

Briefing July 2020

Federal Act on Financial Services (FinSA) / Federal Act on Financial Institutions (FinIA): Deadlines for the End of the Transition Regime Start

On 1 January 2020, the Federal Act on Financial Services of 15 June 2018 (FinSA) and the Federal Act on Financial Institutions of 15 June 2018 (FinIA) entered into force, subject to a phasing-in period of up to two years. The new regulations rely to a significant extent on private organisations taking over (public) supervisory functions and handling the alternative dispute resolution schemes for client disputes. Six months into the FinSA and FinIA becoming effective, this institutional framework is now essentially in place, and several transitional periods within which market participants have to take action or comply with the regulations have been put in motion.

Specifically, with effect from 6 July 2020, the Swiss Financial Market Supervisory Authority (FINMA) authorised the first two supervisory organisations which will be responsible for the supervision of portfolio managers and trustees under the FinIA. It also admitted, with effect from 20 July 2020, the first registration body for client advisers pursuant to the FinSA. Finally, the Federal Department of Finance recognised, with effect from 24 June 2020, a number of ombudsman's offices for financial services providers under the FinSA.

FINMA authorises first two supervisory organisations

Under the FinIA, **portfolio managers and trustees** (as well as certain precious metals trade assayers) require a licence by FINMA and are subject to its supervisory oversight and enforcement powers. However, the ongoing prudential supervision will be exercised by private **supervisory organisations**

authorised by FINMA to perform this regulatory function.

Effective 6 July 2020, FINMA authorised the first two of these supervisory organisations: (a) the **Organisme de Surveillance des Instituts Financiers (OSIF)** based in Geneva, which was established by the existing anti-money laundering (AML) self-regulatory organisation Association Romande des

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Intermédiaires Financiers ARIF, and (b) the **Organisation de Surveillance Financière (OSFIN)** based in Neuchâtel, with offices in Zurich and Lugano, established under a collaboration between the two existing AML self-regulatory organisations Polyreg Allg. Selbstregulierungs-Verein and Organismo di Autodisciplina dei Fiduciari del Cantone Ticino. Three further applications for an authorisation as supervisory organisation are still pending with FINMA.

The authorisation of the supervisory organisations by FINMA triggers the **deadline** for portfolio managers and trustees to join a supervisory organisation.

New financial intermediaries who intend to commence a regulated activity as a portfolio manager or trustee within one year from the coming into force of the FinIA (i.e. by the end of the year 2020) will continue to be able under the transitional regime to take up their activity as soon as they have joined a recognised AML self-regulatory organisation for AML purposes. However, they now have a deadline of **6 July 2021** (i.e. within one year from the first supervisory organisations having been authorised): (i) **to be admitted as a member of one of the supervisory organisations**, and (ii) **to file a licence application** with FINMA.

Existing portfolio managers and trustees that did not require an authorisation from FINMA under the previous regulations (but only a membership with a self-regulatory authority for AML purposes), and are newly subject to a licence requirement according to the FinIA, are not specifically affected by the timing of the authorisation of the first supervisory organisations. They had to report to FINMA by 30 June 2020 that they intend to apply for a licence. Having done so, they are now only required to satisfy **the requirements of the FinIA, join a supervisory organisation and submit a licence application with FINMA by the end of 2022** (i.e. within three years from the FinIA entering into force). They may continue to conduct their business activities during such time if they are subject to supervision by a recognised AML self-regulatory organisation (specific transitional rules apply to portfolio managers and trustees that were previously directly supervised by FINMA for AML purposes).

Up until the end of the notification period on 30 June 2020 (see above), FINMA had received notifications from 1,934 existing portfolio managers and 272 existing trustees that intend to apply for a licence. We therefore expect that FINMA will face an intense workload to process all applications.

Portfolio managers and trustees commencing their activities from **1 January 2021** onwards will need to have a **FINMA licence and be affiliated with a supervisory organisation** before they can start their regulated business. In light of the impending workload for FINMA and the supervisory organisations, it is advisable to initiate the application process well in advance.

FINMA admits registration body for client adviser register

Client advisers of: (a) domestic financial services providers within the meaning of the FinSA that are not subject to prudential supervision, or (b) foreign financial services providers that provide financial services in Switzerland or for clients in Switzerland, **must register with a registration body admitted by FINMA** (subject to an exemption for client advisers of foreign prudentially regulated financial services providers that only serve professional or institutional clients in Switzerland). As part of the registration process, the applicants will need to prove to the satisfaction of the registration body that they have the necessary professional expertise and fulfil further requirements such as having professional indemnity insurance and working for a financial services provider that is affiliated to an ombudsman's office. The purpose of the client adviser register is to allow clients to ascertain, based on the public register, that their client adviser has satisfied the criteria for registration and to create awareness among registrants regarding their duties under the rules of conduct of FinSA. However, the registration is not associated with any ongoing supervision of client advisers by the client adviser register or FINMA. The enforcement of the FinSA against client advisers and financial services providers that are not supervised by FINMA therefore remains in principle limited to the criminal law provisions sanctioning certain specific violations of the duties provided for by the FinSA.

FINMA announced that it will admit, effective as of 20 July 2020, the first registration body for client advisers: the **regservices.ch** register operated by BX Swiss (an affiliate of one of the two Swiss stock exchanges). Further registration bodies may still be admitted. The admission of this first registration body by FINMA triggers a **transitional period of six months, i.e. until 19 January 2021**, within which affected client advisers may commence or continue their activities, but will have to submit an application to the registration body (submission within the deadline is sufficient).

Federal Department of Finance recognises ombudsman's offices

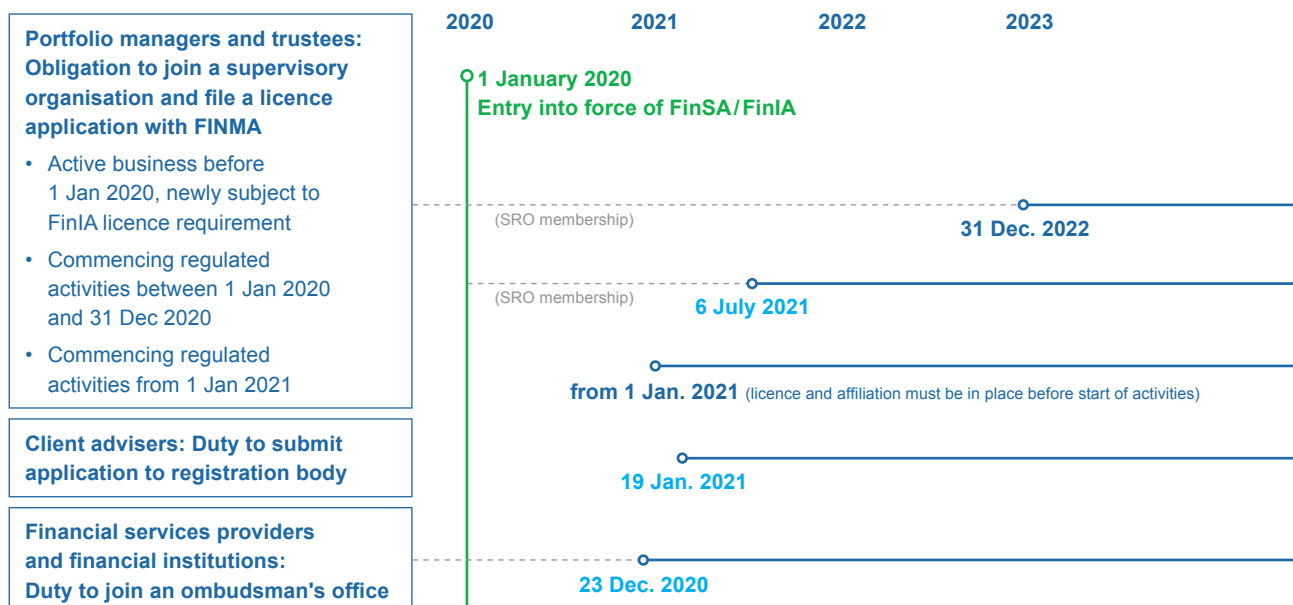
Ombudsman's offices as an impartial dispute-settlement body are a new customer protection instrument in Swiss financial regulation. Financial services providers within the meaning of the FinSA (incl. foreign financial services providers that provide financial services in Switzerland or for clients in Switzerland) and financial institutions within the meaning of the FinIA are in principle required to join a recognised ombudsman's office before commencing their business activities. However, during the phasing in period of the new regulations, the requirement to join is subject to a **transitional period of six months from the date on which the first ombudsman's office is recognised** (submission of the application within the deadline is sufficient).

The Federal Department of Finance (FDF) as the competent authority recognised the first ombudsman's offices according to the FinSA with **effect from 24 June 2020** (an updated list of recognised ombudsman's offices can be found under: <https://www.efd.admin.ch/efd/en/home/das-efd/ombudstelle-nach-fidleg.html>). Therefore, affected financial services providers and **financial institutions must file an application with an ombudsman's office by 24 December 2020** at the latest.

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As it stands, the law does not provide for any exemptions from the duty to join an ombudsman's office. Therefore, all financial services providers subject to the FinSA are required to join an ombudsman's office, even if they only deal with professional or institutional clients or if they are affiliated with a similar organisation in their home jurisdiction. However, a **legislative project is currently pending in Swiss parliament that would exempt (foreign and domestic) financial services providers from such a duty if they serve professional or institutional clients (within the meaning of the FinSA) only**. This is a sensible exemption in view of the fact that the ombudsman's office is an institution for the protection of consumers and no such consumer protection is required in the business with professional and institutional clients.

It is likely that this revision will come into force only after the expiry of the 24 December 2020 deadline. Financial intermediaries that would benefit from the exemption should monitor the development of the legislative process and communications by the FDF and take a view as to whether affiliation could be dispensed with even before the revised law comes into force. It is possible that the revised law could be passed by the second chamber of Swiss parliament in its September session and it should be considered at this point whether a non-affiliation under the conditions of the future exemption can be expected to remain without consequence even if not yet in force.



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