BÄR & KARRER

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FinSA/FinIA: Ready for takeoff – the Federal Council releases the final versions of the ordinances implementing the FinSA and FinIA

On 6 November 2019, the Federal Council formally decided that the Federal Act on Financial Services of 15 June 2018 (FinSA) and the Federal Act on Financial Institutions of 15 June 2018 (FinIA) would enter into force on 1 January 2020 with a phasing period of up to two years. Furthermore, the Federal Council published the three ordinances implementing this legislative package, the Ordinance on Financial Services (FinSO), the Ordinance of Financial Institutions (FinIO), and the Ordinance on the Supervisory Organisations. As part of this process, the Federal Council clarified certain topics raised in the consultation process. This briefing summarises the main changes introduced by the final versions of the ordinances in comparison with the draft published in the consultation proceedings.

Clarification regarding the scope

Definition of financial services

The FinSO clarifies the scope of the FinSA in several important aspects: first of all, the FinSA takes a middle of the road approach to **defining the financial service of selling and purchasing financial services**, departing from the much more extensive view taken in the draft ordinance, which included distribution generally as part of this financial service. The FinSO defines selling and purchasing securities as actions directed at a specific client aiming specifically to sell or purchase securities (article 3 (2) FinSO). This definition substantially narrows down the scope of activities in the distribution chain that constitute financial services. It marks a welcome departure from the overreaching approach that was presented in the consultation proceedings.

Consequently, only true sales-related services to clients will be within the scope of the rules of conduct and the organisational duties and, if applicable, client advisor registration obligations of the FinSA. In the same vein, the final version of the FinSO **dropped** the provisions **restricting marketing** of financial instruments. At the same time, it is important not to overstate the scope of this clarification: the materials suggest that a roadshow presentation would be enough to constitute a financial service. This raises a substantial uncertainty considering the fact that an offer does not constitute a financial service. Moreover, article 127a of the Collective Investment Schemes Ordinance (as amended by the FinIO) provides that all advertisement for foreign collective investment schemes triggers the obligation to appoint a Swiss representative and a paying agent.

Corporate finance services and lending

A further clarification concerns the applicability of the FinSA to **corporate finance advisory services**. Indeed, unlike MiFID II which applies under certain circumstances to corporate finance advisory services, as so-called ancillary services, FinSA did not specifically include these services in the catalogue of financial services subject to the new regulations. There was, however, a level of uncertainty about whether such services would nevertheless be in-scope as they constitute – in a very broad sense – advice in connection with the sale and purchase of financial instruments, although this was not the focus of the legislative reform. Therefore, a further positive outcome of the consultation proceedings is the clarification that corporate finance advisory services, including **M&A advisory** and **advice regarding capital raising**, the **placement of financial instruments**, with or without underwriting, and **financing** in connection with such services do not constitute financial services (article 3 (3)(a)-(d) FinSO). Furthermore, the FinSO also clarifies that "*a loan is deemed to **finance the purchase of securities***" only if the **financial service** provider is also engaged in the underlying transactions or is aware that the credit will be used to **fund such activities**. The materials explain that the purpose of this definition is to limit the scope of the FinSA to Lombard lending and similar credit facilities.

Cross-border services – Registration of Client Advisors

The FinSA will mark an important departure from the current regulation as it will subject **foreign service providers** to Swiss law if they offer their services to clients in Switzerland and require their **client advisor to register themselves in the registry of client advisors**. The ordinance clarifies the scope of the reverse solicitation exemption and provides that when a relationship was initiated at the request of a client, all financial services provided to that client are deemed not to have been provided in Switzerland (article 2 (2)(a) FinSO). This exempts from FinSA all transactions carried under the umbrella of, e.g., a portfolio management, an investment advice relationship or even a plain brokerage relationship that were initiated at the initiative of the client. If this was not the case, the exemption covers only the specific financial services requested at the initiative of the client (article 2 (2)(b) FinSO).

Regarding the registration duty, the Federal Council opted to exempt client advisors of **foreign financial service providers** who are **subject to prudential supervision** in their home country from the registration duty provided they exclusively act to provide financial services to professional or institutional clients (article 31 FinSO). The FinSO does not condition this recognition on the equivalence or adequacy of the prudential supervision in the home country. While this will decrease the administrative burden related to registration, this does not fully exempt the foreign service provider from complying with the FinSA. Quite to the contrary, they will continue to need to comply with Swiss law and will have to ensure that they follow the Swiss rules of conduct and have an appropriate organisation, which requires a careful gap-analysis, including for MIFID II compliant service providers.

Rules of conduct

The FinSO also departs from the draft that was published for consultation regarding the rules of conduct. An initial minor clarification relates to the duty to inform clients of **costs and risks**. Unlike the draft that was part of the consultation process, it will **not be necessary to update** the information following any material change. However, this change does not affect the relationship with clients as a matter of contract law, where clients need to be informed of changes in prices and fees and, in line with most general terms and conditions, consent negatively to any such changes.

A further set of clarifications relate to the duty to **hand out a key information document (KID) to private clients.** In connection with **execution-only transactions**, the FinSO specifies that financial service providers are required to hand out a KID to retail clients only if they can be obtain it with a reasonable effort (article 11 (2) FinSO), e.g. if they can be found on the Internet or on a generally accessible platform. Moreover, it will be possible for execution-only clients to agree that the KID will be made available to them after the transaction is completed, provided such consent is provided, separately from the general terms and conditions, in writing or in another form that creates a text-based evidence (article 11 (3) FinSO).

On a related point, the FinSO clarifies explicitly – in line with the explanatory materials – that financial instruments that are produced for a specific private client do not need to have a KID, thus excluding tailor-made OTC derivatives from the duty to prepare and hand out a KID (article 80 (2) FinSO).

Finally, the FinSO provides further details regarding the **information** that needs to be collected for the **suitability tests**. Specifically, article 17 requires the financial service provider to consider as a part of the client's financial situation the nature and amount of recurring income, their wealth and current and future financial liabilities. Furthermore, the definition of, the investment objectives must include in particular the investment horizon, the purpose of the investment, the propensity to accept risk and investment restrictions (if any). Based on this information, the financial service provider should prepare a risk profile and for portfolio management and ongoing investment advice agree on an investment strategy with the client.

Prospectus

Content of the Prospectus and Relief

The FinSA will introduce a new comprehensive review and approval regime for prospectuses. The FinSO does not depart in a substantive manner from the drafts that were published in the consultation process. In essence, the content requirements were finalised and provide explicitly for **exemptions for well-known seasoned issuers**, the issuance of **subscriptions rights**, and the issuance of securities without a simultaneous admission to trading or alternatively for an admission to trading without a concurrent public offering of securities.

Exemption under the Banking Ordinance

In addition, the FinIO amends the Bank Ordinance to define the circumstances under which a **public bond offering does not constitute a public offer to take deposits**, which would trigger licensing requirement under the Federal Act on Banks and Saving Institutions of 8 November 1934 (Banking Act).

Swiss issuers of debt securities will continue to be exempt from the Banking Act, if: (a) the offering is based on a **prospectus under the FinSA** or (b) they **publish** in a similar form the **following information:** (i) the name, seat and a short description of the business of the issuer, (ii) interest rate, issuance price, subscription period, issuance date, duration and redemption terms, (iii) the latest audited financial statements and interim financial statements at entity and consolidated level, to the extent available, (iv) information on any guarantor or security provider and (v) the representative of the bondholders if applicable pursuant to the terms of the bond (article 5 (3)(b) Banking Ordinance).

This approach constitutes a pragmatic framework that will allow Swiss issuers to continue to carry out public offerings in full reliance on an exemption to prepare a prospectus under the FinSA without triggering the more burdensome licensing requirements under the Banking Act.

Trustees and Portfolio Managers

As part of the regulatory reform project, portfolio managers and investment managers will require a licence from FINMA and will be subject to ongoing prudential supervision by supervisory organisations.

Exemptions for Family Trusts and Private Trust Companies

To decrease the administrative burden in closely connected relations, the FinIA exempts persons who act as **portfolio managers or trustees for the family members** from the licensing requirements (article 2 (2) (a) FinIA). In this connection, the FinSO takes a broad view of the definition of family relations: in addition to family members and entities directly or indirectly controlled by family members, the FinIO now explicitly exempts asset managers and trustees controlled by trusts and foundations that were **created by a family member from the scope of the FinIA** (article 4 (2) FinIO). Importantly for a number of trusts and foundations, this exemption also applies when the vehicle also pursues a public or philanthropic purpose (article 4 (3) FinIO). This exemption creates room for single family office and private trust companies to operate without requiring a licence from FINMA or being subject to prudential supervision.

Moreover, the FinIO provides for the possibility of FINMA exempting a dedicated trust company that is held and monitored by a financial institution to act as trustee for a family trust (article 9 (3) FinIO).

As a further response to the feedback from the consultation process, the FinIO **dropped** the requirement to hold a **specific formal qualification** to act as a senior executive of a portfolio manager or a trustee and instead it provides for a general requirement regarding training and professional experience: a qualified senior executive will need to have at least five years of professional experience as a trustee or a portfolio manager (as the case may be) and training of at least 40 hours in the relevant area (article 25 (2) FinIO). In addition, they will be required to pursue continuing professional education to retain their qualification (article 25 (3) FinIO).

Exemption from Direct Supervision for Affiliates of a Financial Group

The FinIO further provides that FINMA may exempt **portfolio managers and trustees that are part of a financial group** that is supervised by FINMA from the obligation to join a supervisory organisation. However, the ordinance now specifies that they will need to be closely integrated in the risk management, internal control system and internal audit regime of the financial group.

Adjustments to the Corporate Governance Requirements

The FinIO also fine-tunes a number of elements regarding the corporate governance requirements applicable to asset managers and trustees. As a response to the feedback from the consultation process, the FinIO **dropped** the requirement to hold a **specific formal qualification** to act as a senior executive of a portfolio manager or a trustee and instead it provides for a general requirement regarding training and professional experience: a qualified senior executive will need to have at least five years of professional experience as a trustee or a portfolio manager (as the case may be) and training of at least 40 hours in the relevant area (article 25 (2) FinIO). In addition, they will be required to pursue continuing professional education to retain their qualification (article 25 (3) FinIO).

Furthermore, it raised the threshold for FINMA to require an asset manager or a trustee to have a **majority of non-executive directors on its board**. The threshold will be reached if: (a) (i) the asset manager or trustee employs ten or more full-time equivalents or (ii) if its annual gross revenue exceeds CHF 5 million and (b) the scope and type of activities so require (article 23 (4) FinIO). The threshold for FINMA to require an **internal audit** remains, by contrast, at CHF 10 million (article 26 (4) FinIO).

The FinIO also raised the threshold for asset managers and trustees to be require to have **independent risk management** and **internal controls** in place. Asset managers and trustees will thus be exempt from this requirement if; (a) (i) they employee five or fewer full-time equivalents or (ii) have an annual gross revenue of less than CHF 2 million and (b) pursue a business model without significant risks (article 26 (2) FinIO).

Transitional Regime

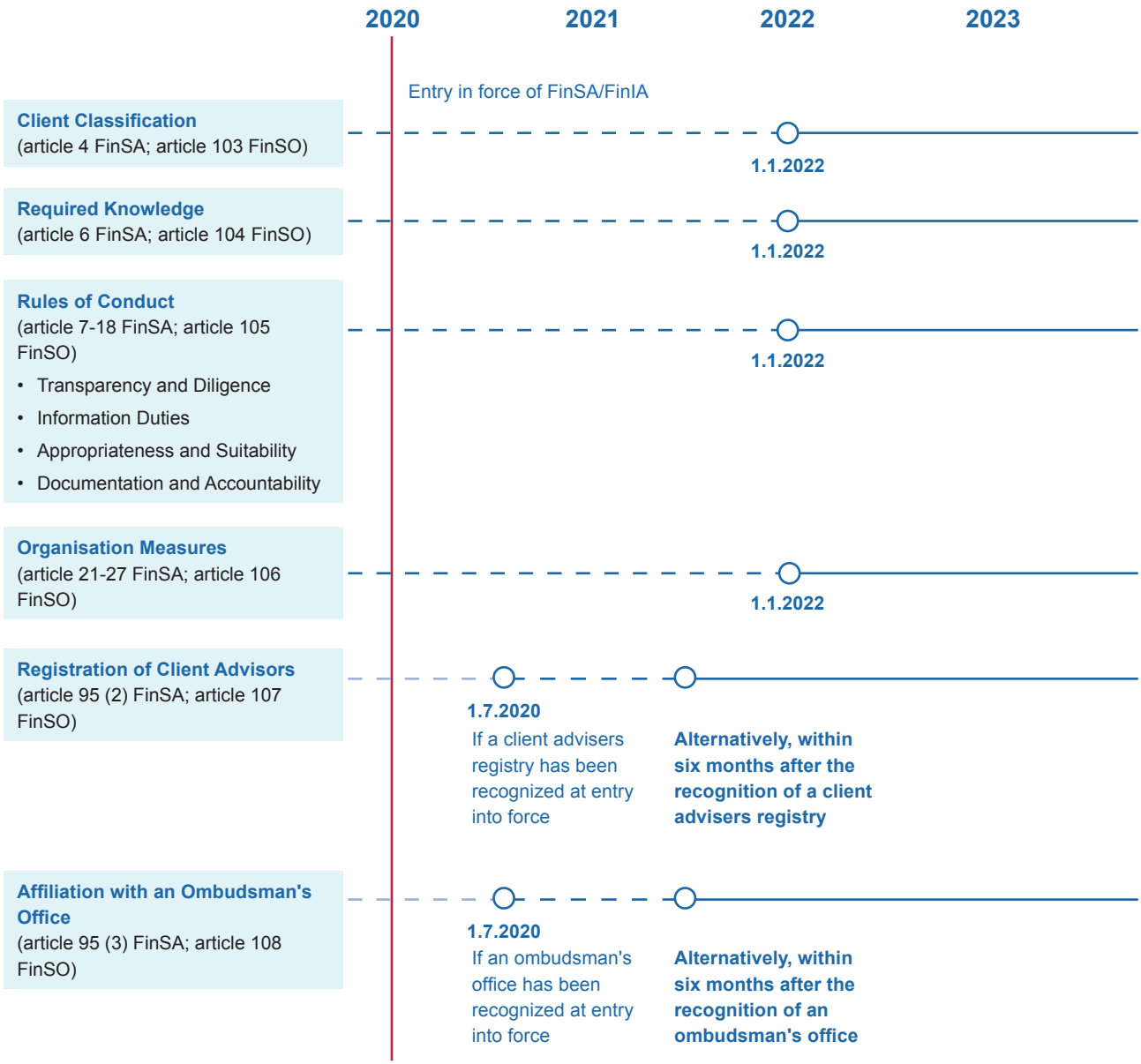
The FinSA and FinIA are due to enter into force on 1 January 2020. This will allow issuers to rely on the substitute compliance regime provided for by the FinSA and potentially use **EU approved prospectuses** and **KID** under the PRIIPS-Regulation, as soon as the 1 January 2020.

However, to allow financial service providers to transition into the new regime, the FinSO and FinIO provide for a generous transitional regime. Financial service providers will have **two years to comply with the rules of conduct and organisational obligations** under the FinSA (article 105 (1) and 106 (1) FinSO). They will be allowed to **make the switch** before this deadline expires by notifying their audit company of this decision and the date on they intend to comply with the FinSA (article 105 (2) and 106 (2) FinSO). Until such time, they will continue to be subject to the applicable regime that was relevant to them, e.g. under the Securities Exchange and Securities Trading Act, under the Collective Investment Schemes Act or other applicable rules of self-regulation that were recognised as a minimum standard by FINMA (article 105 (3) and 106 (3) FinSO).
An important side effect of this modified regime relates to the **offering of foreign collective invest-**

ment schemes to qualified investors. The FinSA amends the Collective Investment Scheme Act to restrict the requirement to appoint a Swiss representative and paying agent to cases where the fund is offered to professional investors, to the exclusion of retail clients who opted to be treated as professional investors (article 120 (4) of the Collective Investment Schemes Act). However, as a consequence of this modified regime, the requirement to appoint a Swiss **representative and paying agent will continue to apply during the two-year transition period** unless they are exclusively offered by financial service providers who made the switch and comply with the FinSO (article 105 (3)(e) and 106 (3)(e) FinSO). In line with the existing regime, this requirement will not apply when collective investment schemes are not distributed in Switzerland, including when the collective investment scheme is exclusively marketed to regulated qualified investors.

Furthermore, financial service providers will have six months from the entry in force of the FinSA to join an **Ombudsman's office**, if such an office is recognized upon entry in force of the FinSA. Alternatively, they will have six months from the date an Ombudsman's office is recognized to join it (article 95 (3) FinSA and 108 FinSO). A similar regime has also been put in place for client advisors who are subject to the **registration duty**: they will have six months to register, if a client advisor is authorised upon entry in force of FinSA and, otherwise, six months from the authorisation of a register of client advisors (article 95 (2) FinSA and 107 FinSO).

Finally, the transitional regime for **asset managers and trustees** has not changed following the consultation proceedings. In essence, if they are already member of an SRO, they will have six month to report to FINMA their intent to seek a license under the FinIA and then have three years to satisfy the requirements under the FinIA, including affiliate with a supervisory organization and file an application to be supervised by FINMA (article 74 (3) FinIA). If not, they can either join an SRO by the end of 2020 or join a supervisory organization and file an application to be supervised by FINMA within the same deadline (article 92 (1) FinIO).


2020
2021
2022
2023
Entry in force of FinSA/FinIA
Client Classification
(article 4 FinSA; article 103 FinSO)
1.1.2022
Required Knowledge
(article 6 FinSA; article 104 FinSO)
1.1.2022
Rules of Conduct
(article 7-18 FinSA; article 105 FinSO)
• Transparency and Diligence
• Information Duties
• Appropriateness and Suitability
• Documentation and Accountability
1.1.2022
Organisation Measures
(article 21-27 FinSA; article 106 FinSO)
1.1.2022
Registration of Client Advisors
(article 95 (2) FinSA; article 107 FinSO)
1.7.2020
If a client advisers registry has been recognized at entry into force
Alternatively, within six months after the recognition of a client advisers registry
Affiliation with an Ombudsman's Office
(article 95 (3) FinSA; article 108 FinSO)
1.7.2020
If an ombudsman's office has been recognized at entry into force
Alternatively, within six months after the recognition of an ombudsman's office

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