THE KEY TARGETS OF REGULATORY CHANGES IN SWITZERLAND

ANDREA HUBER AND LEA HUNGERBÜHLER OF LOYENS & LOEFF DETAIL THE EFFECT THE UPCOMING REGULATORY CHANGES IN SWITZERLAND WILL HAVE ON ASSET MANAGERS

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Switzerland has been known as a jurisdiction with a rather liberal set of regulations over asset managers for many years, but a number of changes are arriving in the near future. With the Financial Services Act (Finsa) and the Financial Institutions Act (Finia), the Swiss Federal Council wants to create uniform competitive conditions for financial intermediaries, improve client protection and align Swiss law with EU regulations and directives (in particular Mifid II, PRIIP and Prospectus Regulation) with a view to an equivalent regulatory framework. The dispatch of these two acts was issued by the Swiss Federal Council in 2015, after consultation with numerous stakeholders.

In the aftermath of the proposal, the two parliamentarian chambers – the Council of States and the National Council, as well as their respective commissions for economic affairs and taxes – discussed and amended the drafts. Due to various changes and differences between the two parliamentarian chambers, the acts are still subject to parliamentary deliberation and will not enter into force before mid-2019. Even though the final text of the two acts is expected to be defined in due course, it is still possible that certain deviations from the latest draft versions will occur.

ALIGNMENT WITH EU LAW: ACCESS TO THE EU MARKET?

One of the key purposes of the new Swiss financial market regulations lies in the alignment with relevant EU law, with a view to a possible equivalence decision by the European Commission under article 47 Mifir. Such a decision would enable Swiss financial intermediaries to provide investment services on a cross-border basis to professional clients and eligible counterparties all over the EU. Even though Mifid II/Mifir became applicable as of 3 January 2018, no equivalence decision under this provision has been taken so far. Even though the Swiss law provisions will be quite similar to the ones laid down in Mifid II, therefore there is neither a guarantee nor a right for a (timely) positive equivalence decision.

Nevertheless, it can be assumed that the changes in the Swiss regulatory landscape will get the Swiss regulation closer to the one applicable in the EU and, therefore, increase the chances of a positive equivalence decision and, consequently, access to the EU market for serving professional clients and eligible counterparties. Until a positive equivalence decision has been made, there remains no unified system of access to the EU market. Accordingly, market access in the area of investment services and investment products is a matter of national discretion, meaning that each EU member state can define its own regime for market access for third country firms.

NEW SUPERVISORY REGIMES FOR ASSET MANAGERS

Unlike in most EU member states and in contrast to the requirements laid down in Mifid II, the current Swiss regulatory framework does not foresee any prudential supervision or authorisation requirements for asset managers, unless they manage the assets of collective investment schemes (which triggers authorisation and supervision by the Swiss Financial Market Supervisory Authority [Finma]) or pension funds (where currently an authorisation by the Federal Supervisory Commission Occupational Pension Benefits is required).

With the entry into force of the Finia, this will change as all Swiss asset managers will be subject to authorisation by Finma as well as ongoing supervision. For simple asset managers, the supervision will be conducted by a supervisory organisation authorised by Finma under the new regime. Asset managers of collective assets will be supervised by Finma directly. Asset managers of collective investment schemes as well as of pension funds qualify as "asset managers of collective assets", which entails, in contrast to the rules for "simple" asset managers, direct supervision by Finma. Regardless of the qualification as simple asset manager or asset manager of collective assets, the financial intermediary will have to comply with the conduct rules set out in the Finsa and any violations thereof may result in regulatory or criminal sanctions. Moreover, and as it is the case already today, the Federal Anti-Money Laundering Act applies to any asset manager located in Switzerland.

ASSET MANAGEMENT VERSUS INVESTMENT ADVISORY ACTIVITIES UNDER THE CURRENT REGULATORY REGIME

As a general rule, collective investment schemes may delegate their investment decisions to a supervised asset manager, whereas non-supervised investment advisors may only provide investment recommendations but may not take the final decisions on where to invest. However, in certain constellations, the advisory mandate may amount to (de facto) asset management activities, in

particular if the advisor's proposal is accepted by the fund management without careful and independent review or if the investment advisor has significant influence on the investment decision, for example by having a seat in an investment committee with decision-making powers.

Finma already stepped up its supervisory activities in the asset and investment management industry in 2012, and since issued notices which provided further guidance on the distinction between asset management and investment advisory. For asset managers of collective investment schemes targeting qualified investors only and presiding over assets not exceeding Sfr100m, including leveraged assets, respectively Sfr500m for non-leveraged assets where investors cannot exercise termination and redemption rights for a period of five years, currently no prudential supervision or authorisation are required. Accordingly, for this category of asset managers (*de minimis*), under the current regulatory framework the distinction between asset management and investment advisory is purely theoretical.

ASSET MANAGEMENT AND ADVISORY ACTIVITIES UNDER THE FINIA REGIME

As a consequence of the new Finia rules, the distinction between asset management and investment advisory activities will become more relevant. Since under the Finia any asset manager, including those of the de minimis category, will need a licence, the distinction between asset management and investment advisory will be of importance to small asset managers/investment advisors who are currently benefitting from the de minimis exemption. Even though those asset managers currently considered as de minimis will not be subject to Finma supervision as asset managers of collective assets, they will need Finma authorisation and be subject to supervision by a supervisory organisation (as simple asset

managers). The same is true for investment advisors that, in fact, qualify as asset managers based on Finma guidance and practice.

It is expected that for simple asset managers, the requirements for licensing – such as organisational requirements – will not be as extensive as those applicable to asset managers of collective assets. Nevertheless, there will be minimum requirements in terms of good reputation, verification of proper business conduct by the parties responsible, adequate financial guarantees, appropriate organisational structure and an adequate internal control system, risk management and compliance function as well as a segregation of these functions. At the same time, outsourcing of such functions will be possible under certain conditions.

REGULATORY CHANGES FOR INVESTMENT ADVISORY IN GENERAL

While for simple asset managers a licensing requirement will be introduced, this will not be the case for investment advisors. Also under Finsa and Finia, they will not be subject to authorisation or supervision. Nevertheless, investment advisors will also be affected by certain new rules – most importantly, they will have to abide by the rules of conduct laid down in Finsa. Violations of such rules may entail criminal sanctions. It is noteworthy, though, that various rules of conduct are not mandatorily applicable if services are provided to professional and institutional clients. Moreover, Finsa will introduce a register for client advisors. Investment advisors located in Switzerland as well as those located abroad providing their services on Swiss territory will need to be enrolled on such register. Enrolment requires the conclusion of an adequate liability insurance (or equivalent financial securities), participation in a unit of the ombudsperson as well showing that the advisor(s) provides over the necessary education with regards to their obligations under Finsa.

NEW CLIENT SEGMENTATION UNDER FINSA

Like under Mifid, Finsa intends to introduce a new client segmentation consisting of retail clients, professional clients and institutional clients. Depending on the qualification of the clients, certain Finsa requirements need to be observed. Specifically, professional clients include (i) Swiss regulated financial intermediaries; (ii) Swiss regulated insurance companies; (iii) foreign financial intermediaries subject to prudential supervision; (iv) central banks; (v) public entities with professional treasury operations; (vi) pension funds with professional treasury operations; (vii) companies with professional treasury operations (vii); and companies that reach at least two of the following thresholds: balance sheet of at least Sfr20m, turnover of at least Sfr40m and own funds of at least Sfr2m; (ix) private investment structures with professional treasury operations for high-net worth individuals and (x) certain high-net worth individuals who want to be treated as professional clients (opting-out; on the other hand, all professional clients can declare that they want to be treated as a retail client, opting-in).

> “ONE OF THE KEY PURPOSES OF THE NEW SWISS FINANCIAL MARKET REGULATIONS LIES IN THE ALIGNMENT WITH RELEVANT EU LAW”

Categories (i) to (iv) above will be considered as institutional clients, whereas any client not qualifying as a professional client will be considered as a retail client.

RELEVANT CHANGES UNDER FINIA IN CONNECTION WITH DISTRIBUTION OF FUNDS

Under Finia, the current obligation for distributors of collective investment schemes to obtain a licence from Finma shall be abolished. This obligation will be replaced by the registration and training requirement for client advisors mentioned above as well as the obligation to adhere to regulatory conduct rules.

Also, the term “offering” in the Finsa will replace the existing term “distribution” under the current Swiss Federal Act on Collective Investment Schemes, whereby any invitation to acquire a financial instrument that contains sufficient information on the offer conditions and the financial instrument will count as an offering. The latest draft of Finsa suggests a set of explicit exemptions from the prospectus requirement. The list of exempted transactions includes inter alia, public offerings limited to professional clients, offerings addressed to less than 500 private clients, and offerings with a minimum investment of Sfr100,000 or of securities with a denomination of at least Sfr100,000. Also, de minimis offerings of less than Sfr8m over a period of 12 months are exempted.

In addition, the appointment of a Swiss representative will no longer be required to offer non-Swiss funds to qualified investors, i.e. professional clients under Finsa.

NEED FOR ACTION?

As a consequence of the new regulatory regime, the distinction between asset management and investment advisory will become more relevant, especially for the simple asset managers and those managing collective assets belonging to the de minimis category today. The same holds for investment advisors who do not have to care about the qualification (asset manager versus investment advisor) due to the de minimis rule today – as of entry into force of Finia, they will have to assess whether advisory services are provided or whether their business could, potentially, also qualify as asset management, which triggers a licensing requirement and the applicability of additional regulatory rules.

While mere advisory services for pension funds as well as collective investment schemes will still be exempt from licensing requirements and supervision, for certain (*de facto*) asset managers the new rules might lead to a licensing requirement as well as to supervision by Finma or a supervisory authority. Nevertheless, businesses providing mere advisory services are also well advised to review their compliance with conduct rules laid down in Finsa, since abidance with such rules will become mandatory for investment advisors as well, and any violation may entail significant administrative or criminal sanctions. Moreover, for financial advisory services an entry in the advisory register will be required. ■