

New financial service and financial institution regulations

29 November 2019 | Contributed by [Meyerlustenberger Lachenal](#)

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Executive summary

The Federal Council recently decided to put the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA) into effect on 1 January 2020 as the last part of the financial market regulations reform project. Concurrently, the Federal Council published the final versions of the implementing ordinances with some amendments compared with the previous draft versions published during the public consultation period. The Swiss Financial Market Supervisory Authority (FINMA) is expected to publish the first draft of the additional implementing provisions by the end of 2019 and a final version by the end of the first quarter of 2020.

Brief overview

The legislature took a decision to profoundly overhaul Swiss financial market regulations (ie, the organisation of the financial market supervisory authority, the financial market infrastructure regulations, the financial service regulations at the point of sale and the regulations on financial institutions) by transforming their primarily product-oriented statutes into cross-section legalisation. The final part of this decision will come into force on 1 January 2020 with the introduction of the FinSA and the FinIA.

FinSA will create a uniform competitive environment for financial intermediaries at the point of sale and increase client protection. It will introduce code of conduct requirements that financial service providers must comply with at the point of sale. Further, FinSA will establish provisions for prospectus duties and require a clear and understandable key information document for financial instruments. Conversely, the FinIA standardises the rules for financial service providers that manage third-party assets, in particular:

- (external) investment managers;
- trustees;
- managers of collective assets;
- fund management companies; and
- securities houses (formerly securities broker or dealers).

In addition to introducing two new laws, the Federal Council published the final versions of the Financial Services Ordinance (FinSO), the Financial Institutions Ordinance (FinIO) and the Supervisory Organisation Ordinance (SOO).

The FinSO stipulates the advice and information that financial service providers must provide (and provisions on their organisation) and establishes a new register for client advisers, client documentation and ombudsman services. Moreover, the FinSO contains implementing provisions concerning the prospectus and key information documents, which should make it easier for clients to compare different financial instruments.

The FinIO governs the licensing requirements and obligations for financial institutions (other than banks) and their supervision. The managers of individual assets and trustees are now subject to prudential supervision and less stringent requirements than those for managers of collective investment schemes, fund management companies and securities dealers (now referred to as securities firms).

Further, the SOO fleshes out the licensing requirements and activities for the newly introduced

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supervisory organisations that will supervise (external) investment managers and trustees together with FINMA.

Main changes to final ordinances

On 9 September 2019 the Federal Department of Finance pre-published a list of key amendments to the draft FinSO, FinIO and SOO. A more comprehensive analysis of the now-published final ordinance texts reveals the Federal Council's amendments, based in particular on the results of the public consultation:

- The concept of financial services in Article 3 of the FinSO, insofar as it covers the purchase and sale of financial instruments, has been adapted in line with the divergent opinions gathered during the public consultation so that it is now neither too broad nor too narrow (the term 'mediation' has also been deleted).
- The negative list of financial services in Article 3 of the FinSO has been expanded and clarified (in particular, there is no customer relationship for services such as corporate finance or the merger and acquisition of companies).
- The obligation on financial service providers under Article 14(2) of the FinSO to inform customers about changes has been deleted (as decided by Parliament).
- The terms 'risk profile' and 'investment strategy' have been included in the suitability test (Article 17 of the FinSO).
- Foreign client advisers of prudentially supervised institutions and professional or institutional clients no longer need to register.
- The regulations for the unauthorised advertising of financial instruments have been deleted (Article 95(3) of the FinSO).
- For execution-only transactions, a basic information sheet is deemed to exist if it can be found at a reasonable cost (Article 11(2) of the FinSO).
- A provision has been included under which a basic information sheet may be made available only to private customers with their consent after a transaction has been concluded, even in the case of execution-only transactions (Article 11(3) of the FinSO).
- The basic information sheet for collective investment schemes can now be drafted in English as well as one of the official Swiss languages (Article 89(2) of the FinSO).
- The exceptions in Articles 3 *et seq* of the FinIO regarding economic and family ties, as well as the mandates regulated by law, in particular with regard to corporate treasury function and trustees, have been clarified.
- The relationship between the general requirements and institution-specific licensing requirements have been clarified through a better delimitation of the respective provisions, in particular with regard to organisation (Articles 12 and 23, 37, 51 and 66 of the FinIO) and the delegation of tasks and outsourcing (Articles 15 *et seq*, 40 and 56 of the FinIO).
- The criteria for determining the commercial or professional capacity of asset managers and trustees has been defined more precisely (Article 19 of the FinIO).
- The supervision of asset managers and trustees by a supervisory organisation can now be made dependent on a special type of statutory professional secrecy (Article 21(2) of the FinIO).
- The professional experience and training requirements of qualified managing directors of asset managers and trustees have been clarified (Article 25(1) of the FinIO).
- With regard to the management of collective assets, it has been made explicitly clear that the transfer of tasks to asset managers may also take place below the *de minimis* thresholds provided for in Article 24(2) of the FinIA (Article 40(1) of the FinIO).
- A separate provision on auditing (as provided for in Article 79 of the draft consultation) has not been included.
- Supervisory organisations have the possibility to train supervised persons (Article 4(3) of the SOO).
- The provisions on the financial resources (Article 5 of the SOO) and reserves (Article 6 of the SOO) of supervisory organisations have been clarified.
- Changes to the law for precious metals trading auditors have been deferred.

The Federal Council will closely monitor developments in the European Union following the introduction of the EU growth prospectus and swiftly propose adjustments to the FinIO if necessary to prevent competitive disadvantages for small and medium-sized entities.

FINMA is expected to publish the draft versions of its implementing ordinances and circulars before the end of 2019 and the final version in the first quarter of 2020. This will not be a problem as there is a two year transitory period for most of the new duties.

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