Bill further introduces a **reorganization proceedings** for failing insurance companies and insurance intermediaries. Such proceedings conceptually correspond to those applicable to banks and securities firms pursuant to the BankA.

If there is a founded concern that an insurance company is **over-indebted** or has **serious liquidity problems**, FINMA may order protective measures, commence reorganization proceedings or – if there is no prospect of restructuring at least part of the insurance business – order the bankruptcy of the insurance company.

During reorganization proceedings, FINMA may, among other things, appoint a restructuring officer and approve a **restructuring plan**. FINMA may take measures such as ordering portfolio transfers, restructure the capital or order certain or changes to insurance contracts, taking into account the requirement of equal treatment of creditors. The termination of reinsurance contracts may be postponed for a maximum of four months.

In line with the rules applicable to banks and securities firms, the reorganization proceedings pursuant to the ISA Bill also adopt a **safe harbor**, according to which protective measures or reorganization proceedings do not affect (i) contractual rights of set-off or netting (e.g. rights regarding the close-out netting under master agreements for OTC derivatives, securities lending or repo transactions), (ii) rights for the private sale of securities with a market value provided as collateral, and (iii) rights for the "porting" of positions or margin, provided they have a market value. However, by analogy to the rules applicable to banks and securities firms, FINMA shall have the authority to order a **stay** of termination rights and the exercise of rights protected by the safe harbor for a maximum period of **two working days** (article 52g ISA Bill).



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