CENTRE DE DROIT
BANCAIRE ET FINANCIER

Asset management

Revision of the SBA Guidelines on Asset Management Mandates

Par Eric Favre le 22 December 2020

On 1 December, the SBA notified its member banks of the revised Guidelines on Asset Management Mandates (previously : Depierre, cdbf.ch/900/). Two important points should be noted. The first is the entry into force on 1 January 2020 of the Financial Services Act (LSFin) and its implementing ordinance (OSFin), which are partly based on MiFID II. The second is that the ASB has given the guidelines the status of voluntary self-regulation, meaning that they are not binding in the same way as previous versions of its guidelines, which were recognised by FINMA.

With the introduction of the FinSA and FinID, mandatory state standards now regulate the asset management sector. The SBA therefore considered it appropriate to simply specify best practices to supplement the new law and ordinance in order to promote the image and high quality of Swiss asset management (preamble § 1 of the guidelines). In addition, Art. 12 para. 1 OFINMA now requires broad support for recognition. Free self-regulation thus offers greater flexibility for a subject that primarily concerns banks. To take account of the levels of protection introduced by the LSFin, the guidelines do not apply to professional clients *per se*.

The guidelines have been shortened to avoid duplication. In essence, the rules on principles and the mandate itself (sections 1 and 2), the requirements for compliance with the written form and the rules on the bank's remuneration remain unchanged in the new version.

The implementing provisions concerning the establishment of the client's risk profile (taking into account their knowledge and experience), the investment strategy and risks, the remuneration and retrocession arrangements and the adequate organisation of the bank have been deleted. These obligations are now set out in Articles 8, 10, 12, 21 ff., 25 and 26 of the LSFin.

With regard to the exercise of the mandate (section 3), the provisions on the diligence and care required of the bank are materially equivalent in the revised and current versions of the guidelines ; it is normal for these requirements to remain, as the LSFin does not contain any details on this subject. However, implementation provision 9 now mentions the risk inherent in the selected investment, which is a reference to Articles 10 and 12 LSFin, as in practice the investments and the client concerned will each receive a risk rating, which must correspond.

The articles limiting the investment instruments to be used, risk diversification and liquidity have not been materially amended in our opinion (in particular the provisions on securities lending,

which have been moved to Art. 19 LSFin). We note some relaxations regarding liquidity frequency, temporary overdrafts (implementing provisions 18 and 22) and more illustrations and details regarding the use of derivatives (implementing provisions 23 to 25). The retention of these provisions is justified, as the FinSA and the FinID do not contain any details on these subjects.

The final provisions (section 4) differ significantly from the current version. Since the guidelines are intended to serve as an optional supplement to the LSFin, their entry into force takes into account the applicable transitional law. They will therefore enter into force on 1 January 2022 ; if a bank has notified its auditors of its early adoption of the relevant provisions of the LSFin, it may already apply the guidelines.

That said, we consider that the guidelines may have more than a purely optional scope. Although they are in theory simple rules of conduct with no direct effect on the relationship between the client and their bank (which is governed by the mandate and specific agreements), we are aware that certain standards of conduct may have a dual public-private nature.

According to the Federal Council's message (p. 8121), the rules of conduct under the FinSA are a matter of public law and do not directly interfere with the private law relationships between service providers and their clients. Civil courts must rule on the basis of the applicable provisions of private law, but may clarify them by referring to the rules of the FinSA.

The fundamental provision with dual public-private effect is the former Article 11 of the Stock Exchange and Securities Trading Act (LBVM), which was repealed by the FinIA. According to the draft message (p. 1306), its purpose is to list the essential principles that traders must observe at all times and include in their internal regulations. According to doctrine, this article was then presented as having mainly public law effects. In 2007, however, the Federal Court set a precedent by ruling that it had both regulatory and private law effects, and in particular that the parties could not derogate from the obligations imposed by it (see ATF 133 III 97 and judgment 4C.205/2006 of 21 February 2007, Gottrau, cdbf.ch/510), thereby conferring on it the status of a mandatory standard and significantly extending its scope and reach.

By extrapolating this finding, the Federal Court will probably consider that certain standards of conduct in the FinSA and the OSFin also have effects under private law, since they incorporate and clarify the rules of the former Art. 11 LBVM. Consequently, in assessing the conduct required of a diligent manager, civil courts could use the guidelines as an industry standard, as is the case in many areas of civil liability. It will therefore be important to keep an eye on these provisions and their implementation by banks.
