

FinSA/FinIA: proposed follow-up regulation by FINMA

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Introduction

The new Financial Services Act (FinSA) and Financial Institutions Act (FinIA) came into force on 1 January 2020 together with the implementing ordinances (the Financial Services Ordinance (FinSO), the Financial Institutions Ordinance (FinIO) and the Supervisory Organisations Ordinance) passed by the Federal Council. These laws oblige the Swiss Financial Market Supervisory Authority (FINMA) to pass a number of implementing provisions pertaining to selected, mainly technical issues. As a result, FINMA has created a new, streamlined Financial Institutions Ordinance (FinIO-FINMA) and introduced amendments to several current FINMA ordinances and circulars. Three existing circulars will be abolished. At present, FINMA does not intend to create a FINMA ordinance in connection with the FinSA. FINMA will hold a public consultation on the new regulations up to 9 April 2020.

The new FinIO-FINMA regulates:

- the details of professional indemnity insurance for portfolio managers, trustees and managers of collective assets;
- details on calculating the *de minimis* threshold for gaining authorisation as a portfolio manager; and
- risk management and the internal control system for managers of collective assets.

In addition, FINMA must amend its existing ordinances and circulars and will abolish three circulars that have become redundant due to the new legislation. FINMA also proposes amending the threshold for the obligation to identify clients in its Anti-money Laundering Ordinance (AMLO-FINMA) from Sfr5,000 to Sfr1,000 for transactions in so-called 'virtual currencies' (ie, cryptocurrencies). Through these measures, FINMA is implementing the international standards approved in mid-2019 and acknowledging the heightened money-laundering risks in this area.

FinIO-FINMA

FINMA aims to implement the necessary technical implementing provisions for the FinSA and the FinIA as leanly as possible, taking into account the Federal Council's ordinances.

FINMA had to issue certain regulations under various delegation provisions. The new rules introduced by FINMA are designed to be competition and technology neutral. In the new FinIO-FINMA, FINMA mainly regulates the details of professional liability insurance for portfolio managers, trustees and managers of collective assets, details on the calculation of the *de minimis* threshold (ie, the threshold below which a manager of collective assets requires only the less intensive licence as portfolio manager) and on risk management, compliance and the internal control system for managers of collective assets.

Requirements for professional liability insurance for portfolio managers, trustees and managers of collective assets

The requirements are based on the already existing requirements for professional liability insurance for the former asset managers of collective investment schemes under the Collective Investment Schemes Act as before 2020. Newly introduced is a supplementary liability for policies with a claim assertion principle or loss occurrence principle. The scope of insurance coverage refers to the

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geographical and material business area defined in the relevant organisational documents. Professional liability insurance must cover financial losses arising from all activities for which the portfolio manager, trustee or manager of collective assets is legally responsible, regardless of whether the loss was caused by negligence or gross negligence.

This regulation excludes a reduction in case of gross negligence. With regard to portfolio managers and trustees, 70% of the sum insured, which is available for all claims in a year, can be offset against the funds covered by professional liability insurance. This buffer in relation to the full sum insured is provided to ensure that the necessary funds are available in the event of liability, as professional liability insurance replaces part of the funds. With regard to managers of collective assets, insurance protection covers 2% of the totally managed assets for individual claims and 3% of the totally managed assets for all claims in a year.

Definition and calculation of de minimis threshold

The corresponding provisions in the FINMA Collective Investment Schemes Ordinance (CISO-FINMA) mainly on covered assets and asset valuation will be transferred to the new Financial Institution Ordinance-FINMA. The term "managers of collective assets" now also includes managers of pension fund assets. Where appropriate and necessary, the existing provisions will be supplemented with specific principles for managers of pension fund assets.

Risk management, compliance and internal control system for managers of collective assets

The requirements regarding risk management, compliance and internal control systems were essentially taken over from the CISO-FINMA. A new provision is that institutions managing collective investment schemes must assess and document liquidity and other material risks at the level of the individual collective investment scheme at regular intervals under various market scenarios. This provision takes account of the importance of ongoing liquidity management in fund management and, in particular, the requirements of the International Organisation of Securities Commissions. Also new is the obligation for institutions to define appropriate internal liquidity thresholds for each collective investment scheme that they manage.

Proposed changes to AMLO-FINMA

Abolishment of DSFI status

As the FinIA abolished the former status of directly supervised financial intermediaries (DSFI), which were financial intermediaries according to the Anti-money Laundering Act (AMLA) directly supervised by FINMA, such DSFIs must join a self-regulatory organisation for their future AML supervision until the end of 2020 and the AMLO-FINMA requires corresponding amendments. FINMA will more or less keep the old provisions for DSFIs and apply them to portfolio managers, which newly came under prudential supervision according to the FinIA.

New threshold for virtual currency transactions

The Financial Action Task Force recommendation published in mid-2019 on how to deal with so-called 'virtual asset service providers' will be implemented. Accordingly, the threshold for transactions in cryptocurrencies of currently Sfr5,000 will be lowered to Sfr1,000, provided that such transactions do not qualify as money transfers or remittance for which there are other thresholds. According to FINMA, the lowering of the threshold value for the identification of clients in transactions with virtual currencies is necessary due to the increased risks of money laundering and terrorist financing of virtual currencies. This is intended to make criminal transactions (eg, illegal transactions on the dark web or the repatriation of proceeds from cyberattacks) even more difficult in future.

According to FINMA, there are currently approximately 100 members of self-regulatory organisations (SROs) which claim to offer exchange transactions with cryptocurrencies. The lowering of the threshold value applies only to such providers either being portfolio managers supervised by supervisory organisations or other financial intermediaries being a member of an SRO having corresponding regulations in place. For many of these providers, this is likely to lead to additional costs for transactions between Sfr1,000 and Sfr5,000. In such constellations, the client must be reidentified (eg, on the basis of FINMA Circular 2016/7 Video and Online Identification). According to FINMA, this measure aims to meet international requirements that also apply to Switzerland and to protect the reputation of the Swiss financial market.

Easement of AML duties in connection with granting consumer credits

The AML duties in connection with granting consumer credits have been eased by not requiring an identification document to be legalised under certain conditions.

Further proposed material changes

FINMA intends, among other things, to abolish Circular 13/9 on the distribution of collective schemes, as it is of the opinion that the FinSA conclusively regulates the offering of financial instruments. However, the provision on the publication and notification duties of representatives of foreign collective investment schemes will be transferred in a more principle-based form to the CISO-FINMA.

Further, the provisions on market abuse in primary markets as well as organisational duties in FINMA Circular 13/8 on market conduct rules will be extended to portfolio managers and trustees.

Finally, the FINMA Circulars 08/5 on securities dealers and 10/2 on repurchase and reverse repurchase transactions and securities lending and borrowing transactions (Repo/SLB transactions) will be abolished, as these issues are now largely covered by the FinSA, the FinIA and the FinIO. However, FINMA will continue to apply Notes 6 to 9 of the FINMA Circular 10/2 on general declaration and disclosure requirements to clients in connection with SLB transactions.

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