

Update

Newsflash September 2019

Key amendments to the draft implementing ordinances of the new Swiss Federal Financial Services Act and the Swiss Federal Financial Institutions Act

On October 24, 2018, the Swiss Federal Finance Department ("FFD") published for consultation the draft implementing ordinances of the Swiss Federal Financial Services Act and of the Swiss Federal Financial Institutions Act. On September 9, 2019, the FFD published a list of key amendments to the draft ordinances taking into account the outcome of the consultation. The final version of the ordinances should be available beginning of November 2019.

1. Introduction

On October 24, 2018, the FFD published draft ordinances to the Swiss Federal Financial Services Act ("FinSA") and the Swiss Federal Financial Institutions Act ("FinIA") as part of the formal consultation process among the Swiss financial industry. The Financial Services Ordinance ("FinSO") and the Financial Institutions Ordinance ("FinIO") will contain key provisions on the implementation of the new legislation. The consultation ended on February 6, 2019 and led to several amendments to the implementing ordinances.

The final version of the ordinances should be available beginning of November 2019. On September 9, 2019, the FFD however published a list of key amendments to the draft FinSO and FinIO and confirmed its intention to propose to the Federal Council the entry into force of the new legislation on **January 1, 2020**. There are strong reasons to believe that the Federal Council will follow this proposal.

The purpose of this Newsflash is to provide a summary of the key amendments proposed by the FFD to the draft implementing ordinances. For an overview of the key features of the new legislation, please refer to our previous Newsflashes of June and October 2018 as well as of March 2019¹.

¹ Lenz & Staehelin, Newsflash June 2018, Update on the New Swiss legislation on financial services and financial institutions; Lenz & Staehelin, Newsflash October 2018, Publication of draft implementing ordinances of the new Swiss Federal Financial Services Act and the Swiss Federal Act on Financial Institutions for Consultation; Lenz & Staehelin, Newsflash March 2019, Offering of Cross-border Financial Services in Switzerland under the new Swiss Financial Services Act.

2. Key amendments to the FinSO

- › "Purchase and sale" of financial instruments: A compromise has been reached on the definition of "financial services" and, more specifically, the one of "purchase and sale" of financial instruments. The reference to "intermediation" activities has been deleted in the definition of "purchase and sale" activities. As a result, any activity which is directed at specific investors and ultimately aims at the purchase or sale of financial instruments constitutes a financial service under FinSA. This applies even in the absence of any advisory services.
- › Corporate finance and M&A activities: To answer practical concerns, the negative catalogue of financial services has been extended. As result, corporate finance and M&A related services are now explicitly excluded from the FinSA scope of application.
- › Exemption regarding the Client Advisors Register: A significant and welcome change in the draft FinSO is the new exemption applicable to client advisors of regulated foreign financial institutions from the duty to register with the Client Advisors Register. This exemption is no longer limited to foreign institutions belonging to a Swiss consolidated financial group. Such exemption is however available only in relation to financial services rendered to professional and institutional clients.
- › Key Information Document ("KID"): Facilitations regarding KIDs have been implemented for execution-only clients. More significantly, KIDs for collective investment schemes can now also be published in English. This matches the rules applicable to all other financial instruments which require a KID when offered to private clients (other than to private clients in connection with a discretionary portfolio management).
- › Prohibition to advertise: The prohibition to advertise or offer a financial instrument whose sale to the targeted clients is not authorized, because the financial instrument has not been approved or is inadequate in view of the client profile, has been abolished in the FinSO. It can however not be excluded that a similar prohibition already derives from other general

provisions on investors protection, such as the Swiss Federal Act on Unfair Competition.

- › Prospectus: At this stage, the provisions regarding prospectuses do not appear to have been materially amended. They should thus remain largely the same as in the initial draft FinSO published in October 2018.

3. Key amendments to the FinIO

- › Asset managers: Persons who exclusively manage assets of individuals or entities with whom they have family or economic ties, as well as persons who manage assets under a specially regulated mandate (such as guardianship or testamentary execution), are in principle not subject to the FinIA. These concepts have been specified, in particular for company treasury and trustees.
- › Assets managers' and trustees' authorization requirements: The new version of FinIO sets higher thresholds that have to be exceeded for FINMA to be entitled to require the appointment of an independent body responsible for executive management, supervision and control of asset managers and trustees. The requirements regarding the work experience and training of asset managers and trustees have also been detailed. One can imagine that specific experience and training standards will be further applied.
- › Collective asset management: The new version of the FinIO expressly allows the delegation of collective portfolios to Swiss managers which do not reach the legal *de minimis* thresholds.

4. Timeline and transitional provisions

The final versions of the ordinances are expected to be published beginning of November 2019. The FFD confirmed its recommendation that the new legislation enter into effect on January 1, 2020.

Taking into account concerns of market participants as to the timing required to implement the new legislation, the FFD now proposes a transitional period of two years (instead of one) for complying with the new

rules regarding client classification, conduct and organization and requirements relating to KIDs.

A separate consultation process is still expected to be conducted as regards the ordinances on the regulations to be enacted at the level of the FINMA, once the final version of the FinSO and FinIO has been published. We will keep you

informed by way of further newsflashes with more detailed analysis of the new Swiss financial regulation.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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