LGT – Regulatory Update for EAMs

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June 2018

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I. Preliminary remarks

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- In light of recent events (conclusion of the parliamentary deliberations in mid-June 2018) and given the group of participants (EAMs domiciled in Switzerland), the presentation places a focus on the **FinIA/FinSA** with individual references to the **MiFID II** legislation (tabular overviews provided in the Annex) and, in particular, the differences between these regulations.
- With respect to the **FinIA** and **FinSA**, the presentation provides information on the **current status of the legislation** following the conclusion of the parliamentary deliberations with the final vote of the Federal Assembly on June 15, 2018. To the extent that they are already known, reference is also made to regulatory areas covered in the Federal Council's **ordinances** on the FinIA and FinSA.
- The final versions of the FinIA and FinSA are (temporarily) available via the following **link**:

  https://www.newsd.admin.ch/newsd/message/attachments/41750.pdf

  https://www.newsd.admin.ch/newsd/message/attachments/41734.pdf

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Core elements of the new Swiss financial market architecture

- Cross-sector regulation ("interdisciplinary regulation") for four regulatory levels:
  - Supervision (organization, expertise) ⇨ relationship between supervisory authorities and financial intermediaries
  - Institutes (forms, requirements) ⇨ authorization conditions
  - Financial market infrastructure (rules for market participants) ⇨ functioning of market
  - Financial services (products, distribution) ⇨ relationship between financial intermediaries and clients
- Legislatory objectives:
  - Same business, same rules – creation of a level playing field for financial market participants
  - Improved client protection ⇨ disputed whether this objective has been achieved (depending on political allegiance)
  - Promotion of the competitiveness of the Swiss financial market
  - Appropriate supervision of asset managers and their business; goal to achieve equivalent supervision that is recognized as such by the EU and thus allows access to its internal market
- Transfer to the FinSA of all conduct obligations arising from special acts (e.g. Art. 11 of the Federal Act on Stock Exchanges and Securities Trading (SESTA), Art. 20 ff. of the Collective Investment Act (CIA))
- SESTA: has largely been incorporated in the new Financial Markets Infrastructure Act (FMIA; entry into force: January 1, 2016) and will be repealed with the introduction of the FinIA.
- CIA: regulation of the portfolio managers of collective investment schemes and fund management companies in the FinIA; the CIA will continue to govern collective investment schemes as a product-specific act.

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Timetable

2012	FINMA position paper on distribution rules; request to FDF to prepare draft bill
2014	Opening of consultation procedure
2015	FDF report submitted for consultation procedure; publication of dispatch and FinIA/FinSA drafts
December 2016	Approval by the Council of States as the first Council
September 2017	Approval of the National Council as the second Council (with differences to the Council of States)
Spring 2018	Further discussion by the Council of States (bill passed on March 7, 2018)
Summer 2018	Further discussion by the National Council and Council of States (resolution of differences), final votes in both Councils on June 15, 2018
June/July 2018	Final work on the FinSO/FinIO in five working groups (distribution, prospectus, basic information sheet, independent asset managers, other topics) with around 50 people involved from different stakeholder groups
Oct. 2018 – Feb. 2019	Publication of the FinSO/FinIO drafts, consultation procedure
Feb. – Oct. 2019	Adjustment/finalization of the FinSO/FinIO (internal administrative procedure)
Nov. 2019	Adoption of the FinSO/FinIO by the Federal Council, publication
January 1, 2020	Entry into force of the FinIA/FinSA including associated ordinances (FinSO/FinIO)
December 31, 2022	Expiry of FinIA transitional period for EAMs: required to meet all authorization conditions by this time and submit an authorization application (FINMA reporting obligation, however, already within six months of entry into force, i.e. by June 30, 2020)

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Spotlight: FinIA/FinSA according to decision of Parliament

- Relatively little ultimately now remains of the original “tsunami of regulations”, meaning the FinSA and FinIA have also become business-compatible for EAMs.
- Simplified enforcement of the civil law claims of clients of financial services providers has essentially been removed, i.e.:
  - no special arbitration courts
  - no legal/process fees fund (to be maintained by the financial services providers!)
  - no group composition proceedings (“class action lawsuits”)
  - no exemption from advance payment obligation for legal/process fees
  - no bearing of costs by financial services providers even in the event of victory in the proceedings
  - no reversal of the burden of proof in the event of inaccurate, misleading or unlawful information in the basic information sheet or prospectus, i.e. clients must – if they have suffered losses as a result – prove that the financial services provider (or possibly also EAMs) did *not* apply the required level of care.
- With the FinIA, EAMs are now subject to supervision that is, however, not performed by FINMA itself, but rather by organizations that are approved and supervised by FINMA (i.e. the tried-and-tested SRO model known from the Anti Money-Laundering Act (AMLA)).
- Insurers have been excluded from the scope of application of the FinIA and FinSA (regulated in the Insurance Act and in the Insurance Supervision Act).

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Spotlight: FinIA/FinSA according to decision of Parliament (cont.)

- Duty to provide information under the FinSA: Detailed, wide-ranging obligation to inform clients about the offered financial instruments. Main aspects: appropriateness and suitability. Consideration of knowledge, experience and financial circumstances of the individual client.
- Detailed requirements with respect to basic information sheet (on the respective financial instrument) for private clients, uniform prospectus requirements for securities (offered publicly or traded at a trading venue). Basic information sheets should allow for a comparison of products and well-founded investment decisions.
- Increased requirements with respect to the recording and retention of communication and correspondence as well as reporting.

III. FinIA: contents (1)

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Chapter 1: General Provisions

- Section 1: Subject Matter, Purpose and Scope of Application
  - Art. 1 — Subject matter and purpose
  - Art. 2-4 — Scope of application, commercial nature, group relationships
- Section 2: Common Provisions
  - Art. 5-7 — Duty to obtain authorization, authorization cascade and authorization conditions
  - Art. 8 — Changes in authorization-relevant facts
  - Art. 9 f. — Organization, place of management
  - Art. 11 — Guarantee (of irreproachable business conduct)
  - Art. 12 — Public offer of securities on the primary market
  - Art. 13 — Protection against confusion and deception
  - Art. 14 — Delegation of tasks (outsourcing)
  - Art. 15 — International business (reporting obligation)
  - Art. 16 — Ombudsman (affiliation requirements)

Chapter 2: Financial Institutions

- Section 1: Asset Managers and Trustees
  - Art. 17 — Definitions (asset manager, trustee)
  - Art. 18 — Legal form (permitted legal forms, CR listing obligation)
  - Art. 19 — Tasks
  - Art. 20 — Qualified management (minimum requirements)
  - Art. 21 — Risk management and internal control (minimum requirements, delegation, incompatibility)
  - Art. 22 f. — Minimum capital and collateral (or insurance obligation), own funds requirements

III. FinIA: contents (2)

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Chapter 2: Financial Institutions (cont.)

- Section 2: Managers of Collective Assets
  - Art. 24 — Definition
  - Art. 25 — Legal form (only commercial enterprises permitted)
  - Art. 26 f. — Tasks and delegation to third parties
  - Art. 28 f. — Minimum capital and collateral, own funds
  - Art. 30 — Group and conglomerate supervision (consolidated supervision)
  - Art. 31 — Change of manager of collective assets (reporting obligation)
- Section 3: Fund Management Companies
  - Art. 32 — Definition
  - Art. 33 — Legal form and organization (only stock corporations with registered shares permitted; requirements with respect to independence)
  - Art. 34 f. — Tasks and delegation to third parties
  - Art. 36 f. — Minimum capital, own funds
  - Art. 38 — Rights of fund management company
  - Art. 39 — Change of fund management company
  - Art. 40 — Segregation of fund assets (in the event of the bankruptcy of the fund management company)

III. FinIA: contents (3)

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Chapter 2: Financial Institutions (cont.)

- Section 4: Securities Firms
  - Art. 41 — Definition
  - Art. 42 — Legal form (securities firms with their registered office on Switzerland must be commercial enterprises)
  - Art. 43 — Foreign-controlled securities firms (provisions of the Banking Act [BankA] apply by analogy)
  - Art. 44 — Tasks
  - Art. 45-47 — Minimum capital and collateral, own funds, liquidity and risk diversification, additional capital
  - Art. 48 — Accounting (the relevant provisions of the BankA apply by analogy)
  - Art. 49 — Group and conglomerate supervision (definition and reference to the provisions of the BankA)
  - Art. 50 f. — Record-keeping and reporting duty (reference to FINMA regulations)
- Section 5: Branches
  - Art. 52-55 — Duty to obtain authorization, authorization conditions for branches of foreign financial institutions, requirement of reciprocity, financial groups and conglomerates
  - Art. 56 — Collateral
  - Art. 57 — Exemptions
- Section 6: Representation Offices
  - Art. 58 f. — Duty to obtain authorization and authorization conditions
  - Art. 60 — Exemptions

III. FinIA: contents (4)

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Chapter 3: Supervision

- Art. 61 — Responsibility (for EAMs and trustees: supervision by FINMA with involvement of supervisory organization under the Financial Market Supervision Act for execution of day-to-day supervision)
- Art. 62 — Auditing of asset managers and trustees
- Art. 63 — Auditing of managers of collective assets, fund management companies, securities firms, etc.
- Art. 64 — Duty to provide information and to report in the case of delegation of significant functions
- Art. 65-67 — Suspension of voting rights, liquidation, measures under insolvency law

Chapter 4: Liability and Criminal Law Provisions

Section 1: Liability

- Art. 68

Section 2: Criminal Law Provisions

- Art. 69 — Violation of professional confidentiality
- Art. 70 — Violation of the provisions on protection against confusion and deception
- Art. 71 — Violation of the record-keeping and reporting duties

Chapter 5: Final Provisions

- Art. 72 — Implementing provisions (competence provision for Federal Council for adoption of an ordinance)
- Art. 73 f. — Repeal and amendment of other legislative instruments, transitional provisions (incl. deadline for submission of authorization request; please note: ***no*** grandfathering)
- Art. 75 — Referendum and entry into force

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Subject matter, purpose and scope of application of the FinIA (Art. 1 f.)

- The FinIA governs the **requirements for acting as a financial institution**, especially with respect to authorization/licensing, as well as their **supervision**. Its objective is to achieve equivalent supervision that is recognized as such by the EU and thus gain access to the internal market (as per requirements set out in the MiFIR).
- Purpose: to protect investors and clients and ensure the proper functioning of the financial market
- "**Financial institutions**" pursuant to the FinIA (Art. 2 para. 1):
  - **Asset managers** (Art. 17 para. 1) (so-called “simple” asset managers)
  - Trustees (Art. 17 para. 2)
  - Managers of collective assets (Art. 24) (so-called “qualified” asset managers)
  - Fund management companies (Art. 32)
  - Securities firms (Art. 41)
- In particular, the following are ***not*** subject to the FinIA (Art. 2 para. 2):
  - Investment advisors
  - Persons who manage solely the assets of persons with whom they have business or family ties (no commercial element)
  - Persons who manage assets solely within the context of employee participation schemes
  - Lawyers and notaries (incl. auxiliaries and legal entities, i.e. “Law Firm AG”) if the legal or notarial element predominates with respect to the portfolio management activity in question (e.g. mandate as executor), i.e. the relevant activity is subject to professional confidentiality in accordance with Art. 321 of the Swiss Criminal Code
  - Occupational pension schemes (i.e. pension funds) and other institutions whose purpose is to serve occupational pensions (welfare funds)
  - Insurance companies as defined in the Insurance Supervision Act (ISA)
  - Banks pursuant to the BankA

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Overview of the common provisions for all types of financial institutions pursuant to the FinIA (Art. 5 – 16)

- Duty to obtain authorization (Art. 5)
- Authorization cascade (Art. 6)
- Authorization conditions and entitlement (Art. 7)
- Change in authorization-relevant facts (Art. 8)
- Organization (Art. 9)
- Place of management (Art. 10)
- Guarantee (of irreproachable business conduct) (Art. 11)
- Public offer of securities on the primary market (Art. 12)
- Protection against confusion and deception (Art. 13)
- Delegation of tasks (outsourcing; Art. 14)
- International business (Art. 15)
- Ombudsman (Art. 16)

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Authorization (Art. 5 – 7)

Asset managers (EAMs)

- **Duty to obtain authorization** for "financial institutions" under the FinIA and thus also for asset managers. Authorization directly by ***FINMA*** (Art. 5 para. 1 in conjunction with Art. 2 para. 1(a)) in cooperation with supervisory organization.
- **Supervision:** EAMs are not supervised directly by FINMA, but rather by ***supervisory organizations (SOs)*** that are recognized and supervised by FINMA but are otherwise independent of FINMA (prudential, i.e. comprehensive supervision) (Art. 61). SOs are comparable to SROs pursuant to the AMLA, meaning that certain SROs will simultaneously perform SO functions (e.g. VQF, Zug, via the specially established subsidiary company "FINcontrol Suisse AG"; OAR-G/VSV: Swiss Supervisory Organisation of Wealth Managers and Trustees).

Investment advisors

- ***No duty to obtain authorization*** (exhaustive list of "financial institutions" required to obtain authorization can be found in Art. 2 para. 1) and thus also *no prudential supervision*.
- They are, however, subject to the ***business conduct requirements stipulated under the FinSA*** (Art. 2 FinSA), including the criminal law provisions (Art. 92 ff. FinSA) and – as before – the professional rules and codes of conduct of industry organizations.

Trustees

- Switzerland has ratified the Hague Trust Convention, meaning that trusts are recognized in Switzerland (but are, however, not classified as legal entities under Swiss law).
- Recognized as a "financial institution" for the first time under the FinIA: Trustees (not the trust itself, as it does not represent a legal entity that has legal capacity or is able to enter into contracts) (Art. 2 para. 1(b) in conjunction with Art. 17 para. 2). Thus subject to the ***same rules that apply to EAMs***, including duty to obtain authorization and supervision by SOs (Art. 61).
- Only applies to trustees that are resident or domiciled in Switzerland
- Does *not* apply to foundation boards (but probably to foundations if they fall under the scope of Art. 2) and likely also *not* to protectors.

Family offices

- ***Single-family offices*** (and their employees) that exclusively manage their own assets or those of their principals, respectively (i.e. individuals with family ties) are not deemed to be "financial institutions" under the FinIA and are thus ***neither required to obtain authorization nor are they supervised*** (Art. 2 para. 2(a)).
- ***Multi-family offices*** that also manage third-party assets are, on the other hand, generally deemed to be asset managers subject to the FinIA in accordance with Art. 2 para. 1(a) and are thus ***required to obtain authorization and are supervised***.

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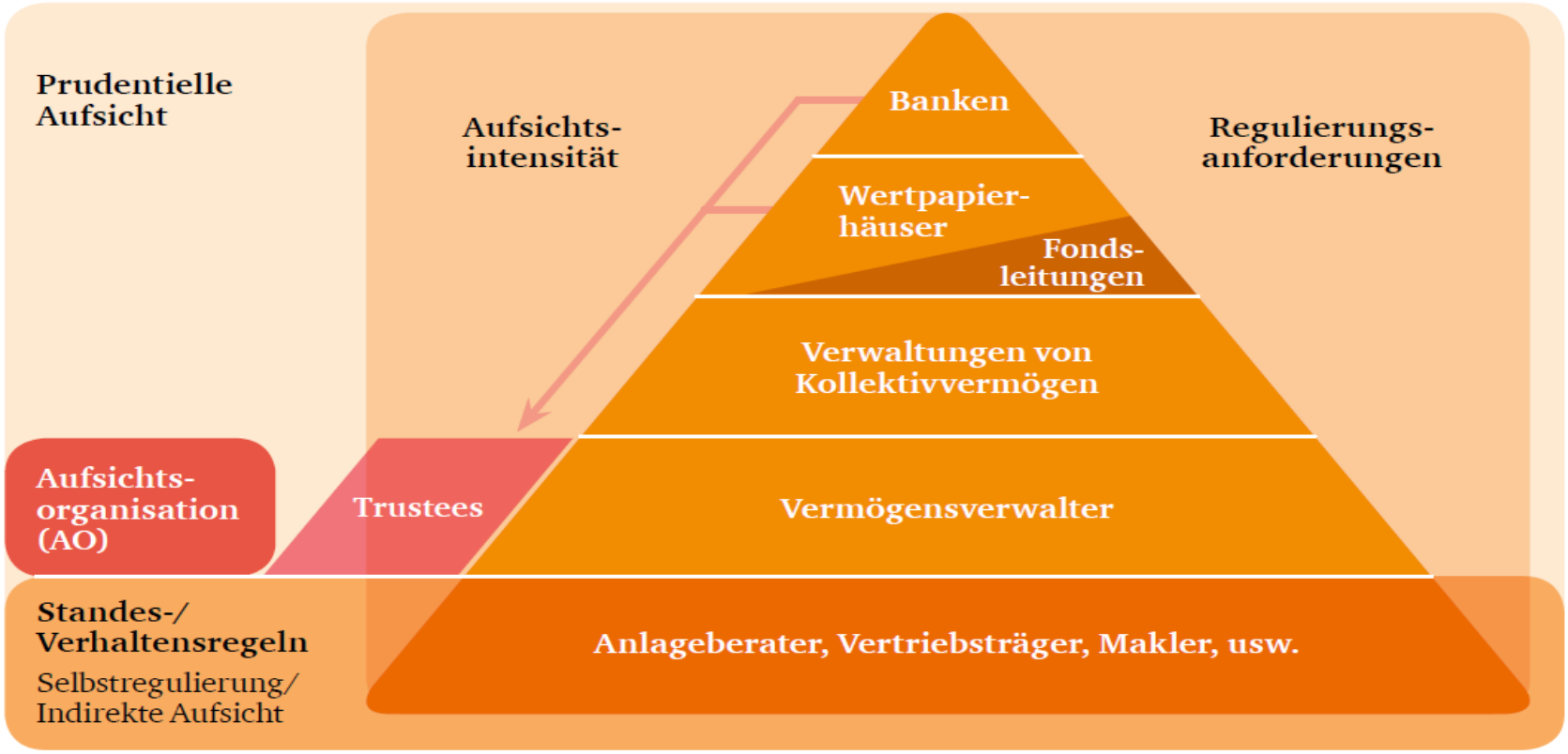
Expansion of prudential supervision and authorization chain



Source: PwC

Authorization cascade means that authorization for a superordinate category also includes authorization for the subordinate category(ies). Example (Art. 6 para. 1): authorization to operate as a bank also authorizes an entity to operate as a securities firm, a manager of collective assets, an asset manager and a trustee.

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Authorization conditions for asset managers – general

- Asset managers must meet the conditions stipulated under **Art. 5 – 16 (common provisions for all financial institutions)** and **Art. 17 – 23 (specific provisions for asset managers)** in order to entitle them to operating authorization from FINMA (Art. 7 para. 1). Together with the authorization request, evidence must also be provided that supervision is performed by a recognized SO, i.e. SO affiliation is required for the issuing of authorization by FINMA (Art. 7 para. 2).

  → Important: If the requirements are met: entitlement to operating authorization (Art. 7 para. 1)

- The Federal Council can define further requirements if this is necessary for the implementation of recognized international standards (Art. 7 para. 3) → relevant with respect to equivalence with European provisions

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Authorization conditions for asset managers – organization/management

- Asset managers are required to define appropriate management rules and be organized in a manner that enables them to meet their statutory obligations (Art. 9 para. 1). As a framework act, the FinIA only makes few specifications in this regard. These are not only to be met at the time that authorization is granted, but rather permanently.
- The Federal Council defines minimum requirements with respect to organization, taking account of different business activities, company sizes and risks (Art. 9 para. 3)
  - → significant discretionary powers for Federal Council
  - → preliminary work in working groups and statements in the consultation procedure for the draft FinIO will be decisive
- Appropriate for BoDs and EBs:
  - At least three BoD members of which two (i.e. the majority) are independent of the EB
  - Generally only joint signatory powers
- Fundamental quantitative and qualitative requirements for Executive Boards introduced by Parliament (Art. 20), see slide 21
- In accordance with Art. 716b of the Swiss Code of Obligations (SCO), organizational regulations are required if management is delegated by the BoD to individual members or third parties. → This of course also applies to EAMs in the form of stock corporations (AG) or limited liability companies (GmbH).

Authorization conditions for asset managers – organization/management (cont.)

- EAMs must implement a risk management system, including an effective internal control system (ICS) (Art. 9 para. 2)
  - Risk assessment already required now by all stock corporations (see Art. 663b(12) SCO).
  - Auditor must also verify and confirm the existence of an ICS as part of a *regular* audit
  - The risk management system must – in addition to the non-explicitly-mentioned usual risk categories such as market risks, product risks, client risks and operational risks – also expressly cover legal and reputational risks (see next slide for elements of the risk management system)
  - Possible content of ICS (see also CISO-FINMA, Art. 67 ff.):
    - Legislator does not stipulate a specific system. Instead, the ICS should be adjusted in line with the company's respective circumstances (see also Art. 9 para. 3 according to which the Federal Council should take account of the financial institution's specific risks in defining organizational requirements within the framework of the FinIO)
    - Documentation of key processes
    - Identification, assessment (incl. measurement procedure), management and monitoring of all risks (see also Art. 9 para. 2 of the FinIA)
    - Measures aimed at risk prevention and management (following the occurrence of a risk)
    - Authorities and limits of executive bodies/function holders, escalation procedure should limits be exceeded
    - Important: ICS must be known to and "lived" by employees
- Asset managers must effectively be managed from Switzerland (Art. 10)
- The persons entrusted with administration and management must (Art. 11: guarantee):
  - provide the guarantee of irreproachable business conduct (primarily relates to the body and not the individual members and also applies overall to the financial institution itself);
  - enjoy a good reputation and have the specialist qualifications required for their functions (see also Art. 20; slide 21).
- The same also applies to involved parties that directly or indirectly hold 10% or more of the share capital or votes of a financial institution (Art. 11, para. 3 – 6)

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Specific provisions for asset managers (Art. 17 ff.)

- Definition (Art. 17)
  - An **asset manager** is a person/company mandated to manage client assets on a commercial basis in the name of and on behalf of clients within the framework of financial services in accordance with Art. 3(c)(1-4) of the FinSA.
  - Definitional elements:
    - ***Mandate*** (portfolio management mandate)
    - for the provision of one or more of the following ***financial services***: Acquisition or sale of financial instruments; acceptance and transmission of orders involving financial instruments; portfolio management; investment advisory services
    - with corresponding ***power of disposal*** over the client's assets
    - ***Commercial nature***, i.e. independent business activities aimed at generating a sustainable profit (Art. 3)
- Legal form (Art. 18)
  - Possible legal forms:
    - Sole proprietorship
    - Commercial enterprise (especially AG/SA and GmbH/LLC)
    - Cooperative
  - Obligation to be listed in the commercial register (only possible upon provision of authorization by FINMA)
- Tasks (Art. 19)
  - Management of individual client portfolios, with it *also* being possible to provide the following services:
    - Investment advice
    - Portfolio analysis
    - Offering of financial instruments

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Specific provisions for asset managers (Art. 17 ff.) (cont.)

- Management requirements (Art. 20)
  - Principle: at least two qualified individuals (always in the case of new establishment of EAM)
  - Exception: one qualified individual if the proper continuation of business operations can be demonstrated (i.e. a kind of "grandfathering")
  - What does "qualified" mean? → Qualifications that are appropriate for the activity in question and sufficient relevant professional experience. Detailed regulations in the FinIO.
- Risk management and internal control requirements (Art. 21)
  - Suitably equipped risked management system and effective internal controls, thus ensuring, among other things, that adherence to statutory and internal requirements is guaranteed (compliance)
  - Corresponding tasks can be performed by qualified managers (see Art. 20) or delegated accordingly to qualified employees or third parties (outsourcing)
  - Hierarchical and functional separation of compliance and risk management from portfolio management. Individuals who perform risk management or internal control tasks must not be involved in the activities that they are monitoring.
  - Risk management and compliance tasks can be performed by appropriately qualified EB members, employees or external parties (outsourcing pursuant to Art 21 para. 2; see slide 22)
- Requirements with respect to minimum capital, collateral and own funds (Art. 22 f.)
  - Minimum capital: CHF 100,000 must be deposited in cash
  - Adequate collateral or professional liability insurance (Federal Council stipulates corresponding minimum amounts in the ordinance)
  - Appropriate level of own funds, i.e.
    - at least ¼ of fixed costs according to the most recent annual financial statements at all times but
    - no more than CHF 10 million

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Great significance is attached to outsourcing options (Art. 14, Art. 21 para. 2 and Art. 64; see also Art. 24 of the FinSA)

- Outsourcing is possible and especially interesting for smaller EAMs. However, outsourcing is only possible to third parties that meet the required conditions (skills, knowledge, experience and authorizations) for the activity in question (Art. 14 para. 1).
- Responsibility remains with the asset manager (obligations in regard of selection, instruction and monitoring in accordance with the general SCO provisions, see Art. 399 para. 2 for mandate law).
- For the transfer of investment decisions to persons abroad, an agreement between FINMA and the foreign supervisory authority may be required (Art. 14 para. 2).
- Duty to provide information and to report of those persons to whom tasks are delegated: Not only the principal (e.g. EAM), but also the supervisory authority can perform an audit of outsourcing partners at any time (Art. 64).
- Legal, compliance, internal control and risk management as typical outsourcing areas (see Art. 21 para. 2).
- Example of compliance services:
  - Case-specific advice
  - Compliance "body lending"
  - Compliance outsourcing, i.e. outsourcing of entire compliance function and organization
  - Development of directives, ICS, appropriateness and suitability forms, etc.
  - Support with authorization requests and other forms of contact with authorities
  - Advice with respect to possible MROS reports in the AMLA area

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Supervision of asset managers (Art. 61)

- SOs as the appropriate means for Switzerland to regulate the supervision of EAMs
  - FINMA is generally responsible for ensuring that financial institutions subject to prudential supervision under the FinIA comply with the relevant requirements. For asset managers and trustees, Art. 61 of the FinIA specifies supervision by FINMA *with the involvement of an organizationally independent "supervisory organization" (SO) with self-regulatory character*.
  - The new SO concept is governed in the Financial Market Supervision Act (Art. 43a ff. FINMASA)
  - FINMA is ultimately responsible for supervision, ongoing supervision is performed by SOs
  - SOs must be authorized by FINMA and are supervised by FINMA
  - SOs must (of course) be independent of their affiliated supervised institutions
  - SOs are financed through the contributions of the supervised institutions (i.e. while there should be more than one SO, there should not be too many [FINMA wants no more than three SOs])
  - SOs audit their affiliated EAMs and trustees on a periodic basis (every one to four years) and notify FINMA in the event of possible breaches of authorization conditions → FINMA issues sanctions in accordance with the FINMASA catalog, SOs themselves possibly issue sanctions via penalties (SRO system)
  - SOs can also supervise financial intermediaries in accordance with the AMLA provided they are authorized as SROs in accordance with Art. 24 of the AMLA
- SRO landscape in a state of transition
  - SROs are working on positioning themselves as SOs (VQF; OAD-FCT/Polyreg; OAR-G/VSV) → There will be several SOs.
  - DSFI status will be immediately rescinded with the entry into force of the FinIA; requirement to affiliate with an AMLA SRO within six months and – in the case of EAMs or trustees – an SO within three years.
  - Industry Organisation for Independent Asset Managers (BOVV) under the CISA will also be immediately discontinued with the entry into force of the FinIA. It will, however, likely be possible for BOVV members to switch to an SO under reduced conditions.

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Ongoing supervision of asset managers by SOs

- According to the requirements of the Federal Council (FinIO) and FINMA (technical and operational level)
- According to risk-based supervisory concept (size, risk)
- Audit according to audit frequency (one to four years) with respect to all relevant financial market laws
- Audit reports → report, measures, sanctions
- Obligation of EAMs to segment clients with appropriateness and suitability test
- Education and further training obligations
- Information and reporting/accountability obligations vis-à-vis clients
- Documentation and handover obligations
- Obligation of transparency and care
- Organizational requirements
- Ombudsman affiliation

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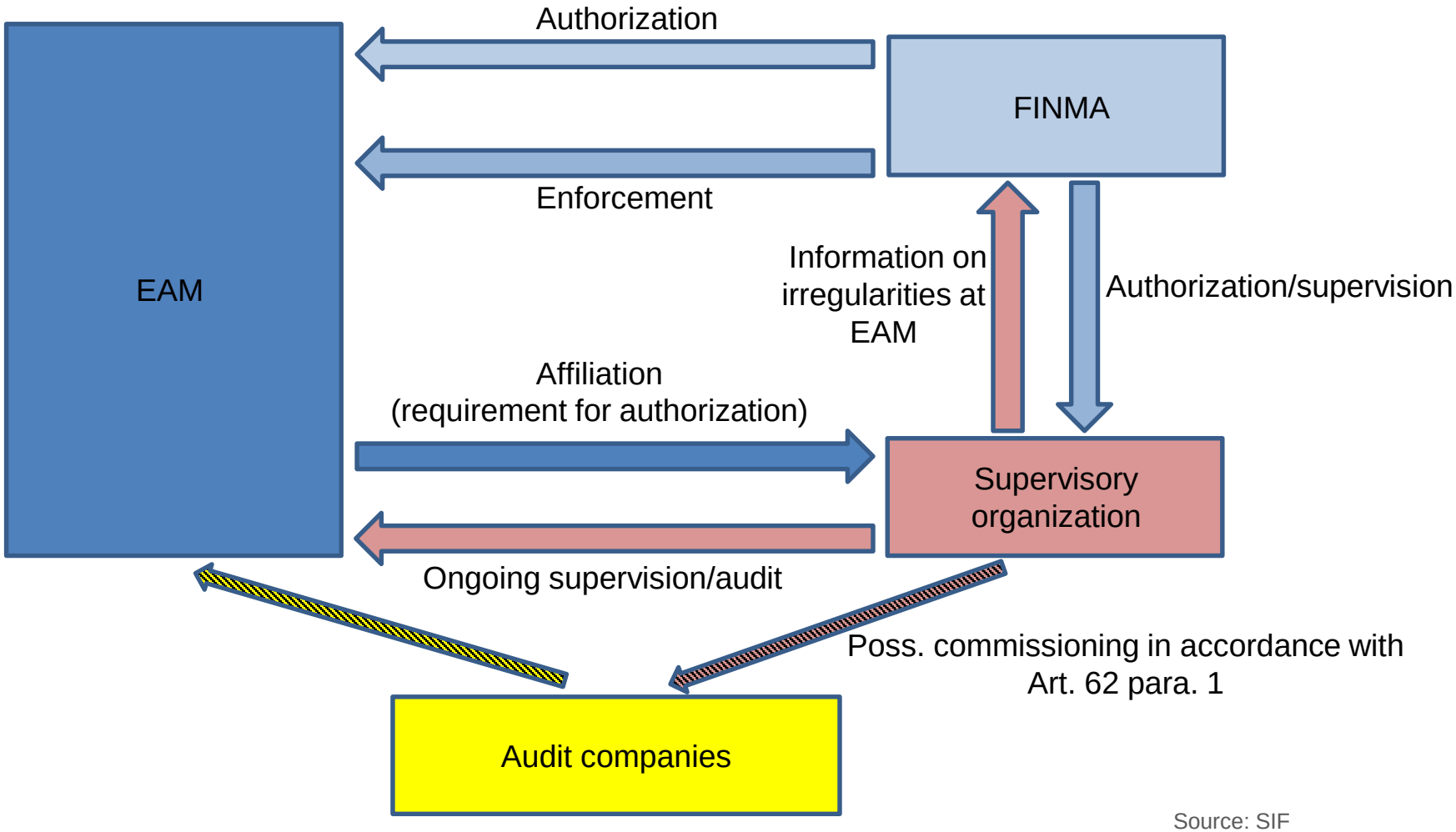
Structure of supervision of asset managers



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What do asset managers need to do by when? (Art. 74 para. 1 and 2)

- Asset managers that possess CISA authorization for the management of collective assets upon the entry into force of the FinIA do not require new or additional authorization (see authorization cascade)
- Asset managers that will *now* be subject to a duty to obtain authorization upon the entry into force of FinIA:
  - must contact FINMA within six months of the FinIA entering into force;
  - need to meet the requirements specified under the FinIA within three years of its entry into force and submit an authorization request to FINMA (prior affiliation with an SO is required to this end);
  - can continue their existing activities until an authorization decision is reached upon submitting the authorization request in a timely manner.

Grandfathering

- Dropped by Parliament during the procedure for resolving differences!

V. FinIA/FinSA – To-do list for EAMs

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- FinIA:
  1. EB: Increase to (at least) two members or govern deputization arrangements should a member be prevented from performing his/her role, add independent members to the BoD
  2. Introduce joint signatory powers
  3. Hierarchical and functional separation of portfolio management and risk management/compliance
  4. Risk management/compliance: search for possible outsourcing partners and/or independent BoD member
  5. Create simple ICS
  6. Check whether own funds equate to 25% of annual fixed costs; increase if required
  7. Take out professional liability insurance (see also increasing number of court cases due to retrocessions)
  8. Check separation of activities that are relevant under supervisory law and those that are not (e.g. in family offices portfolio management from other service categories)
  9. Check qualified shareholders (do they offer guarantee?)
- FinSA:
  1. Ensure client segmentation
  2. “Do good and write about it”: document dealings with clients and, in particular, record in writing client profiles showing their risk appetite and risk capacity (have these signed by the clients)
  3. Creation of transparency with respect to retrocessions (adjust contracts where necessary)
- And, where applicable, for MiFID II:
  1. Telephone recordings
  2. Diversity within management committees
  3. Emergency planning
  4. Review retrocession policy

VI. Cryptocurrencies: fintech in Swiss legislation

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Introduction of "sandbox" in accordance with the revised BankO (as of August 1, 2017)

- Acceptance of deposits from the public of up to CHF 1 million. No longer deemed to be commercial, i.e. is exempt from authorization obligation
- Deposits can neither be invested nor bear interest
- Deposits can originate from more than 20 depositors
- Deposits may be invested and interest bearing if they are intended to fund a commercial or an industrial main activity
- Depositors must be informed that the deposits are not covered by the deposit protection scheme
- AMLA remains applicable
- Targeted effect:
  - Crowdlending and crowdfunding should be promoted: funds flow directly from investors to the companies that require money (without banks as intermediaries)
  - Smaller tranches for lenders

New rules for settlement accounts in accordance with the revised BankO (as of August 1, 2017)

- Increase deadline for settlement accounts from seven to 60 days

New "banking license light" in accordance with Federal Council dispatch of February 1, 2017:

- New authorization category for companies that accept a maximum of CHF 100 million in deposits from the public
- No lending activities with maturity transformation
- Reduced requirements with respect to own funds (at least 5% of the accepted deposits from the public, but at least CHF 300,000) and liquidity
- No deposit protection
- No investment, no accrual of interest on deposits
- To be introduced in 2019 at the earliest

VI. Cryptocurrencies: overview of token types

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- Payment tokens: function as means of payment
  - Characteristic: payment tokens do not include a right to a claim against the issuer. Their value, similar to a commodity, is based on supply and demand
  - Qualification: the tokens are deemed to be a means of payment, but not securities
- Utility tokens: provide access to a digital application or service
  - Characteristic: utility tokens include a claim to actual delivery against the issuer or a third party (e.g. a right to software, a right to accommodation in a specific hotel)
  - Qualification: are not securities if a token holder is exclusively granted access to a digital application or service
- Asset tokens: include token that represent assets
  - Characteristic: the cryptocurrency includes a debt claim against the issuer or a membership right in the sense of company law
  - Qualification: asset tokens are securities within the meaning of Art. 2(b) of the FMIA if they represent an uncertificated security and are suitable for mass standardized trading

VI. Cryptocurrencies: supervisory treatment

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- Payment tokens
  - As payment tokens are not securities, the following applies:
    - The multilateral trading of payment tokens does not need to be conducted via stock exchanges (according to the information available to us, multilateral trading does also not have to be performed via an organized trading system within the meaning of Art. 44 of the FMIA with lower regulatory requirements than for stock exchanges).
    - Persons who trade payment tokens for the account of third parties do not require a securities trading license.
    - Persons who issue payment tokens do not require a license as a bank.
- Utility tokens
  - Utility tokens are also not securities and are regulated in a similar manner to payment tokens. The following applies:
    - Multilateral trading does not need to be conducted via a stock exchange or a multilateral trading system (utility tokens are likely rather unsuitable for multilateral trading).
    - Neither a securities trading license nor a banking license is required for the issuing of utility tokens.
- Asset tokens
  - Asset tokens as securities are subjected to the following restrictions:
    - The issuing of tokens that are analogous to equities or bonds results in prospectus requirements.
    - For the multilateral trading of tokens, the same regulations are applied as for other securities (equities, bonds, options).
    - Under certain circumstances, the issuers of asset tokens require a banking or securities trading license (this must be clarified on a case-by-case basis).

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Tokens have similarities to objects, but are not categorized as such according to prevailing opinion

- Similarities:
  - Ownership is to be assigned to the person in whose wallet the tokens are held.
  - Generally speaking, the transfer of ownership requires a transaction giving rise to a transfer agreement and a legal obligation, i.e. a purchase agreement or gift and an ownership transfer (e.g. transfer from one wallet to another or transfer of the wallet itself).
- Differences:
  - Cryptocurrencies are not objects.
  - As is the case with book-entry securities, they are transferred by means of a change in registration.

Tokens share similarities with "Fiat money", but there are also differences here:

- Similarities:
  - Cryptocurrencies can be accepted as a means of payment.
  - Cryptocurrencies can be used as a store of value.
- Differences:
  - Cryptocurrencies are not legal tender, i.e. in Switzerland and, as far as is known, in no other country can monetary debts be settled with cryptocurrencies against the will of the creditor.
  - Bank account balances in cryptocurrencies are not privileged in the event of the bank's insolvency (fiat currency balances held with banks are privileged in Switzerland if they do not exceed CHF 100,000).
  - In contrast to issuers of fiat currencies, issuers of cryptocurrencies do not have a currency monopoly in their respective country.

Holding of cryptocurrencies with third parties

- Deposit (individual custody):
  - The depositor holds cryptocurrencies in safe custody with a custodian, with the custodian holding the cryptocurrency in a wallet in the name of the depositor.
    - As the cryptocurrencies are held separately, i.e. not together with the custodian's assets, they can be segregated in the event of the custodian's bankruptcy.
- Deposit (collective custody):
  - The depositor holds cryptocurrencies in safe custody with a custodian, with the custodian holding the cryptocurrencies in a client wallet together with the currencies of various other clients.
    - As the cryptocurrencies are held separately, i.e. not with the custodian's assets, they can be segregated in the event of the custodian's bankruptcy.
- Irregular deposit:
  - The depositor delivers cryptocurrencies to the custodian with the express or implicit obligation to return the same cryptocurrency amount.
    - Cryptocurrencies are transferred into the ownership of the custodian and the depositor has only a mandatory claim to the return of the deposited cryptocurrencies, meaning that in the event of the custodian's bankruptcy the cryptocurrency is not segregated.
- Loan:
  - The lender undertakes to transfer ownership to cryptocurrencies and the borrower undertakes to return the same type of cryptocurrencies.
    - The lender has a right to a claim against the borrower for the payment of the cryptocurrencies and does not have a right to segregation in the event of the borrower's bankruptcy.

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Taxation of cryptocurrency investors as private individuals

- Private assets:
  - An increase in the value of a cryptocurrency is not to be subjected to tax provided the cryptocurrency is held for investment purposes (Circular No. 36 of the FTA of July 27, 2012, applies analogically to the distinction between business and private assets).
- Business assets:
  - An increase in the value of cryptocurrencies is to be subjected to tax if the cryptocurrency belongs to the business assets of a person taxable in Switzerland.

Distinction between private assets and business assets

- As a rule, belongs to private assets if:
  - The holding period of the currency is at least six months;
  - The transaction volume (equates to the sum of all purchase prices and sales proceeds) per calendar year does not total more than five times the value of the cryptocurrencies at the beginning of the tax period;
  - The investments are not or not significantly financed by third-party borrowing;
  - The purchase and sale of derivatives is limited to the hedging of the currency positions.
- As a rule, belongs to business assets if:
  - The individual currencies are only held for a short period;
  - Significant borrowed funds are used;
  - Derivatives are not only used for hedging purposes;
  - A systematic and planned approach is applied to the management of the cryptocurrencies (subordinate indicator);
  - There is a close relationship between the currency transactions and the professional activity and special technical knowledge is applied (subordinate indicator).

VII. Annex: organization/corporate governance: comparison (1)

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Criterion	MiFID II	FinSA/FinIA
Highest strategic management body	• Sufficient knowledge, skills and experience on a collective basis • Requirements with respect to composition ("diversity") • Tasks: definition, approval, monitoring of (a) strategic objectives and implementation, (b) company organization incl. governance, (c) company policy and (d) remuneration policy	• No specific regulations in the FinSA, but (a) general requirements under the SCO and (b) requirements according to the FinIA apply • FinIA: ○ Art. 10: EAMs must effectively be managed from Switzerland ○ Art. 11: Persons tasked with administration and management must (as the body in question) provide the guarantee of irreproachable business conduct. Also applies to shareholders or parties involved indirectly with a participation of at least 10% (on the basis of capital or votes) • Art. 7 para. 3: Federal Council can define further authorization conditions in ordinances if this is required for the implementation of recognized international standards (e.g. MiFID II) (equivalence requirement) • Art. 9 para. 1: EAMs must be organized in a way that allows them to meet their statutory obligations • Art. 9 para. 3: Federal Council defines minimum requirements with respect to organization in ordinances → to be expected: requirements with respect to BoD, EB, risk management, etc.

VII. Annex: organization/corporate governance: comparison (2)

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Criterion	MiFID II	FinSA/FinIA
Strategy, structure, processes	• Detailed requirements with respect to organization, systems and procedures for: ○ Internal organization and governance ○ Systems/procedures ○ Emergency planning ○ Accounting ○ Continual review and improvement	• FinSA: ○ Art. 21: Obligation to adopt internal regulations and a suitable organizational structure with respect to compliance with the FinSA ○ Art. 22: Requirements with respect to ensuring skills, knowledge and experience at an employee level • FinIA: ○ Art. 21: EAMs must define suitable corporate governance rules and, among other things, also maintain an ICS (as is already the case today for all stock corporations) ○ Requirements in accordance with Art. 20 as regards corporate governance and risk management ○ Art. 22 f.: minimum requirements with respect to collateral and own funds (as authorization conditions) • Otherwise applicable: The FinIA and FinSA as framework acts → details provided within the framework of Federal Council ordinances, a lot still currently open
Organizational requirements with respect to services	• Art. 16 para. 4: measures to ensure continuity of securities services and investment activities	• Art. 23 f. of the FinSA: regulation of responsibilities with respect to EAMs upon the delegation of orders to other financial services providers (service provider chain)

VII. Annex: organization/corporate governance: comparison (3)

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Criterion	MiFID II	FinSA/FinIA
Organizational requirements with respect to financial instruments	• Art. 16 para. 3: procedure for the approval and regular review of self-designed financial instruments deployed for clients ("product governance") • Art. 16 para. 3: Measures to obtain relevant information pertaining to financial instruments designed by third parties	• No specific *organizational* requirements but detailed regulations with respect to reviewing suitability and appropriateness • Otherwise: FinSA as a framework act → details provided within the framework of Federal Council ordinances
Organizational requirements with respect to the involvement of third parties (outsourcing)	• Art. 16 para. 5: measures aimed at risk prevention in the event of outsourcing; this must not have a detrimental effect on internal control measures and audits conducted by supervisory authorities	• Art. 23 of the FinSA: outsourcing is generally permitted but only if the required skills, knowledge, experience and authorizations are in place. Also an obligation to ensure careful instruction and monitoring. • Art. 14 and Art. 64 of the FinIA: ○ same requirements as in Art. 23 of the FinSA ○ Clarification that responsibility remains with the EAM. → obligation to ensure careful selection, instruction and monitoring ○ Duty to provide information and report of the outsourcing partner vis-à-vis the supervisory authority which can also perform audits directly at the site of the outsourcing partner • Legal, compliance and risk management as typical outsourcing areas

VII. Annex: organization/corporate governance: comparison (4)

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Criterion	MiFID II	FinSA/FinIA
Recording and saving of communication	• Detailed requirements (organization, procedures, systems, etc.) with respect to the recording of telephone calls and communication with clients (electronic, personal) • Obligation to save for at least five years • Provision of information to clients	• No regulation with respect to the recording and retention of client communication but: o Obligation to document client needs and financial services (Art. 15 of the FinSA) o Reporting and other accountability obligations at the wish or request of clients (Art. 16 of the FinSA)
Holding of client assets and financial instruments	• Designation of internal responsibility with respect to the protection of client instruments and assets • Provision of report to clients on at least a quarterly basis • Detailed requirements with respect to the separation of client assets • Establishment of a compliance function with extended duties	• No specific regulations but these could follow in Federal Council ordinances for equivalence reasons

VIII. Annex: information for clients: comparison of the FinSA/MiFID II

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Criterion	MiFID II (Art. 24)	FinSA (Art. 8 f.)
Information about the company and the offered services	• Detailed regulations about the duty to provide information with respect to companies • These requirements can be met through the provision of standardized brochures during client onboarding	• Extremely detailed regulations about the duty to provide information with respect to companies, incl. reference to the possibility of a mediation procedure before an ombudsman in the event of a dispute between clients and the EAM
Information about the financial instruments relating to the mandate	• Detailed regulations about the duty to provide information with respect to the financial instruments relevant to the type of mandate in question • These requirements can generally be met through the provision of standardized brochures during client onboarding (or upon a later change in mandate type) Special documentation now only in special cases (special products)	• Outside of the suitability and appropriateness test, there are only few product-related duties to provide information; as a rule, however, these must be met prior to the conclusion of a contract or the provision of the relevant service • Duty to provide information can be met simply through the provision of standardized brochures
Information about PM mandate (incl. costs)	• Very detailed information requirements with respect to the mandate, financial instruments (assessment, risks, etc.) and costs	• No specific information requirements
Information about investment advisory services (incl. costs)	• New distinction between independent and dependent investment advisory services (consequences primarily as regards the permissibility of retrocessions) • Very detailed information requirements with respect to costs	• No specific information requirements
Remarks	• Information requirements under MiFID II legislation significantly more stringent and detailed than in the FinSA	• Recommendation for Swiss EAMs wishing to operate on a cross-border basis: provision of MiFID II-compliant brochures (possibly with local adjustments/information)

IX. Annex: conflicts of interest: comparison of the FinSA/MiFID II

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Criterion	MiFID II (Art. 23 in conjunction with Art. 16 para. 3)	FinSA (Art. 25 ff.)
Identification, prevention and regulation of conflicts of interest	• Obligation to take measures with respect to the identification, prevention or regulation of conflicts of interest (a) between the EAM and clients as well as (b) between clients	• Obligation to take organizational measures (a) aimed at preventing conflicts of interest and (b) avoiding instances in which clients are put at a disadvantage (in the event of unavoidable conflicts of interest) • Obligation to adopt an internal directive aimed at the prevention of the unauthorized use of "insider information" for own account by EAM employees
Disclosure to clients	• Regulation of the timing, form and content of the disclosure (to clients) of conflicts of interest as well as corresponding measures	• With respect to retrocessions if and to the extent that these are still even permitted (see slides on section X.)
Special provisions	• EU Commission can (via delegated legal acts) provide further specifications	

X. Annex: retrocessions: comparison of the FinSA/MiFID II

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Criterion	MiFID II (Art. 24 para. 8)	FinSA (Art. 26)
PM mandate	• Acceptance of retrocessions not permitted or retrocessions must be passed onto clients	• Retrocessions permitted in all business categories (PM business, investment advice, execution only) if: ○ Clients have been expressly informed in advance about the type and scope of the remuneration and have opted against having it passed onto them OR ○ The remuneration is forwarded to the client in full. ○ If the remuneration amount cannot be quantified in advance, the client must be informed of the calculation parameters and ranges. The amounts actually received can then be disclosed subsequently at the request of the client.
Independent investment advice	• Acceptance of retrocessions not permitted or retrocessions must be passed onto clients	
Dependent investment advice	• Retrocessions may only be accepted and retained under certain conditions that are difficult to meet in practice	
Remarks	• MiFID II: general ban on retrocessions	• FinSA: retrocessions are generally permitted but with clear transparency requirements → unclear whether FinSA regulation will survive in the longer term due to lack of equivalence with European regulations. • First legal anchoring of Federal Court practice that has emerged over the past 10 years.

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