Adoption of implementation regulation on FinSA and FinIA

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Key takeaways

- **Adoption of implementation regulation on FinSA and FinIA**
- **New FINMA Financial Institutions Ordinance ("FinIO-FINMA") entering into force on 1 January 2021**
- **Amendments to and repeal of existing FINMA ordinances and circulars**

Overview

On 12 November 2020, FINMA adopted its regulation implementing the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). Besides making adjustments to existing FINMA ordinances and circulars, FINMA also issued the new ordinance FinIO-FINMA. In addition, FINMA is repealing three circulars that are no longer needed.

FinIO-FINMA

FinIO-FINMA will regulate the details of professional indemnity insurance for portfolio managers, trustees and managers of collective assets, details on calculating the de minimis threshold for gaining authorisation as a portfolio manager, and on risk management and internal control system for managers of collective assets.

Professional indemnity insurance

According to Article 22 para. 2 FinIA, portfolio managers and trustees must, in addition to the minimum capital, have adequate security or take out professional indemnity insurance. Article 31 para. 2 of the Financial Institutions Ordinance (FinIO) stipulates that professional indemnity insurance, as far as it covers the risks of the business model, may be counted 50% towards qualifying capital. This means that a maximum of 50% of the own funds can be

provided by crediting the professional indemnity insurance. FinIO specifies that FINMA shall regulate the details of professional indemnity insurance, which must be fulfilled in order for this to be credited towards qualifying capital. The requirements for professional indemnity insurance for portfolio managers and trustees are based on the concept of the already existing requirements for the professional indemnity insurance of former asset managers of collective investment schemes under the Collective Investment Schemes Act (CISA). FINMA has taken up and implemented the differentiation of the regulation for portfolio managers and trustees on the one hand and managers of collective assets on the other, as suggested in the preliminary consultation.

De minimis threshold

With the de minimis threshold, managers of collective assets who do not reach the threshold of the materiality limit are treated as simple portfolio managers. Article 34 para. 4 FinIO obliges FINMA to regulate the details of the so-called de minimis calculation. With the entry into force of FinSA and FinIA, the regulation of asset managers of collective investment schemes has been transferred from CISA to FinIA. Accordingly, the previous provisions of Articles 73 and 74 of the FINMA Collective Investment Schemes Ordinance (CISO-FINMA) will be transferred to FinIO-FINMA. The term "managers of collective assets" now also includes managers of occupational pension scheme assets. Prior to the entry into force of FinIA and FinSA, there were no corresponding implementing regulations for the calculation of the threshold value for managers of occupational pension scheme assets, as they did not previously know a de minimis threshold. Article 24 para. 2 let. b FinIA now provides that managers of occupational pension scheme assets are considered to be portfolio managers if the assets under management are less than CHF 100 million and, in the mandatory segment, they manage no more than 20% of the assets of an individual occupational pension scheme.

Risk management and internal control system

Article 41 para. 9 FinIO requires FINMA to regulate the details of the provisions relating to risk management and internal control for managers of collective assets and fund management companies. In principle, FINMA adopted the existing rules from CISO-FINMA. Accordingly, no additional effects are expected from this regulation. In addition, based on the work of the International Organization of Securities Commissions (IOSCO), certain new obligations will be introduced in relation to the performance of stress tests. Furthermore, certain aspects relating to the independence of risk control will be adapted to reflect points of a recommendation of the Swiss Funds & Asset Management Association (SFAMA).

Adjustments to existing FINMA ordinances and circulars

FINMA Collective Investment Schemes Ordinance (CISO-FINMA)

The changes made in the CISO-FINMA are essentially only of a formal nature.

Collective Investment Schemes Bankruptcy Ordinance-FINMA (CISBO-FINMA) and FINMA Banking Insolvency Ordinance (BIO-FINMA)

In contrast to the previous legal situation, the bankruptcy proceedings for fund management companies are no longer subject to CISBO-FINMA but to BIO-FINMA. The measures listed in BIO-FINMA also apply analogously to fund management companies in the event of the risk of insolvency.

Anti-Money Laundering Ordinance (AMLO)

The adjustments made by AMLCA-FINMA are mainly of a formal nature.

FINMA circulars (2013/8 “Market Conduct Rules”, 2013/3 “Auditing”, 2015/2 “Liquidity Risks – Banks”, 2018/3 “Outsourcing Banks and Insurers”, 2017/7 “Credit Risks – Banks” and 2020/1 “Accounting – Banks”)

The scope of application of FINMA Circular 2013/8 "Market Conduct Rules" will be adapted to cover portfolio managers, trustees and managers of occupational pension scheme assets who are now subject to a FINMA licensing requirement. With the amendments to Circular 2018/3 "Outsourcing Banks and Insurance Companies", externally managed investment companies with variable capital (SICAVs) will no longer be covered by the circular. Third-party managed SICAVs must, however, still comply with the requirements for the delegation of tasks under the Collective Investment Scheme Act (CISA) and its implementing ordinance. Further, rather minor adjustments have been made in FINMA Circular 2015/2 "Liquidity Risks – Banks", 2017/7 "Credit Risks – Banks" and 2020/1 "Accounting – Banks".

Repeal of existing FINMA circulars

With the introduction of FinSA and FinIA, various circulars will become obsolete and will therefore be repealed. Moreover, with the expiry of the transitional periods as per the end of 2021 for the fulfilment of the obligations according to FinSA, FINMA is currently reviewing the repeal of further circulars (e.g. FINMA circular 2009/1 "Guidelines on asset management").

FINMA circular 2008/5 “Securities Dealers”

The content of the circular is now largely reproduced in FinIA and its implementing ordinance. The circular will therefore be repealed. However, the previous practice regarding introducing brokers and the licensing requirement for representative offices of foreign securities dealers remains valid and is in principle to be applied analogously to all representative offices of foreign financial institutions under Article 58 FinIA.

FINMA circular 2010/2 “Repo/SLB transactions”

Article 19 FinSA now regulates the basic principles of securities lending. Therefore, the circular will be repealed. In interpreting Article 19 para. 2 FinSA, FINMA will continue to adhere to its supervisory practice of the circular even after its repeal.

FINMA circular 2013/9 “Distribution of Collective Investment Schemes”

The circular will be repealed as FinSA conclusively regulates the offering of financial instruments.

Further steps

FinIO-FINMA and the partial revisions of FINMA circulars 2013/8, 2013/3, 2018/3, 2017/7 and 2020/1 will come into force on 1 January 2021. FINMA circulars 2008/5, 2010/2 and 2013/9 will also be repealed by this date. Financial institutions subject to the implementation regulation must ensure compliance with the legal amendments and specifications made by FINMA in due course.

Contributor: Daniela Fritsch (Associate)

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Oliver Widmer

Partner
Attorney at law
Head Financial Services

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 42
oliver.widmer@pestalozzilaw.com



Andrea Huber

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 41
andrea.huber@pestalozzilaw.com

