

NEW SWISS FINANCIAL MARKETS REGULATION – Paradigm Shift in Draft Ordinances to the Financial Services Act (“FinSA”) and the Financial Institutions Act (“FinIA”):

The draft ordinances of the Federal Council to FinSA (“FinSO”) and to FinIA (“FinIO”) that have recently been issued for consultation (end of consultation period: 6 February 2019) contain a number of helpful clarifications and also the advent of a comprehensive new regime for providing cross border financial services as well as for the offering of securities into Switzerland. In this newsletter we would like to shed some light on selected points which – should no changes be made – could have a major impact on the way business is done compared to what the market participants have been used to over the years and what was anticipated under FinSA/FinIA before the publication of the draft ordinances:

NOTABLE POINTS:**1. Extension of the definition of “financial services” / No exemption for foreign financial service providers:**

- The definition of “financial services” in FinSA lists the following activities vis-à-vis clients in relation to financial instruments: receipt and transmission of orders, portfolio management, investment advice, granting of loans to finance transactions as well as the acquisition or disposal of financial instruments.
- The FinSO now sets out additionally that any activity which is not transaction-related advice but which is specifically aimed at the purchase or disposal of a financial instrument, as e.g. the intermediation of financial instruments, falls under “acquisition or disposal of financial instruments” and hence is to be deemed a financial service.
- In its explanatory report (“ER”) the Federal Council sets out that the said activity now mentioned in the FinSO must be covered, as otherwise – in contrast to the current legislation in the area of collective investment schemes (“CIS”) – no conduct rules or registration requirements would be applicable to market participants engaging in such activity. However, it should be noted that the said addition to the definition of foreign financial services in the FinSO relates to any financial instrument and not only to CIS.
- The Federal Council has renounced granting any exemptions from the prior registration requirement to financial service providers subject to foreign prudential supervision only.

2. Introduction of reverse solicitation rules for financial services by foreign financial service providers:

- According to FinSA financial service providers subject to FinSA are persons who provide financial services on a commercial basis in Switzerland or for clients in Switzerland.
- FinSO sets out that financial services which are rendered by a foreign financial service provider:
 - based on a client relationship (e.g. investment management or advisory agreement) which has been entered into on the explicit initiative of the client; or
 - financial services which have been requested by the client via correspondence outside Switzerlandare outside the scope of applicability of FinSA/FinSO.
- FinSA/FinSO do not contain explicit rules on advertising of financial services (as opposed to advertising of financial instruments).

3. The definition of “offer” remains vague

Definition of “offer”: According to the FinSO an offer pursuant to the FinSA is any communication which (a) contains sufficient information on (i) the offering conditions and (ii) the financial instrument and (b) usually aims to draw attention to and to dispose of a particular financial instrument. The FinSO also defines the term “advertising” which is used in the FinSA in the context of the prospectus and basic information sheet requirements and states that “offers” and “advertising” vis-à-vis clients who may not acquire the financial instrument concerned is not permissible. It is set out in the ER that such clients may not be shown any such offers or related advertising materials by whichever means and that the distinction between simple advertising and an offer will not always be easy to draw. Neither the FinSA nor the FinSO contain a definition of the “offeror”.

SOME ANTICIPATED CONSEQUENCES:

Points 1 and 2:

The extension of the definition of “financial services” via the FinSO could have a great impact on **cross border financial services**, as any individual person engaging in an activity falling under such definition vis-à-vis a client in Switzerland (e.g. intermediation of any financial instruments) would be subject to the **prior Swiss client advisor registration requirement** (presumed deadline for registration application: 30 June 2020) as well as the Swiss rules of conduct under the FinSA (presumed deadline for compliance: 31 December 2020) while the reverse solicitation exemptions for such financial service seem to be limited.

A violation of the Swiss client advisor registration duty is subject to relatively severe penal consequences.

The same registration and compliance requirements apply if a **Swiss presence** is involved that is not licensed by the Swiss Financial Market Supervisory Authority (FINMA). However, if the Swiss presence advertises the services of a foreign financial service provider regulated in its country of domicile as an (i) asset manager, (ii) an asset manager of collective investment schemes (iii) a securities dealer or a (iv) bank, the **foreign financial service provider** will have in addition to obtain a **licence for establishing a representative office in Switzerland**. Such requirement already exists under the current legislation with respect to categories (iii) and (iv), but will be newly introduced with respect to categories (i) and (ii). In case of the latter categories the FINMA will have to be notified by 30 June 2020 by the foreign financial service provider concerned. The deadline for the application for the respective licence and compliance with the respective requirements ends on 31 December 2022.

Point 3:

As a clearer shape of the definition “offer” as well as a definition of the “offeror” would need to be found once the new legislation is applied, it would seem recommendable to comply with any requirements applicable to “offers” in cases of uncertainty. This would in particular apply with regard to the offering of CIS to non-qualified investors in Switzerland which seem to be subject to a FINMA-approval requirement even if only a single non-qualified investor is concerned. Such approval would be needed as from the entry into force of the new legislation on 1 January 2020.

For more information feel free to contact any of our investment fund specialists (www.nastra.ch).

Note: None of the information contained herein is to be regarded as legal advice.