

**Briefing November 2018**

## FinSA/FinIA: Impact on Offering Foreign Collective Investment Schemes into Switzerland

On 15 June 2018, the Swiss parliament adopted the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA). On 24 October 2018, the Swiss Federal Council opened a consultation process regarding the three ordinances implementing these acts, the Financial Services Ordinance (FinSO), the Financial Institutions Ordinance (FinIO) and the Supervisory Organisation Ordinance (SOO), which will last until 6 February 2019. The two acts are expected to enter into force together with the ordinances on 1 January 2020 and will introduce an entirely new regulatory framework governing the Swiss financial markets. This briefing focuses on the impact of the FinSA and the FinIA on the offering of foreign collective investment schemes into Switzerland. These rules entail major revisions resulting in a significant easing of the regulatory burden for distributing foreign collective investment schemes.

### FinSA and FinIA also affect Regulation of Collective Investment Schemes

The FinSA and the FinIA amend the regulatory framework for collective investment schemes set out in the Collective Investment Schemes Act (CISA). The purpose of these amendments is to create a level playing field for the provision of financial services and financial products. These changes will impact Swiss collective investment schemes, their asset managers and the distributors of collective investment schemes and will introduce a new regime for the offering of foreign collective investment schemes to qualified investors in Switzerland.

The following changes to the CISA are of interest: First, the existing distribution regime for foreign collective investment schemes will be replaced by

a new regime which simplifies the offering of foreign collective investment schemes to qualified investors in Switzerland. Second, the regulatory requirements will no longer be triggered by the "**distribution**" of foreign collective investment schemes but by an "**offering**" which is defined more narrowly. Third, the distributor license will be abolished and persons offering investment schemes will not be subject to a specific licensing requirement. Instead, a person offering collective investment schemes will qualify as a **financial services provider** pursuant to the FinSA and, hence, must comply with the rules of conduct under the FinSA. Finally, the criteria for qualified investors will be broadened to include large companies, regardless of whether they have professional treasury operations or not, as well as private investment vehicles created for high-net-worth individuals provided they have professional treasury operations.

## **Simplifications for Offering Foreign Collective Investment Schemes to Qualified Investors in Switzerland**

The revised CISA will introduce a new regime for the offering of collective investment schemes to qualified investors which will replace the existing distribution regime for foreign collective investment schemes.

This new regime will substantially **decrease the compliance burden** for offering foreign collective investment schemes to qualified investors. Under the revised CISA, it will be possible to **offer** foreign collective investment schemes to **all qualified investors** (except for high-net-worth individuals who have elected to be treated as a professional client/qualified investor) without appointing a Swiss representative and a Swiss paying agent. This substantially extends the range of qualified investors to whom a collective investment scheme may be offered without retaining a Swiss representative and a Swiss paying agent to cover not only regulated Swiss financial institutions, but also, among others, occupational pension funds, companies with a professional treasury and public entities with a professional treasury.

However, this new regime will not go so far as to include high-net-worth individuals who have opted to be treated as qualified investors. If they are approached as part of the offering, it will still remain necessary to appoint a Swiss representative and a paying agent.

### **From "Distribution" to "Offering"**

Moreover, the new regime will be based on the "offering" of foreign collective investment schemes: a term which is defined more narrowly than distribution.

Today, the regulatory requirements are triggered by any form of distribution of collective investment schemes, which is broadly defined to include any form of offering or advertising with just a few limited exemptions. Under the new regime, the decisive factor is whether a foreign collective investment scheme is "offered" in Switzerland. The FinSA defines an offer as any invitation to acquire a financial instrument that contains sufficient information on

the conditions of the offering and the terms of the financial instrument. Under the new regime, any offer will trigger the application of the Swiss rules on the offering of foreign collective investment schemes in Switzerland. However, based on the consultation report, the definition of an "offering" will be more limited than the current understanding of "distribution".

**Generic advertising** (including pre-marketing activities) for foreign funds and other collective investment products in print and electronic publications and in connection with roadshows will in many cases not contain the information required by law to constitute an offering. If, however, specific collective investment schemes are presented to potential investors at marketing events such as roadshows and the investors have the opportunity to acquire the collective investment schemes by simply accepting an offer at the event or thereafter, this activity, as a whole, will be deemed to be an offer and will trigger the respective regulatory consequences. As a result, drawing a line between the advertising and offering of collective investment schemes will require a case-by-case assessment.

In addition, the **geographical scope** of the new regime will also be more **limited** since it only covers offerings in Switzerland and no longer applies to offerings from Switzerland. This will allow Swiss distributors to offer foreign collective investment funds to clients abroad even from Switzerland without needing to comply with the Swiss regulatory framework.

At the same time, certain exemptions, which exist under the current law, will no longer be explicitly excluded from the definition of an offering under the FinSA. However, most of them will continue to apply as a practical matter under the new rules. For example, although the exception allowing for investors having an investment management or an investment advisory mandate will be dropped, retail clients who have entered into an investment management or an advisory agreement on a long-term basis with a regulated financial institution will be deemed to be qualified investors in the sense of the revised CISA to whom foreign collective investment schemes can be offered without the requirement of the collective investment scheme of having to appoint a paying agent and a Swiss representative.

## **Alignment of Qualified Investor Definition with Client Segmentation According to the FinSA**

The revised CISA maintains the well-established distinction between qualified investors and non-qualified investors. However, the definition of a qualified investor will be adjusted to align it with the client segmentation provided for by the FinSA: **all professional investors** under the FinSA will be qualified investors. Additionally, as is currently the case, retail clients who entered into an investment management or an advisory agreement on a long-term basis with a regulated financial institution will be deemed to be qualified investors unless they opt out from this regime.

Under the new regime, regulated financial intermediaries, regulated insurance companies, central banks, pension funds with professional treasury operations, public entities with professional treasury operations and companies with professional treasury operations continue to be considered as qualified investors under the revised CISA. However, the definition of regulated financial intermediaries will be expanded to include not only banks, securities firms (formerly securities dealers), fund management companies, asset managers of collective investment schemes but also portfolio managers and trustees, because they will be subject to prudential supervision under the FinIA.

Furthermore, **investment vehicles** for high-net-worth individuals with a professional treasury department and **large companies** (i.e. companies which exceed two of the following criteria: (i) balance sheet of CHF 20 million, (ii) sales of CHF 40 million or (iii) equity of CHF 2 million) will be deemed to be professional investors under the FinSA and consequently qualified investors under the revised CISA.

Finally, a **high-net-worth individual** will continue to be able to opt to be treated as a professional investor and as a qualified investor under the revised CISA but the threshold will be lowered. A person can opt for this treatment if he or she can credibly declare (i) that he or she holds assets of at least CHF 500,000 and has sufficient professional knowledge and experience to understand the risks related to the investments; or that he or she (ii) holds at his or her disposal assets

of at least CHF 2 million. The draft FinSO clarifies, in line with the existing regulatory framework, that high-net-worth status should be determined on the basis of financial assets, to the exclusion of, among others, direct investments in real estate and assets held in an occupational pension plan. According to the draft FinSO, persons who jointly own the funds can only declare an opting-out together. Furthermore, in the case of common funds, the draft FinSO provides that at least one person must have the requisite education and experience to be a high-net-worth individual by virtue of their knowledge and experience. In such a case, that person must have the power to dispose of the assets alone.

## **Repeal of the Distributor Licence – Offering of Collective Investment Schemes as a Financial Service**

A further important development is the repeal of the licensing requirement for distributors of collective investment schemes ("distributor license"). Under the CISA as amended by the FinSA and the FinIA, distributors of collective investment schemes will no longer need a licence from FINMA or, for foreign distributors, in their home jurisdiction to carry out their activity in Switzerland.

Concurrently, the same activity is likely to constitute a financial service pursuant to the FinSA and, hence, the distributor will need to comply with the rules of conduct provided under the FinSA. Indeed, under the FinSA, units of collective investment schemes are deemed to be financial instruments and the purchase, sale and transfer of such units as well as the acceptance of orders, issuing recommendations (investment advice) and investing in such units on behalf of clients (asset management) will qualify as a financial service, if it is carried out for clients on a professional basis. Consequently, the information duties and the rules of conduct under the FinSA will apply to such activity.

Furthermore, client advisers of financial service providers which are not supervised by FINMA, such as investment advisers, as well as client advisers of foreign financial services providers will have to be registered in the register of advisers (unless

an exemption applies). This requirement will also apply to foreign client advisers who deal exclusively with qualified investors. The Federal Council proposes in the draft FinSO only to exempt client advisers of foreign financial service providers that are subject to prudential supervision and that are part of a financial group, which is subject to the consolidated supervision of FINMA, from the registration obligation if they provide their services in Switzerland exclusively to professional investors.

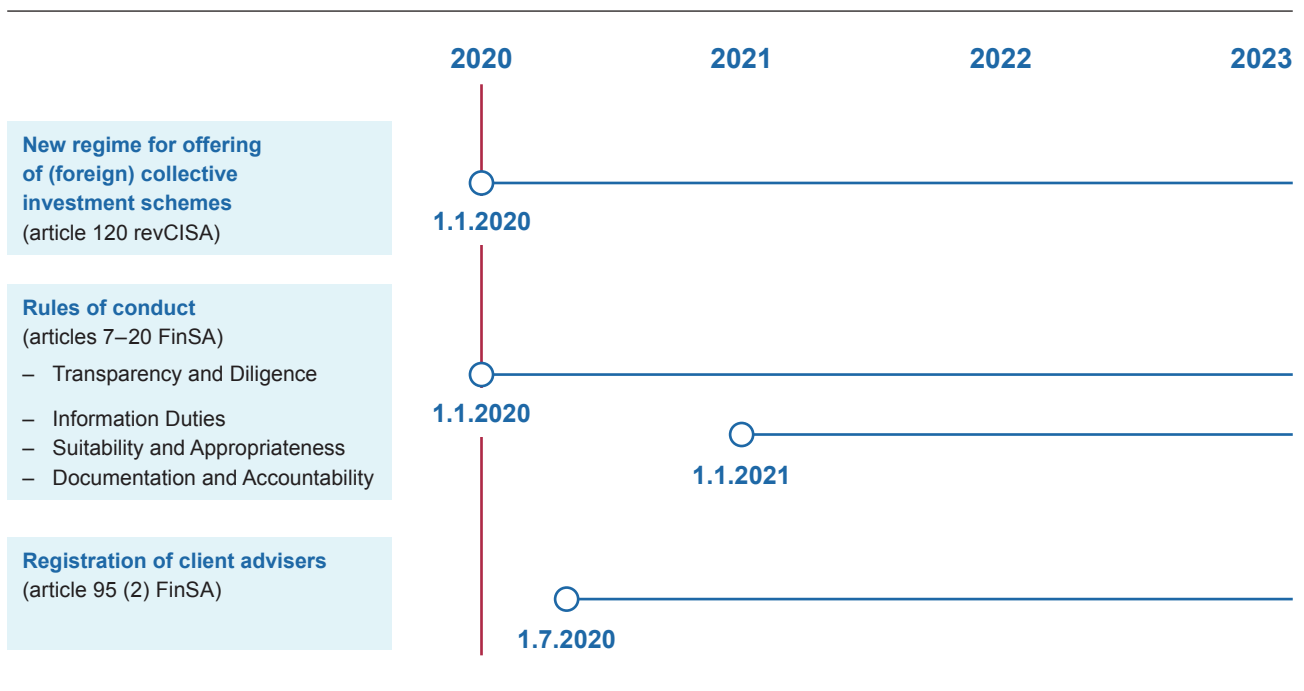
## Outlook

The new rules regarding the offering of collective investment schemes and the abolition of the prudential licensing requirements for distributors of collective investment schemes are expected to enter into force on 1 January 2020. However, the new regulations also entail the application of the new status as a financial service provider for persons providing

financial services in Switzerland or to clients in Switzerland. As such, they call for a careful assessment of the specific impact of the new regulation on a case by case basis.

Foreign funds and their managers will most likely benefit from the new regime since the regulatory burden for offering collective investment schemes in Switzerland to qualified investors will be reduced compared to the current regime. In turn, market participants qualifying as a financial service provider will have to comply with the rules of conduct set out in the FinSA and their client advisers may have to register themselves in the register of advisers by the end of the transition period on 1 July 2020.

Finally, the draft FinSO provides for a transition period of one year, until 1 January 2021, for financial service providers to comply with their new information duties and rules of conduct.



## Authors



**Prof. Dr. Rashid Bahar**  
Partner  
T: +41 58 261 53 92  
rashid.bahar@baerkarrer.ch



**Dr. Martin Peyer**  
Senior Associate  
T: +41 58 261 52 76  
martin.peyer@baerkarrer.ch

Further Contacts:

**Frédéric Bétrisey**  
Partner  
T: +41 58 261 57 05  
frederic.betrisey@baerkarrer.ch

**Paolo Bottini**  
Partner  
T: +41 58 261 58 00  
paolo.bottini@baerkarrer.ch

**Urs Brügger**  
Partner  
T: +41 58 261 50 00  
urs.bruegger@baerkarrer.ch

**Dr. Daniel Flühmann**  
Partner  
T: +41 58 261 50 00  
daniel.fluehmann@baerkarrer.ch

**Dr. Peter Hsu**  
Partner  
T: +41 58 261 53 94  
peter.hsu@baerkarrer.ch

**Eric Stupp**  
Partner  
T: +41 58 261 50 00  
eric.stupp@baerkarrer.ch

**Bär & Karrer Ltd.**  
Brandschenkestrasse 90  
CH-8027 Zurich  
Telephone: +41 58 261 50 00  
Fax: +41 58 261 50 01  
zurich@baerkarrer.ch

Quai de la Poste 12  
CH-1211 Geneva  
Telephone: +41 58 261 57 00  
Fax: +41 58 261 57 01  
geneva@baerkarrer.ch

baerkarrer.ch  
Zurich, Geneva, Lugano, Zug

