

# FINSA / FINIA : A NEW FINANCIAL SERVICES REGIME FOR SWITZERLAND - WHAT WILL CHANGE?

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## THE EFFECT FOR THE FOREIGN FUND AND INVESTMENT MANAGEMENT INDUSTRY

In this first series of several briefings to be posted on the new Financial Services Act and Financial Institutions Act we will look at some of the proposals and their effect in particular for the foreign fund and investment management industry.

Following the approval by the Swiss government in December 2015 of the draft Financial Services Act (**FinSA**, **FIDLEG** (German) and **LSFin** (French)) and Financial Institutions Act (**FinIA**, **FINIG** (German) and **LEFin** (French)), the two bills are currently being discussed in Parliament with a vote scheduled for this Autumn. The **FinSA** and **FinIA** are both part of a set of new laws aiming at improving the Swiss financial market architecture and are based on EU directives such as MiFID, the Prospectus Directive and the PRIIPs project to a great extent.

### 1. A New Client Categorisation Regime

Similar to MiFID, the FinSA introduces a new client categorisation regime and distinguishes between: (i) retail clients, (ii) professional clients and (iii) institutional clients.. The requirements of the FinSA vary depending on the category of clients to which the financial services are provided.

Professional clients are: (i) Swiss regulated financial intermediaries, (ii) Swiss regulated insurance institutions, (iii) foreign financial intermediaries and insurance institutions subject to a prudential supervision, (iv) central banks, (v) national and supranational public entities with professional treasury operations, (vi) public entities with professional treasury operations, (vii) pension funds with professional treasury operations, (viii) companies with professional treasury operations, (ix) companies that reach at least two of the following thresholds (balance sheet of CHF 20 million or more, turnover of CHF 40 million or more and 250 full time employees or more on a yearly basis), (x) private investment structures with professional treasury operations set up for high net worth individuals and (xi) certain high net worth individuals who may "opt out" to be treated as professional clients.

Institutional clients are a subset of professional clients and include the categories (i) to (v) listed above.

Retail clients combine all the clients that do not qualify as professional clients.

Certain retail clients (high net worth individuals and their private investment structures) have the possibility to request to be treated as professional clients (opting out, under the FinSA, to be called opting up). On the other hand, professional and institutional clients may declare that they wish to be treated as retail clients (opting in).

## **2. Code of Conduct**

The FinSA sets-out code of conduct that financial service providers must discharge to all their clients other than institutional clients. These rules include among others suitability checks, information duties, documentation and reporting duties as well as transparency and due care (best execution) rules.

## **3. Requirements concerning the Offering of Financial Instruments**

The FinSA also provides for a set of new obligations which apply to all financial service providers targeting clients in Switzerland. Those rules are mainly based on the EU directives (MiFID, Prospectus Directive 2003/71/CE, PRIIPs project). Some main requirements that must be satisfied when offering financial instruments include:

- (a) A prospectus containing all the material information for the investments decision of the investor will have to be published. This prospectus requirement will apply to all public offerings (primary and secondary) in Switzerland and to all securities that are to be admitted to be traded on a trading venue, including derivatives. The prospectus will have to be approved by a new regulatory body that will be licensed by the Swiss Financial Supervisory Authority FINMA. Some exceptions and a simplification for SME are envisaged.
- (b) In addition to the prospectus requirement, those offering financial instruments to retail clients must provide a key information document that should enable investors to be correctly informed when making investment decisions as well as help them compare various financial instruments in a simple and understandable way.
- (c) Persons that are in direct contact with clients offering financial services are defined as "client advisors" and will have to apply for entry into a national public register. Minimum requirements regarding the education of client advisors are also expected.

Under the new FinSA, the private placement regime applicable to the offer of securities will expressly be codified and provide that an offer to a maximum of 150 retail clients will not have to satisfy the prospectus requirement.

## **4. Licence Requirement for Independent Asset Managers**

Until now, independent portfolio managers and trustees were not under the supervision from the FINMA. A key change introduced by the FinIA is that independent portfolio managers and trustees will in future be regulated and require an authorisation in order to offer their services in Switzerland.

The authorisation will be granted by the FINMA. The prudential supervision itself is however managed by a specific supervisory body which would act upon the directives of the FINMA.

A grandfathering clause is provided in the current draft according to which independent asset

managers will not be subject to the licence requirement if they have at least 15 years of experience and do not accept new clients.

## **5. Consequences for Swiss Distributors**

The FinIA does not list distributors of collective investments schemes as regulated entities. It is therefore to be expected that distributors of collective investments schemes will no longer be required to obtain a license from the FINMA, as long as they do not carry out another regulated activity. This amendment affects Swiss distributors, since foreign distributors operating on a cross-border basis are not required to have a license from the FINMA, but need to be subject to an adequate supervision in their home jurisdiction.

The need to obtain a license for the distribution of collective investment schemes will be replaced by the obligation for client advisors of entities which are not supervised by the FINMA to be registered in a national register.

The fact that Swiss distributors will no longer need a license to offer foreign funds may affect the market in different ways. On the one hand, this may create more competition in the market and, on the other hand, investors may prefer dealing with entities supervised by the FINMA, such as representatives of collective investment schemes, instead of any unregulated providers of financial services.

## **6. Consequences for Swiss Representatives of Foreign Funds**

Under the current Collective Investment Schemes Act (CISA), the distribution of foreign funds to qualified investors in Switzerland requires the appointment of a Swiss representative.

The FinSA introduces the concept of "offer" defined as any proposal to acquire financial instruments (including interests/units/shares in collective investment schemes) which contains sufficient information on the terms of the offer and the relevant financial instruments. This new concept should replace the broad concept of "distribution" of the CISA.

The new amended CISA will keep the concept of "qualified investors" and provide that all professional clients pursuant to the FinSA are considered qualified investors. There is no longer a distinction in the amended CISA between regulated qualified investors and unregulated qualified investors.

The obligation to appoint a Swiss representative for foreign funds will be amended too. The appointment of a Swiss representative is now no longer necessary to offer foreign funds to qualified investors i.e. professional clients under the FinSA. However, a Swiss representative must be appointed if the foreign fund is offered to high net worth individuals who are deemed qualified investors (opting out).

It is expected that both the FinSA and the FinIA should enter into force in 2019.

In our next briefing on the new FinSA and FinIA we will expand on the topic of the code of conduct and in particular the new regime affecting the duty of information, appropriateness and suitability.

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