

Switzerland's new regulatory landscape

January 11, 2021

Numerous legal developments are currently impacting the Swiss financial market place. The new regime is intended to align Switzerland with the rest of Europe, as well as keeping up with new technologies and boosting the attractiveness of Switzerland as a stable and innovative financial and asset management centre.

New legislation

The **Swiss Financial Services Act** ("FinSA") and the **Swiss Financial Institution Act** ("FinIA") came into force on 1 January 2020 along with their implementing ordinances the **Swiss Financial Services Ordinance** ("FinSO") and the **Swiss Financial Institution Ordinance** ("FinIO").

These new laws resulted in consequential amendments to numerous other laws including the **Swiss Collective Investment Scheme Act** ("CISA") and its implementing ordinance ("CISO").

FinSA ("Swiss MiFID")

FinSA has become known in Switzerland as the Swiss MiFID. Its main purpose is investor protection and it generally applies to all financial service providers.

For the first time, FinSA provides unified provisions applicable to all financial service providers with regard to key issues such as client segmentation, conduct, organisational rules, prospectus requirements, offers and other matters.

Many of the new financial service rules under FinSA differ on the basis of the categorisation of the investor/client. The new client segmentation rules are broadly similar, though not identical, to the MiFID II client categorisation provisions, dividing the universe of clients into professional investors (which are further sub-divided into institutional and other professional investors) and retail investors.

FinIA (licensing requirements for financial institutions)

The purpose of FinIA is to provide for unified licensing requirements for all financial institutions.

With FinIA, the general requirements to obtain a FINMA license are all based on common principles with the standards becoming more stringent as the complexity and potential risk for clients and the market increase. Nevertheless licenses for banks, financial market infrastructures and Swiss funds continue to be governed by their own individual legislative acts which have merely been amended as a result of FinSA and FinIA.

The following Swiss financial institutions are currently subject to the general licensing conditions provided by FinIA:

- Portfolio managers

- Trustees
- Managers of collective assets (assets of funds and pension funds)
- Fund management companies
- Securities firms

Marketing of funds in Switzerland

The previous marketing regime was based on the notion of “distribution”. Only activities deemed to constitute distribution triggered regulatory obligations.

Under the new legislation, the concept of "fund distribution" from the previous version of the Collective Investment Schemes Act has been abolished. One financial service defined in FinSA as the “sale and purchase of a financial instrument” now explicitly applies to “any activity undertaken directly towards a client specifically aiming to purchase or sell a financial instrument”. This definition now includes classic fund marketing (as well as marketing other financial services) to end-clients.

Client advisor register

Under the new regime, all natural persons providing financial services in or into Switzerland are deemed client advisors (even if no investment advice takes place.) Client advisors of Swiss and foreign unregulated financial institutions or client advisors working in their own name will be subject to registration requirements with the client advisor register. This will apply to, in particular, holders of licenses such as a distributor license under CISA, which no longer exists under the new regime.

Client advisors of regulated financial service providers in Switzerland are not required to register. Foreign client advisors subject to prudential supervision are also exempt from registration to the extent that they only market to professional or institutional investors in Switzerland.

Ombudsman office

Based on FinSA, all financial services providers active in Switzerland, including those marketing funds, must become affiliated with an ombudsman office, which has obtained the relevant authorisation by FINMA to act in this capacity. This is to ensure clients a possibility of mediation for differences between financial service providers and their clients without disproportionate costs for the client. Exemptions should apply to service providers who limit their clients to institutional/professional clients.

Appointing a Swiss representative and paying agent

Previously, if a foreign fund was looking to market into Switzerland to non-regulated qualified investors, this was only possible after appointing a Swiss representative and a Swiss paying agent.

A major change to the fund marketing regime is that it is no longer required to appoint a representative and paying agent when marketing to qualified investors (with the exception of high net worth individuals who have opted-out of the retail protection regime, in which case the requirement remains).

While the marketing rules (e.g. conduct, organisation) under the new regime will be the same for all financial products, including funds, the categorisation of clients that may or may not be approached are not the same for funds and other products. The relevant client segmentation for funds is still to be found in CISA. The new definition of "qualified

investors" in CISA now broadly aligns with the category of professional investors under FinSA. CISA however still provides for some "qualified" investors that are not deemed to be professional investors under FinSA.

Pre-marketing

Contrarily to the old regime, where an obligation to appoint a Swiss representative and a paying agent was triggered as soon as any information was provided on a concrete fund ("distribution"), even if the fund was not yet established, the definition of an offer (which is to say, any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself) is more restrictive. This may allow more scope for testing the waters by speaking with high net worth individuals about a fund idea and without having to appoint a Swiss representative unless the project moves forward.

For good order's sake even if this "pre-marketing" is admissible prior to appointing a Swiss representative and paying agent, the FINSA rules applicable to marketing still apply. This includes in particular, as the case may be, registration as a client advisor and an affiliation with an ombudsman where no exemptions apply.

Regulation of various financial institutions

The regulatory provisions applicable to licensing and running financial institutions have now mainly (with the notable exception of banks) been removed from their ad hoc legislation and been consolidated in the new FinIA.

Examples of the generally applicable conditions for obtaining and maintaining an authorisation of any financial institution from the regulator in Switzerland include: effective management of the institution in Switzerland, assurance of irreproachable business conduct of the institution and persons entrusted with tasks at all higher levels of management; conditions on delegations of limited tasks to third parties, and, as the case may be, prudential supervision of such delegate; and any form of significant participation in a business abroad or physical presence outside of Switzerland is subject to prior disclosure to or approval by FINMA.

The regulatory framework for selected financial institutions is as follows:

Portfolio managers

Under FinIA, portfolio managers are defined to include all persons mandated to manage assets on a commercial basis in the name of and on behalf of the client. However, these must be distinguished from providers of advisory services, as the latter do not require a license or on-going supervision.

Portfolio managers active in Switzerland prior to the entry into force of FinIA on 1 January 2020 were required to notify FINMA of their activity by 30 June 2020. There is now a transitional period until 31 December 2023 to comply with the new legal requirements and to file an authorisation application.

Although portfolio managers must apply to FINMA for their authorisation, once it is granted, on-going supervision then takes place at the lower level by a new form of supervisory authority, which is entrusted with conveying substantial regulatory breaches to FINMA. So far, four authorities have been approved by FINMA for these purposes.

Asset managers of collective assets

The regulations around asset managers of collective investment schemes was first introduced in Switzerland in 2013. The requirements to be fulfilled are largely based on EU-law (including AIFMD standards) and are subject to similar de minimis rules. Swiss asset managers of collective investment schemes need to obtain an authorisation from FINMA, and will continue to be subject to supervision for as long as they carry out the activity in Switzerland.

What is changing under the new legislation is the treatment of Swiss pension funds. Under the new rules, the pension

funds themselves continue not to be generally regulated by FINMA. However, the managers of assets of pension funds are now subject to the same FINMA license as for asset managers of collective investment schemes.

Asset managers of pension funds who now require a FINMA authorisation had a six month period to notify FINMA of these circumstances. In any case, a transitional period is currently still running until the end of 2023, by which time they must be compliant with the rules on asset management of collective assets as set-out in FinSA and have filed an authorisation application with FINMA demonstrating such compliance.

Fund management companies

No major changes need to be reported in connection with the regulatory conditions to obtain a fund management company license. Granting of the authorisation and prudential supervision remains entirely FINMA's responsibility.

However, it should be noted that, unlike other foreign regulated financial institutions, it is not possible to open a branch office in Switzerland of a foreign fund management company (such as an AIFM).

Securities firms

Aside from the consolidation of regulations under FinIA, the material conditions for licencing have not undergone any material changes.

Transitional regime and timescales

It is intended that a transitional period of two years be introduced for financial service providers to implement the FinSA conduct and organisational rules, including the new client segmentation rules for the purpose of rendering financial services (e.g. appropriateness and suitability tests), expiring 31 December 2021. However, managers may implement the new rules earlier and enjoy lighter regulation in some respects as a result.

The new rules limiting the necessity to appoint a Swiss representative and paying agent for marketing foreign funds in Switzerland to only (i) retail investors and (ii) high net worth individuals who have opted-out of the retail investor protection when a fund is "offered" to them enter into force on 1 January 2022 at the latest. If the manager has implemented the new conduct and organisational rules of FinSA prior to that deadline, the new rules apply as of the implementation (Swiss managers must notify the time of regime change to their regulatory auditor).

Under FinSA, the new client segmentation rules substantially impact how financial service providers can proceed within each client category. All financial service providers must categorise all their clients according to the new segmentation rules and apply the relevant conduct in their dealings with them according to their relevant client segment by 1 January 2022. Despite this timeline, the new definition of "qualified investor" to market funds in the revised CISA is based on the FinSA categorisation, and is already in force since 1 January 2020.

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