

# Update

## Newsflash October 2018

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### **Publication of draft implementing ordinances of the new Swiss Federal Financial Services Act and the Swiss Federal Act on Financial Institutions for Consultation**

**On June 15, 2018, the Swiss Parliament has concluded its deliberations on the new Swiss Federal Financial Services Act ("FinSA") as well as of the Swiss Federal Act on Financial Institutions ("FinIA") and has passed these two new acts. The Swiss Federal Finance Department ("FFD") has now published for consultation the drafts of the implementing ordinances to the FinSA and FinIA, containing key provisions on the implementation of this new legislation. The consultation period will end on February 6, 2019.**

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#### **1. Introduction**

The Swiss Federal Council published in November 2015 the draft FinSA and FinIA as a response to the 2009 financial crisis and with a view of meeting international standards, including the so-called "equivalence" under the "third-country provisions" provided for by MiFID II.

On June 15, 2018, after intensive parliamentary debates, both the Council of States and the National Council have agreed on all provisions of the FinSA and the FinIA.

In the meantime, the FFD has finalized the drafts of the implementing ordinances to both the FinSA and the FinIA. On October 24, 2018, the FFD published the draft ordinances in order to

proceed with the formal consultation process among the Swiss financial industry. This consultation process is scheduled to end on February 6, 2019.

The purpose of this Newsflash is to provide a first and preliminary overview of the key issues and open questions which arise as a result of the publication of the draft ordinances to the FinSA and FinIA. For an overview of the key features of the new legislation, we refer to our previous Newsflash of June 2018<sup>1</sup>

#### **2. Structure of the Implementing Ordinances**

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<sup>1</sup> Lenz & Staehelin, Newsflash June 2018, Update on the New Swiss legislation on financial services and financial institutions

The FFD has published for consultation two separate ordinances, namely a draft of the Federal Implementing Ordinance to the FinSA ("FinSO") as well as the draft of the Federal Implementing Ordinance to the FinIA ("FinIO"). These implementing ordinances provide for the rules and regulations which the Swiss legislator has delegated to the Federal Council based on express provisions in the FinSA and FinIA in order to further detail the new legislation. In this context, the Federal Ordinance on Collective Investment Schemes ("CISO") has undergone substantial modifications as well. In addition, the FFD has also published for consultation a draft of the new Ordinance on the Supervisory Organizations, whose purpose is to regulate the supervisory functions which will be delegated by FINMA to the new supervisory organizations for the purpose of the ongoing supervision over asset managers and trustees.

The consultation procedure does not contain the drafts of the implementing ordinances to the FinSA and the FinIA which are expected to be published by the Swiss Federal Market Supervisory Authority ("FINMA") in its capacity as supervisory authority (hereinafter "FinSO-FINMA" and "FinIO-FINMA"). The FinSO-FINMA and the FinIO-FINMA are expected to contain more technical regulations, linked to the implementation of FINMA's supervisory functions. By contrast, the FinSO and the FinIO will contain more fundamental "level 2" type rules to the extent that a sufficient legal basis is contained in the FinSA or the FinIA for a delegation to the Federal Council to legislate.

The implementing legislation contained in the FinSO and the FinIO as well as the FinSO-FINMA and the FinIO-FINMA will, pursuant to the traditional concept of Swiss law, be further specified by self-regulation, in particular the self-regulation to be published by the Swiss Funds and Asset Management Association ("SFAMA"). At this stage, key changes to the self-regulatory framework of SFAMA are namely expected relating to the distribution of investment funds. The concept of the "distribution" of investment funds is currently laid down in Art. 3 of the Federal Act on Collective Investment Schemes ("CISA") and will be replaced by a new concept of the "offer of financial instruments" contained in Art. 3 lit. g FinSA. By contrast, other more

product specific self-regulations regarding investment funds, such as the model regulations and prospectuses for Swiss collective investment schemes as well as other model documents and guidelines, including transparency rules or code of conducts, are expected to be subject to more formal changes. Indeed, the self-regulation of SFAMA was, in many respects, already in line with the new standards set by the FinSA and in particular the new rules of conducts which will be implemented by this new legislation.

The question remains open as to how and to what extent FINMA will issue circulars in its capacity as supervisory authority to further define certain concepts set out in the FinSA and FinIA.

### **3. Preliminary key comments on the FinSO/FinIO**

In our newsflash of June 2018, we have set out in detail the key elements of the new legislation, in particular of the relevant rules of conduct. A detailed analysis is necessary in order to assess whether the FinSO and the FinIO contain any significant new elements which may have an impact on Swiss and foreign financial services providers. Based on an initial review of the draft FinSO and FinIO, the following, among many other novelties, is at this stage noteworthy:

- › Notion of "financial services": The FinSO expressly provides that the concept of the "purchase and sale" of financial instruments does not only relate to the actual transaction, but also includes any action in the context of which there is no transaction-based advice, but which specifically aims at an offer or sale (such as any activity related to the intermediation or distribution of a financial instrument) (Art. 3 lit. c para. 1 FinSA/Art. 3 para. 1 FinSO). The main purpose of this wide interpretation is to cover certain circumstances which currently constitute a "distribution" of investment funds within the meaning of Art. 3 CISA and would otherwise not anymore be regulated in Switzerland.
- › Financial Services within a Group: Financial services provided within a group are not considered to be "financial services" subject to the new legislation (Art. 3 lit. d FinSA/Art. 3 para. 2 FinSO), and respective group entities

are exempted from authorization requirements as asset manager, securities houses, etc. (Art. 2 para. 2 lit. a FinIA/Art. 2 para. 2 FinIO).

- › Notion of Offer/Offer to the Public: An offer is defined as a declaration to a recipient containing all essential elements which allow that recipient to take an investment decision (Art. 3 lit. g FinSA/Art. 3 para. 3 FinSO). There is by contrast no "offer", if the recipient of such offer does not have the possibility to accept and take an investment decision, such as the publication of prices, or factual information, or any corporate communication (Art. 3 para. 5 FinSO). Further, the concept of a "public offer" widely follows the current interpretation of an offer to an unlimited circle of persons, as currently laid down in Art. 652a and 1156 CO (Art. 3 lit. h FinSA/Art. 3 para. 4 FinSO).
- › Publicity: A new concept of "publicity" is introduced in the context of Swiss prospectus regulations. The publication of prices or performance data does not qualify as publicity (Art. 68 FinSA/Art. 95 para. 2 FinSO). Any publicity for a financial product shall not be misleading and, accordingly, cannot be made towards clients who cannot acquire the relevant financial instruments. Publicity for a fund reserved for qualified investors could therefore not be directed towards non-qualified investors (Art. 95 para. 3 FinSO).
- › Client classification: The FinSO confirms the very flexible conditions and modalities for an opting-out of wealthy private clients to be classified as "professional clients" (Art. 4 FinSA/Art. 4-5 FinSO). In this respect, the regulations of the FinSA, as detailed by the FinSO, provide for a more flexible approach for the opting-out of private clients as compared to the MiFID II regime.
- › Rules of conduct: The rules introduced as to the information of clients, in particular the obligation to provide clients with a so-called Key Information Document (Basisinformationsblatt/feuille d'information de base) ("KID"), are, by contrast to the rules applicable under MiFID II, more flexible in case of "execution only" transactions, as long as the executed transaction or the transmission

of an order is not preceded by an advice (Art. 8 para. 4 FinSA/Art. 11 FinSO). The draft FinSO further provides for a template Swiss KID as well as for a detailed description of the information to be covered in the KID, whereby a distinction is made depending on the type of product, its risk profile, costs and the minimum term of the product (Art. 60 para. 2 and 63 lit. a FinSA/Art. 88 FinSO).

- › Register of Client Advisors: The FinSO specifies the obligation of individual client advisors to register with the register of advisors. More specifically, the FinSO expressly exempts prudentially supervised foreign client advisors who are subject to a prudential supervision and, in addition, are member of a group which is subject to the consolidated supervision of FINMA, always provided that the services offered in Switzerland are exclusively directed towards professional or institutional clients (Art. 31 et seq. FinSO). Interestingly, this exemption is at this stage not granted to foreign financial services providers which are not member of a group subject to FINMA's consolidated supervision. It is uncertain at this stage whether the Federal Council will extend shortly such an exemption, as this may also depend on the negotiations between Switzerland and the EU. In any event, this would require an amendment of the FinSO (Art. 31 FinSO).
- › Product documentation: The draft FinSO contains detailed rules on the content and form of prospectuses for financial instruments (Art. 50 FinSO) :
  - › Similar to the current regulations of SIX Swiss Exchange, the draft FinSO provides for a number of separate prospectus schemes setting out the required prospectus content. Separate prospectus schemes are included for the following type of financial instruments: equity instrument, debt instruments, derivatives, real estate companies, investment companies and collective investment schemes (Annexes 1 – 6 to the FinSO).
  - › The draft FinSO provides for the possibility that the reviewing body may grant exemptions from the prospectus

content requirements on a case by case basis.

- › The draft FinSO further specifies the content and general structure of the prospectus summary, without, however, providing for overly formalistic rules or strict limitations on the length of such summary (Art. 54 FinSO).

In line with current market practice, the draft FinSO specifies that no pre-publication review is required for the prospectuses of the following type of financial instruments: Bonds (including convertible bonds, and regulatory capital instruments) and certain structured products (Art. 60 FinSO and Annex 7 to the FinSO). In case a prospectus is published without prior review, the prospectus has to prominently note this fact.

With regards to KIDs the draft FinSO considers KIDs that were prepared pursuant to the European PRIIPs Regulation as equivalent. Where a foreign KID is considered equivalent, no additional Swiss KID has to be prepared (Art. 87 FinSO and Annex 14 to the FinSO).

- › Supervision of Asset Managers: The FinIO specifies the new supervisory regime which will apply to independent asset managers and trustees, newly subject to a detailed prudential supervisory regime (Art. 4 et seq., 11 et seq. and 27 et seq. FinIO). The FinIO provides however for flexibility for smaller asset managers with a low risk business model and a company size or gross income below a certain threshold (see e.g. Art. 15 para. 5 FinIO, Art. 18 para. 2 FinIO, Art. 19 para. 3 FinIO and Art. 29 para. 6 FinIO).

Furthermore, asset managers who limit themselves to the management of the wealth of their family members, as further specified in the FinIO, are expressly exempted from the authorization regime as independent asset managers and trustees (Art. 2 para. 3 FinIO).

- › Delegation : The requirements for the delegation of tasks have been widely harmonized across all categories of entities subject to the FinIA, with on certain respects more flexibility as compared to the requirements of the current Art. 66 CISO-FINMA (Art. 9, 17, 32 and 48 FinIO).

- › De minimis rules: The de minimis rules, providing for an exemption of the authorization requirement as asset manager of collective assets, which apply currently only to Swiss managers of foreign collective investment schemes, is now extended to managers of Swiss collective investment schemes and pension funds (Art. 27 FinIO). Asset managers of collective assets, which benefit from this exemption, will however be supervised as any other asset manager. In case the de minimis threshold are exceeded, Art. 27 para. 5 FinIO imposes a deadline to notify FINMA within 10 days and submit to FINMA an authorization request within 90 days.

- › Specific rules applicable to ETFs : The revised CISO contain less restrictive requirements for the listing of share classes of foreign ETFs. Under the new regulation, only the share classes of foreign ETFs that are effectively offered to non-qualified investors in Switzerland must be listed on an authorized Swiss exchange. No listing requirement exists for share classes which are not actively offered to non-qualified investors in Switzerland (Art. 40 para. 5 CISO).

- › Branches/representative offices : While the authorization requirements for Swiss branches of foreign supervised financial services providers remain in line with the current requirements, the obligation to request from FINMA an authorization as so-called "representative offices" is extended to all foreign financial services providers, including asset managers and trustees with employees in Switzerland on a permanent basis or any other agent entrusted with the marketing of the services of those foreign entities (Art. 58 FinIA/Art. 75 FinIO). The requirements are expected to be in line with the current requirements for the authorization of representative offices of banks and securities dealers, as currently set out in the FINMA's Ordinance on Foreign Banks and in the Stock Exchange and Securities Trading Ordinance.

#### 4. Timeline and transitional provisions

The final text of the FinSO and of the FinIO are expected to be published in the third quarter of

2019, meaning a few months only before the entry into effect of the new legislation. The current expected effective date is January 1, 2020. The FinSO and the FinIO contain various transitional provisions, in particular concerning (Art. 103 to 110 FinSO and Art. 86 to 87 FinIO):

- › the compliance with the client classification rules, the required knowledge of client advisors as well as with other organizational requirements;
- › the compliance with the rules of conduct contained in the FinIA;
- › the compliance with the new prospectus requirements as well as the requirements relating to KIDs;
- › the authorization requirement for asset managers of pension funds;
- › the affiliation of the directly subordinated financial intermediaries to a supervisory organization;
- › the affiliation of financial institutions to an ombudsman's office;

- › the authorization requirement for branches and representative offices of foreign financial institutions;
- › the KID for real estate funds, securities funds and other funds for alternative investments.

## **5. Further way of proceedings**

The financial industry is expected to provide extensive comments on the FinSO and the FinIO by the end of the consultation period set to February 6, 2019. As a result of this consultation process, the draft ordinance may therefore still undergo significant changes. Furthermore, a separate consultation process will be conducted by FINMA, most likely in Spring 2019, as regards the draft FinSO-FINMA and FinIO-FINMA. We will keep you informed by way of further newsflashes with more detailed analysis of the new legislation and its implementing ordinances..

**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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