Switzerland: new financial markets legislation

On 1 January 2020, the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) went into effect. The two legislations have considerably modified the country's financial market law architecture. Consisting, by and large, of the Collective Investment Schemes Act (CISA) and its implementing ordinances, FINMA Circulars as well as SFAMA self-regulation, the previous regime had an essentially sectoral structure. By contrast, the new laws set out uniform cross-sector rules, thus translating a horizontal approach.

The FinIA establishes the authorisation conditions and organisational requirements for financial institutions subject to prudential supervision. The FinSA articulates rules on the provision of financial services and the offering of financial instruments. The present article offers an overview of some key changes that the new regime has brought about.

1. Independent asset managers

Pursuant to the FinIA, independent asset managers include three different financial institutions, namely, *portfolio managers*, *trustees* and *managers of collective assets*. Portfolio managers are persons who are mandated to manage assets in the name and on behalf of clients. Their management activities include the acquisition and administration of financial instruments, as well as personal recommendations on transactions with such instruments. A trustee is someone who manages or holds a separate fund for the benefit of the beneficiaries or for a specified purpose, thereby using the vehicle of a trust within the meaning of the 1985 Hague Trust Convention. A manager of collective assets is a person who manages assets in the name and on behalf of either collective investment schemes or occupational pension schemes. With respect to the last category of independent asset managers, the FinIA sets out several *de minimis* rules.

As financial institutions, independent asset managers need to obtain an authorisation (managers of collective assets that are already subject to other equivalent official supervision in Switzerland being exempted). FINMA grants such authorisation upon satisfaction of several conditions (some of which do not apply to managers of collective assets). These conditions include the affiliation to an ombudsman's office at the latest on assuming their activity, the effective place of management in Switzerland, a guarantee of irreproachable business conduct, a good reputation, especially of the persons responsible for the administration and management and of the qualified participants; the proof of supervision by a supervisory organisation in line with the Financial Market Supervision Act, the listing in the commercial register, an adequate collateral or coverage by a professional liability insurance; sufficient own funds. Portfolio advisors and trustees need to have an appropriately defined risk management system in place as well as an effective internal control structure to ensure, among others, compliance with legal and internal provisions. In general, their management body must consist of at least two qualified persons. A person is deemed qualified to manage business operations if he or she has received appropriate training in the activities of a portfolio manager or trustee and at the time of assuming management duties has had sufficient professional experience in portfolio management for third parties or within the framework of trusts. What is more, portfolio managers and trustees that have their registered office or place

of residence in Switzerland must have one of the required legal forms: sole proprietorship, commercial enterprise, or cooperative.

2. Client segments

The FinSA establishes the two main client segments: "retail clients" and "professional clients". Professional clients are, *inter alia*, the following types of investors: (a) financial intermediaries as defined in the 1934 Banking Act; (b) insurance companies as defined in the 2004 Insurance Supervision Act ; (c) foreign financial intermediaries and insurance companies subject to an equivalent form of prudential supervision; (d) central banks; (e) public entities with professional treasury operations; (f) occupational pension schemes and other occupational pensions institutions with professional treasury operations; (g) companies with professional treasury operations; (h) large companies within the meaning of the law; (i) institutional clients, including national and supranational public entities with professional treasury operations; (j) private investment structures with professional treasury operations created for high-net-worth retail clients; as well as k) high-net-worth retail clients and private investment structures created for them that have opted out. High-net-worth retail clients need to meet one of two criteria, which the new legislation has lowered significantly. As of now, they must have at their disposal assets of at least CHF 500,000 and benefit, based on training, education and professional experience or comparable experience in the financial sector, from the necessary knowledge to understand the risks associated with the investments, whereby a credible declaration on the part of the investor suffices (before: a proof at the moment of the acquisition). Alternatively, high-net-worth retail clients need to have assets of no less than CHF 2 million (before: CHF 5 million).
The FinSA also comprises an opting-out/in regime, under which certain clients may change the client segment, including the associated level of protection. High-net-worth retail clients and private investment structures created for them may ask to be treated as professional clients (opting-out). Inversely, professional clients who are not institutional clients may declare that they wish to be treated as retail clients (opting-in). The declaration to change the client segment requires the written form or any other verifiable form of text. It should be noted that CISA continues to distinguish between "qualified investors" and "non-qualified investors", which, although not completely but to large extent, correspond to the two categories introduced by the FinSA.

3. Rules of conduct

Financial service providers must comply with the rules of conduct set out in the FinSA. Drawing on the MiFID framework, the rules of conduct comprise a range of supervisory duties, *inter* alia, to inform their clients; to review the appropriateness or suitability of the services they propose; to document and, to render account of, their services; to ensure transparency and care with respect to their services; and to register.

3.1. Duty to inform

A financial service provider is under the obligation to inform its clients about its name, address, field of activity and supervisory status; the possibility of initiating mediation proceedings

before a recognised ombudsman; and the general risks associated with financial instruments. In addition, they must provide information on personally recommended financial service and the associated risks and costs; the business affiliations with third parties in connection with the financial service offered; and the market offer taken into account when selecting the financial instruments. In the case of personal recommendations of financial instruments, they need to make available, if required, a key information document and a prospectus. The information may be made available to clients in standardised form on paper or electronically. Advertising must be indicated as such.

3.2. Duty to review the appropriateness and suitability of financial services

Financial service providers that offer investment advice or portfolio management services are obliged to perform a suitability review. Depending on the extent of services they propose, the review may cover the clients' financial situation, investment objectives, experience and knowledge, as well as the question if the financial instruments are appropriate for the prospective clients. It is important to note that the assessment of the clients' knowledge and experience relates not only to individual transactions but to the financial services offered.

3.3. Duty of documentation and rendering of account

Financial service providers must document in an appropriate manner, among others, the financial services agreed with clients and the information collected about them, as well as the financial services actually provided for clients. When providing investment advice, they also need to document the needs of the clients and the grounds for each recommendation leading to the acquisition or disposal of a financial instrument. At the clients' request, the financial service providers must provide them with a copy of the aforementioned documentation. Moreover, and also upon request, they need to render account of the financial services; the composition, valuation and development of the portfolio; and the costs associated with the financial services. Professional clients may expressly release financial service providers from applying the aforementioned rules.

3.4. Duty of transparency and care in client orders

Financial service providers are required to uphold the principles of good faith and equal treatment when handling client orders. In particular, they must ensure in the execution of their clients' orders that the best possible outcome is achieved in terms of cost, timing and quality. Regarding cost, they shall consider not only the price of the financial instrument but also the expenses incurred in the execution of the order and the compensation from third parties. If applicable, financial service providers need to prepare, and bring to the attention of their staff, internal directives on the execution of client orders. They may borrow financial instruments from clients' portfolios as a counterparty or act as an agent for such transactions only if the clients have given their prior and express consent to these transactions.

4. Duty to register

Both client advisers of Swiss financial service providers not subject to supervision in accordance with the Financial Market Supervision Act and client advisers of foreign financial service providers may perform their activity in Switzerland only if they are entered in a register of advisers. Subject to certain conditions, the Swiss government may exempt prudentially supervised client advisers of foreign financial service providers from the duty to register. Client advisers are entered in the register of advisers if they prove that they have sufficient knowledge of the code of conduct set out in the FinSA and the necessary expertise required to perform their activities, have taken out professional indemnity insurance or that equivalent collateral exists; and are themselves affiliated to an ombudsman's office in their capacity as a financial service provider or the financial service provider for which they work is affiliated to an ombudsman's office. Client advisers shall not be entered in the register of advisers if they have been convicted of a number of criminal offences mentioned in the FinSA or have been prohibited from performing the registrable activity pursuant to the Financial Market Supervision Act.

5. "Offer" (rather than "distribution") of financial instruments

The new regime has replaced the concept of "distribution" (established under the CISA) by the more general notion of "offer". Pursuant to the FinSA, an offer is any invitation to acquire a financial instrument which comprises sufficient information on the terms of the offer and the financial instrument itself. Applicable to all financial instruments, it represents a type of commercial financial service.

As a consequence of the conceptual change outlined in the previous paragraph, all CISA provisions pertaining to distribution have been repealed. In particular, the requirement to obtain a license as a distributor no longer applies. Instead, a person offering financial services now needs to register in the advisor register (see section 4 hereabove). What is more, the exceptions to distribution as set out in the CISA have been abolished. However, they either have been integrated in new provisions or continue to apply materially. Examples for such exceptions include the case of reverse solicitation (i.e. the provision of information and the subscription of collective investment schemes at the instigation or at the own initiative of the investor), as well as the existence of a discretionary management agreements with an independent asset manager.