

SWISS INVESTMENT REPORT* 20

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

New legal framework for the Swiss Financial Market

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New legal framework for Swiss Financial for the Swiss Financial Market

I. Introduction

The current applicable Swiss laws contain just basic regulations on financial products. Financial service providers operate in a sparsely regulated area. Today, customers have limited access to information about service providers and financial products. When the international financial markets collapsed around 2008, it became clear that weak regulation was not enough and that two aspects in particular needed improvement: insufficient customer protection and loose control (self regulation) of financial service providers.

European countries such as Germany, Liechtenstein, Great Britain or France, have introduced different models of state financial market supervision as a reaction to the great loss of during the crisis. In Europe, new regulations had very different effects depending on the country. In this respect, the composition of the financial markets played a major role. Generally, higher costs led to a consolidation of some markets, however, greater customer trust in some markets even led to an increasing demand.

In the year 2012, the Swiss Federal Council mandated the Federal Department of Finance (FDF) in co-operation with the Federal Department for Justice and Police (FDJP) and the Swiss Financial Supervision Authority (FINMA) to draft new comprehensive legal regulations for financial products and service providers. The Federal Council of States as well as the Federal National Council adopted the new laws on June 15, 2018. Both new laws are said to enter into force together on January 1, 2020.

This article provides an introduction to the new law, identifies newly regulated fields, and distinguishes the new law from existing laws. Finally, the effects on foreign providers and customers will find brief consideration.

II. New Financial Services Act (FinSA)

The new FinSA in general sets out rules of conduct, which financial service providers must comply with vis-à-vis their customers. Further, it creates new

information duties like prospectus requirements and, in particular demands for a simple and understandable, so-called **basic information sheet** for financial products. The rules implemented with the FinSA aim to harmonise conditions of competition and to improve customer protection. The FinSA applies to financial service providers, customer consultants and creators and/or providers of financial instruments.

According to the FinSA, a new set of **rules of conduct** must be complied with. This most probably will lead to higher cost, but probably also to an increasing quality of services and trust of customers. The rules of conduct include:

- **Customer due diligence:** Financial service providers must act in the best possible interest of the customer. The law further stipulates expertise, accuracy and conscientiousness.
- **Information Duties:** Financial service providers must ensure better assessment of quality and their own incentives must be apparent. Independent service providers have to disclose third party compensation and forward it to their clients. This will increase consultancy costs in the future. Furthermore, clients need to be informed about counterparty-risks (The risk that the counterparty (e.g. a bank) could become insolvent before the conclusion of a swap transaction, for example, was considered virtually non-existent before the financial crisis).
- **Client Audit and Segmentation:** Financial service providers must gather knowledge about their clients and assign them to either the group of private, professional or institutional customers. This new rule should minimize risks and discrepancy between clients' self-assessment and reality. Until today such assessment of clients was part of self-regulations. With the new FinSA, these rules now will be an integrated part of the law.
- **Documentation and Accountability:** This duty refers to customer contacts and information on services provided. Such documents may serve as evidence in possible civil litigations.
- **Transparency and Diligence:** This includes the duty to execute customer orders in the best possible way. Customers have to be treated equally

and according to the principle of good faith (which of course already applies under the present law). Financial service providers must ensure that the execution of customer orders reaches best possible results evaluated from a financial, temporal and qualitative point of view.

Furthermore, newly implemented **organizational measures** require financial service providers to verify compliance with the FinSA and adopt an appropriate operational organization. This also includes control of skills and education of employees and registration of such staff with the so-called *Register of Client Advisers*, which will be introduced together with the new law.

III. New Financial Institutions Act (FinIA)

The new FinIA mainly unifies authorization requirements and sets a level for minimum organizational measures for financial institutions that are subject to prudential supervision. In particular the new law applies to asset managers of individual client assets, asset managers of collective assets, fund management companies and securities dealers. Financial institutions that exclusively manage assets of persons with family ties or other person who they economically depend on, as well as persons who exclusively hold assets within the framework of employee participation plans, do not fall within the scope of application of the FinIA.

Compared to now, the number of supervised companies will increase significantly. Asset managers of individual client assets, managers of pension plan assets and trustees will be covered by the FinIA. However, not all of the aforementioned service providers will be supervised by the FINMA. Trustees and individual client assets managers will be supervised independent supervisory organisations which themselves need to be authorized by the FINMA. Hence, for some financial institutions a parastatal supervisory model will apply.

Any asset manager, who has not been subject to a prudential supervision but has been running a business for 15 years or more, can benefit from a grandfathering-clause. The clause allows such asset managers to keep

operating without supervision in the extent of further caring for their existing clients.

IV. Impact on the existing Financial Markets Regulations in Switzerland

FinSA and FinIA are two of four different laws which together form the legal architecture of the new financial market. The Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), which regulates the supervision authority (FINMA), sets out the rules and provides instruments for financial market supervision, on the one hand, and the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA), which governs the organisation and operation of financial market infrastructures and the conduct of financial market participants in securities and derivatives trading, on the other hand, complete the new Swiss Financial Market regulatory system.

The FINMA is the supervision authority for the financial market according to the laws on Mortgage Bonds, Contracts of Insurance, Collective Investments, Banking, Stock Market, Anti-Money Laundering, Insurance Supervision and Financial Market Infrastructure. With the new law, the FINMA authorizes independent financial service providers and trustees and has full enforcement competences towards them. However, supervision is not done by the FINMA itself, but, as outlined before, by parastatal supervisory bodies.

The banking sector again is subject to detailed regulations through different laws, such as the Federal Banking Act or the FINMASA. In principle, banks stay under the rule of the Federal Banking Act and will not fall within the scope of the FinIA.

Insurances governed by the Federal Act on the Supervision of Insurance Companies neither fall within the scope of the FinSA, nor within the scope of the FinIA. New provisions are planned to be adapted to the Insurance Supervision Act during the next revision.

V. Significance for Foreign Service Providers

Foreign collective investment schemes experience significant simplification with the new FinSA and FinIA, since the new laws amend the Collective Investment Schemes Act (CISA). A new regime simplifies the offering of collective investment schemes to qualified investors in Switzerland. Namely, the distribution license will be abolished; instead, persons who offer collective investment schemes qualify as financial service providers and must comply with the rules of conduct according to the FinSA. Also, the term *qualified investors* (article 10 CISA) will be defined according to the term *professional clients* of article 4 or 5 FinSA. Therefore the spectrum of possible investors will be broader in the future and particularly include large companies and private investment vehicles.

After January 1, 2020, foreign financial service providers who do not have a Swiss branch or who are not prudentially supervised in Switzerland have to register with the *Register of Client Advisers*. According to article 28 FinSA, customer consultants of foreign financial service providers, in principle, may only operate within the territory of Switzerland after they have successfully been entered into the registry.

VI. Conclusion

On the one hand, financial service providers will meet additional costs for compliance with the new regulations. On the other hand, more clear and unified product information will increase customer trust. The effects of the new regulations on the market can only be evaluated at a later point in time. In other European countries, the effects of the new regulation were sometimes very different.

From a foreign perspective, foreign funds and fund managers will rather benefit from less regulatory hurdles in the future. However, since they qualify as financial service providers according to the new FinSA, a careful

assessment and implementation of rules stipulated by the new law is advisable.

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