

Update

Newsflash November 2019

Publication of the final versions of the implementing ordinances of the Swiss Federal Financial Services Act and the Swiss Federal Financial Institutions Act

On November 6, 2019, the Swiss Federal Finance Department published the final versions of the implementing ordinances of the Swiss Federal Financial Services Act and of the Swiss Federal Financial Institutions Act. At the same time, the Swiss Federal Council decided that the new legislation will enter into force on January 1, 2020, subject to a wide range of transitional periods. This newsflash discusses key features of the implementing ordinances and the various transitional periods.

1. Introduction

On November 6, 2019, the Swiss Federal Finance Department ("FFD") published the final versions of the ordinances to the Swiss Federal Financial Services Act ("FinSA") and the Swiss Federal Financial Institutions Act ("FinIA"). The Financial Services Ordinance ("FinSO") and the Financial Institutions Ordinance ("FinIO") contain key provisions on the implementation of the new legislation. As compared to the draft ordinances that were published for consultation in October 2018, the final versions of the FinSO and the FinIO have been amended on a number of key features.

Further, the Federal Council set the entry into force of the FinSA, the FinIA and their implementing ordinances for January 1, 2020.

The purpose of this Newsflash is to provide a summary of the key differences between the final versions of the FinSO and the FinIO and the drafts published on October 24, 2018 (see our Newsflash of [October 2018](#)). This Newsflash also presents the transitional regime. For an overview of the legislative process, please also refer to our previous Newsflashes of [June](#) and [October](#) 2018 as well as of [March](#) and [September](#) 2019.

2. Key features of the FinSO

- › **"FinSA scope of application:** The FinSA scope of application is largely based on three concepts: (i) the concept of "offer", which is any proposal to acquire financial instruments containing sufficient information on the offer and the instrument, (ii) the concept of "advertising", which is any communication

- drawing the investors' attention to specific financial instruments and (iii) the concept of "provision of financial services", which includes the acquisition or disposal of financial instruments, receipt and transmission of orders regarding financial instruments, discretionary portfolio management and investment advice. The third concept triggered significant discussion and debate around its scope of application. The final FinSO provides more clarity by taking out the controversial concept of intermediation.
- › Corporate finance and M&A activities: The FinSO now clarifies that a wide range of corporate finance and M&A activities do not constitute financial services. More specifically, the following does not constitute a financial service: (i) advice in connection with the structuring or raising of capital and M&A transactions, (ii) placement of financial instruments, and (iii) financing activities with respect to (i) and (ii) above. These activities will thus fall outside the scope of application of the FinSA.
 - › Exemption regarding the Client Advisors Register: Pursuant to the draft FinSO, foreign client advisors of a financial service provider which is subject to prudential supervision in its home jurisdiction, and, in addition, is a member of a group which is subject to the consolidated prudential supervision by FINMA were exempt from registration as regards financial services provided exclusively to professional and/or institutional clients. The final FinSO now extends this exemption also to client advisors of non-Swiss prudentially supervised financial service providers. Hence, client advisors of such financial institutions will not have to register with the Client Advisors Register, provided they render their services exclusively to professional and/or institutional clients. The FinSO only requires that the non-Swiss financial institutions be prudentially supervised in their home jurisdiction. The FinSO does not require that such regulatory supervision be equivalent to the one in Switzerland, nor that the home jurisdiction provides for any form of reciprocity towards Swiss-based financial institutions.
 - › Key Information Document ("KID"): The final version of the FinSO now allows KIDs for collective investment schemes to be prepared in English (previously, the draft FinSO required German, French or Italian). Furthermore, the applicable transitional period regarding KID for structured products has been extended to two years (previously one year). Accordingly, a simplified prospectus can be used still during the next two years.
 - › Prohibition to advertise: Pursuant to the draft FinIO, the advertising or offer of a financial instrument the sale of which to clients is not authorized due to, for example, a lack of approval of the financial instrument or the inadequacy with the client's risk profile was forbidden. This prohibition has been dropped in the final FinIO (save for funds units). The practical consequences of this prohibition remain to be determined.
 - › Prospectus: All in all, the final FinSO did not include substantial changes compared to the draft FinSO. The final FinSO now includes updated and completed prospectus checklists and provides for clarifications regarding certain aspects of the new prospectus requirement. In terms of timing of the new prospectus requirements, the FinSO provides for a 6 month transitional period, starting from the time FINMA has authorized the new prospectus reviewing bodies and in any event not earlier than October 1, 2020.
- Finally, with respect to debt instruments issued by a Swiss issuer and for which no prospectus is required (*i.e.* for which an exemption is available), the Swiss banking ordinance (which is partially amended in parallel to the FinSO), will require the publication of an information document containing the key elements of the debt instruments and certain information on the issuer (including financial statements).

3. Key features of the FinIO

- › Asset managers' and trustees' authorization requirements: Pursuant to the draft FinIO, FINMA could, under certain conditions, request from asset managers and trustees to set up a body responsible for senior management,

supervision and control, whose majority would consist of non executive members. Pursuant to the final FinIO, these conditions have been raised. A majority of non-executive directors may now be requested by FINMA if the asset manager or trustee (i) employs ten or more full time employees or its annual gross income exceeds CHF 5 million and (ii) if the scope and type of activities require it.

Further, the thresholds above which risk management and internal control for asset managers and trustees do need to be independent from the income-generating activities have been raised. Pursuant to the final FinIO, risk management and internal control must be independent from income-generating activities if the asset manager or trustee (i) employs six or more full time employees or its annual gross income exceeds CHF 2 million and (ii) its business model involves high risks.

For additional information regarding trustees, please refer to our separate [Newsflash](#) published today.

- › **Collective asset management:** Pursuant to the draft FinIO, investment decisions could only be delegated to asset managers of collective investment schemes subject to a recognised supervision. The final FinIO now extends the delegation possibilities to asset managers of collective investment schemes which are below the *de minimis* thresholds set forth in the FinIA. In our view, delegation to a *de minimis* entity is only permissible if such entity is based in Switzerland.

4. Transitional provisions

Taking into account concerns of market participants as to the timing required to implement the new legislation, a general transitional period of two years (instead of one) has been granted for complying with the new rules regarding client classification, rules of conduct and organization.

Financial institutions newly subject to

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authorization and prudential supervision under the FinIA will have:

- › 6 months to notify FINMA; and
- › 3 years to request an authorization.

Financial service providers will have 2 years to comply with the new FinSA rules starting from January 1, 2020 regarding:

- › obligations in relation with the new client classification;
- › obligations to ensure that client advisers have the relevant training;
- › measures required for the implementation of the new rules of conduct, including information, adequacy and suitability checks, best execution and documentation;
- › obligations for supervised entities which are financial service providers to meet the new FinSA organizational requirements; and
- › requirements relating to the offer of financial instruments (for existing financial instruments).

All financial services providers will be required to remain compliant with the pre-existing laws and regulations relating to rules of conduct as long as they have not implemented the new rules under the FinSA. This also applies regarding the obligation to keep a Swiss representative and Swiss paying agent in place as long as the fund marketing activities do not comply with the new FinSA rules. Accordingly, if such marketing activities in Switzerland continue after January 1, 2020, the respective Swiss representative and Swiss paying agent agreements cannot be terminated with effect as of January 1, 2020.

5. FINMA Ordinances

A separate consultation process is expected to start soon as regards the ordinances on the regulations to be enacted at the level of FINMA. A publication of the final texts should take place during the second quarter of 2020. Further newsflashes will be issued with a more detailed analysis of the new Swiss financial regulation framework.

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

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