

Financial Services Act (FinSA) & Financial Institutions Act (FinIA) Impact on foreign funds

January 28, 2020



Carnegie Fund Services Ltd. is the leading independent legal representative of foreign collective investment schemes in Switzerland, authorized and regulated by FINMA since 2003. We provide a one stop shop solution, including representation, paying agency, tax reporting and general distribution. Furthermore, we provide in-house translation services in five languages. Our staff includes a team of lawyers, qualified translators and a number of experienced fund administration specialists in our operations department, allowing us to offer a comprehensive, efficient and cost-effective service. We represent more than 800 funds managed by more than 110 different fund managers.

Contents

Financial Services Act (FinSA) and Financial Institutions Act (FinIA) - Impact on foreign funds	2
I. Client/Investor Segmentation	3
II. New notions around fund marketing in Switzerland	4
III. Language of Fund Documents	5
IV. Ombudsman and Register of Advisers.....	6
Summary table	7
V. Transitional Periods	8

Third edition: all additions from the second to the third edition are indicated in blue italic print.

Financial Services Act (FinSA) and Financial Institutions Act (FinIA) - Impact on foreign funds

On June 15, 2018, the Swiss parliament adopted the Federal Act on Financial Services ("[FinSA](#)") and the Federal Act on Financial Institutions ("[FinIA](#)"). *Following the publication of the respective Financial Services Ordinance ("[FinSO](#)") and the Financial Institutions Ordinance ("[FinIO](#)") on November 6, 2019, FinSA, FinSO, FinIA and FinIO entered into force on January 1, 2020.*

The purpose of FinSA is to oversee all financial services as well as to regulate the offer of products in the Swiss market – rather like MiFID II in the EU. FinIA introduces coordinated supervision for the various categories of financial institutions: portfolio managers, managers of collective assets, fund management companies and securities firms. The entry into force of the two acts also led to amendments of existing laws, including to the Collective Investment Schemes Act ("[CISA](#)"). CISA remains the legislation concerning collective investment schemes as a product, including foreign collective investment schemes.

FinSA impacts the fund industry. It categorises clients into segments and has significant consequences on the distribution of funds: a summary of these consequences is presented in section "I". In section "II", we will examine the *newly introduced notions revolving around marketing in Switzerland*. In section "III", we present the rules regarding the language to be used for fund documents in Switzerland and section "IV" focuses on registration and affiliation requirements for *client advisers* in order to perform financial services in Switzerland. Section "V" provides an overview of the applicable transitional periods following the entry into force of the law.

I. Client/Investor Segmentation

Unless they wish to consider all their clients as retail, financial service providers shall assign the persons to whom they provide financial services to a specific segment – retail-, professional- or institutional clients. The segmentation of clients found in Art. 4 par. 3 to 5 and Art. 5 par. 1 and 4 FinSA impacts the notion of “*qualified investor*” (professional investor). The qualified investor definitions are listed below:

- a. **financial intermediaries** as defined in the [Banking Act](#), the FinIA and the CISA
- b. **insurance companies** as defined in the [Insurance Supervision Act](#)
- c. **foreign clients** subject to a prudential supervision, in their jurisdiction, as the entities listed under *a* and *b* above
- d. **central banks**
- e. **public entities with professional treasury operations**¹
- f. **occupational pension schemes and other institutions** whose purpose is to serve occupational pensions **with professional treasury operations**
- g. **companies with professional treasury operations**
- h. **large companies** – a large company being a company which exceeds two of the following criteria (Art. 4 par. 5 FinSA):
 - (i) balance sheet total of CHF 20 million;
 - (ii) turnover of CHF 40 million;
 - (iii) equity of CHF 2 million.
- i. **private investment structures with professional treasury operations created for high-net-worth retail clients**
- j. **high-net-worth retail clients and private investment structures created for them without professional treasury operations**², (Art. 5 par. 1 and 2 FinSA), after declaring they wish to be considered professional clients based on the fulfilment of one of the two following conditions:
 - (i) on the basis of training, education and professional experience, or on the basis of comparable experience in the financial sector, possess the necessary knowledge to understand the risks associated with the investments and have at their disposal financial assets of at least CHF 500,000; or
 - (ii) have financial assets of at least **CHF 2 million** (previously CHF 5 million) at their disposal.

In respect of (i) and (ii) above, at the time of acquisition of an investment, a credible declaration on professional qualifications and financial net worth are sufficient (Art 5 par. 2 FinSA), proof thereof as per Art. 6 par. 5 [CISO](#) is no longer necessary.
- k. **retail clients and clients described under j. above, for whom** a financial intermediary, in accordance with Art. 4 par. 3 let. a. FinSA or a prudentially supervised foreign **financial intermediary** (independent asset manager), **provides portfolio management or investment advice** in accordance with Art. 3 let. c. items 3 and 4 FinSA **within the scope of a permanent portfolio management or investment advice relationship** [mandate]. Such clients can retain their non-qualified investor status (retail client) if they declare in writing they do not wish to be considered qualified investors. (Art. 10 par. 3ter CISA, and in respect of clients described under *j.*, Art. 129a CISO)

Each client enters by default into one of the categories provided by law. The opting-in and opting-out system allows clients to change their segment in order to either opt in to benefit from higher protection or to opt out to benefit from lower protection and more liberty. Under certain conditions:

- **institutional clients** may declare that they wish to be considered **professional clients** (opting-in / down);
- **professional clients** may declare that they wish to be considered **institutional clients**³ (opting-out / up) or **retail clients** (opting-in / down); and

¹ A professional treasury shall exist if the entity/company entrusts at least one person with proven professional qualifications and experience in the financial sector with the responsibility of managing the financial resources of the company on an on-going basis (FINMA Circular 2008/5 Securities Dealers, unofficial translation: <https://assets.kpmg/content/dam/kpmg/ch/pdf/ch-finma-circular-2008-05-en.pdf>).

² The 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 FinSO, beneficial owners who jointly own assets can only declare an opting-out together to be considered professional clients. Furthermore, in the case of common assets, the FinSO provides that at least one person must have the required 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 a power of attorney from the other person(s) to dispose of the assets alone.

³ Only clients listed under *f.* and *g.* on page 3 may opt out to be considered institutional clients.

- **high-net-worth retail clients**⁴ may declare that they wish to be considered **professional clients** (opting-out / up).

The law does not allow going up or down more than one level.

The new regime simplifies the offering of foreign collective investment schemes to qualified investors in Switzerland. The range of qualified investors to whom a collective investment scheme may be offered without appointing a Swiss representative and a Swiss paying agent is extended 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, **it is still necessary to appoint a Swiss representative and a paying agent** to offer collective investment schemes to high-net-worth individuals even if they have opted-out to be treated as professional clients/qualified investors.

➤ See table on page 8.

II. New notions around fund marketing in Switzerland

Distribution

Until the entry into force of the FinSA regime, **distribution** within the meaning of the CISA was any advertisement or proposal for collective investment schemes not exclusively addressed to investors which are prudentially supervised, being: banks, fund managers, securities dealers, investment managers or insurance companies. The CISA provided for some additional exceptions, such as reverse solicitation or placement of collective investment schemes made by financial intermediaries holding discretionary investment management mandates or financial advisory mandates when certain regulatory conditions are met - please see section "1." k.

Offer

Under Art. 3 let. g FinSA, an **offer** is any proposal to acquire a financial instrument that includes sufficient information about the terms of the offer and the financial instrument concerned. Providing fund documents for FINMA-authorized funds to a potential investor/client **constitutes an offer** in the sense of FinSA.

A general communication shall not be qualified as an offer within the meaning of the FinSA if it does not contain enough information to lead to an investment decision being made and a subscription order being placed. Art. 3 par. 5 FinSO details that such communication must usually draw attention to a given financial instrument with the intention of selling it: this must be analysed on a case-by-case basis according to the circumstances, the structure and the content of the communication concerned.

The **publication of data on an information platform** may constitute an offer within the meaning of the FinSA if all the information and documents that enable an investor to make an investment decision appear on the platform or when it is possible to subscribe shares directly through the platform. The mention of NAV, price, information on risks, the mere provision or transmission to existing clients or financial intermediaries of factual information or documents required by law (in particular the publications provided for by the CISA) do not constitute an offer under FinSA.

In addition, the **geographical scope** of the new regime is **limited to Switzerland** and does hence no longer apply to offerings from Switzerland. This allows Swiss financial service providers to offer foreign collective investment schemes to potential investing clients outside of Switzerland, even from Switzerland, without needing to comply with the Swiss regulatory framework, but only in full respect of the laws and regulations in force in the jurisdiction in which the target client resides.

A financial service in the sense of Art. 3 let. c item 1 is deemed to be any activity addressed directly to an end-client that is specifically aimed at the acquisition or disposal of a financial instrument. In practice, this includes interactions which can be considered as a "cause" of a specific investment decision by the client.⁵ Such interaction has to be assessed in light of the intent of the financial service provider.

⁴ Including private investment structures created for them without professional treasury operations (see j. on p. 3)

⁵ [SFAMA FinSA/FinIA Frequently Asked Questions – version as of December 2019](#), pt. 1

An **offer may constitute a financial service**⁶ pursuant to Art. 3 let. c. items 1 and 3 FinSA and, hence, the “distributor” – adviser – needs to comply with the **code of conduct** provided under Art. 7 to 20 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 (discretionary asset management) qualify as a financial service, if it is carried out for clients on a professional basis. Consequently, the information duties and the code of conduct under the FinSA shall apply to such activity.

Advertising

The notion of **advertising** is newly introduced by Art. 68 FinSA. Any publicity for a collective investment must be clearly identifiable as such and must mention the prospectus, the key information document for the relevant collective investment as well as the place where such documents can be obtained. *According to Art. 127a CISO, advertising for foreign collective investment schemes already triggers the statutory obligations to have the fund approved by FINMA for offering to retail (non-qualified) investors, in accordance with Art. 120 par. 1 CISA. This article also requires the appointment of a Swiss representative and a Swiss paying agent. In the case of a fund being offered to high-net-worth retail clients that have opted-out to be considered qualified investors (including private investment structures created for them without professional treasury operations), a Swiss representative and Swiss paying agent have to be named, but no FINMA authorization is required, as per Art. 120 par. 4 CISA.*

In order to delimit the offer and the advertisement, it is considered that the more precisely the advertisement refers to a specific financial instrument, the more one can assume that it is an offer.

Roadshows

Roadshows should be analysed on a case-by-case basis. As described above, an activity is only deemed to constitute a financial service in the sense of Art. 3 par. 2 FinSO if an end-investor is addressed directly, with the intent of causing the acquisition or disposal of a specific financial instrument by such end-investor. Even if an activity is not deemed to constitute a financial service, a check should be made in each individual case as to whether the conditions are met for it to qualify as an offer or, in minimum, as advertising⁷. The organizer of a roadshow may invite qualified investors as per Art. 4 par. 3 let. a to i FinSA in conjunction with Art. 10 par. 3 CISA - but not high-net-worth individuals who have opted-out to be considered qualified investors – without naming a Swiss representative and a Swiss paying agent for the funds to be presented.

Who may attend my roadshow?

Type of fund	Clientele / Audience		
	All investors	Qualified Investors incl. HNWI QI	Qualified Investors excl. HNWI QI
FINMA auth. UCITS	✓	✓	✓
AIF w/ Rep and PA	X	✓	✓
AIF w/o Rep and PA	X	X	✓

III. Language of Fund Documents

As from January 1, 2020, fund documents for Switzerland can be published in English or in one of the three Swiss national languages – French, German or Italian⁸.

Funds can choose to change their official language for fund documents in Switzerland from French/German/Italian to English. The decisive time is the period within which a fund document has to be filed with FINMA. If the deadline for filing falls into 2020, the Swiss-compliant fund documents can be filed in English. As a consequence, in order to be filed in English after January 1, 2020:

- **KIIDs, prospectuses and articles** shall not be older than December 2, 2019 (30 days);
- **Semi-annual reports** shall not be older than November 1, 2019 (2 months);
- **Annual reports** shall not be older than September 1, 2019 (4 months).

⁶ According to the [Federal Department of Finance comments on FinSO](#), an offer as such is not considered a financial service in the sense of Art. 3 let. g FinSA. To be qualified as a financial service, additional elements – such as investment advice – are necessary.

⁷ [SFAMA FinSA/FinIA Frequently Asked Questions – version as of December 2019](#), pt. 10

⁸ [Prospectus](#): Art. 40 par. 2 FinSA / [KID](#): Art. 89 FinSO / [Prospectus, KID, \(semi-\)annual reports](#): Art. 133 par. 1 revCISO

Funds wishing to change their official language for Switzerland must express their intention in both, the FINMA filing and a publication on the Swiss publication platform.

In case the FINMA-filing of a Swiss-compliant document established prior to the dates indicated above is delayed, such documents shall still be translated into a Swiss official language. That is because the deadline for the FINMA filing would fall in 2019 and hence be subject to the unrevised CISA regime.

The publication language follows the official language of the fund documents in Switzerland. Consequently, when choosing English for the establishment of Swiss-compliant fund documents, publications in respect of those fund documents shall be in English.

IV. Ombudsman and Register of Advisers

Any person (individual or company) that provides financial services on a commercial basis in Switzerland or for clients in Switzerland (**financial service provider**) shall be affiliated to a Swiss ombudsman office at the latest when commencing activity (Art. 77 FinSA).

The licensing requirement for distributors of collective investment schemes "**Distributor Authorisations**" is **abolished**. Under the CISA, as revised by the FinSA and the FinIA, distributors of collective investment schemes do no longer need a FINMA authorisation or – for foreign distributors – an authorisation to distribute in their home jurisdiction to carry out their activity in Switzerland. The said authorisation is replaced by the requirement for employees of certain financial service providers to **enter into the register of advisers in Switzerland**.

Client advisers⁹ – employees – of Swiss financial service providers **that are prudentially supervised by FINMA** do not need to be entered into the register¹⁰.

According to Art. 28 par. 1 FinSA, client advisers employed by financial service providers which are not supervised by FINMA pursuant to Art. 3 of the [Financial Market Supervision Act](#) and client advisers of foreign financial service providers **have to be entered into the register of advisers**, unless the exemption mentioned below applies.

As per Art. 31 FinSO, **client advisers employed by foreign financial service providers that are subject to prudential supervision are exempted from the registration obligation if they provide their service in Switzerland exclusively to professional and institutional clients** as per Art. 4 par. 3 and 4 FinSA definition.

Financial service providers must make sure that the client advisers they employ have the required knowledge and skills to perform their activity and that such activity is duly covered by a professional liability insurance.

The **client adviser, who is required to have his or her name entered in the register, must:**

1. be **affiliated to a Swiss ombudsman office** as defined in Art. 74 FinSA for the purpose of settling disputes regarding the clients' claims against the client adviser or financial service provider in mediation proceedings (Art. 29 par. 1 let. c FinSA). Client advisers can benefit from their employer's affiliation and independent client advisers must themselves be affiliated to the ombudsman as financial service providers in their own name;
2. as previously required for distributors, have **concluded a professional liability insurance contract** or have provided equivalent financial guarantees (Art. 29 par. 1 let. b FinSA). Client advisers can benefit from their employer's insurance cover (Art. 29 par. 3 FinSA); and
3. **have sufficient knowledge of the code of conduct set out in FinSA and the necessary expertise required to perform his or her activities** (Art. 29 par. 1 let. a in conjunction with Art. 6 FinSA).

Further information on the requirements for registration shall be available in Q1 2020, upon publication of the related FINMA Circular. *In addition, the relevant register will communicate the specific requirements in respect of the registration conditions, as for example in matters of necessary knowledge.* For more details, you can visit one of the client advisers register's website by clicking on the following link : <https://www.regservices.ch/en/client-advisor-registry/>

A fourth edition of this note will be issued once the Register of Advisers and the Ombudsman are approved. This is expected to happen during the first half of 2020.

⁹ Client advisers: natural persons who provide financial services on behalf of a financial service provider or themselves as financial service providers.

¹⁰ Pursuant to Art. 52 and 58 FinIA, branches and representation offices of foreign financial institutions have the duty to obtain a FINMA authorisation as of January 1, 2020.

Ref. list p.3	FinSA clientele Segmentation / Target market in Switzerland	default / option	Category		Need to appoint a Representative and a Paying Agent?		Requirements on the financial service provider				
			FinSA	CISA	UCITS	AIFs	Affiliation to an Ombudsman ?	Does the client adviser need to be entered into a register ?			
							Subject to the offer constituting a financial service in the sense of FinSA	Is the financial service provider prudentially supervised ?			
			No	Yes	Swiss	Foreign		Swiss	Foreign		
a-d	Swiss and foreign banks investing for their own account Swiss and foreign insurance companies investing for their own account Central banks Regulated fund management companies National and supranational public entities with professional treasury operations	default	Institutional	Qualified	No	No	Yes	Yes	Yes	No	No
		opt-in	Professional		No	No	Yes	Yes	Yes	No	No
e	Public entities with professional treasury operations	default	Professional	Qualified	No	No	Yes	Yes	Yes	No	No
		opt-in	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes
f-g	Occupational pension schemes with professional treasury operations Companies with professional treasury operations	opt-out	Institutional	Qualified	No	No	Yes	Yes	Yes	No	No
		default	Professional		Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes
		opt-in	Retail	Non-Qualified	Yes	Yes	Yes	No	Yes		
h-i	Large companies Private investment structures with professional treasury operations created for high-net-worth retail clients	default	Professional	Qualified	No	No	Yes	Yes	Yes	No	No
		opt-in	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes
j	High net worth individuals and private investment structures created for them without professional treasury operations (HNW = financial sector experience + CHF >500k assets or CHF >2M assets)	opt-out	Professional	Qualified	Yes	Yes	Yes	Yes	Yes	No	No
		default	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes
j+k	High net worth individuals and private investment structures created for them without professional treasury operations that opt-out to be treated as professional clients for whom a financial intermediary provides portfolio management or investment advice within the scope of a permanent portfolio management or investment advice relationship [mandate]	opt-out + investment advice / portfolio mgmt	Professional	Qualified	No	No	Yes	Yes	Yes	No	No
k	Retail clients for whom a financial intermediary provides portfolio management or investment advice within the scope of a permanent portfolio management or investment advice relationship [mandate] Retail clients	default	Retail	Qualified	No	No	Yes	Yes	Yes	No	Yes
		default	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes

professional treasury operations shall exist if the entity/company entrusts at least one person with proven professional qualifications and experience in the financial sector with the responsibility of managing the financial resources of the company on an on-going basis (FINMA Circular 2008/5 Securities Dealers)

V. Transitional Periods

FinSA, FinIA and the related ordinances - FinSO and FinIO - entered into force on January 1, 2020. A two-year transitional period allows financial service providers and client advisers to comply with the new legal provisions. The transitional period applies indistinctly to both financial service providers which are already active on the Swiss financial market and to newcomers.

Client advisers actively offering financial products must affiliate themselves to an ombudsman's office and announce themselves to a register by June 30, 2020. The client advisers will thereafter have until December 31, 2021 to obtain a formal entry in the register (Art. 95 par. 2 and 3 FinSA).

Starting from January 1, 2020, the two-year transitional period is applicable to financial service providers to:

- meet the obligation set forth by Art. 4 par. 1 FinSA to classify their clients (Art. 103 par. 1 FinSO);
- ensure that client advisers have the relevant training (Art. 104 FinSO);
- fulfil the obligations arising from the implementation of the new rules of conduct as per Art. 7 to 18 FinSA – i.e. information, adequacy and suitability checks, best execution and documentation – (Art. 105 FinSO).
- meet the organizational requirements set forth by Art. 21 to 27 FinSA (Art. 106 FinSO);
- switch to the new FinSA Key Information Document (KID) format (Art. 110 let. b FinSO) – it is hence not necessary to establish a FinSA KID during the transitional period if a EU-KIID already exists.

Distribution agreements entered into under the CISA regime do not automatically become void with the entry into force of the new regime (Art. 105 par. 5 FinSO). Rather the distribution agreements with financial service providers remain in force until such financial service providers confirm they are FinSA compliant (as well as their whole offering scheme).

Financial service providers implementing the new FinSA regulations before January 1, 2022 must inform their auditor accordingly in order to create clarity about the supervisory regime which applies to the respective financial service provider. For financial service providers not required to undergo a prudential audit in Switzerland there is no corresponding reporting obligation after having implemented the FinSA provisions. From a practical point of view, termination of distribution agreements requires formal notification of termination to all parties, including the representative of foreign funds.¹¹

As long as they have not implemented the new FinSA rules, financial service providers shall remain compliant with the pre-existing laws and regulations relating to rules of conduct. This also applies to the obligation to have a Swiss representative and a Swiss paying agent appointed until the fund marketing activities are compliant with the FinSA regime *as well as to the SFAMA Distribution Guidelines. Kindly note that the term "distribution" shall be replaced with the term "offer" when reading the SFAMA Distribution Guidelines.* As a consequence, Swiss representative and Swiss paying agent agreements cannot be automatically terminated with effect as of January 1, 2020. Rather, as from the date financial service providers confirm they are in full compliance with FinSA.

SFAMA aims to change its entire self-regulation regime (guidelines, expert recommendations and sample documents) following the entry into force of FinSA and FinIA, the revised CISA, the related federal ordinances as well as the new/amended FINMA ordinances and circulars. The amended SFAMA guidelines require approval from FINMA. Such approval will only be given after FINMA has issued its revised ordinances and circulars. This is unlikely to happen before autumn 2020¹².

The only exception to the two-year transitional period applies to independent wealth managers/financial advisers that become subject to FinIA: they must notify FINMA within 6 months of their intention to obtain an authorization as a financial institution and will thereafter have until December 31, 2022 to complete their request for authorization (Art. 93 par. 4 FinIO).

¹¹ [SFAMA FinSA/FinIA Frequently Asked Questions – version as of December 2019](#), pt. 30

¹² [SFAMA FinSA/FinIA Frequently Asked Questions – version as of December 2019](#), pt. 33

As your partner in the implementation of FinSA, Carnegie Fund Services Ltd. is glad to assist you in:

- segmenting your clientele as per categories set forth by FinSA to assess the legal requirements to offer your products in Switzerland
- determining which language should be chosen for your fund documents and translating accordingly
- getting affiliated to an Ombudsman
- getting your staff ready and taking the required steps to enter them into the register of advisers
- obtaining the newly required FINMA authorisation for independent wealth managers/financial advisers
- obtaining the FINMA authorisations to establish a Swiss branch or a representation office for a foreign financial institution

* * *

For further information, please contact our Legal Team: legalone@carnegie-fund-services.ch

Neil Carnegie
CEO

Claudia Suter
Head of Legal

Eale Lokau
Senior Legal Counsel

Sammy Nasri
Legal Counsel

