

# Update

## Newsflash March 2019

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### Offering of Cross-border Financial Services in Switzerland under the new Swiss Financial Services Act

**On 15 June 2018, the Swiss Parliament adopted the new Swiss Financial Services Act ("FinSA") and the new Swiss Financial Institutions Act ("FinIA"). This Newsflash summarizes certain key changes that will affect the offering of cross-border financial services in Switzerland by foreign financial service providers.**

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#### 1. Background

Historically, Switzerland has taken a liberal stance as regards the provision and promotion of financial services on Swiss soil by foreign financial institutions on a cross-border basis. As long as the services do not involve a physical presence in Switzerland (e.g., through a branch or representative office) and the services do not relate to specific regulated activities or products (e.g., collective investment schemes, structured products, consumer credits, (re)insurance products or participation in market infrastructures), they may be freely offered and promoted to Swiss-based clients.

This regime will shortly be affected by the forthcoming overhaul of the regulatory framework applicable to the provision of financial services, which is expected to enter into force on 1 January 2020. The following provides an overview of the main changes that will impact foreign financial service providers in this context.

For a more comprehensive overview of the changes that the new legislative framework will imply, please refer to our Newsflash of June 2018, "[Update on the new Swiss legislation on financial services and financial institutions](#)" and 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](#)".

#### 2. Client Advisors Register

The new legal regime will introduce an obligation for both Swiss and non-Swiss client advisors of financial service providers to become registered in a Client Advisors Register prior to providing financial services, as defined under FinSA, in Switzerland. Consequently, if a foreign financial institution provides such financial services to clients in Switzerland on a cross-border basis, its individual client advisors will become subject to a registration requirement in Switzerland regardless of their domicile or place of work.

The Swiss Federal Council may exempt client advisors of foreign regulated financial service providers from the duty to register if the services they provide in Switzerland are exclusively targeting professional or institutional clients, and subject to a reciprocity test. That said, the current draft implementing ordinance (the Financial Services Ordinance, "FinSO") only provides for a very limited exemption solely applicable to client advisors of foreign service providers, which are part of a financial group subject to the consolidated supervision of the Swiss Financial Market Supervisory Authority (FINMA). As it is, this exemption would therefore apply to Swiss financial groups exclusively. Depending upon the outcome of the ongoing consultation process of FinSO, this exemption may be extended (or not) to all financial service providers that are part of a foreign regulated group.

The registration requirement in the Client Advisors Register will apply to employees of financial service providers, as well as to individuals providing financial services personally. In this context, whilst distributors of collective investment schemes will no longer be subject to licensing requirements under FinSA, they may have to register as a client advisor if they are deemed to render financial services (see below under 4).

To register, client advisors will be required to demonstrate sufficient knowledge of the rules of conduct set out in FinSA and necessary expertise to perform their activities. They will also need to have a professional indemnity insurance (or equivalent guarantee) and to be affiliated to an ombudsman's office.

### **3. Rules of conduct and organizational requirements**

Generally speaking, the provision of financial services to clients in Switzerland on a cross-border basis will fall within the scope of FinSA. A financial service provider under FinSA is defined as any person providing financial services in Switzerland or to Swiss-based clients. In this context, whilst the precise scope of application of FinSA will depend upon the outcome of the consultation process of FinSO, it is expected that FinSA rules of conduct and organizational requirements will apply to foreign

financial service providers, unless (i) the client relationship is entered into at the express initiative of the client, or (ii) the financial services are requested by correspondence abroad.

In this context, foreign financial service providers falling within the ambit of FinSA will need to comply with the Swiss rules of conduct and organisational requirements. As a first step, foreign financial service providers will need to classify their clients according to the FinSA approach, which is largely in line with the EU classification.

The rules of conduct will include an obligation of information, an obligation to verify the appropriateness and adequacy of a financial instrument or service (in case of investment advice or asset management, but not for mere execution only transactions), as well as a documentation obligation. In addition, organisational requirements will apply, such as the obligation to take adequate measures and establish appropriate governance to ensure a fit and proper organization, including in connection with the disclosure of conflicts of interests.

### **4. Distribution of foreign collective investment schemes in particular**

Under the current Swiss legal framework, the distribution of foreign collective investment schemes to non-qualified investors in Switzerland presupposes FINMA authorization for the fund. If only non-regulated qualified investors are targeted, solely the appointment of a Swiss representative and paying agent is required. Swiss fund distributors further need to be licensed by FINMA.

The new FinSA will abolish both the licensing requirement for distributors and the entire current concept of "distribution" (which will be replaced by the one of "offer"). The current investor segmentation under the Collective Investment Schemes Act ("CISA") will be maintained as a matter of principle but adapted to the new client classification system under FinSA.

It is expected that the definition of an "offer" will be more limited than the current concept of "distribution" (i.e., will provide for more

flexibility), but the final approach will only be known once the implementing ordinances are finalised.

At this stage, it is uncertain to what extent and under what circumstances, fund distribution activities will be characterized as "financial services" under FinSA. Should such distribution of collective investment schemes be viewed as being not only an "offer", but also a "financial service", it will imply compliance with the obligation to register in the Client Advisors Register (see above under 2) and the rules of conduct and organizational requirements (see above under 3).

The new regime will generally facilitate the offer of foreign collective investment schemes to qualified investors. Indeed, the requirement to appoint a Swiss representative and a paying agent for foreign collective investment schemes offered exclusively to qualified investors will fall away (except for offers to high-net-worth individuals and their holding vehicles who opted-in to be treated as qualified investors). The applicable regime as regards collective investment schemes targeting non-qualified investors will in essence remain the same as today.

## 5. Next steps

Overall, the new FinSA regime will involve a

change of paradigm for foreign financial service providers. Going forward, the inbound provision of financial services in Switzerland will imply compliance with the requirements set forth by FinSA and, in particular, the registration of individual client advisors in a specific register. The consultation process of the implementing provisions ended on 7 February 2019. It is expected that FINMA will publish additional implementing ordinances for consultation.

The legislative package is expected to enter into force on 1 January 2020. The following transitional provisions should then apply (subject to the final implementing ordinances that may amend these deadlines):

- › One year (i.e., until 1 January 2021) to comply with the rules of conduct and implement the organizational requirements.
- › Six months (i.e., until 1 July 2020) to register the advisors in the Client Advisor Register.
- › Six months to affiliate with an ombudsman's office as of the date of recognition of an ombudsman's office (i.e., at the earliest until 1 July 2020).

**Please do not hesitate to contact us should you have a query.**

**Legal Note:** The information contained in this 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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