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# ***FinSA/FinIA***

Analysis of the requirements  
of the Federal Financial Services Act and  
Financial Institutions Act applicable to  
financial intermediaries

This brochure has been made available by PwC Legal to give you an overview of the requirements and initial effects of FinSA/FinIA. Further intentions of the document are to give you an overview of the effected areas of the Swiss Financial Markets and upcoming regulatory changes.

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## Introduction

Parliamentary consultation on the legislative proposals of the Financial Services Act (FinSA) and the Financial Institution Act (FinIA) began in the summer of 2014. The Federal Council adopted the dispatch on the FinSA and the FinIA at the beginning of November 2015. On Friday, 15 June 2018, Swiss Parliament adopted the FinSA and FinIA, which will **take effect on 1 January 2020**.

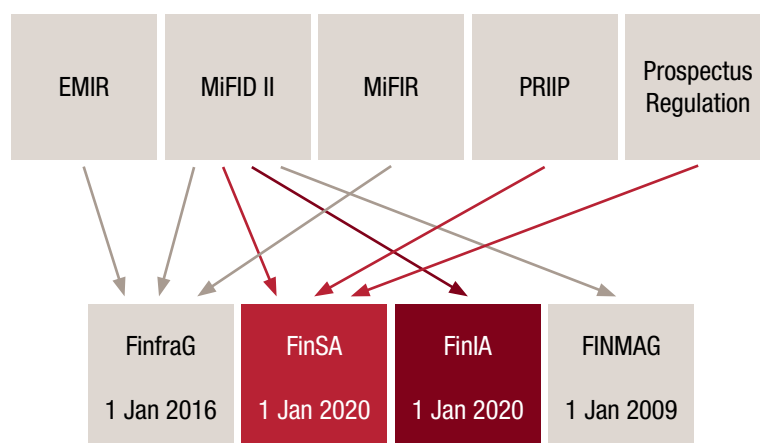
This brochure, provided by PwC Legal, provides an overview of the main subject areas and initial concerns, and is intended to help you get an overview of the regulation of the Swiss financial market and the next steps to be expected.

In addition to the points already known from Markets in Financial Instruments Directive II (MiFID II) on investor protection, FinSA and FinIA regulate other subject areas such as

- the **register of advisors**,
- the **prospectus requirement**,
- the **FinSA key information document (FinSA KID)**,
- the **licensing obligation**<sup>1</sup>,
- **penal provisions**, and
- the expected **specifications of the Federal Council**.

FinSA and FinIA are often referred to as the Swiss equivalent to the EU MiFID II regulation. MiFID II in principle pursues similar goals to FinSA and FinIA, but both FinSA and FinIA deal with many subject areas that are either found in another EU legal standard or are completely new or even complementary.

The Swiss and EU Regulatory projects could be visualised as follows:



Now that the legal texts have been published, PwC Legal recommends that affected companies take stake internally and draw up a gap assessment/ discuss potential impacts to enable them to take the necessary steps for implementation.

<sup>1</sup> Financial institutions under Article 2 paragraph 1 FinIA require authorisation from FINMA.

## Executive summary

Regardless of your corporate structure, you fall within the **scope of FinSA** if at least one of the following criteria applies to your company:

### FinSA



*Do you offer one of the following services?*

- Execution Only
- Investment consulting
- Asset management (managed accounts and discretionary mandates)
- Granting of loans for financial instruments



*Do these services pertain to the following financial instruments?*

- Equity securities
- Debt securities
- Shares in collective investment schemes
- Structured products
- Derivatives
- Structured investments
- Bonds

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### FinIA

**FinIA primarily regulates the licensing obligation and associated necessary requirements for:**

- Portfolio Managers
- Trustees
- Managers of collective assets
- Fund management companies
- Securities firms.

# 1. What topics are covered by FinSA?

The aim of the FinSA is to protect the **interests of investors and to keep this level of protection high** – similar to the aim of MiFID II. This is primarily achieved through the standardization of regulations on transparency, the general avoidance of conflicts of interest, as well as the adherence to standard due diligence obligations. In addition, both FinSA and FinIA pursue the goal of creating relevant organisational structures so that financial intermediaries have to implement these principles in their internal processes.

It should be noted that the implementation of the FinSA principles is not a one-time adjustment, but a **long-term amendment of the existing processes**. Therefore it is important to take pre-existing processes into account when implementing FinSA and to introduce new processes only where necessary.

## Client classification

Client classification under FinSA **follows the logic of MiFID II**; only the designations that differ.

The following classification is provided:

FinSA	MiFID II	Requirement
Professional client	Professional client	<ul style="list-style-type: none"><li>• Financial intermediaries under the Banking Act, FinIA and CISA</li><li>• Insurance companies under the ISA</li><li>• Foreign clients subject to prudential supervision</li><li>• Central banks</li><li>• Public corporations with professional treasury services</li><li>• Pension funds and institutions with professional treasury services, which serve the purpose of occupational pension provision</li><li>• Companies with professional treasury services</li><li>• Large companies</li><li>• Private investment structures set up for wealthy private clients with professional treasury services</li></ul>
Private client	Retail client	<ul style="list-style-type: none"><li>• All clients who are not professional clients</li></ul>
Institutional client	Eligible counterparty	<ul style="list-style-type: none"><li>• All professional clients who wish to voluntarily declare themselves as institutional clients (opting-in), as well as national and supranational public corporations with professional treasury services.</li></ul>

Wealthy or particularly experienced clients have the right to **opt out** and be classified as professional rather than private clients. This is available to customers if they either:

- By virtue of their **trading and professional experience** or comparable experience in the financial sector have the **knowledge** necessary to understand the risks of investments and have **assets of at least 500,000 CHF, or**
- Have **assets of at least 2 million CHF.**

In fact, this leads to a very congruent definition, which differs only in terms of the naming, as well as opting-out and opting-in process. That means that a Swiss financial institution operating in the European Economic Area must have three client classifications in its system:

- **FinSA classification**
- **MiFID II classification**, and
- **CISA classification** (qualified and non-qualified clients).

Implementing the different client classification is the key challenge to find the greatest synergies, thus, to derive a meaningful, non-restrictive and correct definition.

### *MiFID II Info Box:* **opting-out/opting-in**

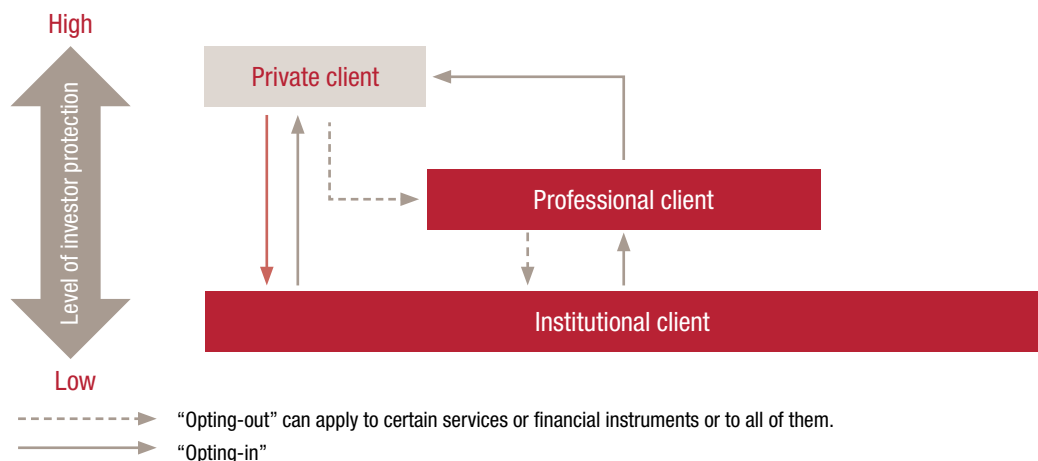
MiFID II requires that a private client (small investor) meets at least two of the following three criteria to be categorised as a professional client:

- **Experience: at least ten transactions per quarter in the relevant market**
- **A portfolio of at least 500,000 EUR, and/or**
- **At least one year of experience in the financial sector**

### *MiFID II Info Box:* **relevant market**

MiFID II requires that a client meets the criteria in each relevant market, meaning that for MiFID II it is possible to take a different approach for each relevant market. With FinSA, the criteria must be met in full (across all markets).

Opting-out and opting-in chart



## Duty to inform

The duty to inform under FinSA is very closely aligned with the provisions of MiFID II.

FinSA clearly states that **communications regarding the transaction with institutional and professional clients are simplified**. Extensive information obligations generally do not apply to transactions with institutional clients. The duty to inform may be **waived bilaterally** in transactions with professional clients. However, this waiver must be put in place bilaterally and should not be established in the standard terms and conditions.

The following information must be communicated to the client prior to the conclusion of the contract or the offering of any relevant services:

- **General information.**
  - This includes name and address,
  - field of activity,
  - supervisory status,
  - general risks in connection with financial instruments, and support in disputes by the ombudsman's office.
- **Business-related information.**
  - Business-related information includes information on personal recommendations and the specific risks associated with them,
  - information on economic ties to third parties, and any conflicts of interest, as well as
  - the product overview taken into account when selecting financial instruments.
- **Product-specific information.**
  - In the context of investment advice, private clients must be provided with the product-specific information that is contained in the FinSA KID.
  - **In the case of Execution Only** (unless a FinSA KID is already available) or **asset management, no product-specific information must be provided.**

### *MiFID II Info Box:*

#### ***relief with respect to duty to inform***

General relief for institutional clients and situational relief for professional clients is only possible under MiFID II if no investment advice or complex financial instruments of the relevant service are affected.

## Adequacy and suitability of financial services

The FinSA principles are also very closely based on MiFID II in this area. However, there are some differences that need to be emphasised in detail.

Similar to MiFID II, and the duty to inform above, the adequacy and suitability of financial services for institutional clients does not need to be assessed.

In principle, however, financial services providers offering investment advice and asset management services are required to carry out adequacy and suitability assessments, depending on the client classification.

### Logic of the assessment:

Private clients	Adequacy and suitability assessment		
	Adequacy assessment		
	Knowledge and experience	Financial situation	Investment horizon
Execution Only	—	—	—
Investment advice not in the context of a portfolio	*	—	—
Asset management and investment advice in the context of a portfolio	*	*	*

Professional clients should be treated as follows, regardless of their original classification (opting-out):

Professional client	Adequacy and suitability assessment		
	Adequacy assessment		
	Knowledge and experience	Financial situation	Investment horizon
Execution Only	—	—	—
Investment advice not in the context of a portfolio	—	—	—
Asset management and investment advice in a portfolio context	—	—	*

**The assessment** of the necessary knowledge and experience in the area of asset management and investment advice in a portfolio context must always be **in connection with the service provided** and not with the respective financial instrument.

The financial institution has the option of compensating for clients' lack of knowledge and experience by providing clarification.

### *MiFID II Info Box: adequacy and suitability assessment for Execution-Only transactions*

Under MiFID II, the general inapplicability of the adequacy and suitability assessment is only possible for non-complex products for private investors (small investors). Under FinSA, this assessment can be waived for Execution-Only transactions, regardless of the complexity of the financial instrument.



## Documentation

Obligations with regard to documentation do not differ significantly from current practice; however, it should be noted that **a copy of the clients dossier must be made available to the client upon his request**. Fundamentally, the information to be disclosed is as follows:

- The **financial services agreed and provided**
- The **composition and valuation**, as well as the **development of the portfolio**
- The **costs associated with the financial services**.

The definition and precise level of detail will be defined in future Federal Council ordinances. One key component – **the level of detail of the product costs to be accounted for – has not yet been explicitly regulated**.

These requirements are, however, implicitly regulated by the requirement for uniform FinSA KID to be provided to private clients in connection with investment advice.

### *MiFID II Info Box:* **telephone recordings**

MiFID II explicitly requires that every telephone conversation in connection with the processing of a client transaction is recorded.

### *MiFID II Info Box:* **disclosure of product costs**

There is no obligation under FinSA to disclose service or product costs to the client on a consolidated basis, as is the case under MiFID II.

## Best execution

FinSA fundamentally follows the principles of MiFID II and increases investor protection. Every financial services provider must ensure the **best possible result** in the execution of its clients' orders with regard to the:

- **financial aspect** (price, costs, compensation of third parties),
- **timing**, and
- **quality of execution**.

### *MiFID II Info Box:* **Top 5 best execution stock exchanges/brokers**

Investor protection is required under both FinSA and MiFID II. However, a major difference is the required transparency with respect to the market. For example, to date the FinSA regulation does not require a reporting of the top five brokers or stock exchanges with the highest turnover.

## Governance

The requirements for the internal governance are defined, to ensure that investor protection and principles of transparency are carefully and sustainably implemented and applied in the company, for the benefit of the clients.

The provisions are based on those of MiFID II and regulate the internal implementation of the points outlined below. These requirements are not new; in fact, they run consistently through all of the legislator's regulations, with the declared objective of being able to also **sustainably take** the new requirements to be implemented **into account** in the **company's internal rules** and regulations and manage the corresponding risks.

## Organisational measures and necessary instructions

In practice, these requirements mean that they must be integrated into the 'three lines of defence model' with **consistent policies**. Above all, adjustments to the new standards must be made in the following areas (list not exhaustive):

- |                                                    |                                                                                                                                                              |
|----------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| • Directive on Risk Management/ICS                 | • Best Execution and Order Processing Policy                                                                                                                 |
| • Organisational-by-laws                           | • Conflicts of Interest including Compensation by Third Parties (Inducements) and Employee Transactions (Market Abuse Regulation and Insider Trading) Policy |
| • Customer Classification Policy                   | • Outsourcing Policy.                                                                                                                                        |
| • Employee Training Policy                         |                                                                                                                                                              |
| • Adequacy and Suitability Assessment Policy       |                                                                                                                                                              |
| • Information and Documentation Obligations Policy |                                                                                                                                                              |

## Conflicts of interest and inducements

This is probably one of the most controversial matters in connection with FinSA and MiFID II. The focus is on the **treatment of conflicts of interest**, and in particular the **compensation of third parties (inducements)**.

The overarching principle in this context is the disclosure of conflicts of interest to clients, regardless of their origin.

If the financial services provider receives contributions or compensation from third parties and these could cause a potential conflict of interest, there are only **two permissible options**. Payments of the following nature are categorised as compensation:

- Brokerage
- Commission
- Fees
- Discounts
- Kickbacks
- Trailer fees
- Other pecuniary benefits.

### Option 1 – waiver consent

- The client must be **explicitly informed** by the financial services provider of **any compensation** before the transaction is concluded, and
- must **explicitly agree** that the compensation will not be passed on and that the financial services provider will retain it.
- The **information to the client** must include the type and scope of compensation, and must be **disclosed in figures before the service is provided**. If an exact calculation is not possible, the calculation parameters must be disclosed in such a way that the client gains a sense of the corresponding amount. The exact amount must be disclosed ex-post at the client's request.

### Option 2 – passing on to clients

- The **full amount** of the compensation **is passed on** to the client.

In connection with the avoidance of conflicts of interest, the legislator places great emphasis on the monitoring of employee transactions, focusing on insider training and potential market abusing actions.

#### *MiFID II Info Box:* **inducements**

In this area there is a significant divergence to versus MiFID II, as the client is permitted to waive the passing on of contributions. This option is not available under MiFID II.

#### *MiFID II Info Box:* **(in-)dependent investment advice**

FinSA does not differentiate between dependent and independent investment advice; in the case of independent investment advice under MiFID II, contributions of any kind are generally prohibited.

#### *MiFID II Info Box:* **paid inducements**

Under MiFID II, not only payments received, but also payments made, are included in the scope of application and are therefore largely prohibited.

#### *MiFID II Info Box:* **research unbundling**

In contrast to MiFID II, research is not explicitly classified as a contribution from third parties under FinSA, meaning that the unbundling of research costs is not necessary.

## Registration of advisors: Register of advisors

### Who needs to register?

From the entry into force of the Act, **natural persons who provide professional financial services in Switzerland or for clients in Switzerland must register and have their name entered in an advisory register.**

This affects client advisors of financial service providers **who are not subject to supervision under FINMASA.** As a result, the respective financial service provider does not require a license, recognition, authorisation or registration under FINMASA.

The **same requirements also apply to foreign financial service providers who advise clients in Switzerland.** However, under certain conditions, the Federal Council may grant an exemption for client advisors of foreign financial service providers if they exclusively serve professional and institutional clients. In general, however, all foreign advisors must be registered in the advisory register.

### What criteria must be met for registration?

To be entered in the register of advisors by an official registration office approved by FINMA, the following criteria must be met and verified:

- **Knowledge**
- **Professional indemnity insurance** or equivalent financial guarantee
- Affiliation with an **ombudsman's office.**

### Which information is required for the registration?

The following information must in minimum be collected, verified and entered by the registration office:

- Surname and first name
- Company and address of the financial services provider for which the advisor works
- Role and position of the client advisor
- Field of activity
- Education and relevant training
- Ombudsman's office
- The date of registration.

## The prospectus requirement and FinSA KID

As mentioned at the beginning, one key objective of FinSA is to increase transparency and thus investor protection. The obligation to publish a **prospectus or FinSA KID** and make it available to investors in advance **strengthens equivalence with the EU market**, as the EU regulations which already exist in this context contain very similar requirements, specifically the **Prospectus and PRIIP Regulation** applicable in the EU.

Both document types must be handed over exclusively to private clients or created for products which are accessible to private clients.

A prospectus must be prepared and published before securities or collective investments are offered or admitted to a Swiss stock exchange. FinSA defines securities as all standardised stocks, book-entry securities, derivatives and intermediated securities which are suitable for mass trading.

The client must be provided with the FinSA KID (BIB) before a financial instrument is sold via an **advisory mandate.**



## Contents of the prospectus and FinSA KID

The main contents of the two standard documents are compared below.

	Prospectus	FinSA KID
<b>What triggers the scope of application?</b>	<ul style="list-style-type: none"> <li>Any public offer in Switzerland for the purchase of securities</li> <li>Admission of securities to trading on a stock exchange</li> </ul>	<ul style="list-style-type: none"> <li>When offering financial instruments to private clients</li> </ul>
<b>Who needs to create it?</b>	<ul style="list-style-type: none"> <li>Providers of securities, or</li> <li>The party seeking admission to trading on a stock exchange</li> </ul>	<ul style="list-style-type: none"> <li>Creators of financial instruments</li> </ul>
<b>What is the content?</b>	<b>Important information on:</b> <ul style="list-style-type: none"> <li>Issuers and warrantors and guarantors (board of directors, management, statutory auditors and other bodies)</li> <li>Latest half-year or annual financial statements, or, if not yet available, information on assets and liabilities</li> <li>State of business</li> <li>Prospects, risks and disputes</li> <li>and the need for a summary</li> </ul>	<b>Important information on:</b> <ul style="list-style-type: none"> <li>The name of the financial instrument and identity of the creator</li> <li>The nature and characteristics of the financial instrument</li> <li>The risk and return profile of the financial instrument</li> <li>The cost of the financial instrument</li> <li>The minimum holding period and tradability of the financial instrument</li> <li>The licensing and approvals associated with the financial instrument</li> </ul>
<b>When?</b>	<b>No later than:</b> <ul style="list-style-type: none"> <li>The start of the public offering, or</li> <li>When the securities concerned are admitted to trading</li> </ul>	<b>No later than:</b> <ul style="list-style-type: none"> <li>At the start of the public offering</li> </ul>
<b>Where?</b>	<b>The prospectus may be published:</b> <ul style="list-style-type: none"> <li>In one or more newspapers with a distribution corresponding to the issue</li> <li>In the Swiss Official Gazette of Commerce</li> <li>By cost-free distribution in printed form at the registered office of the issuer or at the office responsible for the issue</li> <li>In electronic format on the website of the issuer, warrantor and guarantor, stock exchange or office responsible for the issue</li> <li>In electronic format on the website of the review body</li> </ul>	<b>To be specified by the Federal Council</b>

	Prospectus	FinSA KID
<b>How?</b>	<p>The prospectus may consist of a single document or of several individual documents – but always with the following content:</p> <ul style="list-style-type: none"> <li>• Registration form with details of the issuer</li> <li>• Description of securities with details of the securities to be publicly offered or admitted to trading on a stock exchange</li> <li>• Summary of the financial product and conditions</li> </ul>	<p>A standalone document that differs significantly from promotional materials</p>
<b>Collective investment schemes</b>	<p><b>Shares in collective investment schemes are also subject to the prospectus obligation.</b></p> <ul style="list-style-type: none"> <li>• Open collective investment schemes: publish prospectus with fund regulation</li> <li>• Closed collective investment schemes: limited partnership for collective investment schemes produces the prospectus</li> </ul> <p>The prospectus for a collective investment scheme must be published no later than the start of the public offering.</p> <p>A waiver of the prospectus obligation for collective investment schemes can be obtained for qualified investors.</p>	<p>A FinSA KID must be published for shares in investment schemes which can be offered to private investors.</p>
<b>Review</b>	<ul style="list-style-type: none"> <li>• Ex ante authorisation from a review body must be obtained before issuing the public offering</li> </ul>	<ul style="list-style-type: none"> <li>• The producer regularly checks the contained information and revises these, whenever there are major changes.</li> <li>• The obligations can be assigned to a qualified third party.</li> </ul>
<b>FinSA reference</b>	Article 35 et seqq. FinSA.	Article 58 et seqq. FinSA.

## Prospectus

### Exceptions

No prospectus is required if there are exceptions of the following types:

- Type of offer
- Type of security, or
- Type of admission to trading

#### By type of offer

- Only professional investors
- <500 investors
- Securities with a value of <100,000 CHF
- Minimum denomination of 100,000 CHF
- Total value <8 million CHF over a period of 12 months

#### By type of security

- Equity securities which:
  - Are issued outside a capital increase in exchange for equity securities of the same class, which have already been issued
  - Are issued or delivered upon conversion or exchange of financial instruments of the same issuer or group of companies
  - Are issued or delivered as a result of the exercise of a right attached to financial instruments of the same issuer or group of companies
  - Are distributed as dividends to holders of equity securities of the same class, provided information is available on the number and type of equity securities and the reasons and details of the offer
- Securities which:
  - Are offered for exchange on the occasion of a takeover, provided that information is available which is equivalent in content to a prospectus
  - Are offered or distributed in connection with a merger, division, conversion or transfer of assets, provided that information is available which is equivalent in content to a prospectus
  - Are offered or distributed to employers or associated companies of the current or former members of the board of directors or the management or their employees
  - Are issued or unconditionally and irrevocably guaranteed by the Confederation or the cantons, by an inter- or supranational public corporation, by the Swiss National Bank or by foreign central banks
  - Are issued by non-profit institutions to raise funds for non-commercial purposes
  - Medium-term notes
  - Securities with a duration of less than one year (financial market instruments)
  - Derivatives which are not offered in the form of a share issue

## FinSA KID

No FinSA KID needs to be produced in the following instances:






















- Securities are offered in the form of shares, including shares in equivalent securities, which grant ownership rights such as participation or profit certificates, as well as debt securities which are not of a derivative nature.
- Documents pursuant to foreign law which are equivalent to the FinSA KID can be used instead of the FinSA KID.
- A FinSA KID does not need to be produced for financial instruments which may only be acquired for private clients within an asset management agreement.

	Prospectus	FinSA KID
<b>Exceptions</b>	<p><b>According to the type of admission to trading</b></p> <ul style="list-style-type: none"> <li>• Equity securities which: <ul style="list-style-type: none"> <li>– Make up less than 20% of the number of the equities of the same type over a period of twelve months, which are already licensed for trading at the same trading centre</li> <li>– Are issued during the conversion or exchange of financial instruments following exercising of the rights associated with financial instruments, provided that this involves the same type of equities as the equities which are already licensed for trading</li> </ul> </li> <li>• Securities which: <ul style="list-style-type: none"> <li>– Are licensed for trading at a foreign trading centre, whose regulation, supervision and transparency has been acknowledged as adequate by the domestic trading centre, or for which transparency for investors is guaranteed by other means</li> <li>– For which a license has been applied in a trading sector which is open exclusively to professional clients who trade for their own account or the account of professional clients only</li> </ul> </li> </ul>	



## What does FinSA not cover in comparison to MiFID II?

MiFID II, in comparison to FinSA, has a broader set-up and topics are not covered to the same extent. The following table shows the topics, which are not or only partially addressed in the FinSA.

	MiFID II issues	FinSA overlap
1.	Independent and partial advice	
2.	Client order management	
3.	Market making	
4.	Product evaluation	
5.	Selling practices and cross selling	
6.	Product governance	
7.	Algorithmic trading	
8.	High-frequency trading	
9.	Direct Electronic Access	
10.	Complaint management	
11.	Client agreements	
12.	Compensation	
13.	Obligation to keep records	
14.	Best execution	
15.	Corporate governance	
16.	Knowledge and experience	
17.	Client assets	
18.	Conflicts of interest	
19.	Client reporting	
20.	Client classification	
21.	Adequacy and suitability assessment	

## 2. What topics are covered by FinIA?

The FinIA Financial Institution Act governs the requirements to which the work of financial institutions is subject, and has the goal of establishing a broadly based standard for the Swiss financial markets through a very widely requested licensing period.

**FinIA primarily governs the licensing obligation and the associated requirements for the respective institutions. These are:**

- Portfolio Managers
- Trustees
- Managers of collective assets
- Fund management companies
- Securities Firms

These institutions are not defined by their legal form itself, but by the work they perform, which widens the group to which the licensing obligation applies

### **Licensing obligation and definition of an asset manager:**

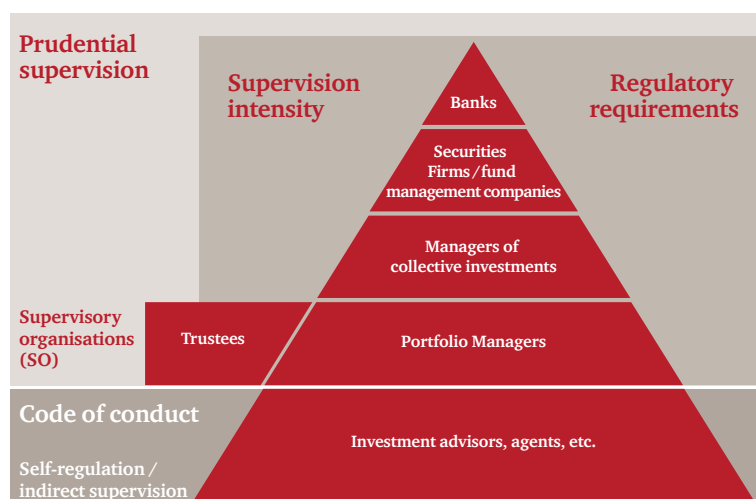
**Anyone who provides the following professional financial services based on an agreement (oral or written) is classified as an asset manager:**

- Buying and selling of financial instruments on behalf of the client
- Execution Only services
- Asset management and discretionary mandates, and/or
- Investment advice or portfolio analysis.

The legal classification and licensing obligation, as well as the obligations involved, essentially depend on the size of the company. This means that no threshold has been set to exclude certain entities below the threshold.

This new provision applies in particular to portfolio managers and trustees.

Authorization requirement chart



### **Licensing obligation**

To assess whether license is required for the work performed – and if so, what kind – the licensing cascade principle is applicable. This states that a properly regulated company may provide additional services like a bank in terms of the Banking Act, and does not require a new license to do so.

An asset manager, on the other hand, may only perform work related to asset management, portfolio consultancy, investment advice and execution-only services.





## Overview of financial institutions to be licensed

The relevant requirements and definitions which create the scope of the licensing obligation are listed below. If an equivalent license is already in place, no additional license is required.

	<b>Portfolio managers</b>	<b>Trustees</b>	<b>Managers of Collective Assets</b>	<b>Fund management companies</b>	<b>Securities Firms</b>
<b>Description</b>	Portfolio managers are persons who, on the basis of a mandate, can professionally dispose of assets on behalf of and for the account of clients.	Trustees are persons who dispose of or manage trust assets on the basis of the formation deed of a trust or for a specific purpose.	Managers of collective assets are persons who professionally manage assets on behalf of and for the account of: <ul style="list-style-type: none"> <li>• Collective investment schemes, and</li> <li>• Pension funds.</li> </ul>	Fund managers are persons who independently manage investment funds in their own name and for the account of investors.	A securities firm is a company which professionally: <ul style="list-style-type: none"> <li>• Trades securities in its own name for the account of the client</li> <li>• Trades securities in the short term for its own account, is mainly active on the financial market and: <ul style="list-style-type: none"> <li>– Could therefore jeopardise the functioning of the financial market, or</li> <li>– Acts as a member of a market place, or</li> <li>– Displays prices for individual securities either publicly on a permanent basis or on request (market maker).</li> </ul> </li> </ul>
<b>Legal form</b>	<ul style="list-style-type: none"> <li>• Sole proprietorship</li> <li>• Commercial enterprise</li> <li>• Cooperative</li> </ul>	<ul style="list-style-type: none"> <li>• Sole proprietorship</li> <li>• Commercial enterprise</li> <li>• Cooperative</li> </ul>	<ul style="list-style-type: none"> <li>• Commercial enterprise</li> </ul>	<ul style="list-style-type: none"> <li>• Company limited by shares with registered office and central administration in Switzerland</li> </ul>	<ul style="list-style-type: none"> <li>• Commercial enterprise</li> </ul>



	Portfolio managers	Trustees	Managers of Collective Assets	Fund management companies	Securities Firms
Tasks	<ul style="list-style-type: none"> <li>• Management of individual portfolios</li> <li>• Management of collective assets, including leveraged products, up to a maximum of 100 million CHF</li> <li>• Management of collective assets, excluding leveraged products, and repayment after no less than 5 years up to a maximum of 500 million CHF</li> <li>• Management of collective assets for pension funds up to a maximum of 100 million CHF</li> </ul> <p><b>In addition:</b></p> <ul style="list-style-type: none"> <li>• Investment advice</li> <li>• Portfolio analysis</li> <li>• Offering of financial instruments</li> </ul>	<ul style="list-style-type: none"> <li>• Management of segregated assets</li> <li>• Ensures value retention</li> <li>• Dedicated use</li> </ul> <p><b>In addition:</b></p> <ul style="list-style-type: none"> <li>• Investment advice</li> <li>• Portfolio analysis</li> <li>• Offering of financial instruments</li> </ul>	<ul style="list-style-type: none"> <li>• Portfolio management</li> <li>• Risk management</li> </ul> <p><b>In addition:</b></p> <ul style="list-style-type: none"> <li>• Fund business for foreign collective investment schemes</li> </ul>	<ul style="list-style-type: none"> <li>• Custody and technical management of collective investment schemes</li> <li>• Administration of an investment company with variable capital (SICAV)</li> </ul>	<ul style="list-style-type: none"> <li>• Management of accounts for execution of client orders</li> <li>• Custody of securities</li> <li>• Professional provision of securities, both publicly and on the primary market, which have been issued by third parties (fee-based or commission-based)</li> <li>• Professional acquisition of own derivatives which are offered on the primary market for its own or third-party account</li> </ul>
Risk management/internal control system	<ul style="list-style-type: none"> <li>• Properly equipped risk management and an effective internal control system</li> <li>• Persons who perform risk management or internal control tasks may not be involved in the activities which they monitor</li> <li>• Possible outsourcing to third parties</li> </ul>	<ul style="list-style-type: none"> <li>• Properly equipped risk management and an effective internal control system</li> <li>• Persons who perform risk management or internal control tasks may not be involved in the activities which they monitor</li> <li>• Possible outsourcing to third parties</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate risk diversification (requirements to be set by the Federal Council)</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate risk diversification (requirements to be set by the Federal Council)</li> </ul>	<ul style="list-style-type: none"> <li>• Appropriate risk diversification (requirements to be set by the Federal Council)</li> </ul>

	Portfolio managers	Trustees	Managers of Collective Assets	Fund management companies	Securities Firms
Minimum capital/guarantees	<ul style="list-style-type: none"> <li>• 100,000 CHF in cash (to be maintained at all times)</li> <li>• Adequate guarantees or professional liability insurance</li> </ul>	<ul style="list-style-type: none"> <li>• 100,000 CHF in cash (to be maintained at all times)</li> <li>• Adequate guarantees or professional liability insurance</li> </ul>	<ul style="list-style-type: none"> <li>• Demanded minimal capital fully paid-in</li> <li>• Swiss Financial Market Supervisory Authority (FINMA) may allow an adequate guarantee in place of minimum capital</li> </ul>	<ul style="list-style-type: none"> <li>• Demanded minimal capital fully paid-in (level to be determined by Federal Council)</li> </ul>	<ul style="list-style-type: none"> <li>• Demanded minimal capital fully paid-in (level to be determined by Federal Council)</li> </ul>
Equity	<ul style="list-style-type: none"> <li>• At least one quarter of the fixed costs of the last financial statement, up to a maximum of 10 million CHF</li> </ul>	<ul style="list-style-type: none"> <li>• At least one quarter of the fixed costs of the last financial statement, up to a maximum of 10 million CHF</li> </ul>	<ul style="list-style-type: none"> <li>• Adequate equity (level to be determined by Federal Council)</li> </ul>	<ul style="list-style-type: none"> <li>• Adequate balance between the equity of the fund management company and the total assets of the collective investment schemes managed by it</li> </ul>	<ul style="list-style-type: none"> <li>• Adequate equity and liquidity (individually or on a consolidated basis)</li> </ul>

## Importance for branches and representations in Switzerland

A foreign financial institution **requires a license** to establish a branch in Switzerland. This branch must permanently and professionally carry out one of the following activities, meaning they require a license:

- Portfolio management: management of discretionary mandates/managed accounts
- Trustee work
- Portfolio management of collective investments schemes: asset management
- Trading in securities
- Management of client accounts, and
- Conclusion of transactions

Foreign fund management companies may not establish a branch in Switzerland.

## Licensing obligation for representations

**Financial institutions** that employ **representatives in Switzerland** who are commercially active **outside the aforementioned fields of activity** and specialise solely in acting as an intermediary or in transferring client orders, are also required to obtain a license.

### 3. Penal provisions under the Financial Services Act (FinSA) and Financial Institution Act (FinIA)

	Offence	Penalty
FinIA	Breach of professional confidentiality	Custodial sentence of up to 3 years
	Obtaining pecuniary gain	Custodial sentence of up to 5 years or a fine
	Negligence	Fines of up to 250,000 CHF
	Breach of provisions regarding protection against deception and fraud	Fines of up to 500,000 CHF
	Reporting obligation to FINMA (change to the qualified participation domestically and abroad)	Fines of up to 500,000 CHF
	Breach of the obligations regarding keeping records of orders	Fines of up to 500,000 CHF
	Security trading reporting obligation	Fines of up to 500,000 CHF
FinSA	Breach of duty to provide information	Fines of up to 100,000 CHF
	Breach of adequacy and suitability assessment	Fines of up to 100,000 CHF
	Breach of publication of compensation to third parties – inducements	Fines of up to 100,000 CHF
	Prospectus and FinSA KID: false statements and withholding of essential facts	Fines of up to 500,000 CHF
	Prospectus and FinSA KID: publication after start of public offering	Fines of up to 500,000 CHF
	Prospectus and FinSA KID: publication only after conclusion/signature of contract	Fines of up to 100,000 CHF
	Unauthorised offering of structured products to private clients	Fines of up to 500,000 CHF
	Unauthorised formation of internal segregated assets	Fines of up to 500,000 CHF

## 4. Transitional provisions

**Client advisors** must register with the registration office for entry in register **within six months** of the entry into force of this Act.

The following financial institutions do not require a license:

- Institutions which have a license in accordance with Article 1 Paragraph 1 of the FINMASA as of 1 January 2020.

<b>Institutions for which there is a licensing obligation, but under the current law (before 01/01/2020) do not require a license</b>	Notification within 6 months	30 Jun 2020
	Application for a license from FINMA within 3 years	31 Dec 2022
<b>Licensing obligation of new asset managers or trustees</b>	Application for a license from FINMA within 1 year, after this from the licensing authority (yet to be determined) without undue delay	31 Dec 2020
<b>Register of Advisors</b>	Client advisors must register with the registration office for entry into the register within 6 months.	30 Jun 2020
<b>Ombudsman's office</b>	Financial services providers must affiliate with an ombudsman's office within 6 months	30 Jun 2020
<b>Provisions for financial instruments according to Chapter 3 FinSA (prospectus, FinSA KID)</b>	Securities for which a public offering has been made, or for which an application has been made for admission to trading on a stock exchange, prior to the entry into force	1 Jan 2022
	Financial instruments which have been offered to private clients prior to entry into force	1 Jan 2022
A basic requirement is to affiliate with a self-regulatory authority pursuant to Article 4 Anti-Money Laundering Act (AMLA)		

## 5. What can we expect from the Federal Council, and concerning what topics?

The specification of the exact implementation requirements will be set out in detail by the Federal Council and incorporated into the corresponding regulations. The areas of FinSA and FinIA

on which more information can be expected are listed below. This information should be available in **autumn 2018** to give market participants time to implement it by the deadline.

Subject	Deliverable	Source in FinSA
<b>Accountability</b>	Minimum content of disclosure	Article 16(3)
<b>Execution of client orders</b>	Procedures and systems for execution of client orders	Article 17(2)
<b>Conflicts of interest: organisational precautions</b>	Description of conduct which is prohibited in all instances relating to conflicts of interest	Article 25(3)
<b>Prospectus: exceptions according to type of offering</b>	Changing the number of investors and the contributions in accordance with points (a) to (e) of Article 36(1) FinSA	Article 36(5)
<b>Prospectus: exceptions according to type of security</b>	Other exceptions to the prospectus obligation for other types of security	Article 37(2)
<b>Prospectus: supplementary provisions</b>	<ul style="list-style-type: none"> <li>• Prospectus format</li> <li>• Content of summary</li> <li>• Minimum information in prospectus</li> <li>• Documents which may be referenced</li> </ul>	Article 46
<b>Prospectus: relaxation of obligations</b>	Relaxation of the prospectus obligation and the obligation of issuers to provide addenda	Article 47
<b>Prospectus: open collective investment schemes</b>	Alleviations of what information must be listed in the prospectus as well as the fund regulation	Article 48(3)
<b>Prospectus: prospectus review</b>	Designation of which securities prospectuses must be reviewed following publication	Article 51(2)
<b>FinSA KID</b>	Designation of third parties to whom the production of the FinSA KID can be transferred	Article 58(3)
<b>Supplementary provisions regarding the FinSA KID</b>	<ul style="list-style-type: none"> <li>• Content</li> <li>• Scope</li> <li>• Language, layout</li> <li>• Methods of provision</li> <li>• Equivalence with foreign documents</li> </ul>	Article 63
<b>Structured products</b>	Guarantee requirements	Article 70(3)
<b>Transitional provisions for knowledge and experience</b>	Transitional period for meeting the requirements for the necessary knowledge	Article 95(1) and (5)



Subject	Deliverable	Source in FinIA
<b>Group parent companies and significant group subsidiaries</b>	Criteria for assessing the significance of group subsidiaries	Article 4(2)
<b>Licensing requirements</b>	Definition of additional licensing requirements	Article 7(3)
<b>Organisation</b>	Minimum requirements of financial institution organisation	Article 9(3)
<b>Qualified managing directors</b>	Governing of details	Article 20(3)
<b>Minimum capital, equity and guarantees</b>	<b>Portfolio managers</b> Definition of minimum amounts for guarantees and the insurance amount for professional liability	Article 22(3)
	<b>Managers of collective assets</b> Level of minimum capital and guarantees • Also possibility of linking the granting of the license with taking out professional liability insurance • Equity level	Article 28(3) Article 29(2)
	<b>Fund management companies</b> Level of minimum equity and defining an adequate balance between the equity of the fund management company and the total assets of the collective investment scheme managed by it	Article 34(2) Article 37(1)
	<b>Securities Firms</b> Level of minimum capital and guarantees • Risk diversification requirements • Equity and liquidity level	Article 45(3) Article 46(3)
	<b>License: Managers of collective assets</b> Governing of details regarding licensing as Managers of collective assets	Article 24(3)
<b>Securities Firms: public deposits</b>	Provisions regarding the use of public deposits	Article 44(3)
<b>Branches</b>	Conclusion of state contracts which allow financial institutions from the states that are party to the contract to open a branch without a license from FINMA	Article 52(3)
<b>Exceptions for branches</b>	Exemption from certain provisions for branches of foreign financial institutions	Article 57
<b>Representations</b>	Conclusion of state contracts which allow financial institutions from the states that are party to the contract to open a representation without a license from FINMA	Article 58(3)
<b>Exceptions for representations</b>	Exemption from certain provisions for representations of foreign financial institutions	Article 58(3)
<b>Responsibility</b>	Monitoring requirements	Article 68(2)
<b>Entry into force</b>	Determination of the entry into force	Article 75(2)



## 6. What is the impact of FinSA on other financial sector legislation, and how will it affect financial institutions?

Like FinSA before it, FinIA also introduces a number of changes in various different decrees. These create new rights and obligations, particularly for banks as defined by the Banking Act<sup>1</sup> and for financial institutions as defined by FINIG<sup>2</sup>.

### General changes

#### Material changes

FinIA gives bodies such as the Swiss Financial Market Supervisory Authority (FINMA), regulatory organisations (RO), self-regulation organisations (SRO), the Swiss Federal Tax Administration (ESTV) and auditors new authorities with respect to regulation, authorisation, enforcement and monitoring obligations. For example:

- FINMA now authorises the regulatory organisations and independent personal asset managers and trustees for the purposes of FinIA
- The regulatory organisations monitor and regulate asset managers and trustees for the purposes of FinIA as well as certain trade assayers in accordance with the Swiss Control of Precious Metals Act (PMCA).  
As part of their monitoring activities, the regulatory organisations will also supervise compliance with the provisions of the Swiss Anti-Money Laundering Act (AMLA).
- A certain group of financial intermediaries must submit themselves to a recognised self-regulation organisation.
- The Swiss Federal Tax Administration may conduct checks of financial institutions with respect to VAT for the purposes of FinIA.
- The licensing of auditing firms is being revised.

The provisions relating to debt collection, insolvency law, criminal law and procedural law are also being amended and expanded to include FinIA.

#### Wording amendments

The term “securities dealers” is being replaced by the term “investment firms”. The phrase “as defined by the Financial Institutions Act dated 15 June 2018” is also being added to the term “asset managers” in the individual decrees.

The changes to the wording have no material impact on the individual companies.

### The most important changes for banks as defined by the Swiss Federal Act Governing Banks and Savings Banks (BA)

- Entities are now considered banks if they mainly operate in the field of finance and
  - Receive public deposits amounting to more than CHF 100 mio on a commercial basis, or market themselves publicly for the same
  - Receive public deposits amounting to more than CHF 100 mio on a commercial basis, or market themselves publicly for the same, and invest or charge interest on those public deposits, or
  - Refinance themselves to a significant extent with multiple banks that do not hold a significant share in them in order to finance in any way an unspecified number of people or companies with whom they do not indeterminate constitute an economic unit

<sup>1</sup> The following are considered banks pursuant to BA: banks (including cooperative banks), private bankers, savings banks and people who meet certain criteria.

<sup>2</sup> The following are considered financial institutions pursuant to FinIA: asset managers, trustees, fund managers and investment firms.

- BA now also applies to people who mainly operate in the field of finance and
  - Receive public deposits amounting to more than CHF 100 mio on a commercial basis,<sup>3</sup> or market themselves publicly for the same, and
  - Neither invest nor charge interest on those public deposits
- Participation certificates issued by cooperative banks are now governed by tax law.

### **The most important changes for financial institutions as defined by FinIA**

- The Swiss Code of Obligations (CO) is adding financial institutions as defined by FinIA to the list of custody account representatives. This means that, in addition to banks and asset managers, trustees, fund managers and investment firms are now considered custody account representatives.  
Therefore, trustees, fund managers and investment firms may also exercise any rights of participation entrusted to them.
- The term “financial intermediary” is being expanded in the AMLA to also include financial institutions (asset managers, trustees, fund managers, investment firms and managers of collective investments).

- The National Banking Act (NBA) is being amended so that all financial institutions pursuant to FinSA are required to provide statistical data<sup>4</sup> about their activities to the National Bank. The following documents may be demanded (excerpt):
  - Detailed monthly financial statements
  - Selected balance sheet items for cash volume statistics
- Detailed year-end statistics
- Information regarding loans (loan volume statistics, information regarding credit quality, credit interest statistics, loan issue survey, new mortgages)
- Interest rate statistics
- Securities holdings and turnover
- Collective investment statistics
- Inter-bank credit default risks
- Please refer to the National Bank Directive for the exact details.

<sup>3</sup> The Swiss Federal Council is being granted the authority to adjust this figure to reflect Switzerland's capacity to compete and innovate as a financial centre.

<sup>4</sup> Please refer to the annex to the directive relating to the NBA for the detailed list.



## The most important changes at a glance

The table below provides an overview of the key changes that directly impact banks as defined by BA and financial institutions as defined by FinIA.

The effects of FinIA on other laws in the financial sector mean that banks, financial institutions, asset managers, trustees and fund managers need to fulfil other new requirements in addition to FinSA and FinIA.

New rights
  New obligations
  New punitive provisions

Decree	Key change	Banks	Financial Institutions
<b>CO</b>	In addition to banks, all financial institutions are considered custodian account representatives.		*
<b>CCA</b>	The issuing and brokering of crowdlending is now governed by CCA.	*	
<b>SDA (StG)</b>	Participation certificates issued by cooperative banks are now covered by tax law. Specifically, it governs the tax liability, classification as a taxable certificate and exceptions from tax liability. Corresponding obligations are imposed on the cooperative banks.	*	
<b>VAT Act</b>	All natural persons or legal entities who collective capital investments pursuant to FinIA can delegate tasks to are considered agents.		*
	The Swiss Federal Tax Administration may conduct checks of financial institutions. The obligation to maintain professional secrecy is also being extended to FinIA.		*
<b>VStG</b>	Participation certificates issued by cooperative banks are now subject to withholding tax.	*	
<b>NBA</b>	Financial institutions must provide statistical information regarding their activities to the National Bank.		*
<b>BA</b>	Entities are now classified as banks or persons similar to banks based on defined thresholds relating to public deposits.	*	
	Cooperative banks may now provide for the raising of equity capital in their statutes.	*	
	The equity capital of cooperative banks is defined and provisions govern its issuance. Holders of participation certificates are granted new rights and obligations.	*	
	New punitive provisions are being added.	*	*
<b>AMLA</b>	According to the new classification, banks and persons similar to banks as well as financial institutions and trade assayers are considered financial intermediaries.	*	*
	Data passed on by regulatory organisations must also be taken into consideration in connection with the duty of care.	*	*
	Financial intermediaries must join an SRO.	*	*
	FINMA may require proof of compliance with the obligations of domestic group entities in the group's audit report.	*	*
	Transitional provisions apply to joining an SRO.	*	*
<b>FINMASA</b>	There is an obligation to provide information and report to the regulatory organisation.	*	*
	New punitive provisions are being added.	*	*
<b>FISA</b>	The category of depository banks is being expanded to include investment firms and fund managers pursuant to FinIA as well as foreign banks, financial institutions, securities dealers, central depository banks and other financial intermediaries.	*	*





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