RUOSS VOGELE

FinSA/FinIA in Comparison with EU Regulations: Outline and Pragmatic Implementation

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Management Summary

The FinSA and FinIA relate to the provision of financial services, the offer of financial instruments and the licence requirement for financial institutions. These topics are covered in the EU/EEA mainly under the MiFID II, PRIIPs Regulation and Prospectus Regulation. This Bulletin compares the requirements in Switzerland with those in the EU/EEA. It is shown how the new requirements can be implemented in a pragmatic way. In particular, appropriate internal guidelines must be issued and standard documents drafted.

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New Requirements and Implementation

New requirements for financial services

FinSA/FinIA:

The new Financial Services Act (the «*FinSA*») and the new Financial Institutions Act (the «*FinIA*») together with the implementing ordinances entered into force on 1 January 2020. The following ordinances are concerned: Financial Services Ordinance («*FinSO*»), Financial Institutions Ordinance («*FinIO*») and Supervisory Organisation Ordinance («*SOO*»).

The new legislation mainly concerns the following subject matters:

- Providing financial services;
- Producing and offering financial instruments;
- Authorisation and supervision of financial institutions.

EU Regulations:

In terms of content, the rules are based on the EU regulations, with adjustments made to reflect the specific Swiss circumstances. The EU regulations comprise three levels: The first level includes the general directives and regulations of the EU. The second level comprises the delegated directives, delegated regulations and technical standards. The third level comprises the guidelines and Q&A. Finally, there is implementing legislation of the Member States.

The following EU legislation forms the first level in the context of financial services and financial products:

- *MiFID II:* Directive 2014/65/EU on markets in financial instruments;
- *MiFIR:* Regulation (EU) 600/2014 on markets in financial instruments;
- *PRIIPs Regulation:* Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs);
- *Prospectus Regulation:* Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (replaces Directive 2003/71/EG);
- *UCITS Directive:* Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by UCITS I – V.

In particular, the following EU legislation forms the second level in the context of financial services and financial products:

- *Delegated Regulation 565:* Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU as regards organisational requirements and operating conditions for investment firms and defined terms of the purposes of that Directive;
- *Delegated Directive 593:* Delegated Directive (EU) 2017/593 supplementing Directive 2014/65/EU with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provisions or reception of fees,

commissions or any monetary or non-monetary benefits;

- *Delegated Regulation 653:* Delegated Regulation (EU) 2017/653 supplementing Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) by laying down regulatory technical standards with regard to the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents.

Individual implementation

Concerned companies should evaluate the best way of implementing the new requirements based on their own business activity. The relevant legislation offers alternative implementation solutions in various areas (e.g. differentiation between categories of clients). Furthermore, the specific circumstances of a company should be taken into consideration. Each company should evaluate for itself how to best implement the requirements considering the circumstances of its own business activity. In particular, size and needs of the company as well as already implemented processes and existing documents may be taken into consideration.

Anticipative implementation

Concerned companies should implement the applicable norms in an anticipative way. They should anticipate how the authorities and the courts would retroactively judge the structuring of their own business activities based on the new statutes. This is how the risk of supervisory law measures, criminal sanctions or actions for damages can be minimized in the future (see RVP Bulletin 6/2017 on Reduction of Legal and Reputation Risks through Anticipated Implementation of Norms by Companies).

The relevant norms contain besides supervisory and criminal law sporadically also private law norms or norms with emission effect on civil law relations. The anticipative implementation of statutory norms is different depending on the type of norm.

As far as the implementation of *supervisory law norms* is concerned, the goal is not to avoid unlawful behaviour in particular cases (e.g. providing financial services without preceding client information), but to take appropriate internal measures to minimize the risk of unlawful behaviour in the future. Concerned companies may avoid supervisory law measures (e.g. prohibition of business activity, challenge of assurance of proper conduct of business) mainly by means of appropriate internal guidelines. If there is an appropriate internal organisation in place based on company guidelines, no supervisory law measures will generally be taken in a breach of law event (compare Statute Commentary, p. 8963 - 8964).

As far as the implementation of *criminal law norms* is concerned, the goal is to avoid criminal behaviour to the extent possible. Compliance with such norms is considered particularly important by the legislator. This is why a breach is subject to criminal sanctions. Concerned companies may again issue guidelines in order to minimize the risk of criminal sanctions. The responsibility of norm compliance should thereby be allocated to a specific function and monitored. This is how any breach of law would lead to sanctions against the responsible employee and not against the company itself.

As far as the implementation of *private law norms* or *norms with emission effect on civil law relations* is concerned, the goal is to avoid to the extent possible that clients suffering a loss are able to successfully file an action against the company. For this purpose, concerned companies should draft appropriate standard documents to be used for client relationships and set up a process to deal with client claims.

Combined implementation

There could be combined implementation if a group of companies providing financial services is subject to both FinSA/FinIA and MiFID II, as it has clients in Switzerland as well as in the EU/EEA. One may possibly implement intragroup standards that go beyond the local requirements in Switzerland or in a particular Member State.

A company with registered office in Switzerland must, as regards its Swiss clients, hold a license according to the FinIA and comply with the requirements according to the FinSA regarding the provision of financial services and the offer of financial instruments. However, it may generally be active in the EU/EEA only to a limited extent and subject to specific conditions, respectively, according to the MiFID II/MiFIR (see territorial scope hereafter).

Emanation on private law

There is emanation on private law in the case of the FinSA (Statute Commentary (FN 24), 8921). The civil court in Switzerland will be able to refer to supervisory law for the purpose of specifying existing private

law provisions. However, no new private law duties are thereby created. Existing supervisory and private law provisions remain independent from each other. One may still try to obtain minimum harmonization of supervisory and private law duties by means of the emanation effect.

From the point of view of the financial service provider, the emanation effect of supervisory on private law means first of all that supervisory law provisions do not only need to be implemented for reasons of supervisory law, but also for reasons of private law. Any breach of supervisory law duties may lead not only to supervisory actions and in certain cases criminal law sanctions, but may possibly also be considered in the context of assessing private law claims for damages.

Provision of Financial Services

Statutory Norms

Factual scope of application

FinSA:

Financial service providers must comply with various requirements for the purpose of client protection under the FinSA. Factually, they are subject to the FinSA irrespective of their legal form if they provide financial services (Art. 2 FinSA). One needs to ask who "*financial service providers*" and what "*financial services*" are. The respective factual scope of the FinSA is mainly based on the following definitions of terms, subject to various exemptions (e.g. insurance undertakings, insurance intermediaries, see Art. 2 para. 2 FinSA):

- *Financial service provider* means any person who provides financial services on a professional basis, while a professional basis is given in case of an independent economic activity for the purpose of permanent income (Art. 3 lit. d FinSA). Companies or entities of a group are not considered as financial service providers to the extent that they provide financial services to other companies or entities of the same group (Art. 3 para. 4 FinSO).
- *Financial services* are the following activities carried out for clients: (1) acquisition or disposal of financial instruments; (2) reception and transmission of orders in relation to financial instruments; (3) management of financial instruments (portfolio management); (4) giving personal recommendations on transactions with financial instruments (investment advice); (5) granting loans for transactions with financial instruments (Art. 3 lit. c FinSA). Entities of a group that provide financial services to another entity of the same group are not considered to be clients in the sense of the FinSA (Art. 4 FinSA).
- *Financial instruments* are equity securities, debt instrument securities, units in collective investment schemes, structured products, derivatives, deposits whose redemption value or interest is linked to the risk embedded or the interest rate (except those where the interest rate is linked to an interest rate index) and bonds (Art. 3 lit. a FinSA).

MiFID II:

The MiFID II applies to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the EU/EEA (Art. 1 para. 1 MiFID II). The relevant factual scope of application of the MiFID II is generally based on the following defined terms, subject to various exemptions (e.g. insurance undertakings, insurance intermediaries, see Art. 2 MiFID II):

- *Investment firm* means "any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis." (Art. 4 para. 1 no. 1 MiFID II).
- *Investment services and activities* means "any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I." (Art. 4 para. 1 no. 2 MiFID II).
- *Third-country firm* means "a firm that would be a credit institution providing investment services or performing investment activities or an investment firm if its head office or registered office were located within the EU/EEA." (Art. 4 para. 1 no. 57 MiFID II).
- *Branch* means "a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services and/or activities and which may also perform ancillary services for which the

investment firm has been authorised." (Art. 4 para. 1 no. 30 MiFID II).

- *Investment advice* means "the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments." (Art. 4 para. 1 no. 4 MiFID II). ;
- *Portfolio management* means "managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments." (Art. 4 para. 1 no. 8 MiFID II).

Territorial scope of application

FinSA:

Territorially, the provision of financial services on a professional basis in Switzerland or for clients in Switzerland is subject to the FinSA (Art. 3 lit. d FinSA; Art. 2 FinSO).

Nevertheless, the following financial services are not considered as financial services subject to the FinSA: (1) financial services of non-Swiss financial service providers in the context of a client relationship that was entered into at the express initiative of the client; and (2) financial services that were requested by clients abroad by means of correspondence ("*reverse solicitation*") (Art. 2 FinSO).

MiFID II/MiFIR:

Regarding the territorial scope of application, the provision of investment services and the performance of investment activities with or without any ancillary services in the EU/EEA are concerned (compare Art. 39 para. 1 MiFID II). The EU provisions protecting investors are based on the place of activity and the domicile, respectively.

The MiFIR includes uniform requirements applicable to all Member States; they are stated in Art. 46 – 49 MiFIR: If a third country firm wishes to provide its services to *eligible counterparties* and *professional clients* in the EU/EEA, it must be entered into the ESMA register of admitted third country firms. This requires an equivalence decision of the Commission (Art. 47 MiFIR).

The MiFID II includes a regime with implementation leeway for the benefit of the Member States; it is stated in Art. 39 – 43 MiFID II: It concerns the provision of services to retail clients and "opt-in" professional clients. A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to "opt-in" professional clients in its territory establish a branch in that Member State. If a Member State does not require the establishment of a branch, it determines itself the requirements for the third country firm to comply with. The MiFID II does not specify such requirements.

Nevertheless, the following regarding "*reverse solicitation*" applies under the MiFID II on the EU/EEA level: "The provision of MiFID II regulating the provision of investment services or activities by third-country firms in the EU/EEA should not affect the possibility for persons established in the EU/EEA to receive investment services by a third country firm at their own exclusive initiative. Where a third-country firm provides services at the own exclusive initiative of a person established in the EU/EEA, the services should not be deemed as provided in the territory of the EU/EEA. Where a third-country firm solicits clients or potential clients in the EU/EEA or promotes or advertises investment services or activities together with ancillary services in the EU/EEA, it should not be deemed as a service provided at the own exclusive initiative of the client." (Introductory Note no. 111 of MiFID II). The interpretation of the term "reverse solicitation" generally remains within the competence of the concerned Member State.

Client segmentation

FinSA:

Financial service providers must allocate clients for whom they provide financial services to one of the following segments: (1) retail clients; (2) professional clients; and (3) institutional clients. The various categories of clients are defined in the Act. There is exceptionally no need for any client segmentation if all clients are treated as retail clients (Art. 4 FinSA). There are possibilities of switching for certain categories of clients by means of opting in or opting out based on a written declaration or text form declaration. The financial service providers must inform their non-retail clients about the possibility of opting in before providing any financial services (Art. 5 FinSA). Client segmentation is further specified in the Ordinance (see Art. 4 and 5 FinSO).

MiFID II:

There is a distinction between the following categories of clients: retail clients, professional clients and eligible counterparties. A professional client is a client

meeting the criteria laid down in Annex II of MiFID II. A retail client is a client who is not a professional client. Eligible counterparties are particular professional clients, for example investment firms, credit institutions, insurance companies, etc. (Art. 4 para. 1 no. 10 and 11 as well as Art. 30 para. 2 MiFID II). Non-professional clients may upon request and under certain conditions be treated as professional clients ("opt-in" professional clients, see Annex II of MiFID II).

The MiFID II serves in particular the purpose of investor protection. The respective measures shall be appropriate and take into consideration the peculiarity of each investor category (retail clients, professional clients, eligible counterparties) (Introductory Note no. 86 of MiFID II). Some requirements of the MiFID II are higher for retail clients than for professional clients (see in particular Delegated Regulation 565).

Client information

FinSA:

Financial service providers must inform their retail clients and professional clients of the financial services with legally required content in standardized form on pap er or electronically before contract conclusion or service provision (Art. 8 and 9 FinSA). Professional clients may explicitly waive the information requirement (Art. 20 FinSA). The information duty is further specified in the Ordinance (see Art. 6-14 and 22 FinSO).

Advertising must be indicated as such (Art. 8 FinSA).

MiFID II:

The clients and potential clients must be provided with certain information under the MiFID II; the requirements deviate partly from those under the FinSA. The information requirements concern in particular the following aspects: Fair, clear and not misleading information; information on client categorisation; general information requirements; information on investment firm and its services for clients and potential clients; information on financial instruments; information for the purpose of protecting client finance instruments and client funds; information on costs and additional costs; information on investment advice (Art. 24 para. 3 and 4 MiFID II; Art. 44 – 52 Delegated Regulation 565).

Enquire on appropriateness and suitability

FinSA:

Financial service providers who provide retail clients with investment advice or portfolio management must conduct an appropriateness or a suitability assessment (Art. 10, 13 and 20 FinSA). Financial service providers are obliged to enquire if the clients are retail clients.

A financial service provider who provides investment advice to a retail client for specific transactions without considering the whole portfolio of the client must enquire about its client's knowledge and experience and assess the appropriateness of the financial instruments before recommending them (*appropriateness assessment*) (Art. 11 FinSA; Art. 16 FinSO).

A financial service provider who provides investment advice to a retail client and thereby considers the whole portfolio of the client or who provides portfolio management, must enquire about its clients' financial circumstances and investment objectives as well as the client's knowledge and experience (*suitability assessment*) (Art. 12 FinSA; Art. 16 FinSO). The suitability assessment is further specified in the Ordinance (see Art. 17 FinSO).

In the case of simple execution or transmission of client orders (execution only), the financial service provider must, before providing the service, inform retail clients that no appropriateness or suitability assessment will be carried out (Art. 13 FINSA).

If the financial service provider is of the opinion that a financial instrument is not appropriate or suitable for its retail clients, it must advise against the provision of such service. The lack of knowledge and experience may thereby be compensated by providing explanations. If the information that the financial service provider has obtained is not sufficient for assessing the appropriateness of suitability of a financial instrument, it must inform the retail client that it is unable to conduct such assessment (Art. 14 FinSAG). As a result, the financial service provider may advice retail clients even in the event of missing information or lack of appropriateness or suitability, provided that it provides the necessary information, explains the lacking appropriateness or suitability and advises against the provision of the service (Statute Commentary, p. 8959).

The code of conduct rules for financial service providers stated in the FinSA are public law. They may lead to supervisory law measures or in certain cases criminal sanctions against the company or its employees

in the case of a breach of law. In contrast to that, the civil court must still judge the civil law relation between the financial service provider and its clients based on private law statutory provisions. Nevertheless, he may take the supervisory law code of conduct rules of the FinSA into consideration when applying these private law statutory provisions. In these cases the code of conduct rules have an emission effect on the civil law relation (Statute Commentary, p. 8921).

MiFID II:

"When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, that person's financial situation including his ability to bear losses, and his investment objectives including his risk tolerance so as to enable the investment firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him and, in particular, are in accordance with his risk tolerance and ability to bear losses." (Art. 25 Abs. 2 MiFID II). There is a duty for annual review (Art. 54 para. 12 Delegated Regulation 565).

"Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 25 para. 2 MiFID II, the firm shall not recommend investment services or financial instruments to the client or potential client." (Art. 54 para. 8 Delegated Regulation 565).

"When providing the investment service of investment advice or portfolio management, an investment firm shall not recommend or decide to trade where none of the services or instruments are suitable for the client." (Art. 54 para. 10 Delegated Regulation 565).

Client documentation

FinSA:

The financial service provider is subject to an *obligatory documentation requirement* if it provides finance services to retail clients and professional clients. Various information and agreements must be documented (Art. 15 FinSA). The documentation duty is further specified in the Ordinance (see Art. 18 FinSO). Professional clients may waive such documentation requirement (Art. 20 FinSA; Art. 22 FinSO). The client documentation must be retained appropriately.

MiFID II:

There are various record-keeping and retention requirements under the MiFID II. In particular, the following client documents need to be retained: pre-contractual information documents, assessment of suitability and appropriateness, client contract, client reporting documents, transaction documents, calculation of costs and charges, complaints documents, etc. (Art. 16 para. 6 MiFID II; Art. 72 – 76 Delegated Regulation 565, Annexes 1 and 2).

Rendering account

FinSA:

Upon client's request, financial service providers must grant access to the client documentation. Furthermore, they must, upon client's request, *render account* of (1) the financial services agreed and conducted; (2) the composition, valuation and development of the portfolio; and (3) the costs associated with the financial services (Art. 16 FinSA). The duty to render account is further specified in the Ordinance (see Art. 19 FinSO).

MiFID II:

Clients may (in the case of a loss), apart from the existing reporting duties of the investment firm (Art. 59 – 63 Delegated Regulation 565) ask for specific information (Art. 66 para. 8 Delegated Regulation 565). In this context competent authorities must have, in accordance with national law and with the Charter, the ability to access the premises of investment firms (Introductory Note no. 143 MiFID II).

Client reporting

FinSA:

There is no periodic client reporting requirement applicable to the financial service provider under FinSA.

MiFID II:

"The investment firm shall provide the client with adequate reports on the service provided in a durable medium. Those reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client." (Art. 25 para. 6 MiFID II).

Where an investment firm provides portfolio management, it must produce periodic reports (portfolio management reporting). Generally, it must report on

its asset management activities quarterly and on the costs incurred annually. Furthermore, there is an ad hoc reporting duty if portfolio value decreases by more than 10% (Art. 25 para. 6 MiFID II; Art. 59 – 63 Delegated Regulation 565).

Best execution

FinSA:

Financial service providers must uphold the principles of good faith and of equal treatment when handling client orders (retail clients and professional clients). They must ensure when executing clients' orders that the best possible outcome is achieved in terms of cost, timing and quality. They must issue internal guidelines on the execution of client orders to the employees (Art. 17, 18 and 20 FinSA). The careful execution of client orders is further specified in the Ordinance (see Art. 20 and 21 FinSO). Standards with respect to the execution of clients' orders are specified in self-regulations as for example the code of conduct for securities dealers of the Swiss Banking Association (SBVg) (Statute Commentary, p. 8961).

The use of retail and professional clients' financial instruments requires the client's separate prior consent (in writing or by text). Uncovered transactions with financial instruments of retail clients are not admissible (Art. 19 FinSA).

MiFID II:

There are various requirements for the performance of client orders that partly deviate from the FinSA. There are particular requirements for portfolio management and independent investment advice (Art. 24 para. 4 and 7 as well as Art. 27 – 28 MiFID II; Art. 53 as well as Art. 64 – 70 Delegated Regulation 565).

General organisational requirements

FinSA:

The financial service providers shall ensure that they fulfill their duties under the FinSA through internal regulations and appropriate organization of operations (Art. 21 FinSA).

Within the scope of application of the FinSA, financial service providers, if they are not subject to special law provisions, may implement the provisions of FinSA as follows: (1) define internal requirements that are appropriate considering the size, complexity, legal form and the offered financial services and that correspond to the respective risks; and (2) carefully select employees and ensure that they are trained with respect to the code of conduct and the specific know-how necessary for a particular task. If the business unit includes several persons, the financial service provider must ensure effective supervision in particular through appropriate internal monitoring and define binding operating and business processes (Art. 23 FinSO).

As far as supervised financial service providers are concerned, corporate government, risk management and internal control systems of the company must be adapted to ensure compliance with the code of conduct requirements of the FinSA (Statute Commentary, p. 8963).

MiFID II:

Within the scope of application of the MiFID II, investment firms must comply with various requirements for the internal organisation and the respective documentation. In particular, the senior management has various responsibilities, there must be a compliance function and appropriate risk management, and complaints handling policies and procedures must be implemented (Art. 21 – 26 Delegated Regulation).

Employees

FinSA:

Financial service providers must ensure that they fulfil their duties under the FinSA by means of internal guidelines and appropriate organisation of operations (Art. 21 FinSA). The employees of financial service providers must have the necessary skills, knowledge and experience to perform their task (Art. 22 FinSA).

MiFID II:

Investment firms must comply with various organizational requirements regarding their employees. This includes in particular the remuneration of employees (Art. 16 and Art. 24 Abs. 10 MiFID II; Art. 21 – 29 Delegated Regulation 565).

Client advisors, tied agents

FinSA:

There are special requirements for client advisors: Client advisors are individuals who perform financial services on behalf of a financial service provider or in their own capacity as financial service provider (Art. 3 lit. e FinSA). Client advisors must have sufficient knowledge of the code of conduct set out in the FinSA and the necessary expertise required to perform their task (Art. 6 FinSA).

Client advisors of domestic financial service providers which are not supervised according to Article 3 FINMAG, as well as client advisors of foreign financial service providers may carry out their activities in Switzerland only after their entry in the *register of client advisors*. The Federal Council may exempt client advisors of foreign financial service providers subject to prudential supervision from the registration duty if they provide their services in Switzerland exclusively to professional or institutional clients. The requirements for registration concern mainly sufficient knowledge, professional indemnity insurance and affiliation to an ombudsman (Art. 28 and 29 FinSA). They are further specified in the Ordinance (see Art. 31-33 FinSO). The content of the register is specified in Art. 30 FinSA. Registered client advisors as well as the financial service provider for whom they work are obliged to notify the registration body of all changes in the circumstances underlying their registration (Art. 32 FinSA). The notification duty is further specified in the Ordinance (Art. 41 FinSO). The registration body shall keep the register of client advisors. It requires authorisation from FINMA (Art. 31 FinSA). The registration body is further specified in the Ordinance (see Art. 34-40 FinSO).

MiFID II:

The MiFID II includes particular provisions on tied agents. "A *tied agent* means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments or provides advice to clients or prospective clients in respect of those financial instruments or services." (Art. 4 para. 2 item 29 MiFID II).

"Member States shall allow an investment firm to appoint tied agents for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm." (Art. 29 para. 1 MiFID II).

"Member States shall require that where an investment firm decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the investment firm. Member States shall require the investment firm to ensure that a tied agent discloses the capacity in which he is acting and the investment firm which he is representing when contacting or before dealing with any client or potential client." (Art. 29 para. 2 MiFID II).

"Member States shall require the investment firms to monitor the activities of their tied agents so as to ensure that they continue to comply with this Directive when acting through tied agents." (Art. 29 para. 2 MiFID II).

"Tied agents shall be registered in the public register in the Member State where they are established. ESMA shall publish on its website references or hyperlinks to the public registers established under this Article by the Member States that decide to allow investment firms to appoint tied agents." (Art. 29 para. 3 MiFID II).

Employee compensation

FinSA:

The financial service provider must structure employee compensation such that there is no incentive for the breach of statutory duties or detrimental behaviour vis-à-vis clients. In other words, there must be no conflict of interest to the detriment of the client (Art. 24 FinSO).

MiFID II:

"Investment firms shall define and implement remuneration policies and practices under appropriate internal procedures taking into account the interests of all the clients of the firm, with a view to ensuring that clients are treated fairly and their interests are not impaired by the remuneration practices adopted by the firm in the short, medium or long term." (Art. 27 para. 1 Delegated Regulation 565).

"Remuneration policies and practices shall be designed in such a way so as not to create a conflict of interest or incentive that may lead relevant persons to favour their own interests or the firm's interests to the potential detriment of any client." (Art. 27 para. 1 Delegated Regulation 565).

Personal transactions

FinSA:

As far as own employees are concerned, financial service providers must take measures to prevent staff members to use internal information for improper transactions on their own account. Financial service providers have to specify necessary monitoring measures by means of an internal directive (Art. 27

FinSA). Employees of the financial service provider for the purpose of this provision are also board members, members of management, fully liable joint partners as well as persons in comparable functions (see Art. 30 FinSO).

In addition to the supervisory law provisions on personal transactions, criminal law provisions on insider dealing must be observed (Art. 142 and 154 FMIA).

MiFID II:

"A personal transaction shall be a trade in a financial instrument effected by or on behalf of a relevant person, where at least one of the following criteria are met: (a) the relevant person is acting outside the scope of the activities he carries out in his professional capacity; (b) the trade is carried out for the account of any of the following persons: (i) the relevant person; (ii) any person with whom he has a family relationship, or with whom he has close links; (iii) a person in respect of whom the relevant person has a direct or indirect material interest in the outcome of the trade, other than obtaining a fee or commission for the execution of the trade." (Art. 28 Delegated Regulation 565). A relevant person is a director, employee or a person who is directly involved in the provision of services under an outsourcing arrangement (Art. 2 Delegated Regulation 565).

"Investment firms shall establish, implement and maintain adequate arrangements aimed at preventing the activities [stated below] in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information [...] or other confidential information relating to clients or transactions with or for clients by virtue of an activity carried out by him on behalf of the firm." (Art. 29 para. 1 Delegated Regulation 565).

"Investment firms shall ensure that relevant persons do not enter into a personal transaction which meets at least one of the following criteria: (a) that person is prohibited from entering into it under Regulation (EU) No 596/2014; (b) it involves the misuse or improper disclosure of that confidential information; (c) it conflicts or is likely to conflict with an obligation of the investment firm under the MiFID II." (Art. 29 para. 2 Delegated Regulation 565).

"Investment firms shall ensure that relevant persons do not advise or recommend, other than in the proper course of employment or contract for services, any other person to enter into a transaction in financial instruments which, if it were a personal transaction of the relevant person," would be a misuse of information on the pending client order (Art. 29 para. 3 Delegated Regulation 565).

"Investment firms shall ensure that relevant persons do not disclose, other than in the normal course of his employment or contract for services, any information or opinion to any other person where the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps: (a) to enter into a transaction in financial instruments which, if it were a personal transaction of the relevant person, would be prohibited; or (b) to advise or procure another person to enter into such a transaction." (Art. 29 para. 4 Delegated Regulation 565).

Conflicts of interest

FinSA:

Financial service providers must take appropriate organizational precautions to prevent conflicts of interest that could arise through the provision of financial services and to exclude any disadvantage to clients as a result of conflicts of interest. If a disadvantage to clients due to a conflict of interest cannot be excluded, there must be disclosure vis-à-vis the clients so that they are able to assess whether they still wish the service. As long as financial service providers do disclose their relevant interests, they do not act contrary to the provisions of the FinSA. Certain serious behaviour patterns like *churning*, *front running* or *price fraud*, however, remain always inadmissible (Art. 25 FinSA; Statute Commentary, p. 8965). The conflicts of interest and the related duties are further specified in the Ordinance (see Art. 24-28 FinSO).

MiFID II:

There are various requirements for the handling of conflicts of interests. Appropriate measures must be taken (Art. 16 para. 3 and 6 as well as Art. 23 MiFID II; Art. 33 – 35 Delegated Regulation 565).

Incentive

FinSA:

Regarding benefits from third parties, the legislator has generally adopted Supreme Court case law: Financial service providers may accept benefits from third parties in connection with the provision of financial services only if (1) they have expressly informed the clients of the benefits and the clients waive such benefits in advance; or (2) they pass on the benefits to the clients in full (Art. 26 FinSA). These

provisions on benefits stated in the FinSA are public law with possible emission effect on the civil law relation (Statute Commentary, p. 8966). Benefits from third parties are further specified in the Ordinance (see Art. 29 FinSO).

MiFID II:

"Member States shall ensure that investment firms providing investment advice on an independent basis or portfolio management return to clients any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the services provided to that client as soon as reasonably possible after receipt. All fees, commissions or monetary benefits received from third parties in relation to the provision of independent investment advice and portfolio management shall be transferred in full to the client." (Art. 12 para. 1 Delegated Regulation 593).

"Investment firms shall set up and implement a policy to ensure that any fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of independent investment advice and portfolio management are allocated and transferred to each individual client." (Art. 12 para. 1 Delegated Directive 593).

"Investment firms shall inform clients about the fees, commissions or any monetary benefits transferred to them, such as through the periodic reporting statements provided to the client." (Art. 12 para. 1 Delegated Directive 593).

"Investment firms providing investment advice on an independent basis or portfolio management shall not accept non-monetary benefits that do not qualify as acceptable minor non-monetary benefits in accordance with this Directive." (Art. 12 para. 2 Delegated Directive 593).

Outsourcing

FinSA:

Financial service providers may appoint third parties sufficiently qualified to provide financial services. They must carefully instruct and supervise them. They must enter into a written agreement with the third party. Supervised financial service providers need to comply with the requirements for delegation under the relevant legislation as for example the Swiss Banking Act (Art. 23 FinSA). Third parties must have the skills, know-how and experience that are necessary for the activity (Art. 14 FinIA). The delegation of tasks is further specified in the Ordinance (Art. 15 FinIO).

In the chain of providers the mandating financial service provider remains liable for compliance with the statutory duties (information duty, examination duty, documentation duty and duty to render account). The mandated financial service provider is generally subject to a verification duty (Art. 24 FinSA; Statute Commentary, p. 8963 f.).

MiFID II:

Investment firms may outsource critical and important operational functions to a service provider without need for approval by any authority. They must thereby comply with various requirements. There are additional requirements in the event of a service provider located in a third country (Art. 16 para. 2 and 5 MiFID II; Art. 30 – 32 Delegated Regulation 565).

Joining an ombudsman

FinSA:

Disputes between client and financial service provider should be settled, if possible, by an ombudsman in mediation proceedings. Financial service providers must join an ombudsman when starting their activity at the latest. They are obliged to participate in any proceedings before the ombudsman. They must inform their clients about the possibility of mediation proceedings before an ombudsman. Financial service providers who repeatedly breach their duties are excluded from the ombudsman (Art. 74 and 77 – 83 FinSA). The ombudsman is further specified in the Ordinance (see Art. 98-101 FinSO).

Filing a request for mediation to an ombudsman does not exclude a civil action and does not prevent a civil action from being filed. The ombudsman will terminate any procedure, once a conciliation authority, a court, a court of arbitration or an administrative authority has accepted the case (Art. 76 FinSA).

MiFID II:

"Member States shall ensure the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate. Member States shall further ensure that all investment firms adhere to one or more such bodies implementing such complaint and redress procedures." (Art. 75 para. 1 MiFID II).

"Member States shall ensure that those bodies actively cooperate with their counterparts in other Member States in the resolution of cross-border disputes." (Art. 75 para. 2 MiFID II).

Licence requirement and supervision

FinSA:

Financial service providers who act as portfolio manager, trustee, manager of collective assets, fund management company or securities firm on a commercial basis need a licence in accordance with the FinIA, unless they already hold an appropriate licence. Reference is made to the explanations on the financial institutions that are subject to a licence requirement under the FinIA.

Financial service providers are supervised. The responsible supervisory authority will monitor them so that they fulfil the requirements for the provision of financial services (Art. 87 FinSA).

MiFID II:

Each Member State shall require that the provision of investment services and/or the performance of investment activities as a regular occupation or business on a professional basis be subject to prior authorization in accordance with Title II/Chapter 1 MiFID II (see below).

Administrative and criminal sanctions

FinSA:

Besides possible supervisory law sanctions issued by FINMA there is the possibility of criminal sanctions. Any person who wilfully does not comply with the information and enquiry duties may face a fine of up to CHF 100,000 (Art. 89 FinSA). However, the criminal law provisions of the FinSA do not apply to supervised financial service providers pursuant to Art. 3 FINMASA and their employees! They are only subject to the criminal law provisions of the FINMASA (Art. 92 FinSA).

MiFID II:

"Competent authorities shall be given all supervisory powers, including investigatory powers and powers to impose remedies, necessary to fulfil their duties under this Directive and under Regulation (EU) No 600/2014." (Art. 69 para. 1 MiFID II).

"Without prejudice to the supervisory powers including investigatory powers and powers to impose remedies of competent authorities in accordance with Article 69 MiFID II and the right for Member States to provide for and impose criminal sanctions, Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of this Directive or of Regulation (EU) No 600/2014 and the national provisions adopted in the implementation of this Directive and of Regulation (EU) No 600/2014, and shall take all measures necessary to ensure that they are implemented." (Art. 70 para. 1 MiFID II).

Civil liability

FinSA:

The financial service provider may be subject to civil liability if the client has suffered damage due to inadequate advice and is able to establish the relevant facts. In this context the client is entitled at all times to receive a copy of the client file and all other client-related documents that the financial service provider has produced within the context of the business relationship. If the financial service provider fails to comply the client may take legal action (Art. 72 and 73 FinSA qualifying as private law statutory provisions). The client may file the action for surrender on its own in summary proceedings and possibly also arrange for execution (Statute Commentary, p. 8924). The provision of documents is further specified in the Ordinance (see Art. 97 FinSO).

MiFID II:

The civil liability is generally based on the law of the relevant Member State. If retail clients are concerned, the jurisdiction and the law of the relevant Member State apply.

Pragmatic Implementation

Application analysis

A company active in the finance area must first determine if and to what extent it provides financial services or investment services and activities. In other words, it must compare the factual and territorial scopes of application of the FinSA and the MiFID II with its own business activities. A company may be able to avoid the application of the Act or take advantage of eased application though organisational or contractual structuring.

Internal guidelines and other measures

Financial service providers under the FinSA and investment firms under the MiFID II need to issue internal guidelines in order to avoid supervisory law measures and in certain cases criminal sanctions against the company. If by means of guidelines the internal organisation is set up in a way that the statutory requirements can be complied with, there will generally be no supervisory law measures or criminal sanctions against the company if a breach of law occurs in particular cases.

Standard documents

Financial service providers under the FinSA and investment firms under the MiFID II need to produce appropriate standard documents, primarily in order to be able to protect themselves against actions for damages from clients. Such standard documents appear to be most important in the context of law implementation from the point of view of the financial service provider or the investment firm. In the event of a loss the concerned standard documents and further client documents must be handed out to the client.

It follows that standard documents should be drafted in such a way that statutory requirements are complied with, but still no information is included that could additionally and unnecessarily cause liability in the event of a loss. A financial service provider or investment firm should produce the following types of standard documents:

- Client contract;
- Pre-contractual client information;
- Enquiry document regarding suitability and appropriateness, respectively;
- Client reporting (in the case of the MiFID II).

Implementation in time

The FinSA and implementing ordinance entered into force on 1 January 2020. However, there are transitional periods (starting from entering into force or from recognition or approval of the relevant institute) in the following areas (Art. 95 FinSA; 103 ff. FinSO): registration of client advisor (6 months) and affiliation to an ombudsman (6 months), client segmentation (2 years), qualification of client advisor (2 years), rules of conduct of financial service provider (2 years), internal organisation of financial service provider (2 years). In the event of early compliance with the rules of conduct and the organisational duties, financial service providers must inform their external auditors irrevocably in writing indicating the relevant date (Art. 105 and 106 FinSO).

The MiFID II (incl. MiFIR) entered into force at the beginning of 2018.

Offer of Financial Instruments

Statutory Norms

Factual scope of application

FinSA:

The FinSA does not only regulate the provision of financial services, but also the offering of financial instruments in the primary and secondary market and the related prospectus duties (Art. 35 FinSA). This bulletin exclusively deals with the primary market. Factually, producers and issuers of financial instruments are subject to the FinSA, irrespective of their legal form (Art. 2 FinSA). Therefore, one needs to ask for the meanings of "*financial instruments*", "*producer*" and "*offer*". The respective factual scope of the FinSA is mainly based on the following definitions of terms:

- *Financial instruments* are equity securities, debt instrument securities, units in collective investment schemes, structured products, derivatives, deposits whose redemption value or interest is linked to the risk embedded or the interest rate (except those where the interest rate is linked to an interest rate index) and bonds (Art. 3 lit. a FinSA).
- *Securities* are standardized certificated securities, uncertificated securities, derivatives and intermediated securities that are suitable for mass trading (Art. 3 lit. b FinSA).
- *Producers* are persons who create a financial instrument or make changes to an existing financial instrument, including changing the risk/return profile or the costs connected with the investment in the financial instrument (Art. 3 lit. i FinSA).
- *Offer* is any invitation for the purchase of a financial instrument containing sufficient information on the terms of the offer and the financial instrument itself (Art. 3 lit. g FinSA). *Purchase* or sale of financial instruments means any activity directly addressed to particular clients that specifically focuses on the purchase or sale of a financial

instrument (Art. 3 para. 1 FinSO). The *offer* is further specified in the Ordinance (see Art. 3 para. 5 and 6 FinSO).

- *Public offer* is an offer addressed to the public (Art. 3 lit. h FinSA). The *public offer* is further specified in the Ordinance (see Art. 3 para. 7 FinSO).

PRIIPs Regulation/Prospectus Regulation:

The PRIIPs Regulation "lays down uniform rules on the format and content of the key information document to be drawn up by PRIIP manufacturers and on the provision of the key information document to retail investors in order to enable retail investors to understand and compare the key features and risks of the PRIIPs." (Art. 1 PRIIPs Regulation). The PRIIPs Regulation "shall apply to PRIIP manufacturers and persons advising on, or selling, PRIIPs." (Art. 2 PRIIPs Regulation). The terms "*packaged retail investment product*" ("*PRIP*"), "*insurance-based investment product*" and "*retail investor*" are defined in the PRIIPs Regulation (Art. 4 PRIIPs Regulation).

The Prospectus Regulation "lays down requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State." (Art. 1 para. 1 Prospectus Regulation). This Bulletin exclusively deals with the primary market. The terms "*securities*" and "*offer of securities to the public*" are defined in the Prospectus Regulation (Art. 2 Prospectus Regulation).

Territorial scope of application

FinSA:

The public offer for acquisition of securities must be made in Switzerland for the FinSA to apply (Art. 35 FinSA). The prospectus related provisions of the FinSA generally apply to all securities offered in or from Switzerland (Statute Commentary, p. 8923). The same applies to the offering of structured products to retail clients (Art. 70 FinSA). The duty to issue a key information document is further specified in the Ordinance (Art. 80 FinSO).

PRIIPs Regulation/Prospectus Regulation:

The PRIIP must be offered publicly to retail clients in the EU/EEA for the PRIIPs Regulation to apply.

The securities must be offered publicly to investors in the EU/EEA for the Prospectus Regulation to apply.

Prospectus for public offer of securities

FinSA:

Any person who makes a public offering for acquisition of securities in Switzerland must generally first publish a prospectus with content as specified by the statute (Art. 35 and 40 – 46 FinSA). The prospectus for the primary market is a document that complies with the requirements pursuant to Art. 40-46 FinSA (minimal information in prospectus according to Annexes 1-5 of FinSO for equity securities, debt securities, derivatives, real estate companies and investment companies) and (1) was approved by the reviewing body; (2) was drafted for a public offer in Switzerland and remains to be reviewed pursuant to Art. 51 para. 2 FinSO; or (3) is regarded as automatically recognized pursuant to Art. 54 para. 3 FinSO and is used for a public offer in Switzerland. The prospectus also includes the documents referred to in the prospectus (Art. 43 para. 1 and 2 FinSO).

The Act provides for various exemptions. For example, there is no need to publish a prospectus if the public offering is addressed solely to investors classified as professional clients or to fewer than 500 investors (Art. 36 - 38 FinSA). Furthermore, there is relief of requirements for example for small and mid-size enterprises (Art. 47 FinSA). The prospectus is further specified in the Ordinance (see Art. 44-58 FinSO).

The prospectus duty is triggered by a public offer, i.e. by any notification to the public that contains sufficient information on the terms of the offer and the financial instrument itself in view of the purchase or subscription of a security. It follows that there is a prospectus duty on the primary market if the offer is not addressed to a limited group of people (Statute Commentary, p. 8971). The publication of the prospectus is further specified in the Ordinance (see Art. 92-94 FinSO).

In the case of prospectus duty there is a *review proceeding*. The prospectus must generally be submitted to the (FINMA authorised) reviewing body prior to publication. The reviewing body checks the prospectus for completeness, coherence and understandability and approves it (Art. 51 FinSA). In the event of cross-border distribution, the prospectus must not only comply with the Swiss requirements, but possibly also with the requirements of the EU Prospectus Regulation. If applicable, the reviewing body may approve a prospectus produced under foreign law if specific requirements are complied with. Also the reviewing body may foresee that prospectuses approved

under specific legal frameworks are deemed as authorised in Switzerland as well (Art. 51 and 54 FinSA). The review of the prospectus is further specified in the Ordinance (see Art. 59-79 FinSO).

If there is no requirement to publish a prospectus, the offerors or issuers must still treat the investors equally with regard to the provision of relevant information on a public offer (Art. 39 FinSA).

Prospectus Regulation:

Securities can only be offered to the public in the EU/EEA after prior publication of a prospectus in accordance with the Prospectus Regulation (Art. 3 para. 1 Prospectus Regulation). There are exemptions from the obligation to publish a prospectus (Art. 3 para. 2 Prospectus Regulation). Furthermore, there are requirements for the approval and publication of the prospectus (Art. 20 and 21 Prospectus Regulation).

Prospectus for collective investment schemes

FinSA:

For open-ended and closed-ended collective investment schemes there is generally a requirement to produce a prospectus with legally required content. The minimum content is specified in the Ordinance (see Annex 6 of FinSO). FINMA may exempt collective investment schemes from all or some of the requirements, provided that they are available only to qualified investors pursuant to Art. 10 para. 3 and 3ter CISA (Art. 48 – 50 FinSA).

Prospectuses for collective investment schemes do not have to be reviewed. However, there is still an approval requirement for the documentation of foreign collective investment schemes in accordance with the CISA (Art. 51 FinSA).

UCITS Directive:

The EU law on collective investment schemes is based on the Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). The Directive was repeatedly amended. Currently, there is UCITS V, i.e. the Directive 2014/91/EU of 2014. The obligation to issue a prospectus is based on this Directive.

KID addressed to retail clients

FinSA:

If a financial instrument is intended to be offered to *retail clients*, the producer must generally first produce a key information document (KID). In the case of a personal recommendation of financial instruments to retail clients, the financial service provider must (if applicable) make available the *key information document* and, upon request and free of charge, a *prospectus* (Art. 8 FinSA). The KID is further specified in the Ordinance (Art. 80-91 FinSO). The KID sample document is included in the Ordinance (see Annexes 9-13 FinSO). The documents under non-Swiss law that are recognized as equivalent are also stated in the Ordinance (see Art. 87 FinSO and Annex 14 FinSO).

In the case of remote advisory, the KID may be made available after the conclusion of the transaction if the client provides his consent. The financial service provider must record such consent (Art. 9 FinSA). The provision of the KID and the remote advisory are further specified in the Ordinance (see Art. 13 and 15 FinSO).

No KID is required for financial instruments that may be acquired by private clients exclusively in the context of an asset management agreement (Art. 58 para. 2 FinSO). The asset management agreement must exist on a continuous basis and be in writing or in another form that can be proven based on text and must provide for a fee (Art. 83 FinSO). Furthermore, there is exceptionally no need for a KID if securities are offered in the form of shares or debt instruments without derivate charakter (Art. 58 – 63 FinSA).

PRIIPs Regulation/UCITS Directive:

"Before a PRIIP is made available to retail investors, the PRIIP manufacturer shall draw up for that product a key information document in accordance with the requirements of this Regulation and shall publish the document on its website." ("*PRIIPs KID*"; Art. 5 PRIIPs Regulation). Furthermore, the following applies: "A person advising on, or selling, a PRIIP shall provide retail investors with the key information document in good time before those retail investors are bound by any contract or offer relating to that PRIIP." (Art. 13 PRIIPs Regulation).

In the area of collective investment schemes there is an obligation to produce a document with important information for the investors ("*UCITS KIID*"; Art. 78 ff. UCITS V).

Advertising for financial instruments

FinSA:

Advertising for financial instruments must clearly be identifiable as such. In the advertisement reference must be made to the prospectus and the KID of the respective financial instrument as well as to the place where it can be obtained. The information must correspond to the information provided in the prospectus and the KID (Art. 68 FinSA). Advertising is further specified in the Ordinance (see Art. 95 FinSO).

Prospectus Regulation:

Any advertisement relating to an offer of securities to the public must comply with certain principles (Art. 22 Prospectus Regulation).

Offering of structured products

FinSA:

Structured products may be offered in or from Switzerland to *retail clients* only subject to certain requirements. There is need for a long-term portfolio management or investment advisory relationship. Alternatively, the products may be issued, guaranteed or secured in an equivalent manner by a regulated institution (e.g. bank, insurance company, securities firm, Art. 70 FinSA). The offering of structured products is further specified in the Ordinance (see Art. 96 FinSO).

MiFID II/PRIIPs Regulation:

The MiFID II and PRIIPs Regulation also apply to structured products and structured investments.

Creation of in-house funds

FinSA:

In-house funds of a contractual nature for the purpose of collectively managing assets of existing clients may be created by banks according to the BankA and by securities firms according to the FinIA only if specific conditions are met. Clients may only participate on the basis of a long-term portfolio management or investment advisory agreement. Also a KID must be prepared and provided to retail clients (Art. 71 FinSA). The creation of in-house funds is further specified in the Ordinance (see Art. 96 FinSO).

Licence requirement and supervision

FinSA:

Producers and offerors of financial instruments themselves do not need any licence for their activities. However, persons who contribute to the production and offer of financial instruments qualifying as securities may possibly need a licence as securities firm. Persons operating primarily in the financial sector may perform the following activities only if they hold a licence as a securities firm or a bank: (1) underwriting securities issued by third parties and offering these to the public in a primary market on a commercial basis; and (2) creating derivatives in the form of securities and offering these to the public in the primary market on a commercial basis (Art. 12 FinIA).

FINMA does supervise the securities firms so that they comply with the requirements for the offering of financial instruments (Art. 87 FinSA).

PRIIPs Regulation/Prospectus Regulation:

The PRIIPs Regulation includes market monitoring and product intervention powers (Art. 15 – 18 PRIIPs Regulation).

The Prospectus Regulation includes market monitoring. "Each Member State shall designate a single competent administrative authority responsible for carrying out the duties resulting from this Prospectus Regulation and for ensuring that the provisions of this Prospectus Regulation are applied." The final responsibility for supervising compliance with the Prospectus Regulation and for approving the prospectus shall lie with this authority (Art. 31 para. 1 and 2 Prospectus Regulation).

Administrative and criminal sanctions

FinSA:

The wilful breach of statutory requirements for the production and use of prospectuses and KIDs is subject to criminal sanctions. Furthermore, there are criminal sanctions applicable to persons who wilfully offer structured products to retail clients or create in-house funds without complying with the respective statutory requirements. Supervised financial service providers pursuant to Art. 3 FINMASA and their employees are subject to the criminal law provisions stated in the FINMASA (Art. 90 - 91 FinSA). The criminal liability of legal entities is based on Art. 102 PC.

PRIIPs Regulation/Prospectus Regulation:

The PRIIPs Regulation provides for complaints, redress, administrative penalties and other measures (Art. 19 – 29 PRIIPs Regulation).

The Prospectus Regulation includes provisions on administrative sanctions and other administrative measures (Art. 38 – 43 Prospectus Regulation).

Civil liability

FinSA:

The FinSA contains the following civil liability provision: Any person who provides information that is inaccurate, misleading or in violation of statutory requirements in prospectuses, a KID or similar communications, without applying the required diligence, shall be liable to the acquirer of a financial instrument for the resulting loss (Art. 69 FinSA).

PRIIPs Regulation/Prospectus Regulation:

Civil liability is generally based on the law of the relevant Member State. Where retail clients are involved, the jurisdiction and law of the relevant Member State are mandatory.

The PRIIPs Regulation includes provisions on the civil liability of the PRIIP producer (Art. 11 PRIIPs Regulation).

The Prospectus Regulation includes provisions on prospectus liability (Art. 11 Prospectus Regulation).

Pragmatic Implementation

Product design and analysis

Before a new financial instrument is created, the product should be described from the perspective of supervisory law. One may for example determine the group of people to be addressed, the location and kind of distribution as well as the number of persons who may be approached.

Based on such product description, one will be able to determine the statutory requirements for the product. In particular, one will be able to specify the need for a prospectus and possibly a KID.

Prospectus drafting

Under the FinSA, a prospectus must be drafted in a way that it can be approved by the reviewing body. In other words, it must be complete, coherent and understandable (Art. 51 FinSA). Furthermore, the information must be accurate and according to statutory requirements and not misleading or contradictory in view of possible civil liability (Art. 69 FinSA). Similar considerations apply if there is a statutory requirement for producing a KID. Such a document must be produced and used according to statutory requirements. It is through compliance with statutory requirements that supervisory law measures and criminal sanctions can be avoided and the risk of civil liability be reduced. If based on the product analysis no prospectus needs to be published, there is still a requirement to treat investors equally when providing important product information in order to avoid supervisory law measures (Art. 39 FinSA). The information must be accurate and according to statutory requirements. It must not be misleading or contradictory in order to avoid civil liability ("*similar communications*" pursuant to Art. 69 FinSA).

Under the EU Prospectus Regulation, the same considerations generally apply for prospectus drafting. If there is no obligation to publish a prospectus the Prospectus Regulation provides for the possibility of a voluntary prospectus (Art. 4 Prospectus Regulation).

Product distribution instructions

If a product whether or not subject to the prospectus duty is distributed, the producer should issue appropriate distribution instructions to the distributors in order to ensure compliance with the statutory requirements. Such instructions may for example state that a product must not be offered to private clients or that a product may only be offered after handing out the prospectus and KID.

Implementation in time

The FinSA together with its implementing ordinance entered into force on 1 January 2020. There are partly transitional periods regarding the publication of a prospectus and the drafting of a KID. The current law applies during the transitional periods. The FinSA requires old law products to be updated subsequently: In the event that before the Act enters into force (1) public offers for securities are made; or (2) financial instruments are offered to retail clients, there will be need for a documentation update or new documentation after a transitional period of 2 years (Art. 95 FinSA; Art. 109-111 FinSO).

The PRIIPs Regulation entered into effect at the beginning of 2018. The Prospectus Regulation replaces the Prospectus Directive with effect from 21 July 2019.

Authorisation of Financial Institutions

Statutory Norms

Factual scope of application

FinIA:

All persons who operate asset management business will be subject to a licence requirement and prudential supervision based on the FinIA. The concerned financial institutions require a licence issued by FINMA for their business activities. The following Swiss financial institutions are subject to the FinIA, irrespective of their legal form: (1) portfolio managers; (2) trustees; (3) managers of collective assets; (4) fund management companies; and (5) securities firms. The FinIA includes the following definitions of terms including a description of the respective typical business activity:

- A *portfolio manager* is a person mandated to manage assets on a commercial basis in the name and on the account of clients who may manage the clients' assets as follows: (1) acquisition or disposal of financial instruments; (2) reception and transmission of orders in relation of financial instruments; (3) management of financial instruments (portfolio management); and (4) giving personal recommendations on transactions with financial instruments (investment advice) (Art. 17 FinIA).
- A *trustee* is a person who on a commercial basis manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose based on the instrument creating a trust within the meaning of the Trust Convention of 1985 (Art. 17 FinIA).
- A *manager of collective assets* is a person who manages assets on a commercial basis in the name and on behalf of collective investment schemes or occupational pension schemes (Art. 24 FinIA).
- A *fund management company* is an entity that manages investment funds independently in its own name and for the account of investors (Art. 32 FinIA).
- A *securities firm* is an entity that, on a commercial basis: (1) trades in securities in its own name for the account of clients; (2) trades in securities for its own account on a short-term basis, primarily operates on the financial market and thereby could jeopardize the proper functioning of the financial market, or is a member of a trading venue; or (3) trades in securities for its own account on a short-term basis and publicly quotes prices for individual securities upon request or on an ongoing basis (*market maker*) (Art. 41 FinIA).

Financial institutions having their registered office abroad (*foreign financial institutions*) are subject to the Act and must establish a branch and representation, respectively, in Switzerland if they perform relevant activities in or from Switzerland. The licence requirement is determined as follows:

- Foreign financial institutions must establish a *branch* and require a licence from FINMA if they wish to employ persons in Switzerland who perform any of the following activities in the name of the foreign financial institution on a permanent and commercial basis in or from Switzerland: (1) management of assets or activity as a trustee; (2) portfolio management for collective investment schemes or occupational pension schemes; (3) securities trading; (4) conclusion of transactions; or (5) maintaining client accounts (Art. 52 FinIA).
- Foreign financial institutions require a licence from FINMA (*representation*) if they employ persons in Switzerland who work for them on a permanent and commercial basis in or from Switzerland in another manner than in accordance with Art. 52 FinIG, specifically where these persons forward client orders to them or represent them for marketing or other purposes (Art. 58 FinIA).

The Act includes a list of exemptions from its factual scope. For example, it does not apply to persons who manage solely the assets of persons with whom they have business or family ties. Furthermore, the Act does not apply to insurance companies and banks (Art. 2 FinIA).

MiFID II:

The MiFID II applies to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the EU/EEA (Art. 1 para. 1 MiFID II; see above).

Territorial scope of application

FinIA:

Financial institutions are subject to the territorial scope of the FinIA if they perform activities subject to the Act in or from Switzerland (Art. 52 and 58 FinIA).

Act and Ordinance apply to financial institutions that are active in Switzerland or from Switzerland (Art. 2 FinIO).

MiFID II/MiFIR:

EU/EEA Member States may require "that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to *retail clients* or to *opt-in professional clients* in its territory establish a *branch* in that Member State." (Art. 39 para. 1 MiFID II). If applicable, the branch must acquire a prior authorization by the competent authorities of that Member State in accordance with specific conditions (Art. 39 para. 2 MiFID II; compare also Introductory Note no. 109). The authority is placed with the relevant Member State.

"A third-country firm may provide investment services or perform investment activities with or without any ancillary services to *eligible counterparties* and to *professional clients* within the meaning of Section I of Annex II to Directive 2014/65/EU established throughout the EU/EEA without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47." (Art. 46 para. 1 MiFIR). ESMA will register a third-country firm that has applied for the provision of investment services or performance of activities throughout the EU/EEA only under certain conditions (Art. 46 para. 2 MiFIR).

Licence requirement

FinIA:

The said financial institutions require a licence from FINMA. Financial institutions with a relevant licence pursuant to Art. 1 FINMASA do not need any new licence (Art. 74 FinIA). Managers of collective assets who are already subject to other equivalent governmental supervision in Switzerland (e.g. manager of occupational pension scheme with cantonal licence) are exempt from the duty to obtain a licence (Art. 5 FinIA; Statutory Commentary, p. 9020). FINMA may release managers of collective assets from FinIA provisions entirely or partly in justified cases if specific conditions are met (Art. 2 para. 6 FinIO).

There is a licence chain. More extensive licences include less extensive licences. For example, the licence to act as securities firm also includes the authorisation to act as manager of collective assets, as portfolio manager and as trustee (Art. 6 FinIA).

MiFID II:

"Each Member State shall require that the provision of investment services and/or the performance of investment activities as a regular occupation or business on a professional basis be subject to prior authorization in accordance with Title II/Chapter 1 MiFID II. Such authorization shall be granted by the home Member State competent authority." (Art. 5 para. 1 MiFID II).

"Member States shall register all investment firms. The register shall be publicly accessible and shall contain information on the services or activities for which the investment firm is authorized. It shall be updated on a regular basis. Every authorization shall be notified to ESMA. ESMA shall establish a list of all investment firms in the EU/EEA. That list shall contain information on the services or activities for which each investment firm is authorized and it shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website." (Art. 5 para. 3 MiFID II).

"The home Member State shall ensure that the authorization specifies the investment services or activities which the investment firm is authorized to provide." (Art. 6 para. 1 MiFID II).

"The authorization shall be valid for the entire EU/EEA and shall allow an investment firm to provide the services or perform the activities, for which it has been authorized, throughout the EU/EEA, either through the right of establishment, including through a branch, or through the freedom to provide services." (Art. 6 Abs. 1 and 3 MiFID II).

Licence conditions

FinIA:

Any person who complies with the general requirements and the requirements specific to the individual financial institutions may ask for a licence (Art. 7 FinIA). The general requirements concern mainly the organisation, the place of management in Switzerland, the guarantee of proper business conduct and the name (Art. 9 – 16 FinIA). The specific requirements concern with respect to each financial institution for example the legal form, the tasks, the minimum capital and the equity (Art. 17 – 60 FinIA). The Ordinance includes further specifications on the licence conditions (see Art. 9 FinIO).

MiFID II:

The conditions for the performance of the activities in the EU/EEA are based on the MiFID II (Art. 5 – 20).

In particular, investment firms must comply with various organisational requirements. They include general requirements, compliance, risk management, internal audit, responsibility of senior management, complaints handling, remuneration policies and practices as well as personal transactions (Art. 16 MiFID II; Art. 21 – 29 Delegated Regulation 565).

Duties

FinIA:

During the authorised business activities financial institutions must fulfil various duties: Besides the requirements for the provision of financial services described above, they must comply with the following requirements: They must notify FINMA of any change of facts the licence is based on. They must comply with various requirements in the event of a delegation of task to third parties. They must notify FINMA in advance if they wish to perform certain activities abroad (e.g. establishing a foreign subsidiary, acquiring a qualified participation). They must join an ombudsman not later than the time of starting their activity. Finally, securities firms are subject to record-keeping and reporting duties (Art. 8, 14, 15, 16, 50 and 51 FinIA). The Ordinance includes further specifications on the duties (see Art. 10-18 FinIO).

MiFID II:

During the authorized business activities investment firms must fulfil various duties: Besides the requirements for the provision of financial services described above, they must for example comply with the provisions on the transfer of tasks to third parties and join an ombudsman (see above).

Supervision

FinIA:

Managers of collective assets, fund management companies and securities firms are not only subject to authorisation, but also subject to ongoing supervision by FINMA (Art. 61 FINIA).

Independent asset managers and trustees are subject to authorisation by FINMA and FINMA has full enforcement powers over them. However, the ongoing supervision is not performed by FINMA, but by non-governmental supervisory organisations authorised by FINMA. Consolidated supervision by FINMA pursuant to the FinIA or the Financial Market Acts remains reserved (Art. 61 FINIA). The supervision of asset managers and trustees is further specified in the Ordinance (Art. 83 and 84 FinIO). The licence requirements and the supervision activities of the supervisory organisations are included in the SOO.

MiFID II:

"Member States shall require that an investment firm authorized in their territory comply at all times with the conditions for initial authorization established in the MiFID II. Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in the MiFID II." (Art. 21 and 22 MiFID II).

Administrative and criminal sanctions

FinIA:

Besides possible supervisory law sanctions issued by FINMA there is the possibility of criminal sanctions. The FinIA contains criminal law provisions with respect to the violation of the professional secrecy, the provisions on protection against confusion and deception as well as the record-keeping and reporting duties (Art. 69 – 71 FinIA). The criminal liability of legal entities is based on Art. 102 PC.

MiFID II:

The Member States provide for administrative and criminal sanctions in the context of the MiFID II (see above).

Accountability

FinIA:

Regarding the accountability of financial institutions and their bodies, the FinIA makes reference to the Swiss Code of Obligations. Furthermore, the FinIA contains provisions on the liability of financial institutions in the event of outsourcing (Art. 68 FinIA).

MiFID II:

Civil liability is generally based on the law of the concerned Member State.

Pragmatic implementation

New licence or licence amendment

According to the FinIA Asset managers and trustees must apply for a new licence. Other financial institutions that already hold a licence may need to comply with additional licence requirements. The Ordinance includes information on the licence application (see Art. 9 FinIO).

According to the MiFID II investment firms must admitted as such in a Member State (see Art. 5 – 20 MiFID II).

Implementation in time

The FinSA and implementing ordinance entered into force on 1 January 2020. However, there are transitional periods (starting from entering into force or from approval of the relevant institute) in the following areas (Art. 74 FinIA); Art. 91-93 FinIO): affiliation to an ombudsman (6 months), implementation FinSA by already licensed financial institutions (1 year), licence requirement FinSA of asset managers and trustees (reporting within 6 months, transitional period of 3 years).

The MiFID II (incl. the MiFIR) has entered into effect at the beginning of 2018.

List of Abbreviations

BankA	Swiss Banking Act of 1934
CISA	Collective Investment Schemes Act of 2006
CO	Swiss Code of Obligations
FFD	Federal Finance Department
FinIA	Financial Institution Act of 2018
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Financial Market Supervision Act of 2007
FinSA	Financial Services Act of 2018
FMIA	Swiss Financial Market Infrastructure Act of 2015
MiFID II	EU Directive 2014/65 on markets in financial instruments
MiFIR	Regulation (EU) No 600/2014 on markets in financial instruments
PC	Swiss Penal Code of 1937
PRIIPs R.	Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)
Prospectus R	Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (replaces Prospectus Directive 2003/71/EG)
Prospect D	Directive 2003/71/EG on the prospectus to be published when securities are offered to the public or admitted to trading
Statute Com.	Official Commentary to FinSA and FinIA of 2015
UCITS-D	Directive 2009/65/EG on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS); as amended by UCITS I - V