

Swiss regulation for cross-border business of Singapore-based EAMs in/into Switzerland

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1. Swiss regulatory framework for investment services and providers





1. Swiss regulatory framework for investment services and providers

- > New regulatory framework, in force since January 2020, two main Acts:
 - **Financial Institutions Act (FinIA) and Ordinances**
 - **Licensing** and supervisory regime for financial institutions (external asset managers (“EAMs”) and trustees, managers of collective investment schemes, fund management companies and securities firms)
 - **Financial Services Act (FinSA) and Ordinances**
 - **Rules of conduct** for the provision of financial services and the offer of financial instruments
 - **Organisational** measures (in particular: **registration and affiliation duties**)
 - Rules on simplified enforcement of client claims against financial service providers (**mediation procedure**)



1. Swiss regulatory framework for investment services and providers

- > Scope of application of the Swiss regulatory framework for investment services to EAMs – Overview:
 - With the entry into force of FinIA, EAMs have become subject to a licensing requirement in Switzerland. This licensing requirement applies to
 - EAMs **incorporated in Switzerland**, and
 - Foreign EAMs having a **significant business presence in Switzerland**
 - FinSA applies to all EAMs (domestic and foreign) that **target prospects/clients in Switzerland** by soliciting or providing investment services to them
 - This applies both to investment activities **on Swiss territory** and **via remote means of communication** from abroad into Switzerland



1. Swiss regulatory framework for investment services and providers

- > The following services are defined as **investment services** (*literally: financial services*) under the FinSA:
 - Acquisition or disposal of financial instruments
 - Receipt and transmission of orders in relation to financial instruments
 - Administration of financial instruments (portfolio management)
 - Provision of personal recommendations on transactions with financial instruments (investment advice)
 - Granting of loans to finance transactions with financial instruments (Lombard credits)

2. FinIA licensing requirements for foreign EAMs





2. Licensing requirements under FinIA for foreign EAMs

- > As a general rule, foreign EAMs without permanent establishment in Switzerland are **not subject to licensing requirements** for the promotion or provision of investment services to Swiss clients (be it on Swiss territory or from abroad)
- > **Exception:** If a foreign EAM has a **significant business presence** in Switzerland
- > There are **no conclusive criteria** of what constitutes a significant business presence. The overall circumstances and the **focus of the business activity** of the EAM need to be taken into account



2. Licensing requirements under FinIA for foreign EAMs

- > In order not to establish a (de facto) significant business presence, a **foreign EAM should avoid** in particular the following:
 - Operating a (de facto) branch or representative office in Switzerland
 - Having a strong presence of representatives (client advisors) in Switzerland
 - Perform activities out of any kind of fixed place of business in Switzerland (no office space, regular hotel room, address, mail address or phone number in Switzerland)
 - Employing any staff located in Switzerland and/or using the services of a dependent agent who acts and/or concludes contracts on behalf of the foreign EAM in Switzerland



2. Licensing requirements under FinIA for foreign EAMs

- > The assumption of a significant business presence requires a **physical presence** on Swiss territory. Therefore, investment activities undertaken **via remote means of communication** (e.g. e-mail, fax, telephone, video conference) from abroad into Switzerland **do not trigger licensing requirements**
- > For licensing purposes, it is **irrelevant who takes the initiative** for an investment services related activity (the EAM, or reverse solicitation by the prospect/client)

3. FinSA obligations for foreign EAMs





3.1. Overview

- > FinSA and its Ordinances apply to investment services advertised, promoted or provided in a professional capacity **in Switzerland or to clients in Switzerland**
 - Investment services are deemed to be advertised, promoted or provided **in Switzerland** by a foreign EAM, if the EAM
 - Operates a branch or de facto branch in Switzerland, or
 - If it (regularly) sends client advisors to Switzerland to approach or service clients
 - Advertising, promotion or provision of investment services **into Switzerland** occurs if a foreign EAM advertises its services in the Swiss press and/or (regularly) targets and/or, from abroad, services prospects/clients in Switzerland via remote means of communication
 - Prospects or clients “in Switzerland” include persons **only temporarily visiting Switzerland** (travellers)



3.1. Overview

- > **In conclusion, foreign EAMs that advertise, promote or provide investment services to clients in Switzerland** (either occasionally on Swiss territory or via remote means of communication into Switzerland) **are subject to FinSA**
- > In this case, a foreign EAM is subject to the following main duties established by FinSA and its Ordinances:
 - **Registration** in a Swiss advisor register of all its client advisors in charge of Swiss clients
 - **Affiliation** of the EAM to a Swiss ombudsman office
 - Adherence by the EAM/client advisors to the **FinSA rules of conduct and investor protection rules**



3.1. Overview

- > **FinSA rules are not applicable to foreign EAMs** in the following **exceptional cases**:
 - **Reverse solicitation exception:**
 - FinSA (as a whole) is not applicable in case the foreign EAM purely acts on reverse solicitation, i.e. only performs investment activities upon a prospect's/client's request
 - As reverse solicitation are also recognised activities that are performed within the framework of a client relationship established exclusively upon the client's request
 - **Exceptions for services to professional clients:**
 - Registration and affiliation are not required if the foreign EAM is prudentially supervised in its home country and exclusively targets per se professional or institutional clients in Switzerland
 - FinSA rules of conduct and investor protection rules are only of limited application to professional clients or may be waived by them



3.2. FinSA registration requirements

- > Foreign EAMs need to **register their client advisors** (in case of a natural person: themselves) in a **Swiss client advisor register**
 - The concept of client advisor is extensive and encompasses all natural persons who come in contact with clients in order to offer them a given financial service or to execute a transaction (including client advisors working in a Swiss rep office)
 - There are currently three client advisor registers in Switzerland, approved by the Swiss financial supervisory authority FINMA
 - Registration is done online
 - Biennial renewal of the registration is required
 - The initial registration fee is CHF 640 per client advisor. Reduced fees apply for renewal as well as for the registration of more than five client advisors per company



3.2. FinSA registration requirements

- > Client advisors are only registered if they can prove the necessary skills and training, if they are duly insured or the EAM disposes of sufficient funds, and if the EAM is affiliated to an ombudsman office
 - **Skills and training:** Client advisors must have (a) the **necessary expertise** required to perform their activities (i.e. all the categories of activities they intend to engage in) and (b) **sufficient knowledge of the FinSA rules of conduct**
 - Expertise can be proved either by certificates on pertinent professional training or by the CV and certificates from present or past employers describing the relevant areas in which the advisor has worked
 - In order to be registered, client advisors must complete mandatory training on FinSA rules of conduct (initial training, as well as recurrent training for renewal of registration every two years) and submit the certificate(s) to the register
 - The client advisor registers provide a list with acknowledged training providers. Trainings by other providers are subject to validation by the register



3.2. FinSA registration requirements

- **Indemnity insurance:** EAMs must submit proof of professional indemnity insurance or provide equivalent financial guarantees
 - The insurance must fulfil certain prerequisites defined by law (e.g. notice period at least 3 months)
 - Required annual coverage depends on the number of client advisors registered (at least CHF 500'000 per year for one advisor, CHF 1.5 million from two to four advisors, CHF 3 million for five to eight advisors, etc., up to CHF 10 million)
 - Financial guarantees are only accepted from foreign EAMs that are subject to prudential supervision. A minimum capital equivalent to CHF 10 million is considered equivalent financial security. A copy of the last audited annual financial statements may be submitted as proof



3.3. Affiliation to an ombudsman office

- > All entities subject to FinSA must mandatorily be **affiliated to an ombudsman office**
 - There are currently nine FINMA accredited ombudsman offices in Switzerland
 - Affiliation is done online
 - Affiliation fees vary slightly, but start at CHF 500 per year
- > Affiliation is required because FinSA provides clients with the possibility of introducing a **mediation procedure in case of disputes** with their FinSA regulated financial services provider
- > The aim of the mediation procedure is to promote the out-of-court settlement of disputes and thus avoid protracted litigation and elevated costs



3.3. Affiliation to an ombudsman office

- > The mediation procedure presents the following main characteristics:
 - Clients may file a **request for mediation** with the ombudsman office if they have a complaint (legal claim) that is not pending elsewhere (out of court or in judicial proceedings), and on which they have not been able to reach an agreement with their financial services provider
 - The mediation process must be **simple, fair, fast and impartial**. It must also be inexpensive or free of charge for the clients
 - The ombudsman offices have **no decision-making authority**. They mediate between the parties and, if no agreement is reached, may provide their (factual and) legal assessment of the case. Such an assessment serves as a proposal for dispute resolution and has no legally binding effect
 - At any time, and in particular if no agreement is reached, the parties may **introduce (civil) proceedings**. In this case, the mediation is considered terminated



3.4. FinSA rules of conduct and investor protection rules

- > When performing activities subject to FinSA, EAMs need to **adhere to FinSA rules**.
- > This concerns in particular
 - (1) client classification
 - (2) information duties and
 - (3) rules of conduct



3.4. FinSA rules of conduct and investor protection rules

- > When performing activities subject to FinSA, EAMs need to **adhere to FinSA rules**. This concerns in particular (1) client classification, (2) information duties and (3) rules of conduct
 - > Client classification (client segmentation)
 - Three classes of clients: **Retail, professional and institutional clients**, with possibility to opt in and opt out
 - Classes are “**similar**” to **MiFID II** regulation, but not identical (example: FinSA allows opt-out based only on assets (CHF 2 million and more), while MiFID II always requires professional knowledge and experience)
 - **Less stringent** information and other duties apply to business relationships with **professional and institutional clients** (either by law or possibility to waive)
- EAMs must assign clients in one of the segments



3.4. FinSA rules of conduct and investor protection rules

> Information duties

- Prospects/clients must be provided with **information on the EAM itself**, on the **financial services and products** that are offered and on the possibility to introduce a **mediation request**
- Information must include possible **risks and costs** of financial services and products
- EAM must disclose potential **conflicts of interest** and, when offering a financial instrument, inform the client on the **market offer** taken into account
- Clients must be provided with an “**key information sheet**” on financial products (except in case of discretionary asset management or execution only relationships). Its content is similar to what is required by PRIIPs



3.4. FinSA rules of conduct and investor protection rules

> Most important rules of conduct

○ Appropriateness check

- Before recommending a financial service and/or product, the EAM needs to check the **appropriateness** of the **service/product** for the client in question
- The EAM has to evaluate the **knowledge and experience** of the client with regard to the financial service or product, in particular with regard to the **risks** involved

○ Suitability check

- The EAM needs to verify whether the product or financial service is **suitable** in view of the client's **financial circumstances, investment objectives, knowledge and experience**.
- This includes in particular the **capacity and willingness to take risks**
- Based on this information, the EAM must draw up a **risk profile** for every client and, in case of portfolio management and a continuing consultation relationship, agree on an **investment strategy** with the client



3.4. FinSA rules of conduct and investor protection rules

- Duty of documentation
 - Obligation to document, in an appropriate manner, the financial services offered to the client and the information collected about the client
 - Obligation to provide evidence and to keep records. Duty to document the needs of clients and the reasons for each recommendation leading to the acquisition or disposal of a financial instrument
- Duty to render account
 - Provision documentation if requested by client on the financial services agreed and information collected on the client, etc.
 - Rendering of account on financial services agreed and provided
 - Rendering of account on composition, valuation and development of portfolio
 - Rendering of account on cost associated with the financial services

3.4. FinSA rules of conduct and investor protection rules

- > Summary of the assessments to be performed by an EAM for different activities according to FinSA:

Activity	Type of check required
Portfolio management	Suitability check
Investment advice:	
- <i>Portfolio-based</i>	Suitability check
- <i>Transaction-based</i>	Appropriateness check
Execution only	No check required, but client must be informed that no check is performed
Consequence if service or product is inappropriate or unsuitable for the client	→ Client must be informed and advised against the service or product

4. Impact of the location of client assets





4. Impact of the location of client assets

- > In case of **discretionary asset management services**, the location of the assets has an influence on licensing and/or registration/affiliation duties
 - If assets of a Swiss client are deposited at a **foreign Bank** (i.e. outside of Switzerland) and the **EAM** (portfolio manager) is located **outside of Switzerland**, the performance of discretionary asset management services will not constitute a financial activity performed within Swiss territory. In such a situation, **no license requirements are triggered in Switzerland and registration/affiliation duties are not likely to arise**
 - The same applies to the scenario where the assets are located in Switzerland, the client is domiciled abroad and the portfolio manager is also located outside of Switzerland (i.e. in the Bank's country of establishment)
 - In contrast, **registration and affiliation duties (but no licensing requirements)** arise in case the **client is in Switzerland** and the **EAM manages** its assets in Switzerland **from abroad**



4. Impact of the location of client assets

- > In case of **investment advisory services**, the location of the assets is not likely to have an influence on licensing and/or registration/affiliation requirements
 - In all scenarios, licensing requirements only arise if the EAM has a **significant business presence** and provides investment advice **in Switzerland**
 - If the client is located in Switzerland and the EAM located abroad (i.e. outside of Switzerland) provides investment advice to the client concerning funds located in Switzerland, **registration and affiliation is required**
 - If the client is located in Switzerland and an EAM located abroad (i.e. outside of Switzerland) provides investment advice to the client concerning funds located abroad, **registration is likely to be required**. The **EAM needs to be affiliated to an Ombudsman**, in order to give the client in Switzerland the possibility to make use of the mediation procedure

5. Introduction of a foreign custodian bank by the EAM





5. Introduction of a foreign custodian bank by the EAM

- > An EAM may both actively and upon a prospect's request **present a foreign bank's custodian services** during visits in Switzerland, as long as **no significant business presence** and/or permanent establishment for the Bank is established
- > As the assumption of a significant business presence requires a physical presence on Swiss territory, the EAM may, both actively and upon a prospect's request present a foreign custodian bank's banking services **via remote means of communication** into Switzerland without triggering licensing requirements
- > As the introduction of a third-party foreign custodian bank is considered to be a **banking service**, **no FinSA duties apply** (in particular: no registration and affiliation requirements)



Thank you for your attention!



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