

NEW SWISS FINANCIAL MARKETS REGULATION –Ordinances to the Financial Services Act (“FinSA”) and the Financial Institutions Act (“FinIA”) finally resolved by Swiss Federal Council / Impacts on foreign Fund Providers, Asset Managers and Investment Advisers:

On 6 November 2019 the Swiss Federal Council finally formally resolved the implementing ordinances to FinSA (“FinSO”) and to FinIA (“FinIO”). The effective date of the new legislation will be 1 January 2020. However, transition regimes apply in respect of most of the new rules.

A. HIGHLIGHTS:

- The new legislation in particular introduces:
 - for financial service providers (“FSP”):
 - new requirement of affiliation to an ombudsman’s office;
 - new client segmentation requirements (private, professional and institutional segments);
 - new duties of conduct and organisation as well as client adviser registration requirement.
 - a general authorisation requirement for asset managers (including also any Swiss presences of foreign asset managers promoting the services of such foreign asset managers) while the fund distributor’s licence is abolished.
- The Swiss registration requirement for foreign funds offered or advertised to non-qualified investors in Switzerland is maintained (with English becoming a possible filing language).
- In the area of offering or advertising foreign funds to qualified investors in Switzerland (without registration) a Swiss representative and paying agent will only be required if such activities are directed to high net worth individuals who have chosen not to be treated as private clients (opting-out).
- **Within a transition period of two years financial service providers may decide to adopt the new duties of conduct and organisation. Before such adoption the old duties of conduct and organisation as well as the old Swiss representative and paying agency requirements will remain applicable during the two year transition period.**
- The new authorisation, registration and ombudsman requirements (mentioned above) require official action to be taken within 6 months (the latter two subject to registration and ombudsman’s offices being set up). Immediate implementation measures for foreign fund providers as from 1 January 2020 are minimal: They have to ensure that advertising materials are designated as such.
- As under the new legislation permanent advisory clients not having opted in as a non-qualified (private) investor are a new category of qualified investors, they must be informed of such fact and about the respective risks as well as their possibility to opt in. We think that it is advisable to inform such clients without delay and not to wait for the earlier of the next client contact and two years, as the text of the ordinances would allow.

B. THE NEW KEY TRIGGERS OF REGULATORY REQUIREMENTS REPLACING THE TERM “DISTRIBUTION”:**1. Financial Service:**

- 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 regarding financial instruments, portfolio management, investment advice, granting of loans to finance transactions in financial instruments as well as the acquisition or disposal of financial instruments.
- The FinSO now sets out additionally that any **activity directly targeting particular clients** which is **specifically aimed at the purchase or disposal of a financial instrument** falls under “acquisition or disposal of financial instruments” and hence is to be deemed a financial service. The final explanatory report by the Federal Council (“ER”) sets out that such activity would be an activity in advance of a formal acquisition or disposal of financial instruments but not yet be transaction-related advice and adds that the **regulation of such activity is meant to protect the end-client**. The ER mentions that “road shows” by distributors of foreign funds would be captured by the provision. On the other hand the ER based on a provision in FinSO sets out that if a foreign FSP makes an offer as reaction to a request for proposal from a Swiss domiciled investor this activity as such would be outside the scope of the FinSA, provided that the client advisers of the foreign FSP physically would remain outside Switzerland.
- Anyone **who professionally renders a financial service in Switzerland or for clients in Switzerland** is deemed a **financial service provider**.
- **Any Swiss and foreign FSPs must** ①**affiliate themselves to an ombudsman's office** (deadline: six months from the official recognition of an ombudsman’s office, i.e. 30 June 2020 at the earliest), ②**allocate their clients to the private, professional or institutional client segment** (deadline 31 December 2021) and ③**observe specific rules of conduct** (depending on client segment: duties regarding information, assessment of appropriateness or suitability, documentation and rendering of account, conflicts of interest (including also in context with retrocessions) and **rules of organisation** (transition period until 31 December 2021; within the transition period Swiss FSP can opt in to the new regime by written declaration to their regulatory auditor). The respective provision in the FinSO does not refer to foreign FSP. We think that foreign FSP who distribute foreign funds having appointed a Swiss representative should be able to opt in by written declaration to the Swiss representative of the respective foreign fund. However, we are not sure whether an early opting in to the new regime would always be advantageous.
- Any ④**individuals who make contact with a client and offer it a specific financial service are deemed client advisers and must be entered in a new client adviser register** (deadline: six months from the authorisation of a respective registration office, i.e. 30 June 2020 at the earliest). This applies in particular also to the promotion of segregated mandates on behalf of FSP. Amongst other the entry into said register requires a specific professional insurance policy (might not apply if the FSP has a min. capital of an equivalent of CHF 10 million) and the proof of sufficient professional knowledge and familiarity with the applicable rules of conduct (it seems that the registration office(s) grant a deadline until 31 December 2021 for such proof).
- **The FinSO grants an exception from the registration requirement (⑤) for client advisers acting on behalf of foreign prudentially supervised FSP rendering services only to professional and institutional investors**. Please note that certain professional client categories (e.g. pension funds) may opt in to be treated as private clients.
- A violation of the prior Swiss client advisor registration duty is subject to relatively severe penal consequences.

2. Offering and Advertising of Financial Instruments:

- 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. Neither the FinSA nor the FinSO contain a definition of the “offeror”.
- The FinSO defines the term “advertising” - which is used in the FinSA in the context of the prospectus and basic information sheet requirements – as “any communication directed to investors which is aimed at drawing attention to particular financial services or financial instruments”.
- The Collectives Investment Schemes Ordinance as revised by the FinIA states in the essence that “advertising” foreign funds triggers the same Swiss registration, representation and paying agency duties as the offering of foreign funds.

C. AMENDMENTS TO SWISS REGISTRATION, REPRESENTATION AND PAYING AGENCY DUTIES:

1. FINMA registration for offering (and advertising) of UCITS to non-qualified investors:

- **All fund documents of UCITS to be registered in Switzerland may be filed in English** (the FINMA may or may not apply a transition period);
- Foreign FSP may newly in principle distribute UCITS registered in Switzerland to any client, including non-qualified investors, provided the client advisers of the foreign FSP are entered in the client adviser register.
- Newly, foreign ETFs may be approved by FINMA also if only the share class(es) effectively offered to non-qualified investors in Switzerland is/are listed on a Swiss stock exchange.

2. Offering (and advertising) of funds to qualified investors:

- Swiss representative and paying agency requirement in the area of offers to *qualified* investors is abolished, except for opted out high-net-worth individuals and private investment structures without professional treasury operations created for them, e.g. offering of foreign funds to pension funds (if not opted in as private clients) falls outside such requirement. Please note that to benefit from these new rules the FSP must opt in to the new regime and fulfil in particular the new rules of conduct and organisation (section B.1 fourth bullet point above).

3. General:

- **As from 1 January 2020 it must be ensured that advertising materials are designated as such.**
- **Abolition of the legal basis for self-regulation by SFAMA:** Under the new regime the Swiss representative does not need to be a party to distribution agreements anymore. Please note that to benefit from these new rules (where desirable at all) the FSP must opt in to the new regime and fulfil in particular the new rules of conduct and organisation (section B.1 fourth bullet point above).
- A so called **basic information sheet** (which may be substituted by a PRIIPs-KID separately supplemented by Swiss disclosures) **will be required for any foreign fund offered to a private client** (i.e. also in cases of offering of non-UCITS to qualified investors of the category advisory clients with long-term agreements who have not opted in). The deadline for the implementation of such requirement is 31 December 2021.

D. ABOLITION OF FUND DISTRIBUTOR'S LICENCE AND NEW AUTHORISATION REQUIREMENT FOR SWISS PRESENCES OF FOREIGN ASSET MANAGERS:

1. Abolition of Fund Distributor's licence

- The new legislation does not foresee the fund distributor's licence anymore. Therefore as from 1 January 2020 any existing fund distributor's licences will expire and no duty to notify the regulator of changes effective as from 1 January 2020 will apply in respect of such licences.

2. New Authorisation Requirement for Swiss Presences of Foreign Financial Institutions

- If a Swiss presence advertises the services of a foreign financial institution regulated in its jurisdiction of origin e.g. as an (i) asset manager, (ii) an asset manager of collective investment schemes (iii) a securities dealer or a (iv) bank, the **foreign financial institution** will have to obtain a **licence for establishing a representative office in Switzerland**. Such requirement already existed under the old legislation with respect to such Swiss presences of foreign financial institutions of categories (iii) and (iv), and is 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 institution concerned. The deadline for the application for the respective licence and compliance with the respective requirements ends on 31 December 2022. Please note that regular visits in Switzerland by employees of a foreign financial institution may – depending on the circumstances – already be deemed establishing a Swiss representative office.
- While an authorisation requirement for branches of categories (ii), (iii) and (iv) already existed under the old legislation an authorisation requirement for branches of foreign financial institutions of category (i) is newly introduced with the same notification and authorisation deadlines as respective representative offices.
- Foreign management companies of funds may still neither establish Swiss branches nor representative offices.
- The ER alludes to a possibility of a “downgrading” of the Swiss authorisation (in which case e.g. a foreign asset manager of foreign funds (category (ii)) could obtain a licence for a representative office in Switzerland of an asset manager (category (i))), provided that such minor activity is also engaged in by the foreign main entity to a substantial part. Whether such “downgrading” of the Swiss authorisation would be possible for foreign management companies of funds or not will need to be clarified by the Swiss regulator.

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.