

## Changes in asset management as a result of the FinSA and FinIA

### 1. Introduction

In regulatory terms, the adoption of the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) will lead to a certain upheaval in the financial services industry in general and in asset management in particular. In practice, of all financial instruments, collective investment schemes will be the least affected. Furthermore, few major changes are expected among licence holders pursuant to the Collective Investment Schemes Act (CISA) and securities traders (new: securities houses) pursuant to the Stock Exchange Act (SESTA). Nevertheless, the cost of transferring these institutions from the CISA and the SESTA to the FinIA and FinSA should not be underestimated.

Following the adoption of the communication on FinSA and FinIA on 4 November 2015, and after the Council of States had debated and approved the new laws on 14 December 2016, the National Council largely approved the legislative proposals in its resolution of 13 September 2017. After clearing up any conflicts, the two new laws and the further legislative amendments are expected to be adopted in the spring session of Parliament, which will take place from 26 February to 17 March 2018. The new legislation is expected to enter into force on 1 January 2019 at the earliest. In 2018, extensive and intensive fine tuning will be necessary to implement the new framework laws, in particular the elaboration of the specific regulations.

### 2. Scope of the FinIA

The scope of the FinIA includes the supervision of all financial service providers offering asset management services. This will subject the asset managers of individual assets (often referred to as independent or external asset managers), the asset managers of pension funds and the trustees of trust assets to supervision. As before, investment advisors will not be subject to prudential supervision, but must comply with the regulations of the new FinSA.

As is already the case in the CISA, the FinIA also includes a *de minimis* rule, according to which managers of collective invest-

ment schemes, who manage collective investment scheme assets of up to CHF 100 million (including leverage) or a maximum of CHF 500 million (without leverage and without a right of redemption in the first five years), are exempted from the licensing requirement as managers of collective assets. In addition, managers of pension fund assets are also exempted, provided that the pension fund assets under management do not exceed CHF 100 million and that a maximum of 20% of the assets of an individual pension fund are managed. However, managers of collective assets (collective investment schemes or pension funds), which are subject to the *de minimis* rule, are not entirely exempted from the licensing requirement. In supervisory terms, they will in future be treated as asset managers (of individual assets) and will therefore continue to be monitored by regulatory regimes at a lower level. In addition, due to the wording and the interpretation of the relevant provisions, the *de minimis* rule no longer applies only to the managers of foreign collective investment schemes, but now also to managers of Swiss collective investment schemes. However, as in the past, investors in the managed collective investment schemes must be qualified investors pursuant to CISA.

### 3. Organisational requirements

With regard to the organisational requirements, no material changes are expected for licence holders (fund managers, asset managers of collective investment schemes) previously regulated by the CISA and now by FinIA. However, even these institutions will have to adjust the entire internal framework to the new legal basis. One important prerequisite for being granted a licence is also an appropriate organisational structure (new: "Appropriate rules for company management"). Here, requirements in terms of the material control functions (ICS, risk management, compliance) will continue to have a high priority. For the new institutes subject to mandatory licensing, this part of the licensing requirements may represent a challenging new hurdle. In addition, uniform regulations are planned for the requirements for guaranteeing trustworthy business activity, outsourcing, reporting requirements, etc. The reporting obligations

include the acquisition or sale of a qualified interest, the enlargement or reduction of the qualified interest in order to achieve, exceed or come under the capital or voting thresholds of 20, 33 or 50%. Another new feature is a general obligation on the part of financial institutions to join an ombudsman.

Asset managers (of individual assets) and trustees, who had previously not been subordinated but now require a licence pursuant to FinIA, are also authorised by FINMA as an authorising body, but will be supervised by supervisory organisations which are to be newly created in accordance with the Financial Market Supervisory Act (FINMASA), which are in turn authorised and supervised by FINMA and hold sweeping powers. In this context, it will be interesting to see where the FINMA authorising authority sets the entry threshold for the licences of the newly subordinated asset managers and trustees and how a uniform permanent supervision by the supervisory organisations will be organised and ensured in detail.

### 4. Scope of the FinSA

The scope of the FinSA is broader than that of the FinIA and includes all financial service providers who provide financial services in Switzerland or for clients in Switzerland. The FinSA is intended for financial service providers, client advisors, and the producers and providers of financial instruments, and essentially contains regulations on further education and training for the subordinated bodies as well as codes of conduct for financial services providers (disclosure requirements, appropriateness and suitability testing, documentation obligations, transparency and due diligence requirements for customer orders), organisational measures for financial service providers (appropriate organisational structure, avoidance and disclosure of conflicts of interest) as well as on the mandatory registration and the registration requirements for client advisors. With regard to the provision of financial instruments, the FinSA governs the prospectus requirement, the content requirements for the prospectus and the publication, the appraisal of the prospectus, the basic information sheet for financial instruments and the liability of the persons

involved. Financial instruments also include structured products and internal special assets for which the CISA hitherto included individual provisions. Client segmentation is an especially important prerequisite (private clients, professional clients, institutional clients) for the appropriateness and suitability test, as well as the requirements for the publication of a prospectus or basic information sheet according to FinSA.

Further rules in the FinSA include the obligation for financial service providers to join an ombudsman and the corresponding procedure before the ombudsman in order to facilitate the enforcement of the law. Other regulations of the FinSA include regulations concerning the obligation to surrender the client dossier, supervision and information exchange, as well as sanctions. On the one hand, these rules will implement the requirements of the European Directive MiFID II and thus strengthen the international competitiveness of the Swiss financial industry and, on the other hand, create a uniform regulatory regime for all financial service providers and financial instruments (level playing field).

In order to create a level playing field, the fund industry has also called for a harmonisation of the strict distribution regulations for collective investment schemes to the offering pursuant to FinSA. As a result, the concept of sales will be deleted in the CISA and replaced by the term "offering" as defined in the FinSA. The term "offering" according to the FinSA is more concrete than "distribution" according to CISA. An offer within the meaning of the FinSA exists only if it is an invitation to purchase a financial instrument which contains sufficient information on the terms and conditions and the financial instrument itself. This new approach will cause legal uncertainty for a transitional period, but will certainly be a welcome development in the medium and long term, as the regime is generally more liberal and the same regulations apply to all financial instruments.

## 5. Transitional provisions

The financial institutions already licensed and supervised to date must comply with the new requirements of FinIA within one year after the entry into force. Those financial institutions which now require a licence under FinIA must report to FINMA within six months of the FinIA entering into force and must satisfy the requirements of the FinIA within two years from its entry into force and submit a licence application. The National Council would like to delete the grandfather clause, which is still planned for the communication on FinIA, which provides that asset managers that have been performing their asset management activities for at least 15 years and do not wish to take on new clients are exempted from the licensing requirement.

Client advisors who are obliged to register must register with the registration office and join an ombudsman within six months of the entry into force of the FinSA. The regulations on the prospectus and the basic information sheet must be complied with within two years of the FinSA entering into force. Further transitional provisions will be included in the ordinances to be drawn up.

## 6. Conclusion

The creation of the two new financial market laws (FinSA and FinIA) will lead to a welcome alignment with the European legal systems that MiFID II and other EU regulations must implement. Fortunately, the Swiss legislator refrained from blindly adopting all the provisions of EU law. It remains to be seen whether these new regulations will be recognised as equivalent in the EU and will thus simplify access to European markets. From the Swiss perspective, the fund industry in particular will benefit from the fact that, in principle, uniform supervisory regulations will apply to all financial service providers and financial instruments.

The distribution of the regulations across different laws, in particular the regulation of collective investment schemes in the three laws CISA, FinIA and FinSA, will lead to a further increase in the complexity of the regulations of the already complex and multidimensional collective investment law. The redefinition of distribution regulations by creating the new concept of "offering" will lead to a certain legal uncertainty during a transitional period. However, the fact that a level playing field is being created also in this regard is in the interest of the fund industry in the medium and long term. The fund industry fears that the transition to the FinIA will lead to transaction costs that should not be underestimated. At the same time, however, there will also be a certain liberalisation in some areas.

## 7. Online-Tool FIDLEG SOLUTION

FIDLEG/FINIG will turn the life of the "independent asset managers" upside down. To ensure compliance with FIDLEG/FINIG Kellerhals Carrard has developed the online tool FIDLEG SOLUTION ([www.fidlegsolution.ch](http://www.fidlegsolution.ch)). It will help you to ensure compliance with the requirements of FIDLEG/FINIG.

Your FIDLEG SOLUTION Team:

Dr. Armin Kühne  
[armin.kuehne@kellerhals-carrard.ch](mailto:armin.kuehne@kellerhals-carrard.ch)  
Dr. Dominik Oberholzer  
[dominik.oberholzer@kellerhals-carrard.ch](mailto:dominik.oberholzer@kellerhals-carrard.ch)  
Tamara Erez  
[tamara.erez@kellerhals-carrard.ch](mailto:tamara.erez@kellerhals-carrard.ch)  
Alexandre Gachet  
[alexandre.gachet@kellerhals-carrard.ch](mailto:alexandre.gachet@kellerhals-carrard.ch)  
Benjamin Marti  
[benjamin.marti@kellerhals-carrard.ch](mailto:benjamin.marti@kellerhals-carrard.ch)

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<b>Basel</b> Hirschgaesslein 11 P.O. Box 257 CH-4010 Basel Tel. +41 58 200 30 00 Fax +41 58 200 30 11	<b>Berne</b> Effingerstrasse 1 P.O. Box CH-3001 Berne Tel. +41 58 200 35 00 Fax +41 58 200 35 11	<b>Lausanne</b> Place Saint-François 1 P.O. Box 7191 CH-1002 Lausanne Tel. +41 58 200 33 00 Fax +41 58 200 33 11	<b>Lugano</b> Via Luigi Canonica 5 P.O. Box 6280 CH-6901 Lugano Tel. +41 58 200 31 00 Fax +41 58 200 31 11	<b>Sion</b> Rue du Scex 4 P.O. Box 317 CH-1951 Sion Tel. +41 58 200 34 00 Fax +41 58 200 34 11	<b>Zurich</b> Raemistrasse 5 P.O. Box CH-8024 Zurich Tel. +41 58 200 39 00 Fax +41 58 200 39 11
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