

Marketing of Private Funds in and into Switzerland under the new Swiss Financial Services Act (FinSA): Hot Topics



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Legal Background

On June 15, 2018, the Swiss parliament passed the new Swiss Financial Services Act (FinSA), which entered into force on January 1, 2020¹. FinSA addresses the new rules governing the marketing of financial products, including investment funds. They will constitute the focus of this overview.

The Federal Council adopted the implementing ordinance of FinSA (FinSO) on November 6, 2019 providing the first concrete guidance on the new provisions. FinSO entered into force concomitantly with FinSA on January 1, 2020². The new legislation further entailed substantial adaptations of other laws such as the Swiss Collective Investment Scheme Act (CISA) along with its implementing ordinance (CISO). Those amendments also are in force since January 1, 2020.

This article is solely intended to highlight some of the more crucial points resulting from the new regime linked to marketing of funds. It does not address other financial services in scope of the new legislation.

Marketing of funds under FinSA

Under the new regime, the key concept for the applicability of all the Swiss marketing regulatory obligations under CISA ("distribution") is abolished. As a result, this term has been generally done away with. Furthermore, the FINMA distributor license no longer exists.

Going forward, there is no single trigger concept under FinSA as was the case with distribution under CISA. Various regulatory obligations can be triggered by different activities under the new rules. They can be broken down into financial services, offerings and advertisement.

¹ Available at <https://www.admin.ch/opc/en/classified-compilation/20152661/202001010000/950.1.pdf>

² Available at <https://www.admin.ch/opc/de/classified-compilation/20192374/202001010000/950.11.pdf> - Text currently only available in German

Taking a practical approach, these different concepts will be addressed as needed within the context of the frequently raised topics set-out below.

Hot topics

FinSA generally applies to marketing of shares of collective investment schemes. Marketing of shares in a fund does not appear at first to fall under the activities listed as **financial services** in scope of FinSA. Nevertheless, after the finalisation of the law, wording was introduced in FinSO with the clear intention of catching intermediation services. In its final version, FinSO construes the financial service described in FinSA as the "*sale and purchase of a financial instrument*" as including "*any activity undertaken directly towards a client specifically aiming to purchase or sell a financial instrument*". Accordingly, there is now a general understanding that classic marketing of fund interests to end clients is a financial service. This applies irrespective of whether investment advice, (a separate financial service), is provided or not. In its Explanatory Report dated November 19, 2019³ (Explanatory Report), the Swiss Federal Council states that the sale or purchase of a financial instrument between regulated financial intermediaries is not considered as a financial service since the purpose of the legislation is to protect the end client. Other qualified investors however are still to be considered end-clients and services to them fall within the scope of the FinSA protection. This position is in line with the previous regime under CISA and ensures continuity.

New client advisors and register

A substantial novelty under FinSA is the concept of **client advisors**. Any natural person providing financial services (such as fund intermediation to end-clients) in or into Switzerland qualifies as a client advisor under FinSA. This applies irrespective of whether they act in the name of an entity providing financial services or in their own name.

Client advisors of Swiss and foreign unregulated financial service providers (such as e.g. previously regulated "distributors" and other unregulated fund marketers and placement agents) must register in a new **client advisor register** in Switzerland. Based on the Explanatory Report, it should also be possible for entities to register on behalf of their individual client advisors. There is however no clear legal basis for this statement.

Client advisors of foreign financial service providers subject to prudential supervision abroad (e.g. regulated fund managers) are exempt from the registration obligation if they provide their services exclusively to professional or institutional clients in Switzerland. This exemption from registration does not exempt its beneficiaries from compliance with other requirements of the new regime.

Finally, client advisors of FINMA regulated Swiss branches and representative offices of foreign financial service providers do not need to register in the client advisor register.

³ Available at <https://www.newsd.admin.ch/newsd/message/attachments/58956.pdf> - Text currently only available in German

Client advisors are granted a **transitional period** of six months to notify the client advisor register of their intention to become registered. As no such register has been authorised by FINMA prior to January 1, 2020, the six-month period begins to run as of the first authorisation of a client advisor register.

Ombudsman office

All financial service providers active in Switzerland, including those marketing funds, must join an ombudsman office. This is to ensure there is a possibility of mediation for differences between financial service providers and their clients in Switzerland. Financial service providers must inform their clients of the possibility to make use of a mediation process with the ombudsman office. The affiliation with an ombudsman office is one of the requirements to obtain registration in the client advisor register.

Financial service providers enjoy a six-month **transitional period** to comply with the affiliation requirement. Since no ombudsman office was authorised by January 1, 2020, the six-month period begins to run as of the first authorisation of an ombudsman office.

Appointment of a representative and paying agent in Switzerland

(i) Offer

Another major change in comparison with the prior regime is that the appointment of a representative in Switzerland and of a Swiss paying agent is no longer required to **offer** foreign funds to qualified investors in Switzerland.

A notable exemption however remains with regard to high net worth individuals who opt-out to be treated as professional investors. For these investors, the current regime remains in place and a representative and paying agent are still required.

Under FinSA, an offer is a different concept than providing financial services as described above. Based on FinSA and FinSO, an offer implies "providing sufficient information on the terms and the financial instrument itself". The offer must further "usually be intended to draw attention on the particular financial instrument and to sell it".

Although further guidance on the delimitation between an offer and a financial service is outstanding, it appears that there may be instances when marketing activities in Switzerland for a foreign fund may qualify "only" as a financial service but not reach the higher threshold of an offer. In such a case, it could be argued that it is not necessary to appoint a Swiss representative and paying agent even if the marketing is directed at high net worth individuals who have opted-out. An offer is now furthermore the relevant trigger for various prospectus and other information obligations.

(ii) Advertisement

A new isolated provision in CISO links **advertisement** of foreign funds in Switzerland to the obligation of appointing a representative and a paying agent. The obligation to appoint a Swiss representative and a paying agent in Switzerland to advertise for foreign investment funds in Switzerland should however only apply to advertising available to non-qualified investors irrespective of the new CISO wording. Indeed, as under the previous regime, only

providing information on funds to retail investors triggers an approval obligation for the product by FINMA, entailing the appointment of such agents. In our view, this new provision in CISO is, in practice, to be considered a reminder that advertisement can cause these regulatory obligations to become applicable if non-qualified investors are targeted (or accessed) by the advertisement. However, it does not create a new instance in which appointing a Swiss representative and paying agent is required.

Termination of agreements with a representative and a paying agent

An important consideration for those marketing foreign funds into Switzerland to qualified investors is to determine precisely when they can **terminate** their representative and paying agent agreements currently in place. It is equally relevant to determine as of when it is admissible to begin marketing of a new foreign fund in Switzerland to qualified investors without appointing such parties.

The transitional provisions of FinSO foresee the obligation to appoint and maintain a Swiss representative for foreign funds marketed only to qualified investors until the relevant marketer is fully FinSA compliant. This means that a foreign financial service provider must have implemented all FinSA **conduct** and **organisational rules** as they may be applicable to them before they can effectively terminate the relationship with their existing Swiss agents. During the transition period, further to the continued obligation to appoint a Swiss representative and paying agent, the relationships with the Swiss distributors should be maintained irrespective of the fact that distributors are no longer regulated as such since January, 1, 2020. Finally, the conduct rules issued by the Swiss Fund and Asset Management Association ("SFAMA") remain in force for the same period of time. In any case, all financial service providers must be FinSA compliant at the latest by December 31, 2021.

New conduct and organisational rules

FinSA foresees new **conduct and organisational rules** that apply to all financial service providers. For those marketing funds, they replace the old relevant provisions in CISA. The SFAMA self-regulation based on the previous CISA rules are still to be adapted the new FinSA conduct and organisational regulations. The FinSA conduct rules to be observed when marketing funds consist mainly of information, documentation, reporting and transparency obligations. The new conduct rules do not apply when marketing to institutional investors. Professional investors can now however waive compliance by the marketer with some of these obligations. New organisational rules focus particularly on the avoidance of conflicts of interest. The new conduct and organisational rules must be implemented by **December 31, 2021**. It is only possible to generally switch to the new FinSA regime before this date if the financial service provider is compliant with FinSA in its entirety with respect to all its activities taking place in Switzerland.

New definition of qualified investors

The distinction between qualified investors and non-qualified investors continues to be made under CISA. As until now, only offering funds to non-qualified investors triggers an obligation to obtain a FINMA approval of the product itself. In addition, as in the past, marketing efforts towards regulated financial intermediaries remain out of scope of the new legislation. The definition of **qualified investors** under CISA however now refers to the **client**

segmentation of FinSA. This new segmentation is largely based on MiFID and includes three categories: institutional investors, professional investors and non-professional investors. There are various possibilities to opt-in and out of these categories. Some uncertainty regarding the **transitional period** pertaining to the new client segmentation persists as this is not specifically addressed in any of the transitional law provisions. In our view, the cautious way forward, until additional guidance is available, is therefore to apply the new client segmentation rules **from the onset as of January 1, 2020.**

Reverse solicitation

FinSo continues to provide a reverse solicitation exemption in two instances:

The first one pertains to **cross-border** financial services only and leads to an exemption from the geographical scope of application of FinSA and FinSO. A financial service rendered by a foreign service provider either (i) as part of an on-going contractual relationship explicitly initiated by the client or (ii) explicitly initiated by the client as an individual service are out of scope of the legislation.

The second case concerns **offers**. An offer provided upon the request and initiative of the client which was not preceded by advertisement (as defined in FinSA) for the specific financial instrument from or on behalf of the offeror does not constitute an offer.

Next steps

Anyone marketing collective investment schemes in Switzerland should immediately consider the implications of the new legislation on their particular situation and ensure that they are compliant either on the basis of the transitional rules or by, generally, adapting to the new regime. This is not an easy task as numerous points remain unclear at this early stage.

FINMA is enabled by the legislation to provide technical guidance in the form of a new ordinance. Furthermore, existing FINMA ordinances and circulars impacted by the new legislation such as FINMA-CISO and the FINMA Circular "distribution" will be adapted. FINMA does not however expect that this will be finalised prior to Q4 2020.

SFAMA will also issue new self-regulation adapted to the substantial changes of the applicable regime. In the meantime, market players will need to keep a lookout for the latest developments and implement changes as practice develops in this new environment.

Final Remarks

The topics addressed above are not to be considered as a road map towards compliance or a comprehensive list of measures to be taken under the new rules. Each of these issues may or may not be of relevance to a service provider depending on its business model. Individual financial service providers must consider all their concrete activities in Switzerland, including but not limited to, the marketing of funds. On this basis, personalised legal advice should be sought to generally ensure compliance not only with the FINSA and FINSO rules but, as the case may be, also with the new licensing obligations resulting from the Financial Institutions Act and Financial Institutions Ordinance which entered into force concomitantly on January 1, 2020.

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