

## Why investment advisers in Switzerland should review their business model

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**When the new Financial Institutions Act (FinIA) enters into force presumably not before mid- 2019, all (de facto) managers of funds will be subject to prudential supervision and will require a FINMA licence, either as an asset manager for collective investment schemes, or as a portfolio manager, depending on their assets under management. For this reason, it is of utmost importance to analyse the business model of investment advisers in Switzerland providing advice to investment funds as such activities may fall within the scope of the new FinIA regulation or the new Financial Services Act (FinSA) which shall enter into force simultaneously with the FinIA. Depending on the result of such analysis, certain structural changes may be required to the management structure of investment funds.**

### **Asset management versus advisory activities under the current Swiss Regulatory Regime**

FINMA stepped up its supervisory activities in the asset and investment management industry already in 2012. In particular, FINMA focused more attention on foreign funds and their managers who use the services provided by a Swiss investment adviser. In line with the Swiss legislation on collective investment schemes (CISA), the (foreign) fund manager may delegate investment *decisions* to a third party, provided that this delegation is in the interest of efficient management and that the delegate is a supervised asset manager. By contrast, an investment adviser not subject to prudential supervision, may only offer investment *recommendations* and may not take any investment decision for the fund.

During the course of these reviews, FINMA concluded that the activities of certain investment advisers in Switzerland went beyond mere investment advice. Pursuant to the 2012 FINMA Annual Report, this is the case when the fund manager accepts the investment adviser's proposals without careful, independent

analysis of whether these proposals comply with the provisions of the fund contract. Another example is when the investment adviser has significant influence on the investment decisions, for example by having a seat in an investment committee with decision-making powers. FINMA took the necessary measures and ensured that investment advisers concerned will be confined exclusively to a pure advisory function.

Also in 2012, FINMA issued Notices 33 and 34 providing further guidance regarding the distinction between the terms “asset management” and “investment advisory”. The labelling of the activities itself is not decisive, but dividing the sphere of influence and the ability to control the investment decision process (substance over form), is. The fee split between fund manager and adviser must also be taken into consideration.

However, fund managers managing non-Swiss funds of investors deemed to be qualified investors are exempt from the CISA authorisation requirements, provided assets under management of such collective investment schemes do not exceed CHF 100 million including leveraged assets, or CHF 500 million for non-leveraged assets where investors cannot exercise termination and redemption rights for a period of five years. As these “below threshold” fund managers are currently not subject to prudential supervision by FINMA, the distinction between asset management and investment advisory activities is purely theoretical. This will change under the new FinIA.

### **New Financial Institutions Act**

The new FinIA (*Finanzinstitutsgesetz; FINIG*), which is currently not expected to enter into force before mid-2019, will still include the existing *de minimis* rules for fund managers of collective investment schemes as currently provided by the CISA. Hence, fund managers that fall under these *de minimis* rules, will still not be obliged to obtain a full licence as a fund manager (*Verwalter von Kollektivvermögen*). However, under the FinIA, such “below threshold” fund managers should obtain a licence as a portfolio manager (*Vermögensverwalter*). This is the type of licence prescribed under the new rules for independent and external asset managers that are currently not subject to prudential supervision at all.

It is currently expected that the licensing and organisational requirements for portfolio managers will not be as strict as the requirements for a full fund manager’s licence. However, these requirements will demand good reputation and verification of proper business conduct by the responsible parties, adequate financial guarantees, appropriate organisational structure and an

adequate internal control system, risk management and compliance function as well as segregation of these functions. Outsourcing of certain functions will be possible.

As a consequence of this new regulation, the distinction between asset management and investment advisory activities will become more relevant. Mere advisory activities for the benefit of funds will still be exempt from financial market regulation, but further analysis will be required by Swiss investment advisers to determine whether their structure is in line with the strict FINMA practice. In addition, FinSA (*Finanzdienstleistungsgesetz*; *FIDLEG*) duties in connection with rules of conduct or offering of financial products may apply.

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