

Consultation on the FINMA implementing provisions for FinSA and FinIA

Key points

7 February 2020

Key points

1. The aim of the draft is to effect the necessary implementation at FINMA level of the Financial Services Act, the Financial Institutions Act, and the Federal Council's implementing ordinances in as streamlined, principle-based, and proportionate a way as possible.
2. FINMA was tasked with implementing the legislation with regard to a small number of specific and predominantly technical matters. In doing so FINMA pursued the variants that best reflected the principle of proportionality. It also took into account, where pertinent, the repercussions for the future viability and international competitiveness of the Swiss financial centre. The regulations adopted have been designed in a competition- and technology-neutral way. The differentiation of the regulation has been drawn up in keeping with the objectives and risks of the project. International standards in the financial market area and their implementation in other key financial locations were taken into account where relevant.
3. The new FINMA Financial Institutions Ordinance (FinIO-FINMA), FINMA mainly regulates the details of professional indemnity insurance for portfolio managers, trustees and managers of collective assets, as well as details on calculation of the *de minimis* threshold (below which a portfolio manager authorisation may be issued by way of an exception), and on risk management, compliance and ICS for managers of collective assets.
 - *Professional indemnity insurance requirements for portfolio managers and trustees:* The requirements are based on the concept of the pre-existing guidelines that apply for professional indemnity insurance of former asset managers of collective investment schemes pursuant to the Collective Investment Schemes Act. Follow-up liability is now being introduced for policies underpinned by the claims-based principle or occurrence of damage principle. The scope of the insurance cover relates to the geographically and objectively defined business area in the relevant organisational documentation. The professional indemnity insurance must cover pecuniary losses that arise from all activities for which the portfolio manager or trustee is legally responsible, irrespective of whether they are caused through negligence or gross negligence. The regulations exclude the possibility of any reduction for gross negligence. 70% of the cover amount available for all loss cases in a year may be set against the equity capital of the portfolio manager and trustee covered by a professional indemnity insurance policy. This buffer relative to the total cover amount is designed to ensure that the necessary funds are available in a liability scenario, as the professional indemnity insurance replaces part of the equity capital.

- *Definition and calculation of de minimis threshold:* The corresponding provisions in the FINMA Collective Investment Schemes Ordinance (CISO-FINMA) are being transferred to the FinIO-FINMA. The term “managers of collective assets” now also encompasses managers of pension fund assets. Where expedient and necessary, the existing provisions are being expanded to include specific principles for the managers of pension fund assets.
 - *Risk management, compliance and ICS for managers of collective assets:* The requirements that apply in respect of risk management, compliance and ICS were essentially taken over from the CISO-FINMA. A new provision is that institutions managing collective investment schemes must evaluate and document – at regular intervals – liquidity and other key risks at the level of the individual collective investment scheme, using various market scenarios. With this provision, the importance of ongoing liquidity management by the fund manager and in particular the corresponding IOSCO guidelines are taken into account. Likewise new is the requirement for institutions to define appropriate internal liquidity thresholds for every collective investment scheme that they managed.
 - *Professional indemnity insurance requirements for managers of collective assets:* The regulations of the existing CISO-FINMA are being transferred to the FinIO-FINMA, with adjustments being made to the new terminology in particular. Just as for portfolio managers and trustees, follow-up liability is now being introduced for policies underpinned by the claims-based principle or occurrence of damage principle. With regard to the cover obligation for pecuniary losses caused by negligence or gross negligence, here too the regulations correspond to those that apply to portfolio managers and trustees.
4. As a result of the transfer of the provisions on managers of collective assets and fund managers to the Financial Institutions Act (FinIA), a number of adjustments to the CISO-FINMA will be required. Due to the discontinuation of DSFI (directly subordinated financial intermediary) status, the FINMA Anti-Money Laundering Ordinance (AMLO-FINMA) also had to be adjusted. Furthermore, minor adjustments had to be made to the FINMA Collective Investment Schemes Bankruptcy Ordinance (CISBO-FINMA), with formal adjustments required to the FINMA Banking Insolvency Ordinance (BIO-FINMA) and the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA).
 5. In addition, some circulars need to be adjusted. For example, the scope of FINMA Circular 2013/8 “Market conduct rules” has been adjusted to include portfolio managers, trustees, and managers of pension assets who are now subject to a FINMA authorisation obligation. In FINMA Circular 2018/3 “Outsourcing – banks and insurers”, the administrative

practice in respect of FinIA institutions (with the exception of portfolio managers and trustees) is now being specified. Other adjustments of a fairly minor nature were also made to FINMA Circulars 2015/2 “Liquidity risks – banks”, 2017/7 “Credit risks – banks” and 2020/1 “Accounting – banks”. Finally, Circulars 2008/5 “Securities dealers”, 2010/2 “Repo/SLB transactions”, and 2013/9 “Distribution of collective investment schemes” are being rescinded, as these are being made unnecessary by the Financial Services Act (FinSA) and the FinIA.

6. Moreover, a number of adjustments are being made that do not have a direct connection with the implementation of FinSA/FinIA, but are being implemented in the context of this draft for reasons of subject matter and timing.
 - *AMLO-FINMA*: The threshold for currency exchange transactions involving cryptocurrencies is being reduced from the current level of CHF 5,000 to CHF 1,000, and a recommendation published by the FATF in 2019 for dealing with so-called virtual asset service providers is being implemented. In addition, in the case of life insurance policies involving separate account/custody account management (“insurance wrappers”), a requirement is being introduced for portfolio managers and trustees to carry out clarifications in respect of the policyholder or effective premium payer. The provision applies to business relationships that have been opened since entry into force of the amendment.
 - FINMA Circular 2013/3 “Auditing”: For this circular, the main points are that the existing practices regarding the change of audit company mandates and the auditing of internal models in the banking area are being retained. In addition, adjustments are being made in respect of risk analysis, standard audit strategy and financial market infrastructures, as well as in respect of information on the auditing of annual financial statements for the branches of foreign insurance companies.
7. FINMA held a pre-consultation on the draft on 28 March 2019, and carried out an official consultation between 12 November and 3 December 2019.
8. Adoption is planned for the fourth quarter of 2020.