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In a nutshell

3c/2018

Information series on new financial legislation
Part 3: FinSA and FinIA - Impact on collective investment schemes

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 "crowdlending". 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

Impact on the scope of the Collective Investment Schemes Act (CISA)

In the future, CISA will be limited to product-specific themes. Fund management companies and managers of collective investment schemes are transitioning to FinIA. Furthermore, the distributor licence under CISA will be abolished due to the establishment of self-regulation in the area of fund distribution and the disproportionate nature of the prudential supervision of distributors. If they qualify as financial service providers under FinSA, distributors must also comply with the new FinSA rules of conduct, meet the requirements applicable to client advisers and be registered as advisers.

De minimis rule for managers of collective investment schemes

As with CISA, FinIA provides for a de minimis rule whereby managers of collective investment schemes managing collective assets of up to a maximum of CHF 100 million (including leverage) or a maximum of CHF 500 million (without leverage and with no right of redemption in the first five years) are exempted from the requirement to be authorised as managers of collective investment schemes. In addition, managers of pension funds are now also exempt, provided that the pension fund assets managed do not exceed CHF 100 million and, in addition, that at most 20% of the assets of a single pension fund are managed. However, managers of collective assets (collective investment schemes or pension plans), which fall under the de minimis rule, are not completely exempt from the authorisation requirement but are now considered asset managers (of individual assets) and thus remain subject to a supervisory regime at a lower level. However, the investor group for managed collective investment schemes is still restricted to qualified investors in accordance with CISA.

In our opinion, given the wording and interpretation of the relevant provisions of FinIA and CISA, the de minimis rule now covers not only managers of foreign collective investment schemes, but also managers of Swiss collective investment schemes. The law already provided that managers of collective investment schemes who met the exemption conditions of CISA 2 II (h) were not subject to CISA. This de minimis rule is not limited to managers of foreign collective investment schemes. In the case of Swiss collective investment schemes, however, according to the wording of CISA 31 III, investment decisions may only be delegated to managers of collective investment schemes who are subject to recognised supervision. Based on this, FINMA has deduced that the de minimis rule is limited to managers of foreign collective investment schemes. In principle, this de minimis rule under CISA 2 II (h) is transferred to managers of collective assets in FinIA 24. The wording of FinIA 24 II is not restricted to managers of foreign collective assets. The de minimis rule therefore applies to all managers of collective assets and thus to pension funds that are also managers of Swiss collective assets. CISA 31 III, according to which investment decisions for Swiss collective investment schemes may only be delegated to supervised asset managers, remains unchanged. However, this requirement is now met by de minimis asset managers under FinIA 24, since a de minimis manager of Swiss collective investment schemes must be authorised as a manager of individual assets and is also subject to recognised supervision.

Organisational requirements

As far as organisational requirements are concerned, no substantial changes are expected in material terms for the licence holders (fund management companies, asset managers of collective investment schemes) previously governed by CISA and now by FinIA. However, an adaptation of the entire body of internal rules to the new legal bases will be unavoidable for these institutions too. An appropriate business organisation is still an important prerequisite for a licence. At the same time, requirements for essential control functions (internal control system, risk management, compliance) will continue to play a key role. For institutions that are now subject to authorisation, this part of the licensing requirements may constitute a challenging new hurdle. Reporting requirements now include the acquisition or disposal of a qualifying shareholding or an increase or decrease of the qualifying shareholding to attain, exceed or fall below

the thresholds of 20%, 33% or 50% of the capital or votes. Another new general requirement for financial institutions is that they must now be affiliated with an ombudsman.

Liberalisation in relation to customer segmentation

The rules governing customer segmentation in FinSA 4 f. significantly affect the notion of qualified investor, a key concept under CISA. CISA 10, which was amended pursuant to FinSA, also contains a definition of a qualified investor, but now refers to the definition of the professional client according to FinSA. The difference between a professional client according to FinSA and a qualified investor under CISA is that the term "qualified investor" under CISA, in contrast to a professional client under FinSA, also includes clients that have signed a long-term asset management agreement or an investment advisory agreement.

Professional clients under FinSA now include large companies without a professional treasury. However, two of the following criteria must be met (FinSA 4 V): Balance sheet total of CHF 20 million, sales of CHF 40 million, equity of CHF 2 million. Professional clients also include private investment vehicles for high net worth individuals with a professional treasury (FinSA 4 III (i)). Furthermore, high net worth individuals are defined as persons with both training and experience plus assets of at least CHF 500,000 or with assets of at least CHF 2 million (instead of CHF 5 million as previously applicable to collective investment schemes). In addition, for high net worth individuals, a credible statement of professional qualifications and CHF 500,000 in assets will henceforth suffice; proof at the time of acquisition is no longer required (FinSA 5 II). In the case of funds for qualified investors, FINMA will in future not only be able to grant exemption from the rules of CISA but generally from the provisions of all financial market laws (rev. CISA 10 V).

Impact on the distribution of collective investment schemes

To create a level playing field, the fund industry has called for an alignment of the strict distribution rules for collective investment schemes with the offer under FinSA. As a result, the term "distribution" in CISA is deleted and replaced by the term "offer" within the meaning of FinSA. However, the concept of offer under FinSA is more concrete than distribution under CISA. An offer within the meaning of FinSA exists only where there is an invitation to purchase a financial instrument that contains sufficient information about the terms of the offer and the financial instrument itself.

With the deletion of the term "distribution" in CISA, "non-distribution provisions" according to the current CISA 3 are also deleted. "Non-distribution provisions" will partially become offers to qualified investors. Indeed, there should be no offer in the future in the case of asset management contracts either. In most cases, but not always automatically, the existence of an offer constitutes the provision of a financial service under FinSA. A precondition for the applicability of FinSA is that the activities of the financial services provider must be carried out on a commercial basis (FinSA 3 (d)) and be oriented towards a financial service within the meaning of FinSA 3 (c). It is to be assumed that FinSA will be further clarified accordingly in the ordinance. As far as the financial services according to FinSA 3 (c) are concerned, the focus is on the acquisition or disposal of financial instruments, the acceptance and transmission of orders relating to financial instruments and investment advice (where personal recommendations regarding financial instruments are made). Although, presumably, not every offer will qualify as a financial service under FinSA, according to the will of the legislator, this will be the case to a large extent. Since, in some cases no distribution takes place under applicable law, steps must be taken to ensure this does not lead to stricter rules being imposed. The abolition of the obligation to designate a representative and a paying agent for offers to qualified investors (except for high net worth individuals) should prevent any tightening of the rules and at the same time facilitate the distribution to qualified investors.

This new concept will create legal uncertainty during a transitional period but is certainly to be welcomed in the medium and long term, as the regime is generally more liberal, and the same rules apply to all financial instruments. In the implementation of FinSA it must be ensured that the abolition of "non-distribution provisions" does not lead to an undesired tightening of the rules. In the future therefore, there will no longer be any need for a representative or paying agent, particularly if foreign collective investment schemes are offered not only to institutional clients but also to pension funds and companies with professional treasury services.

Conclusion

The distribution of the rules governing collective investment schemes between three acts - CISA, FinIA and FinSA - will increase the complexity of collective investment schemes law, which is already complex and multi-layered. The redesign of distribution law with the creation of the new concept of an "offer", will also lead to a degree of legal uncertainty in the transitional period. However, in the medium and long term, it is in the interests of the fund industry to create a level playing field in this regard as well. From the perspective of the fund industry, transaction costs resulting from the transition to FinIA should not be underestimated. On the other hand, however, there will also be liberalisation in individual areas. Overall, the effects of FinSA and FinIA on Swiss collective investment schemes law can be considered positive in the medium and long term.

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