

NEWSLETTER

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FINSA AND FINIA ARE IN FORCE – WHAT IS NEW FOR FOREIGN FUNDS?

The Federal Act on Financial Services (FinSA), the Federal Act on Financial Institutions (FinIA) and their implementing ordinances (FinSO and FinIO) as well as the revised Federal Act on Collective Investment Schemes (CISA) and its revised implementing Ordinance (CISO) entered into force on 1 January 2020. The scope of this newsletter is to show the main impact of this new/revised legislation on foreign funds.

I. QUALIFIED AND NON-QUALIFIED INVESTORS ACCORDING TO THE REVISED CISA

Art. 10 para. 3 CISA provides that professional clients according to Art. 4 para. 3 to 5 or Art. 5 para. 1 and 4 FinSA are deemed to be qualified investors. This means that the following types of clients are defined as qualified investors:

- (i) financial intermediaries pursuant to the Banking Act, FinIA and the CISA, such as banks, fund management companies, portfolio managers and securities firms;
- (ii) insurance companies under the Insurance Supervision Act;
- (iii) foreign clients subject to prudential supervision, such as foreign banks, fund management companies and portfolio managers;
- (iv) central banks;
- (v) public entities with professional treasury operations;
- (vi) pension funds with professional treasury operation;
- (vii) companies with professional treasury operations;
- (viii) large companies (i.e. companies exceeding two of the following criteria: balance sheet total of CHF 20 million, revenue of CHF 40 million, equity of CHF 2 million);
- (ix) private investment structures with professional treasury operations, established for high-net-worth retail clients.
- (x) high-net-worth retail clients and private investment structures created for them who declared that they wish to be treated as professional clients (“**Declared Professional Clients**”).

(A high-net-worth retail client is a person who, either on the basis of his/her personal education and professional experience, or on the basis of comparable experience in the financial sector, has the necessary knowledge to understand the risks associated with the investments and has assets of at least CHF 500,000,

or

who has assets of at least CHF 2 million.

According to the FinSO, assets include financial investments that are directly or indirectly owned by the retail client, such as sight or time deposits, securities including collective investment schemes, structured products, derivatives, precious metals, life insurance with surrender value and fiduciary investments. Directly held real estate and claims related to social insurance schemes may not be counted as assets.)

- (xi) Swiss and foreign collective investment schemes and their management companies which are not already deemed to be institutional clients according to the FINSA may declare that they wish to be treated as institutional clients.

Furthermore, according to Art. 10 para. 3^{ter} CISA and in addition to the list of professional clients in the FinSA, the following category of clients also are deemed qualified investors:

- (xii) Retail clients are deemed qualified investors, if a financial intermediary according to section (i) above or a foreign financial intermediary, that is subject to an equivalent prudential supervision, provides them with portfolio management or investment advice within the scope of a permanent portfolio management or investment advice relationship, subject to the condition that they have not declared in writing or in another form demonstrable via text that they do not wish to be treated as qualified investor.

Retail clients are all other clients who are not qualified investors as defined in sections (i) to (xii) above.

II. DISTRIBUTION OF COLLECTIVE INVESTMENT SCHEMES

While under former legislation the term “distribution” was essential to assessing whether the CISA was applicable or not, the term “distribution” and the rules related to this term have been abolished under the new regime. However, this does not mean that the distribution of funds is not subject to any regulation under the new regime.

In particular, distributors no longer need a FINMA license, but this is compensated by the prudential supervision of all portfolio managers and the duty of client advisers to register in the adviser register (see section VI. hereafter).

Furthermore, the distribution activity is covered by Art. 3 let. c FinSA which defines, among others, the following activity, carried out for a client, as a financial service:

- “(i) Acquisition or disposal of financial instruments; ...”

Art. 3 para. 2 FinSO clarifies that the acquisition or disposal of financial instruments, within the meaning of the section above, is deemed to cover any activity addressed directly to certain clients and that is specifically aimed at the acquisition or disposal of a financial instrument. The distribution activity of a fund qualifies, therefore, as a financial service according to the FinSA, when directed towards the end investors. As a rule, such activities towards supervised financial intermediaries shall not qualify as a financial service according to the FinSA, except when a supervised financial intermediary shall acquire the financial instrument for its own account.

The provision of financial services as defined above triggers the requirement to fulfil the various obligations of financial services providers at the point of sale as set forth in the FinSA, i.e. the obligation of segmentation of clients, the obligation to observe the rules of conduct and the organizational rules, the obligation of registration in the register of advisers and of affiliation with an ombudsman.

III. OFFER

According to Art. 3 let g FinSA, an offer is any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself. The FinSO specifies in more detail, that the offer is usually intended to draw attention to a certain financial instrument and to sell it. The FinSO also mentions constellations, which do not qualify as an offer, for instance the provision of information about a financial instrument to a client upon his/her own initiative without prior advertisement for such financial instrument. Moreover, also the naming of financial instruments without or in connection with actual, general information such as ISIN,

NAV's, prices, risk information, tax figures does not qualify as an offer.

1. Offer to Retail Clients

If an activity directed at retail clients qualifies as an offer, this triggers the following duties: (i) prior approval of the foreign fund by the FINMA and (ii) appointment of a Swiss representative and paying agent.

In such cases, the same rules apply in principle as under the previous regime. In particular, the prospectus used in Switzerland must mention the Swiss representative and paying agent, state that the relevant fund documents can be obtained through the Swiss representative as well as the disclosure about retrocessions and rebates, etc.

Furthermore, a key information document, in substance and form as regulated in the FinSA and FinsO (the "FINSA-KID"), or a foreign document equivalent to the FINSA-KID must be provided to retail clients. According to Annex 10 of the FINSO, only the PRIIP according to EU-Ordinance No. 1286/2014 and the delegated EU-ordinance no. 2017/653 is equivalent. Foreign UCITS-Funds may still provide the UCITS-KIID, which must contain the specific information for Swiss investors, as in the past.

Amendments of the prospectus, the KIIDs and of the articles of association must still be reported to the FINMA without delay; there is no hint that the FINMA will amend its interpretation that this means within a month of the amendments' effective date. The amendments of the prospectus and of the articles of association must also be published within the same time frame, if they were not published beforehand – e.g. at the same time as in the fund's home country. The annual and semi-annual reports must still be filed with the FINMA within four or two, respectively, months from close of business.

Under the new regime, it is no longer necessary to provide investors and the FINMA with the prospectus, the articles of association as well as the annual and semi-annual reports in an official Swiss language. English is also permitted. This also applies to the FINSA-KID and to foreign documents which are equivalent to the FINSA-KID, (i.e. currently only the PRIIP). However, as the UCITS-KIIDs are not considered equivalent to the FINSA-KID they may not – ac-

ording to the currently prevailing opinion - be provided to investors and the FINMA in English, but only in an official Swiss language.

2. Offer to Declared Private Clients (without targeting retail clients)

If an offer is addressed to Declared Professional Clients (without targeting retail clients), a prior FINMA approval of the foreign fund is not necessary, but a Swiss representative and paying agent still need to be appointed. The relevant fund documents, which can be in English, must be available through the Swiss representative. Amendments to the fund documents do not have to be reported to the FINMA, and they may not be published in Switzerland. The same applies to the annual and semi-annual reports, which do not have to be filed with the FINMA.

3. Offer Exclusively to Qualified Investors (without targeting Declared Professional Clients)

If an offer is addressed exclusively to qualified investors (without targeting Declared Professional Clients) as defined in section I above), no specific duties have to be observed according to the CISA. Therefore, a prior FINMA approval is not required. Furthermore, it is no longer necessary to appoint a Swiss representative and paying agent (however, please carefully read section VII below concerning transition rules).

IV. ADVERTISEMENT

Art. 68 FinSA requires that advertising for financial instruments be clearly identified as such, refers to the prospectus and the key information document for the financial instrument in question, and indicates where this documentation can be obtained. Furthermore, advertisements and other information on financial instruments intended for investors must correspond to the information given in the prospectus and the key information document. According to Art. 95 FinSo, any communication directed at investors and intended to draw attention to certain financial services or financial instruments shall be deemed advertisement.

The new Art. 127a CISO provides that the advertisement of foreign collective investment schemes triggers the duties noted under Art. 120 para. 1 and 4 CISA. This means that if advertisement is directed at retail clients, then the foreign fund must be approved

by the FINMA in advance and a Swiss representative and paying agent are to be appointed. If the advertisement for the foreign fund targets Declared Professional Clients (without targeting retail clients), a Swiss representative and paying agent must be appointed. If the advertisement targets only qualified investors as defined in section I above (without targeting Declared Professional Clients), neither prior FINMA approval, nor appointment of a Swiss representative and paying agent is necessary (however, please carefully read section VII below concerning transition rules).

The distinction between offer and advertisement may at times be difficult to make in practice. Each specific case must be carefully analysed as to whether an activity qualifies as an offer or as advertisement and which investor type shall be targeted by such activity.

V. ETFs

With regard to ETFs, it is no longer required that all active share classes of an ETF fund or sub-fund are listed on a Swiss stock exchange. But, at a minimum, the share classes offered to non-qualified investors in Switzerland must be permanently listed on a Swiss stock exchange.

VI. REGISTER OF ADVISERS AND OMBUDSMAN

Client advisers of non-supervised Swiss financial service providers and client advisers of foreign financial service providers may carry out their activities in Switzerland only if they are formally noted in a register of advisers.

Client advisers of foreign financial service providers subject to prudential supervision abroad are exempt from the registration obligation, if they provide services in Switzerland exclusively to professional or institutional clients (as defined in the FinSA; this rule differs to the one provided in the first draft of the FinSO and which was mentioned in our April 2019 newsletter).

Entry in the register of advisers requires proof that the client adviser

- has adequate knowledge of the FinSA rules of conduct and the appropriate expertise required to perform his/her job;

- has professional indemnity insurance coverage or equivalent collateral; and
- is individually, or through the financial service provider for which he/she works, affiliated with an ombudsman in the capacity of a financial service provider.

The register of advisers is maintained by a registration body, which must be approved by FINMA. Client advisers must contact the registration body within six months of the registration body receiving FINMA authorization. The FINMA has not yet authorized a registration body. This is expected to take place during the first half of 2020.

The same transitional period applies to the requirement to be affiliated with an ombudsman. The Federal Department of Finance has not yet authorized an ombudsman. This is expected to happen in the first quarter of 2020.

The duty to affiliate with an ombudsman applies to all financial service providers, Swiss as well as foreign, and regardless of whether they must be entered in a register of advisers.

VII. TRANSITIONAL PERIODS

Two-year transitional periods apply to most of the new requirements under the FinSA. Thereby the new rules of conduct and organizational rules according to the FinSA are subject to a two-year transitional period. Within this period, financial services providers have to implement the new rules of conduct and organizational rules as well as any other obligations subject to the two-year transitional period under the FinSA. So long a financial service provider has not implemented the new rules of conduct and organization, Art. 120 para. 4 of the old CISA (and certain other provisions of the old CISA) continue to apply until the provider has implemented the new rules under the FinSA. For a foreign fund, that is distributed by a financial services provider exclusively to qualified investors (without Declared Professional Clients), this means that a Swiss representative and paying agent must remain in place, until the financial services provider at the point of sale has implemented the FinSA rules of conduct and organizational rules. A foreign fund, which targets only qualified investors (without Declared Professional Clients), may therefore profit from the simplifications under the FinSA only once all its financial services providers at the point of sale have implemented the rules of conduct

and organization according to the FinSA and which must be completed no later than 31 December 2021.

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