

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

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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.

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Eighth edition: all additions from the seventh to the eighth 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, as amended.

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 *and new self-regulation documents* 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. Notions around fund marketing in Switzerland

Through the entry into force of the FinSA and the amendments to CISA, the concept of “distribution” was abolished and replaced by the concepts of “financial services”, “offering”, and “advertising” of financial instruments.

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.

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.

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

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.

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

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.

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) and have concluded an adequate insurance policy. Financial service providers that serve solely institutional or professional clients (excluding high-net-worth retail clients having opted out to be treated as professionals) do not need to be

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 CISO

affiliated to an ombudsman. Seven ombudsman offices in the sense of FinSA have been recognized by the Federal Department of Finance (FDF):

- **Swiss Banking Ombudsman Foundation** - affiliation restricted to members of the Swiss Bankers Association (banks)
<https://www.bankingombudsman.ch>
- **Finanzombudsstelle Schweiz (FINOS)**
<https://www.finos.ch/>
- **Ombudsman's Office for financial service providers**
<https://www.ofdl.ch>
- **OFS Ombud Finance Switzerland**
<https://www.ombudfinance.ch>
- **Financial Services Ombudsman (FINSOM)**
<https://www.finsom.ch>
- **Swiss Chambers' Arbitration Institution (SCAI)**
<https://www.swissarbitration.org/Ombuds-FIN>
- **Terraxis SA**
<https://www.terraxis.ch>
- **Unabhängige Ombudsstelle Schweiz AG**
ombudsstelle-schweiz.ch
- **Liechtensteinische Schlichtungsstelle im Finanzdienstleistungsbereich**

The Federal Department of Finance may authorise others in the future.

The licensing requirement for distributors of collective investment schemes "**Distributor Authorisations**" *was abolished*. Under the CISA, as revised by the FinSA and the FinIA, distributors of collective investment schemes no longer *have* 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 *was* replaced by the requirement for employees of certain financial service providers to **enter into a 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 a 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 a 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. Therefore, this exemption does not apply for financial services provided to high-net-worth retail clients or their private investment firms without professional treasury having opted out to be treated as professional clients (Art. 5 par. 1 FinSA).

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 a 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).

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.

Client advisers can benefit from their employer's affiliation and independent client advisers must themselves be affiliated to an 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).

Three registers have been approved by FINMA and the specific requirements in respect of the registration conditions – as for example in matters of necessary knowledge – have been communicated. For more details, visit:

Regservices.ch by BX Swiss AG : <https://www.regservices.ch/en/client-advisor-registry/>

Association Romande des Intermédiaires Financiers : <https://www.arif.ch>

PolyReg Services GmbH : <https://www.reg-fix.ch/fr/home>

Additional registers may be approved by FINMA later.

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	No*	Yes	Yes	No	No
		opt-in	Professional		No	No	No*	Yes	Yes	No	No
e	Public entities with professional treasury operations	default	Professional	Qualified	No	No	No*	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	No*	Yes	Yes	No	No
		default	Professional								
		opt-in	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	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	No*	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	Yes
		default	Retail	Non-Qualified	Yes and FINMA- authorised fund	Not authorised to subscribe to AIFs	Yes	Yes	Yes	No	Yes
j+k	Financial intermediaries providing portfolio management or investment advice within the scope of a permanent portfolio management or investment advice relationship [mandate] concluded with high-net-worth individuals or private investment structures created for them without professional treasury operations that have opted-out to be treated as professional clients	opt-out + investment advice / portfolio mgmt	Professional	Qualified	No	No	Not providing a financial service	No	No	No	No
k	Financial intermediaries providing portfolio management or investment advice within the scope of a permanent portfolio management or investment advice relationship [mandate] concluded with a retail client	default	Retail	Qualified	No	No	Not providing a financial service	No	No	No	No
	Retail clients	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)

*Initially mandatory as of December 26, 2020. Not required anymore as of February 1, 2021 following CH-parliament's decision. Therefore not enforced by FINMA during the period from December 26, 2020 to February 1, 2021.

V. Transitional Periods and new self-regulation documents

FinSA, FinIA and the related ordinances - FinSO and FinIO - entered into force on January 1, 2020. A two-year transitional period *allowed* 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 had to affiliate themselves to an ombudsman's office by December 25, 2020¹¹ and had to submit an application to be entered in the register by January 19, 2021. The client advisers *had* thereafter until December 31, 2021 to obtain a formal entry in a register (Art. 95 par. 2 and 3 FinSA).

The Asset Management Association Switzerland ("AMAS", formerly Swiss Fund and Asset Management Association "SFAMA") has changed 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 AMAS guidelines were recognized as a minimum standard by FINMA on August 25, 2021. The new guidelines, model documents and model distribution agreement have been published by AMAS on September 28, 2021. The new guidelines *entered* into force on January 1, 2022. Although there is no deadline for the replacement of existing distribution agreements, it should take place on a best effort basis as with the FinSA/FinIA transitional period ending on December 31, 2021, all references to the former concept of distribution cease to apply. In any case, the FinSA rules will apply directly at the point of sale as of January 1, 2022. *From a practical point of view, termination of distribution agreements requires formal notification of termination to all parties, including the representative of foreign funds.*¹²

There are two exceptions to the two-year transitional period. The first one applies to independent wealth managers/financial advisers that become subject to FinIA, who 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). The second exception concerns the submission to FINMA of revised fund documents in line with FinSA which was extended by the Swiss regulator until June 30, 2022¹³. Regarding the revised FinSA Key Information Documents specifically (which correspond to the PRIIPs KIDs), the deadline has been further extended by the Swiss Federal Council to December 31, 2022¹⁴.

¹¹ As of February 1, 2021, financial service providers that serve solely institutional or professional clients (excluding high-net-worth retail clients having opted out to be treated as professional clients) do not need to be affiliated to an ombudsman anymore.

¹² [SFAMA FinSA/FinIA Frequently Asked Questions – version as of December 2019](#), pt. 30

¹³ FINMA has extended the deadline under Art. 144 para. 3 of the Collective Investment Schemes Ordinance (CISO) for submitting fund documents revised in line with the FinSA and FinIA until 30 June 2022.

¹⁴ https://www.sjf.admin.ch/sjf/en/home/documentation/specialist-information/basisinformationsblatt_2.html

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

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