www.pwc.ch

Implications of the Financial Services Act (FinSA) / Financial Institutions Act (FinIA) on the Collective Investment Schemes Act (CISA)

I. Introduction

The rollout of FinSA and FinIA will have major implications for the CISA. The CISA will evolve into a purely product-specific legislation, while questions regarding the authorisation of licensees will be transferred to FinIA. The scope of application of CISA will going forward be limited to Swiss collective investment schemes and foreign collective investment schemes offered in Switzerland as products, as well as the custody of Swiss collective investment schemes and the representation of foreign collective investment schemes. The products remaining within the scope of CISA will include collective investment schemes organised under company law in the form of SICAVs, LPCIs and SICAFs, since these are simultaneously asset manager and financial product. Their structure is consequently not comparable with that of fund management companies and asset managers of collective investment schemes as pure financial institutions, the regulation of which will be transferred to FinIA. In general, the changes to CISA resulting from FinSA relate to client segmentation, rules of conduct, prospectus requirements and – above all – the distribution concept.

The amendments to the areas relevant for CISA are largely convincing. Going forward all financial institutions that are engaged in the asset management business will be treated in the same way. Some established regulations have been amended, others have been taken over verbatim. Concerning authorisation and supervision requirements, financial institutions, which are already subject to supervision and are familiar with the provisions of CISA will not experience any major changes. However, independent asset managers and asset managers, which currently fall below the CISA de minimis threshold, will in future be subject to supervision and will have to ready themselves for considerable adjustment. For them, supervision by FINMA will require additional financial expenditure and organisational resources; but at the same time they will be recognised under the law and the new provisions will put them on equal footing with other financial institutions. The terms and definitions of the new rules have largely been chosen with care and take into account potential areas of confusion. For example the terminological separation between managers of collective investments, on the one hand, and “common” asset managers, on the other. However, some areas exhibit inconsistencies. For instance, the revised CISA refers to FinSA for the definition of qualified investor, however within the revised CISA investors with an asset management or investment advisory mandate are additionally deemed to be qualified investors. Precisions could be made in the implementing ordinances in some areas to make the new terms and definitions more clear for use in a legal context. This applies also to the new term ‘offering’, which is only narrowly defined in FinSA. Overall, however, it is to be expected that the new definition of ‘offering’ will liberalise the previous distribution concept. The requirement to obtain authorisation as a distributor of collective investment schemes will be eliminated, which will align the previously more stringent regulations governing the distribution of collective investment schemes to those governing the distribution of other financial instruments. It is also expected that the approximation to MiFID II resulting from the introduction of FinSA and FinIA will further strengthen the competitiveness of Switzerland as a financial centre in the context of the European Union (EU). It remains to be seen whether the EU Commission will recognise the provisions of FinSA and FinIA as equivalent to MiFID II and MiFIR since they do not apply to congruent areas of implementation. Such recognition by the EU Commission would allow Swiss financial service providers to access third-party markets and serve professional clients from Switzerland on a cross-border basis throughout the EU.

This brochure is intended to provide an overview of the implications the adoption of FinSA and FinIA will have on the areas previously governed by CISA and to serve as a guide as regards the new scope of regulation.

II. Client segmentation

1. Client segments

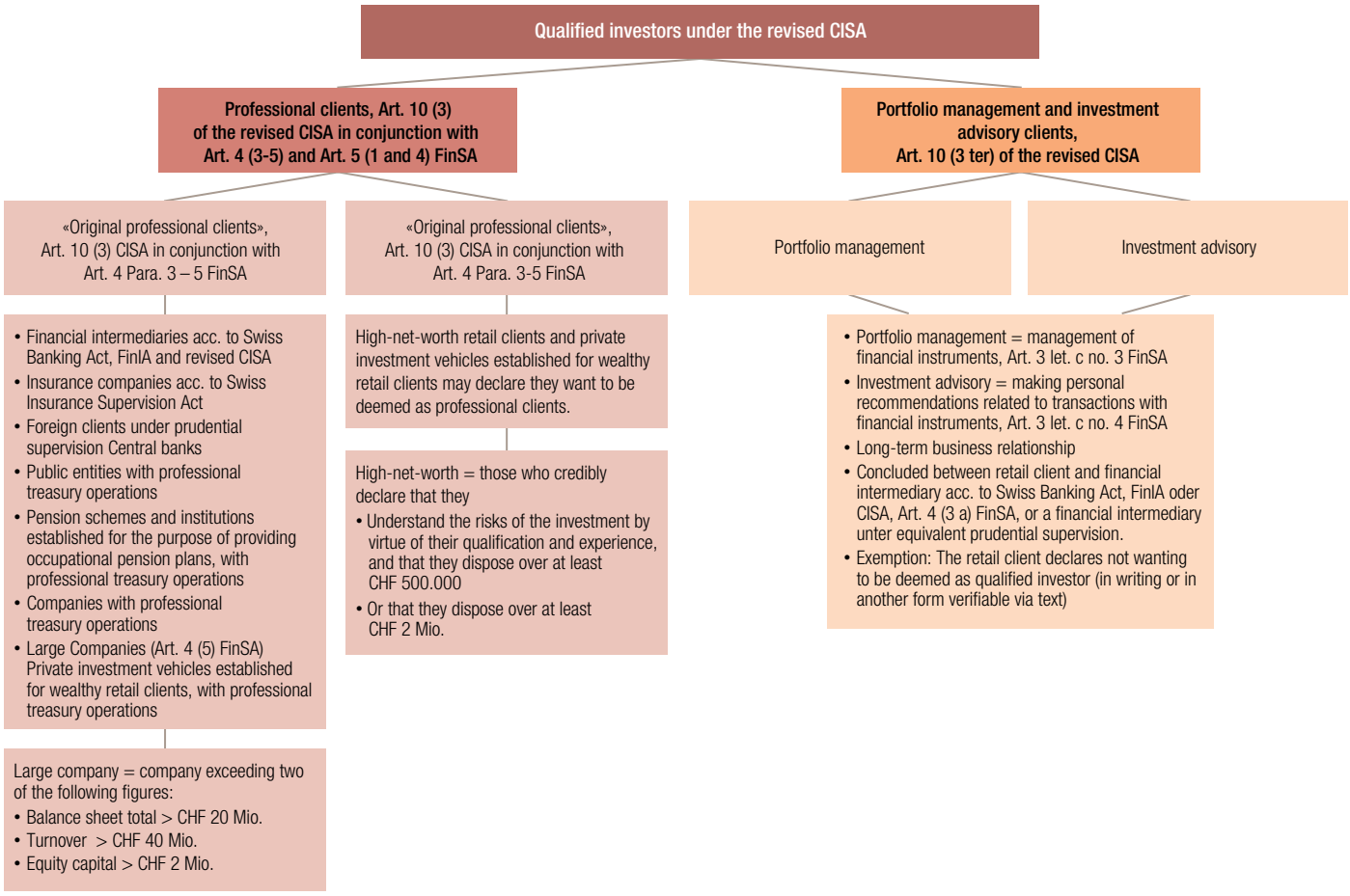
Art. 4 FinSA subdivides clients into retail clients and professional clients, and thus takes its cue from the segmentation according to MiFID II and CISA, which adopt a similar two-tier classification. MiFID II draws a distinction between professional clients and retail investors, and the current provision in Art. 10 CISA distinguishes between qualified and non-qualified investors. Art. 4(3) FinSA lists in detail the clients that fall under the category of professional clients, which is based again on the provisions of MiFID II and the list of qualified investors pursuant to Art. 10(3) CISA. As a result, the terms under FinSA can be understood as they have been until now under Art. 10(3) CISA. The definition of qualified investor thus corresponds by and at large to that of professional client under Art. 4(3) FinSA. To maintain this consistency, going forward Art. 10(3) of the revised CISA will refer to the definition of professional client pursuant to FinSA for its definition of qualified investor. The current terminology according to CISA will thus be preserved and FinSA will be used to specify the term. However, complete congruence between the two definitions is not provided. In particular, according to Art. 10(3ter) of the revised CISA, investors who have concluded a discretionary management agreement (and now also: or investment advisory agreement) with a financial intermediary subject to prudential supervision are deemed qualified investors pursuant to the revised CISA, but are not deemed professional clients as defined by FinSA.

Institutional clients should be seen as a subgroup of the professional clients. This pertains to the group of professional clients specified in Art. 4(4) FinSA, who based on their experience and qualifications operate on a par with financial service providers and do not need the level of protection envisaged for other professional clients.

Finally, it should be noted that companies within a group structure are not deemed clients among themselves according to Art. 4(6) FinSA. In addition, according to Art. 4(7) FinSA, financial service providers can opt out of client segmentation if they treat all clients as retail clients.

The offering of stock option schemes in the form of foreign collective investment schemes exclusively to employees, which pursuant to Art. 3(2) lit. e CISA is not considered distribution, will also in future according to Art. 120(5) of the revised CISA not require approval.

MiFID II	FinSA	revised CISA
Professional client	Professional client, Art. 4(3) FinSA • Financial intermediaries acc. to Swiss Banking Act, FinIA and revised CISA • Insurance companies acc. to Swiss Insurance Supervision Act • Foreign clients under prudential supervision • Central banks • Public entities with professional treasury operations • Pension schemes and institutions established for the purpose of providing occupational pension plans, with professional treasury operations • Companies with professional treasury operations • Large Companies, Art. 4(5) FinSA • Private investment vehicles established for wealthy retail clients, with professional treasury operations	Qualified investor, Art. 10(3) CISA • Reference to Art. 4(3)FinSA • Additionally: investors who have concluded a discretionary management agreement or investment advisory agreement, Art. 10(3ter) of the revised CISA
Eligible counterparty	Institutional client, Art. 4(4) FinSA • Financial intermediaries acc. to Swiss Banking Act, FinIA and revised CISA • Insurance companies acc. to Swiss Insurance Supervision Act • Foreign clients under prudential supervision • Central banks • National and supranational public entities with professional treasury	Sub-group not included within the new CISA, however, Art. 10(3) of the revised CISA also refers to Art. 4(4) FinSA.
Retail investor	Retail client • All clients who are not professional clients.	Non-qualified investor • All investors who are not qualified investors.



2. Implications of the segments

A different level of protection is applied depending on the relevant client segment. For instance, the rules of conduct according to FinSA do not apply to institutional clients, and professional clients can opt out of the application of the duties of disclosure and documentation. As regards the suitability and appropriateness test, financial service providers may also assume in the case of professional clients that these have the required knowledge and experience and that the investment risks associated with the financial service are financially sustainable. Finally, the duty to publish a prospectus provides for an exception if the financial services are offered exclusively to professional clients, and a key information document must only be published when products are issued to retail clients. Also, the requirements governing the offering of foreign collective investment schemes are determined based on the classification of the investor.

3. Changing of segments

Subject to certain conditions, clients can change client segment and thus also the associated level of protection (Art. 5 FinSA). This means that, as also provided in the current Art 10(3bis) CISA and according to Art. 5(1) FinSA, high-net-worth retail clients may declare in writing that they wish to be deemed professional clients and thus opt out of the high level of protection afforded to retail clients. The prerequisite to be considered a high-net-worth retail client depends both according to Art. 5(2) FinSA and Art. 10(3bis) CISA in conjunction with Art. 6 CISO, on a combination of qualifications and available assets or if the required qualifications are not in place, on a higher asset threshold. The latter is considerably lower according to FinSA than it is according to CISO. Either the client must have the required understanding of the investment risks involved by virtue of their qualifications and experience and additionally have assets of at least CHF 500,000 (Art. 5(2a) FinSA), or alternatively have assets of at least CHF 2 million (Art. 5(2b)

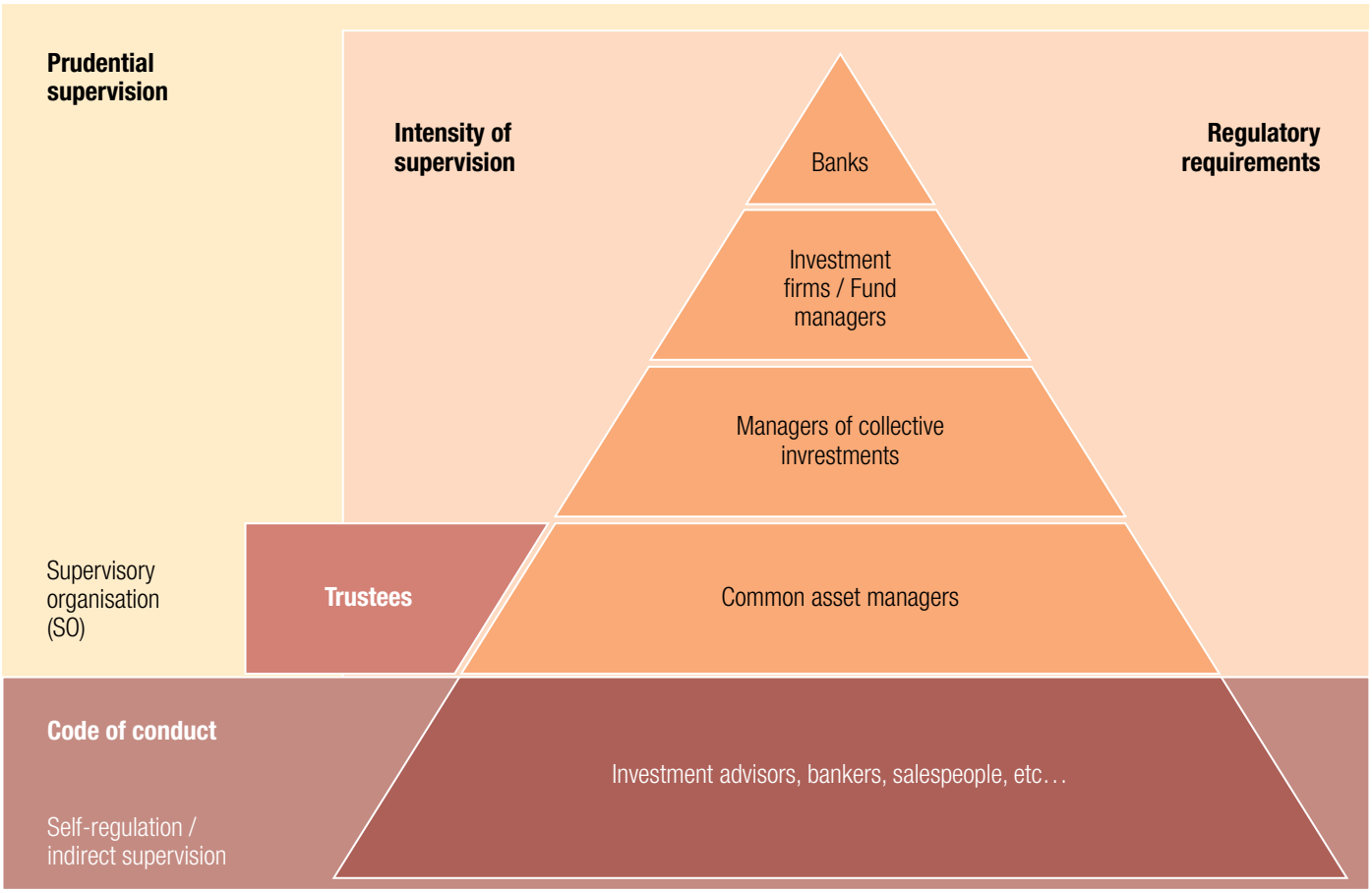
FinSA). It should also be noted that the requirements according to Art. 5(2) FinSA only have to be explained to a credible degree, whereas Art. 6 CISO demands proof. The provision in Art. 10(3bis) CISA will be deleted in future. Instead, reference will be made to the opting-out solution in Art. 5(1) FinSA, and thus retail clients who chose to opt out and be classified as professional clients will be recognised as qualified investors. Other possibilities for opting out of a higher level of protection are provided for in Art. 5(3) and (4) FinSA for certain groups of professional clients. These can declare that they wish to be classified as institutional clients.

Conversely, FinSA also provides for the possibility of opting in, i.e. changing to the retail client segment. Pursuant to Art. 5(5) FinSA, professional clients, who are not institutional clients, can declare that they want to be deemed retail clients. The financial services provider must notify such clients of this fact before providing the service. Earlier versions of the FinSA had envisaged such a change to the retail client segment also for institutional clients, which currently, however, according to Art. 5(6) FinSA can only declare that they wish to be classified exclusively as professional clients. Art. 10(3ter) CISA provides for the option to change to a higher level of protection, whereby investors with a discretionary management mandate can declare that they do not wish to be deemed professional clients.

Formally, the change of segments must be made by a declaration by the client in writing or any other verifiable form of text, such as e-mail. This extension compared to the purely written form supports electronic commerce and will be included accordingly in the amended Art. 10(3ter) of the revised CISA. The declaration applies equally to all business conducted by the client with the financial service provider.

	FinSA	Revised CISA
«Opting out»	• Art. 5 (1) FinSA: High-net-worth retail clients declare they wish to be deemed as professional clients. • Art. 5 (3, 4) FinSA: Professional clients declare they wish to be classified as institutional clients: – Pension schemes and institutions established for the purpose of providing occupational pension plans, with professional treasury operations – Companies with professional treasury operations – Swiss and foreign collective investment schemes and their management companies that are not already considered as institutional clients according to Art. 4 (3 a or c) in conjunction with Art. 4 (4) FinSA	• Art. 10 (3 bis) of the current CISA will be deleted, in future Art. 10 of the revised CISA will refer to Art. 5 (1 and 4) FinSA.
«Opting in»	• Art 5 (5) FinSA: Professional clients who are not institutional clients declare they wish to be deemed as retail clients. • Art. 5 (6) FinSA: Institutional clients declare they wish to be deemed as professional clients.	• Art. 10 (3 ter) of the revised CISA: Clients with a discretionary management or investment advice mandate declare they do not wish to be deemed as qualified investors.

III. Financial institutions



With FinIA, the authorisation requirements for all financial market participants who invest and manage third-party assets, will be regulated uniformly in a single act. The relationship of the individual financial institution licenses to one another is set out in FinIA in a licensing cascade, whereby in principle the license associated with a higher level of regulation automatically constitutes permission to also perform the activities of lower-level licences (Art. 6 FinIA). The license as a bank thereby constitutes the highest level and the license as asset manager the lowest level. The approach that certain license authorisations may formally contain other license authorisations is also already contained in Art. 13(3) CISA in conjunction with Art. 8 CISO. FinSA now further expands on this approach and the specific features and exceptions at the respective levels are explored below in relation to the individual financial institutions relevant to CISA. It should be noted that the new licensing cascade does not exempt financial institutions from compliance with the applicable requirements and duties of each specific license, but only from the formal securing of individual licenses. The provisions concerning the authorisation requirements for financial institutions already subject to regulation have been incorporated into FinIA in a substantively identical manner.

Further, financial institutions which have previously not been subject to regulation have also been added. Going forward, each financial institutions subject to regulation must obtain the respective license before it can be registered in the Commercial Register (Art. 5(2) FinIA), as is currently already indirectly required for asset managers of collective investment schemes due to the requirements in the company purpose (Art. 13(5) CISA).

1. Asset managers

a. New licensing requirement for independent/ external asset managers and trustees

One of the key changes resulting from FinIA is that in future independent external asset managers who have so far not been subject to prudential supervision and have only been subject to AMLA will in future be subject to a licensing requirement in Art. 17 FinIA. The current CISA only subjects asset managers of collective investment schemes to comprehensive supervision. Asset manager as defined by Art. 17(1) FinIA applies to someone who typically on the basis of a mandate has professional disposal over a client's assets on behalf and on the account of

said client. The mere act of providing investment advice does in itself not authorise the asset manager to independently dispose over the assets and thus does not trigger any licensing requirement, but instead is subject solely to the rules of conduct and the advisor registration requirement according to FinSA (see below). The authorisation as asset manager is already formally contained in the licenses as bank, investment firm, fund management company or asset manager of collective investment schemes (as per the licensing cascade). The originally envisaged grandfathering clause, according to which independent or external asset managers who have been practising their activity for at least 15 years and are not accepting any new clients should be exempted from the authorisation requirements, has not been incorporated into the final version of FinIA.

Going forward, trustees who manage or have disposal over the special assets of a trust on behalf of its beneficiaries will also be subject to a licensing requirement (Art. 17(2) FinIA). The authorisation as trustee is only included within the license as bank or investment firm since the activity as trustee requires special knowledge (specifically, of the applicable foreign law that always governs the trust) and the assumption is that only the top two levels of the licensing cascade, i.e. banks and investment firms, have this knowledge. Other financial institutions have to apply for a license to operate as trustee.

Ongoing supervision of asset managers and trustees will be provided by one or more newly appointed supervisory organisations headquartered in Switzerland and subject to FINMA supervision (Art. 61 FinIA in conjunction with the newly introduced Art. 43(a) ff. Financial Market Supervisory Act. Applications for authorisation to operate as asset manager or trustee must be supported by evidence of supervision by one such supervisory organisation, as stipulated in Art. 7(2) FinIA.

b. New financial institution: Managers of collective assets

As a systematic financial institution, the manager of collective assets was created (Art. 24 FinIA). Pursuant to Art. 24(1a) FinIA this includes first and foremost the asset managers of collective investment schemes, the regulation of which will be transferred from CISA , so these can be distinguished on a terminological level from the less strictly regulated asset managers as defined by Art. 17 FinIA.

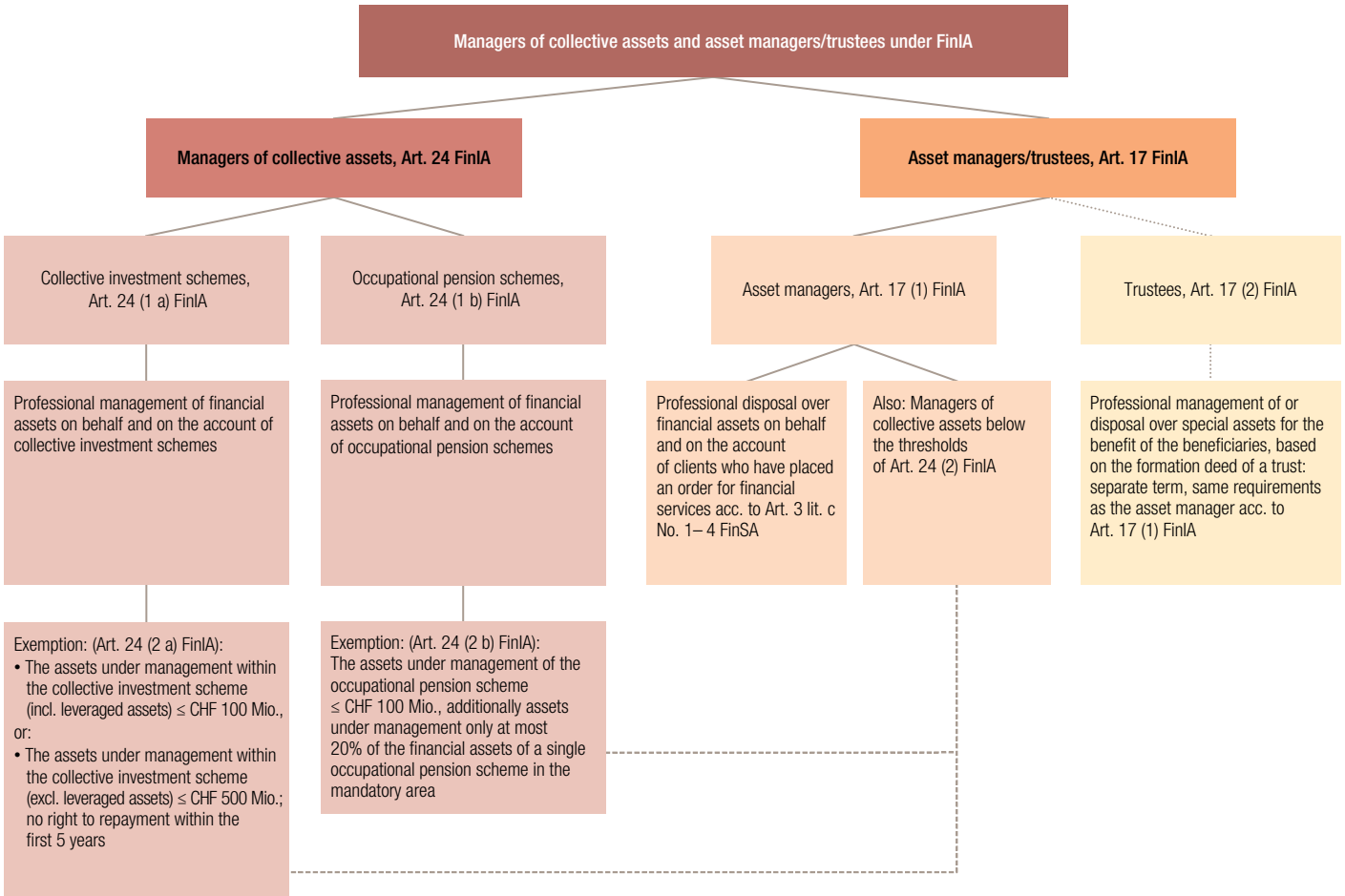
According to Art. 24(1b) FinIA, managers of collective assets also encompasses managers of occupational pension schemes. Since these are external managers who manage collective assets for retirement purposes, this justifies them being subjected to equally strict regulation as managers of collective investment schemes. This however also means, that only the related asset management activity is subject to FinIA, while supervision of the occupation pension schemes and compliance with the investment regulations under the pension law are still governed by the cantonal supervisory authorities and the supervisory commission.

The authorisation requirements for this new financial institution are the same as those defined in CISA and going forward they will also apply to managers of occupational pension schemes. Further, FinIA expressly requires at a legislative level that a minimum capital, securities and equity are available for managers of collective investments. Previously, the requirement was linked to the general authorisation requirements defined in Art. 14 CISA. FinSA will also specify the precise amount in the implementing ordinance. Authorisation to operate as a bank, investment firm or fund management company consequently also formally comprises the authorisation to operate as a manager of collective investments, as per the licensing cascade. It should also be noted that managers of collective assets who are already subject to prudential supervision in Switzerland in line with FinIA requirements do not need to reapply for authorisation. However, they must comply with the requirements of FinIA within one year upon its entry into force, Art. 74(1) sentence 2 FinIA.

As is also foreseen currently in CISA, FinIA contains a de minimis regulation, which was transferred from Art 2(2h) CISA to Art. 24(2a) FinIA. What is new however, is that asset managers of collective investment schemes who do not exceed the thresholds are not exempted in full from the scope of application of the law, but are now deemed asset managers as defined by Art. 17 ff FinIA and have to comply with the requirements stipulated there, which are less strict than those defined in Art 24 FinIA. The same applies to managers of occupational pension schemes, for which a separate de minimis threshold is specified in Art. 24(2b) FinIA. According to this provision, they are deemed asset managers as defined by Art. 17 FinIA if they manage assets of occupational pension schemes totalling no more than CHF 100 million and in the mandatory insurance additionally manage no more than 20 percent of the assets of an individual occupational pension scheme.

Asset managers of foreign collective investment schemes can in accordance with Art. 24(3) FinIA voluntarily re-subject themselves to prudential supervision and apply for licensing as manager of collective investments, if this is required by law in the country where they accumulate or offer collective investment schemes or manage the occupational pension scheme. Since they were previously already subject to an authorisation requirement by law, the new categorisation of asset managers creates the renewed need for voluntary subjection. The specifics of the licensing procedure will be regulated in the implementing ordinance.

Asset managers regulated by FinIA	
Asset managers (Art. 17(1) FinIA)	• someone who typically on the basis of a mandate has professional disposal over a client's assets on behalf and on the account of said client (Art. 17(1) FinIA). • someone who is a manager of collective investment schemes, but the assets under management, including assets acquired through the use of leverage, only amount to a maximum of CHF 100 million (Art. 24(2) lit. a no. 1 FinIA). • someone who is a manager of collective investment schemes, but the assets under management total no more than CHF 500 million and do not include any leveraged financial instruments; the collective investment schemes do not grant repayment in the first five years after the first investment has been made (Art. 24(2) lit. a no. 2 FinIA • someone who is manager of occupational pension schemes, but who manages assets in occupational pension schemes totalling no more than CHF 100 million and in the mandatory insurance additionally manages no more than 20 percent of the assets of an individual occupational pension scheme.
Trustees (Art. 17(2)FinIA)	• someone who, on the basis of the deed of establishment of a trust, on a commercial basis manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose.
Asset managers of collective investment schemes (Art. 24(1) lit. a FinIA)	• someone who manages assets on a commercial basis in the name and on behalf of collective investment schemes.
Asset managers of occupational pension schemes (Art. 24(1) lit. b FinIA)	• someone who manages assets on a commercial basis in the name and on behalf of occupational pension schemes.



c. *Branches and representative offices of foreign collective investment schemes*

Art 52 ff. FinIA consolidates the authorisations previously governed by different laws and ordinances regarding branches of investment firms, banks and asset managers of collective investment schemes into one uniform law while not materially changing the associated duties and requirements. According to current law, Art. 29b CISO requires a FINMA authorisation for a foreign asset manager of collective investment schemes if it employs persons in Switzerland who conduct asset management activities on its behalf on a permanent and commercial basis in or from Switzerland (branch). Going forward, the activities of employed persons in the field of asset management will be listed individually on a purely formal basis in line with the new categorisation as asset manager, trustee and asset manager for collective investment schemes or occupational pension schemes.

If a financial institution employs persons in Switzerland who work on its behalf on a permanent and commercial basis in or from Switzerland in a capacity other than that specified in Art. 52(1) FinIA, specifically if these persons forward client orders to it or represent it for commercial or other purposes, it requires a FINMA authorisation as a representative office pursuant to Art. 58 ff. FinIA. The definition and regulation of representation corresponds in terms of content with the legal form of representation of foreign banks as defined by the banking and stock exchange law. From now on, foreign asset managers of collective investment schemes can also establish a representative office. The Swiss representative needed for the distribution of foreign collective investment schemes, which by virtue of its product-specific activities will still be governed by CISA, has other duties in comparison.

FINMA grants the foreign financial institution a license to set up a representative office if:

a. the foreign financial institution is subject to appropriate supervision;

b. the competent foreign supervisory authorities do not object to the establishment of the representative office;

c. the persons entrusted with its management guarantee an irreproachable business activity.

Foreign fund management companies however, may not establish a branch nor a representative office (Art. 52(2) and Art. 58(2) FinIA).

2. Fund management companies

Art. 32 FinIA defines a fund management company as an entity that manages investment funds independently in its own name and for the account of the investor. This definition corresponds to the understanding of a fund management company pursuant to CISA. Consequently, the provisions of Art. 28 ff. CISA have been transferred without any material changes to FinSA. The only changes concern the standing in the law and the explicitness of the provisions. Art. 34 FinIA, for example, specifies the core duties of the fund management company and already mentions here the delegated administration of an externally managed SICAV and thus is in alignment with other European legislations. The possibility of such a delegation is also provided in the current CISA, but it does not list it until Art. 36(3) CISA, under the provisions pertaining to SICAVs. By contrast, the specific duties of fund management companies are no longer listed in FinIA itself as they are currently in CISA under Art. 30, but rather in its implementing ordinance. Regarding the delegation of tasks, Art. 35 FinIA now explicitly includes the previously implied provision that fund management companies may delegate investment decisions and specific tasks to third parties, but not the management of the investment fund itself. The requirements governing the delegation of duties are no longer contained in FinIA under the provisions pertaining to fund management companies, but under the common provisions, under Art. 14 FinIA, since they apply to all financial institutions. The liability provision under Art. 31(6) CISA is now contained in Title 5 on responsibilities and criminal provisions, Art. 68(2) FinIA. While it has remained unchanged in terms of content, it now applies to all financial institutions.

The final point to note is that the fund management company has a special role within the licensing cascade: even the authorisation to operate as a bank or investment firm does not include the authorisation to operate as a fund management company (Art. 6(1) and (2) FinIA). This special role is attributable to the special requirements placed on fund management companies, which must be set up as a public limited company (Aktiengesellschaft, AG) under Swiss law (Art. 33(1) FinIA) and must pursue the primary purpose of conducting the fund management business (Art. 33(4) FinIA). These requirements are incompatible with the activities of a bank or investment firm.

3. Annual audit of the financial institutions

In general, financial institutions must appoint annually an audit company licensed by the Federal Audit Oversight Authority with the prudential audit of their activities and the associated risks. The detailed requirements are graduated depending on the specific financial institution: In the case of trustees and asset managers, the newly to be established supervisory organisation, which is responsible for the ongoing supervision of trustees and asset managers (see above), can also carry out the audit itself (Art. 62(1) FinIA, Art. 43k(1) FINMASA). It may also increase the audit periodicity to a maximum of four years,

depending on the activities of the supervised institutions. In the case of managers of collective investments and fund management companies, FINMA itself may conduct the audit instead of the licensed audit company (Art. 63(1) lit. a FinIA, Art. 24 FINMASA. FINMA may also increase the audit periodicity to several years depending on the activity of the supervised institution. In addition to this audit of their activities, managers of collective investments and fund management companies must have their annual financial statement and, if applicable, their consolidated group financial statements audited by a government-supervised audit company in accordance with the principles of the ordinary audit of the Swiss Code of Obligations. As stated in Art. 126(3) lit. a CISA and now according to Art. 63(4) FinIA, the fund management company has to appoint the same audit company for itself and the investment funds it manages.

Art. 126 CISA continues to regulate the audit obligation under Art. 24 FINMASA for the investment funds managed by the fund management company, for the SICAV, LPCI, SICAF and the representative of foreign collective investment schemes. The audit obligation for the fund management companies themselves and the asset managers of collective investment schemes as set out in Art. 126 CISA will be transferred to Art. 63 FinIA.

4. Transitional provisions for the authorisation of financial institutes

Financial institutions already subject to prudential supervision in Switzerland in line with FinIA requirements do not need to reapply for authorisation. However, they must comply with the requirements of FinIA within one year upon its entry into force, Art. 74(1) sentence 2 FinIA.

Financial institutions that with FinIA are newly subject to a license must, according to Art. 74(2) FinIA, report to FINMA within six months upon entry into force of the FinIA and, within three years from the date of entry into force, meet the requirements of the FinIA and have submitted an application for authorisation. If they are adequately supervised by a self-regulatory organisation according to Art. 24 AMLA with regard to compliance with the corresponding duties, they may continue their activities until the decision on the authorisation has been granted.

For asset managers and trustees, the special provision of Art. 74(3) FinIA applies, which requires them to report to FINMA without delay and meet the authorisation requirements if they start their activities within one year from entry into force of FinIA. The evidence of supervision by a supervisory organisation in accordance with Art. 7(2) FinIA does not need to be provided until one year at the latest after FINMA has authorised such a supervisory organisation pursuant to Art. 43a FINMASA. An application for authorisation has to be submitted to FINMA within this same time period. Until the decision on the authorisation is granted, the activity may be continued if the supervision is ensured by a self-regulatory organisation in accordance with Art 24 AMLA.

5. Tax Considerations

While FinSA and FinIA do not directly change Swiss tax laws, their implementation by financial institutions should always take into account the impact on the tax efficiency of the group structure.

On one hand, the new registration requirements give the tax authorities a new means of information to systematically check certain groups of taxpayers. On the other hand, small adjustments in contracts or processes can often affect the tax efficiency of the structure. Particularly for managers of collective investment schemes, questions of international profit sharing arise often (transfer pricing). The tax authorities are increasingly taking action against offshore structures with little substance, which can lead not only to income taxes consequences, but also to significant withholding tax risks. It is therefore advisable to secure such international profit distributions with a tax ruling and to review existing tax rulings to see whether they need to be adjusted due to FinIA and FinSA. A further tax risk arises in the distribution of foreign collective investment schemes. Such activity is generally subject to transfer tax if a Swiss bank or financial intermediary is involved. In many cases, the distribution process can be structured in such a way that the Swiss financial institution is not involved in the process as an intermediary, but merely carries out a marketing activity, while the actual investment takes place between the investor and the foreign administrator. In such a case, no transfer tax is due. However, it is advisable to analyse the process in detail and to obtain a respective tax ruling.

IV. Rules of conduct

FinSA places a series of rules of conduct on financial service providers, which must be complied with when providing financial services (Art. 7 ff. FinSA). These are duties of disclosure, duties to perform suitability and appropriateness tests, duties of documentation and accountability, and duties of transparency and due diligence (Art. 7 ff. FinSA). CISA currently already contains its own rules of conduct in Art. 20 ff. While the foreseen FinSA rules of conduct are intended to protect the client when acquiring securities or financial instruments, the current CISA rules of conduct are aimed at investor protection by means of diligent asset management in the interests of the collective investment schemes. The FinSA rules are considerably more comprehensive; the basic principles are, however, already widely known from CISA. Not only does CISA have its own duties of loyalty, due diligence and disclosure (Art. 20 CISA), but Art. 24(3) CISA also stipulates the duty for financial intermediaries engaged to distribute units to record in writing the ascertained client's requirements and the reasons for each recommendation for investment in a specific collective investment scheme. This duty of documentation is now foreseen in Art. 15(2) FinSA for investment advice, in addition to the general duties of documentation with respect to agreed and rendered services (Art. 15(1) FinSA). The organisational rules which follow after the rules of conduct in FinSA and which further serve to ensure implementation of the rules of conduct, are also not unfamiliar territory for collective investment schemes under the prevailing law. For instance, Art. 12 ff. CISA already places precise requirements on the internal organisation of licencees under CISA. In particular, it contains a provision on avoiding conflicts of interest, which is also similarly foreseen in Art. 25 FinSA.

The duties of loyalty, due diligence and disclosure of Art. 20 CISA, the duties of Art. 21 CISA regarding investments, and the provisions regarding exercising membership and creditors' rights of Art. 23 CISA will remain by and at large unchanged in the revised version of CISA. However, they will no longer apply to licencees, but rather to all persons who manage, administer or represent collective investment schemes, as well as their agents. Managers of collective investments and fund management companies must therefore observe both the rules of conduct of CISA and the considerably more comprehensive rules of conduct according to FinSA.

The requirements concerning securities transactions pursuant to Art. 22 CISA and the additional rules of conduct pursuant to Art. 24 CISA, which relate in particular to the distribution of collective investment schemes, will however be incorporated into the rules of conduct of FinSA and will be repealed in the revised version of the CISA. This is in line with the objective of removing distribution from the scope of regulation of the revised CISA. The competency of FINMA to declare rules of conduct of industry organisations as a minimum standard (Art. 20(2) CISA) will also be repealed in the revised CISA in favour of more comprehensive provisions on the rules of conduct in FinSA.

Rules of conduct in detail

✓	**Will remain by and at large unchanged,** however, they now no longer apply to licencees, but to all **persons who manage, administer or represent collective investment schemes,** as well as their agents	*Duty of loyalty, Art. 20(1) lit. a CISA (current/revised version)*	Acting independently action and protecting exclusively the investors' interests
		Duty of due diligence, Art. 20(1) lit. b CISA (current/revised version)	Taking the appropriate organisational measures required for an irreproachable business activity
		Duty of disclosure, Art. 20(1) lit. c CISA (current version)	Ensuring transparent accountability and information about the managed, administered and distributed collective investment schemes; disclosing all charges and fees incurred by the investor and their appropriation;
		Duty of disclosure, Art. 20(1) lit. c CISA (revised version)	Will remain, however, the specified duty to provide complete, truthful and understandable information on the compensation for the distribution of collective investment schemes in the form of commissions, brokerage fees and other soft commissions as laid down in Art. 20(1) lit. c CISA will no longer apply
		Duties regarding investments, Art. 21 CISA (current/ revised version)	Following an investment policy that corresponds at all times with the investment characteristics of the collective investment scheme as set out in the relevant documents. Acceptance of retrocessions and other financial benefits only for the collective investment scheme
✗	**Will no longer apply and will in future be regulated in the FinSA/ Financial Markets Infrastructure Act**	*Securities transactions, Art. 22 CISA (current version)*	Careful selection and regular review of the counterparty for securities trades
✓	Will remain in the CISA	*Membership and creditors' rights, Art. 23 CISA (current/revised version)*	Exercising membership and creditors' rights associated with the investments exclusively in the interest of the investors
✗	Will no longer apply and in future the recording of the client's requirements and of the reasons for recommendation will be regulated in terms of investment advice under Art. 15 FinSA	*Rules of conduct with regard to distribution, especially record keeping duties, Art. 24 CISA (current version)*	Legitimate acquisition of clients and objective provision of advice Engagement of services of third parties only via conclusion of distribution agreements Recording in writing the client's requirements that they have ascertained and the reasons for each recommendation for investment in a specific collective investment scheme

Rules of conduct FinSA	**Asset managers are financial service providers and can:** • Acquire or sell financial instruments, • Accept and transmit orders relating to financial instruments, • Make personal recommendations related to financial services business, and • Grant loans for the execution of transactions in financial instruments and manage financial instruments as managers of collective investments
Duty of information **Art. 8 f. FinSA**	**...and are therefore obliged to inform their clients.** **In general about:** • their name and address; • their field of activity and their supervisory status; • the possibility to initiate conciliation proceedings before a recognized ombudsman; and • the general risks associated with financial instruments. **Specifically regarding the financial service about:** • the personally recommended financial service and the associated risks and costs; • the economic ties with third parties in connection with the financial service offered, including especially the compensation and retrocessions of third parties; and • the market offer taken into account in the selection of financial instruments. In the case of personal recommendations of financial instruments, they make available, if required, a key information document and a prospectus.
Duty to perform suitability and appropriateness tests **Art. 10 ff. FinSA**	**...and are therefore obliged to audit their clients.** • in the case of investment advice with consideration of the client portfolio: the knowledge and experience of the client • in the case of investment advice without consideration of the client portfolio and in the case of asset management: additionally the financial circumstances and investment objectives of the client **unless...** • in the case of professional clients where it may be expected that they have sufficient knowledge and experience and can bear the investment risks • in the case of "execution only" no audit is required

Duty of documentation and accountability **Art. 15 f. FinSA**	• the financial services agreed with clients and the information collected about them; • the information that no suitability and appropriateness test has been performed due to the existence of an exception (see above) or the fact that they have advised the client against using the service on the basis of the test result after the test has been performed; • the financial services rendered to the clients. In the case of investment advice, they also document the client's requirements and the reasons for each recommendation that led to the acquisition or sale of a financial instrument. Financial service providers make the documentation described above available to their clients. Also, upon request of the client, they render account of: • the agreed and rendered financial services; • the composition, valuation and development of the portfolio; • the costs associated with the financial services.
Duty of transparency and care **Art. 17 ff. FinSA**	• financial service providers respect good faith • they ensure the best possible outcomes in terms of finances, time and quality • they use financial instruments from client portfolios only upon prior consent by the client

V. Prospectus requirements

Art. 35 ff. FinSA specifies a uniform requirement for all equity and debt securities to publish a prospectus before making a public offer to purchase or before requesting the admission of securities for trading. Both the primary and the secondary market are thus covered.

In the area of collective investment schemes, a prospectus requirement is already included in Art. 75-77 CISA for open-ended collective investment schemes, in Art. 102(3) CISA for LPCIs and in Art. 116 CISA (which refers to Art. 75 and Art. 77 CISA) for SICAFs. These provisions will in principle be transferred without any material changes to Title 2 of FinSA, where they form a special section for collective investment schemes (Art. 48-50 FinSA); the corresponding section will be deleted in the revised version of CISA.

Pursuant to Art. 48 FinSA, fund management companies and SICAVs will continue to publish a prospectus for open-ended collective investment schemes pursuant to Title 2 of CISA, which shall include the fund regulations in cases where interested persons are not notified as to where such regulations may be separately obtained prior to an agreement being concluded or prior to subscription. Concerning the further required content, Art. 48(3) FinSA now expressly refers to the determination by the Federal Council. The requirement to submit the prospectus and any amendments to the document according to Art. 77(2) CISA can now be found in Art. 48(4) FinSA. The requirement to make available the prospectus free of charge to interested persons prior to an agreement being concluded or prior to subscription according to Art. 75(3) CISA has been slightly amended in Art. 8(5) FinSA within the scope of the duty of disclosure: here, the requirement is linked to the personal recommendation of financial instruments for which a prospectus is to be published, and is now restricted to retail clients.

According to Art. 50 FinSA FINMA will in future be able to exempt collective investment schemes under CISA from all or some of the prospectus requirements, provided that they are open exclusively to qualified investors pursuant to Art. 10(3) and (3ter) CISA and the protective purpose of FinSA is not thereby affected, as is currently already foressen in Art. 10(5b) CISA.

According to Art. 51(3) FinSA, prospectuses for collective investment scheme do not have to be submitted to a reviewing body prior to their publication. The prospectuses of foreign collective investment schemes which are to be distributed in and from Switzerland to non-qualified investors will still, however, require prior approval by FINMA (Art. 51(3) sentence 2 FinSA and Art. 15 (1) lit. e and Art. 120 of the revised CISA.

The key information document which according to Art. 58 ff. FinSA must be published in addition to the prospectus and which should provide investors with the essential information for making a well-founded investment decision, which includes amongst others information about the key features, costs and holding period of the investment, is nothing new for specific collective investment schemes. For example Art. 76 CISA already contained a provision requiring a Key Investor Information Document to be published for securities funds and other funds for traditional investments as a decision-making basis. This requirement will be abolished and newly regulated in FinSA. The new provisions in the FinSA on the key information document shall apply in principle to all financial instruments, but in contrast to Art. 76 CISA shall be restricted to offerings to retail clients. Regarding timing of information, Art. 9(2) FinSA specifies that financial service providers must make the key information document available to their retail clients free of charge prior to subscription to the product or conclusion of an agreement for subscription to the product, as also previously foreseen in Art. 76(5) CISA. Art. 63 FinSA authorises the Federal Council to introduce implementing provisions on the key information document. Implementing provisions can currently also be found for securities funds and other funds for traditional investments in CISA's implementing ordinance, specifically in Art. 107 ff. and Annex 3 CISO.

The publication of the prospectus and the key information document is regulated in Art. 64 ff. FinSA. Regarding the time of publication, for prospectuses of collective investment schemes the special rule defined in Art. 65(1) FinSA shall apply, according to which the prospectus must be published at the latest upon commencement of the public offer. Regarding the place and method of publication, Art. 65(2) FinSA refers to the general provisions of Art. 64(3), (4) and (6) FinSA. Possibilities include publication in the Swiss Commercial Gazette, in written or electronic form. The key information document must be published in the same manner, likewise upon commencement of the public offer (Art. 66 FinSA).

VI. Distribution

1. Distribution vs. offering and exceptions

Pursuant to Art. 3(1) CISA, distribution is currently defined as any offering of and advertising for collective investment schemes that is not exclusively directed at investors according to Art. 10(3) lit. a and b CISA, i.e. regulated financial intermediaries and regulated insurance institutions. This definition of distribution serves as a benchmark for subjecting distributors and foreign collective investment schemes to the scope of application of CISA (see Art. 2 CISA). This broader definition of distribution according to Art. 3 CISA, which only came into force a few years ago as part of the partial revision of CISA in 2013, will now be replaced by the more general definition of offering in Art. 3 lit. h FinSA, according to which an offer is any invitation to acquire a financial instrument which contains sufficient information on the terms of the offer and the financial instrument itself. This definition of an offer applies to all financial instruments. While CISA links the distribution activity to the requirement to obtain a license as a distributor (Art. 13(1) and (2) lit. g CISA), the definition of an offer pursuant to FinSA does not entail any such requirement i.e. the distributor license will be abolished. The sole provison is that the activity is categorised as a commercial financial service according to Art. 3 lit. d FinSA.

The CISA provisions on distribution will be removed entirely. This means that the requirement to obtain a license as a distributor will be abolished and substituted with the requirement for registration in the advisor register. This also means that the exceptions to the term distribution as defined in Art. 3(2) CISA will no longer apply. FinSA does not contain any corresponding explicit provisions, however the exceptions will be regulated elsewhere or shall continue to apply materially.

Accordingly, the exception specified under Art. 3(2) lit. a CISA, according to which it is not deemed to be distribution, if the provision of information and the subscription of collective investment schemes is at the instigation of or at the own initiative of the investor (reverse solicitation), is no longer explicitly provided. The content of this provision shall continue to apply, however, since the definition of an offer according to Art. 3 lit. h FinSA cannot include the acquisition of units at the instigation of or at the own initiative of the investor. As previously considered independent asset managers shall now also be subject to prudential supervision, the exception to the term distribution pursuant to Art. 3(2) lit. b CISA, where information is provided based on a discretionary management agreement with a regulated financial intermediary, shall in future also encompass the exception under Art. 3(2) lit. c CISA, which applies to discretionary management agreements with an independent asset manager. Art. 3 (2) lit. b CISA, in turn, will be incorporated into the revised Art. 10(3ter) CISA, according to which private clients who have concluded a long-term discretionary management or investment advisory relationship with a prudentially supervised financial intermediary according to Art. 4 (3) lit. a FinSA shall be deemed qualified investors as defined in the revised CISA unless they have specified that they do not wish to be deemed as such. For this constellation the revised CISA is thus applicable, whereas previously this exception under lit. b and c resulted in exemption from the applicability of the the (previously still existing distribution) provisions pursuant to CISA. However, this does not have any implications from a regulatory perspective, since the revised CISA does not impose any requirements in terms of personnel and the product authorisation for foreign collective investment schemes will only be needed when offering products to non-qualified investors. The exception under Art. 3(2) lit. d CISA will be deleted, however it will continue to apply purely terminologically, because the publication of prices, net asset values and tax data cannot constitute an invitation to buy securities or financial instruments. Finally, the exception under Art. 3 (2) lit. e CISA will be specified and broadened to include foreign collective investment schemes and exempted from the product authorisation requirement and will be transferred to a new paragraph 5 under Art. 120 of the revised CISA.

Exceptions according to Art. 3 (2) CISA

So far	Going forward
lit. a: reverse solicitation	Not regulated explicitly, but maintained materially
lit. b: discretionary management agreement with a regulated asset manager of collective investment schemes	Incorporated into the new Art. 10 (3ter) of the revised CISA: private clients are deemed qualified investorsr
Incorporated into the new Art. 10 (3ter) of the revised CISA: private clients are deemed qualified investors	Encompassed by lit. b
lit. d: publication of price and rate lists, etc.	Not regulated explicitly, but maintained materially
lit. e: offering of stock option schemes in the form of collective investment schemes to employees	Relevant for foreign collective investment schemes: regulated in a new paragraph 5 under Art. 120 of the revised CISA

2. Advisor register

a. Registration duty

Pursuant to Art. 28(1) FinSA, client advisors working for domestic financial service providers not subject to supervision in Switzerland and client advisors of foreign financial service providers must be registered in an advisor register before they can start performing their activities. This registration does not result in prudential supervision. However, the FinSA rules of conduct applicable to financial service providers must be complied with (see above). All persons who provide financial services on a professional basis are deemed financial service providers.

- *Financial services*
  The term 'financial services' is defined broadly and includes in particular the sale of financial instruments and the transmission of orders in relation to financial instruments, and thus also the distribution of collective investment schemes. Client advisors of financial service providers distributing collective investment schemes must therefore going forward register themselves in the advisor register. The authorisation as a distributor will no longer be required for this purpose with the introduction of FinSA. The corresponding CISA provisions will be removed without replacement. The registration requirement is tied to the individual person, whereas the authorisation as distributor is tied to the legal entity.
- *Professional basis*
  The financial service must be provided on a professional basis, meaning as an independent, ongoing business activity aimed at generating sustained profit. The wording of Art. 3(1) CISA in contrast, does not tie the requirement for authorisation as a distributor to the fact that distribution is performed on a professional basis.
- *Supervision*
  The registration requirement only applies to advisors of financial service providers, which are not subject to supervision in Switzerland. This should ensure that also the employees of financial service providers, whose compliance with the rules of conduct is not subject to regulatory supervision, are acquainted with these rules of conduct. Therefore, employees of domestic financial service providers who are already subject to supervision pursuant to Art. 3 FINMSA are not affected by the registration requirement.

b. Registration requirements

Before a client advisor can be entered in the advisor register they must meet the registration requirements specified in Art. 29 FinSA. These registration requirements afford assurance to the client that the client advisor has the required qualifications and credibility, also with regard to the criminal and supervisory law.

Consequently, the client advisor must have first completed the further education and training required for entry in the register (Art. 29(1) lit. a in conjunction with Art. 6 FinSA). They must also (as previously required for the distributor) have concluded a professional liability insurance or have provided equivalent financial guarantees, Art. 29(1) lit. b FinSA. If the client advisor himself is not a financial service provider, but rather an employee of a financial service provider, which is frequently the case, the financial guarantee may also be provided by the financial service provider, whereby evidence thereof must be provided by the client advisor himself. Furthermore, the financial service provider must be affiliated to an ombudsman as defined in Art. 74 FinSA, for the purpose of settling disputes regarding the client's claims against the financial service provider in mediation proceedings (Art. 29(1) lit. c FinSA). This requirement lays down the rules for implementing the duty to register with an ombudsman according to Art. 77 FinSA also in the case of financial service providers who are not subject to supervision.

With regard to criminal law (Art. 29(2) lit. a FinSA), the client advisor must not have any criminal conviction for an infringement of Art. 89-92 FinSA (namely, breaches of the rules of conduct or the requirements governing prospectuses and key information documents, unauthorised issuing of financial instruments). The client advisor must also not have any conviction for an infringement of Art. 86 of the Insurance Supervision Act (ISA). Finally, the client advisor must not have a criminal conviction for offences against property under Art. 137 – 172ter of the Swiss Criminal Code (SCO). The client advisor must present a current extract from the criminal register upon registration.

With regard to supervisory law (Art. 29(2) lit. b FinSA), the client advisor must not have been issued with an industry ban pursuant to Art. 33 lit. a or Art 33 FINMASA. The registration body verifies this by cross-checking with the supervisory authority. In addition, the supervisory authority notifies the registration body if it issues an industry ban against a previously registered client advisor or if they receive information regarding a criminal conviction against a previously registered client advisor.

The registration requirements can be summarised as follows:

Positive registration requirements, Art. 29(1) FinSA	
lit.a	Education and trainings
lit.b	Professional liability insurance or equivalent financial guarantees
lit.c	Affiliation to an ombudsman

Negative registration requirements, Art. 29(2) FinSA	
lit.a	No criminal conviction according to the regulations of FinSA, Swiss Insurance Supervision Act or asset protection regulations of the Swiss Criminal Code
lit.b	No industry ban under supervisory law in respect of the activity to be registered

c. Content

Based on the foregoing, the advisor register is intended to provide the client with information about the person of the client advisor, particularly regarding his qualifications. The advisor register thus contains at least all information required to this end. Pursuant to Art. 30 FinSA, this includes the last name and first name of the client advisor as well as the company name and address of the financial service provider, so as to be able to first identify the client advisor. Furthermore, the function and standing of the client advisor within the organisation as well as the scope of his performed business activities are also specified. The information on any completed education and training is particularly important, since this helps the client to gain a picture of the client advisor's qualifications. Moreover, the advisor register specifies the ombudsman to the financial service provider is affiliated, so that the client can contact the responsible body directly in the event of a dispute. Finally, the information on the date of registration tells the client how long the client advisor has practised his business activity and how long he has been in complyiing with the registration requirements.

d. Registration body

The registration body pursuant to Art. 31 FinSA is a private body which is licensed by FINMA and is tasked with performing duties under the public law. Insofar as it is reasonable and justified and to the extent that comparability among the registration bodies can be ensured, FINMA can also license multiple bodies. The registration body decides about the entry into the register on the basis of the presented evidence supporting the registration requirements. It also decides on the deletions from the register, for example if it becomes aware that a client advisor no longer meets a registration requirement. On the one hand, the client advisor is personally obligated to notify the registration authority of any changes in his registration requirements. Furthermore, the registration body receives reports from the supervisory authority (see above).

Clients can submit an individual request on the registration body's homepage to find out whether their client advisor is entered in the register. This is intended not only to respect the client advisor's privacy (compared with publishing a full list), but also to provide the client with the requisite information.

3. Foreign collective investment schemes

Under the current legislation, foreign collective investment schemes require a distributor license pursuant to Art. 13 CISA to be distributed in or from Switzerland, and additionally, in contrast to Swiss collective investment schemes, require an authorisation for distribution of foreign collective investment schemes as a product to non-qualified investors pursuant to Art. 120 CISA.

The requirement to obtain a license as distributor will be abolished for both Swiss and foreign collective investment schemes in favour of the requirement to be entered in the advisor register. Art. 19(1bis) CISA, which places additional requirements on financial intermediaries distributing foreign collective investment schemes, will also be abolished as a result.

However, the requirement to obtain an authorisation of the product itself according to Art. 120 CISA will remain. This requirement will be subject to minor formal adjustments. In particular, and in line with the new offering concept according to FinSA, the focus will be placed on offering instead of distribution. Thus, according to the revised wording, going forward foreign collective investment schemes will have to be authorised by FINMA before they can be offered to non-qualified investors in Switzerland. Concerning the question as to who in future will be deemed a qualified investor as defined by the revised CISA, the new client segmentation (see above) shall apply.

Art. 120(4) CISA, according to which foreign collective investment schemes offered exclusively to qualified investors do not require authorisation, but must at all times comply with the conditions under paragraphs 2 lit. c and lit. d, and in particular with the requirement to appoint a representative and a paying agent for the distribution of units in Switzerland, will by and at large remain in force. However, going forward it will be limited to offering units (also) to high-net-worth retail clients who have opted out pursuant to Art. 5(1) FinSA. Conversely and based on the structure of Art. 120 of the revised CISA, it follows that foreign collective investment schemes which are offered exclusively to qualified investors pursuant to Art. 4(3)-(5) FinSA and Art. 10(3ter) of the revised CISA are exempted from the requirements of paragraph 2 lit. c and lit. d. In particular, they no longer require a representative or a paying agent in Switzerland.

Stock option schemes in the form of foreign collective investment schemes, which are offered exclusively to employees do not require authorisation according to Art. 120(5) of the revised CISA.

Units of foreign collective investment schemes are regarded as taxable documents for the purposes of the Swiss securities transfer tax. Accordingly, in the case of distribution, it is important to pay close attention to whether a Swiss financial institution is involved in distribution as an intermediary and owes the transfer tax accordingly (see III.5. above).

List of Abbreviations

FinSA	Financial Services Act
FinIA	Financial Institutions Act
CISA	Collective Investment Schemes Act
CISO	Collective Investment Schemes Ordinance
MiFID II	Markets in Financial Instruments Directive
MIFIR	Markets in Financial Instruments Regulation ((EU) No 600/2014)
LPCI	Limited Partnership for Collective Investments ('Kommanditgesellschaft für kollektive Kapitalanlagen')
SICAV	Investment Company with Variable Capital
SICAF	Investment Company with Fixed Capital
FINMA	Swiss Financial Market Supervisory Authority
AMLA	Swiss Anti Money Laundering Act

Contacts

PwC Legal Switzerland
Birchstrasse 160
Postfach, 8050 Zürich

Dr. Günther Dobrauz
Partner, Leader PwC Legal Switzerland
guenther.dobrauz@ch.pwc.com
+41 58 792 14 97

Sabine Bartenschlager-Igel
Director, PwC Legal Switzerland,
Lead Asset Management
sabine.bartenschlager-igel@ch.pwc.com
+41 58 792 28 73

Anne Batliner
Senior Manager, PwC Legal Switzerland,
Asset Management
anne.batliner@ch.pwc.com
+41 58 792 29 55

Julia Wesselmann
Senior, PwC Legal Switzerland,
Asset Management
julia.wesselmann@ch.pwc.com
+41 58 792 29 94

Benjamin De Zordi
Partner, Tax, Asset Management
benjamin.de.zordi@ch.pwc.com
+41 58 792 43 17

Silvan Amberg
Director, Tax, Asset Management
silvan.amberg@ch.pwc.com
+41 58 792 44 59