

Information series on new financial legislation Part 2: The impact of FinSA and FinIA on Swiss independent asset managers

Introduction

On 15th June 2018 the National Council and the Council of States approved the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). After expiry of the three-month referendum deadline, the Federal Council will decide when FinSA and FinIA will enter into force. At present it is not expected that the referendum will be held, meaning the first part will probably enter into force on 1st January 2019 (Fintech draft), and the rest on 1st January 2020.

FinSA and FinIA will lead to an extensive reorganization of Swiss financial market law. FinSA will regulate all financial services, regardless of who provides them (level playing field). These include in particular asset management and investment advice, but not custody services and only to a very limited extend lending services. FinIA will regulate all financial service providers, with the exception of banks and insurance companies, which remain regulated under the Banking Act (BA) and the Insurance Supervision Act (ISA).

At the same time as FinSA and FinIA, Parliament has included provisions for innovation promotion, better known as the "Fintech licence" or "Banklizenz-light", in the Banking Act (BA), and extended the Consumer Credit Act (CCA) to so-called "crowdfunding". The consultation process for the necessary amendments to the Banking Ordinance and the Ordinance on the Consumer Credit Act has been in progress since 21st June 2018. The amendments to the BA, the CCA and the associated ordinances are to come into force together on 1st January 2019.

In six separate publications we will explain the effects of FinSA and FinIA on the following areas:

1. The Fintech legislation
2. The new prospectus law
3. The independent asset managers
4. The investment advisors
5. Collective investment schemes
6. The law of civil procedure

Background

Under current Swiss legislation, so-called "independent asset managers" ("IAM") are not subject to prudential supervision. They are just subject to the Anti-Money Laundering Act (AMLA) only if they engage in asset management professionally and to the Collective Investment Schemes Act (CISA) if they distribute units of collective investment schemes.

This lack of prudential supervision is not in line with European Union law, and MiFID II in particular. This law provides for prudential supervision of IAMs and stipulates that access to the EU market is reserved for those IAMs from third countries that are subject to equivalent supervision. This equivalence is to be achieved with the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA).

Terminology

The term "independent asset manager" is not provided for in FinSA/FinIA. Rather, a distinction is made between "managers of collective assets" and "asset managers". Both are considered financial institutions according to art 2 FinIA.

Authorisation of asset managers

Who requires authorisation and who doesn't?

Probably the biggest novelty in FinSA/FinIA is the authorisation obligation incumbent on asset managers. FINMA alone is responsible for this authorisation (art 5 (1) FinIA). No authorisation to engage in asset management is required by banks, investment firms (formerly, securities dealers), fund management companies and managers of collective assets. The reason is that these financial institutions already have a licence, which goes further than the authorisation as an asset manager.

What authorisation requirements must be met?

In order for FINMA to grant authorisation to an asset manager, the following conditions must be met:

- The asset manager must affiliate with a supervisory body (art 7 (2) FinIA).
- The asset manager must be affiliated with an ombudsman (art 16 FinIA).

- The asset manager must be organised as a sole proprietorship, commercial enterprise or cooperative (art 18 FinIA).
- In financial terms, there are three requirements: (i) The minimum share capital must amount to CHF 100,000 and be paid in cash. (ii) Securities or professional indemnity insurance is required, the minimum amounts of which are laid down in the ordinances. (iii) Own funds must be at least one quarter of the fixed costs of the last annual financial statements and may not exceed CHF 10,000,000 (art 22 et seq. FinIA).
- The place of management of the asset manager must be in Switzerland (art 10 FinIA).
- At least two qualified managers are required (exceptions are possible, art 20 FinIA), who live within commuting distance of the head office. It is not clear yet whether each asset manager's managerial powers must be separate from those of the board of directors or whether management can be assumed by the board of directors.
- The asset manager must be adequately organised (art 9 FinIA). In addition to the operational activities of asset management, separate risk management, compliance and internal control will also be required (art 21 FinIA).
- Qualified participants (10% or more of the capital or voting rights) must enjoy a good reputation and guarantee that their influence will not jeopardise prudent and sound business practices (art 11 FinIA).
- The persons entrusted with the administration and management of the establishment must provide guarantees of irreproachable business activities, enjoy a good reputation and have the necessary qualifications to perform their duties (art 11 FinIA).
- The Federal Council may lay down further conditions for authorisation (art 7 (3) FinIA).

The details of these authorisation requirements will almost certainly be specified in the ordinances.

Supervision of asset managers

Who is responsible for supervision?

The supervision of asset managers is separate from their authorisation. Authorisation

comes within the remit of FINMA (art 5 (1) FinIA), whereas supervision is the responsibility of a supervisory body (art 61 FinIA). The supervisory body is separate and independent from FINMA and is responsible for the ongoing supervision of asset managers. In turn, the supervisory body is authorised and supervised by FINMA.

What does supervision entail?

Ongoing supervision includes regular checks as to whether the asset manager complies with the requirements of FinIA (see authorisation prerequisites above) and FinSA (see obligations below). These checks may be carried out by the supervisory body itself or by an auditing firm appointed by the asset manager (art 62 FinIA). The audit has to take place at least every four years.

What happens to the AMLA affiliation?

Regardless of FinSA/FinIA, the AMLA remains in force as does the duty of each asset manager to comply with it. However, according to current knowledge, all supervisory bodies will also operate as a self-regulating organisation (SRO). This ensures that AMLA supervision can be carried out hand in hand with FinIA supervision.

The obligations under FinSA

FinSA determines the obligations which each asset manager has to comply with. These obligations must be specified in internal regulations.

FinSA differentiates between private clients, professional clients and institutional clients, whereas institutional clients build a subgroup of the professional clients. The appendix contains an overview of who falls into which client segment. While all the following obligations must be observed with respect to private client, they do not apply with respect to institutional clients at all. No information, documentation and accountability obligations apply when dealing with professional clients.

Information requirements

The asset manager informs its clients about itself and its organisation as well as the risks associated with asset management, any ties to third parties (which is particularly important for retrocessions) and the market offer taken into consideration (art 8/9 FinSA).

Suitability and appropriateness test

Asset managers have to perform a suitability test on their client. This means that the asset manager has to obtain information

about the financial circumstances, investment objectives, knowledge and experience of the client. However, this does not apply to every single transaction but rather to the asset management activity as a whole (art 10-14 FinSA).

The asset manager is not required to carry out an appropriateness test. This is only an obligation for investment advisers.

Documentation and accountability obligation

The agreed financial service, the information gathered about the client and any recommendations to abstain from certain actions must be recorded in writing. Upon request, the client must be provided with a copy of this documentation as well as information about accountability for the managed portfolio.

Transparency and due diligence

Asset managers always have to act in the best interests of the client. FinSA specifies this, but also makes it clear that "in the best interests" is not always the cheapest option, but that in addition to price, time and quality have to be considered (art 17-19 FinSA).

The duty of loyalty

The duty of loyalty also arises from the law of mandates. It requires conflicts of interest to be avoided or disclosed if they cannot be avoided (art 25 FinSA).

Retrocessions are always an issue in this respect: FinSA continues the current case-law on this: Retrocessions are permissible but may only be retained if they have been disclosed to the client and the client has waived them in full knowledge of their amount.

When will FinSA / FinIA enter into force?

It is currently expected that the two laws will enter into force on 1 January 2020. Transitional provisions will however apply as follows.

Existing asset managers

Existing asset managers must register with FINMA within six months of the entry into force (art 74 (2) FinIA). This should therefore be accomplished by 30 June 2020.

Within three years of the entry into force of FinIA they must meet the requirements of FinSA/FinIA and submit an authorisation application to FINMA (art 74 (2) FinIA). The obligation to satisfy the requirements under FinIA therefore do not depend on the FINMA authorisation. During the authorisa-

tion process, the asset manager may continue to operate. However, the precondition is that it fulfils its obligations under AMLA (art 74 (2) FinIA).

Asset managers who commence operations within one year of the entry into force of FinIA.

Asset managers who commence their activities within one year of the entry into force of FinIA must immediately register with FINMA. They must fulfil all authorisation requirements as from the commencement of business. An exception to this is the affiliation with a supervisory body. This affiliation must take place within one year of the approval of the first supervisory body. Within the same period, an application for FINMA authorisation must be filed.

Asset managers who commence operations one year or more after the entry into force of FinIA.

Asset managers who commence their activities one year or more after the entry into force of FinIA, i.e. after 1 January 2021, have to fulfil the above authorisation prerequisites in order to commence business. Engaging in an asset management activity without FINMA authorisation is punishable by law.

FIDLEG SOLUTION as support for compliance with FinSA / FinIA

The implementation of and compliance with FinSA / FinIA require considerable administrative effort. FIDLEG SOLUTION assists you in drawing up the necessary internal regulations and other corporate documents. Discover more on the website of FIDLEG SOLUTION: www.fidlegsolution.ch.

Zurich, September 2018

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Appendix 1: Client segmentation according to FinSA

This overview shows into which client segment a person falls and which opting-in and opting-out possibilities exist. Whereas:

- X determines the statutory customer segmentation;
- Opting-in is the statutory option with an increase of the client protection;
- Opting-out is the statutory option with a decrease of the client protection;
- An increase of the client protection can always be agreed on contractually.

	Private client	Professional client	Institutional client
Bank under BankA		Opting-in	X
Asset manager under FinIA		Opting-in	X
Trustee under FinIA		Opting-in	X
Manager of collective assets under FinIA		Opting-in	X
Fund management company under FinIA		Opting-in	X
Securities firms under FinIA		Opting-in	X
SICAV under CISA		Opting-in	X
Limited partnership for collective investments under CISA		Opting-in	X
SICAF under CISA		Opting-in	X
Representatives of foreign collective investment schemes under CISA		Opting-in	X
Insurance under ISA		Opting-in	X
Foreigners under prudential supervision		Opting-in	X
Central bank		Opting-in	X
National/supranational public entity with professional treasury department		Opting-in	X
Public entity with professional treasury department	Opting-in	X	Opting-out
Pension plan with professional treasury department	Opting-in	X	Opting-out
Company with professional treasury operations	Opting-in	X	Opting-out
Large company according to art 4 (5) FinSA	Opting-in	X	Opting-out
Investment structure for HNWI with professional treasury department	Opting-in	X	Opting-out
HNWI	X	Opting-out	
Investment structure for HNWI with no professional treasury department	X	Opting-out	
Swiss collective investment scheme that does not itself or through its fund management company qualify as institutional client	X		Opting-out
Foreign collective investment scheme that does not itself or through its management company qualify as institutional client	X		Opting-out
All other	X		



Appendix 2: Steps to be taken for the authorization as asset manager?

Asset managers are advised to proceed as follows:

- Select one of the FINMA-approved supervisory bodies.
- Prepare the documents required for affiliation with the supervisory body - FIDLEG SOLUTION will be happy to help (www.fidlegsolution.ch).
- Obtain affiliation with an ombudsman.
- Submit your application for affiliation with the selected supervisory body.
- After receipt of the affiliation confirmation from the supervisory body, submit your application for authorisation to FINMA.
- After receiving FINMA authorisation, inform the supervisory body that authorisation has been granted.