

FINSA & FINIA

The legislative package of the Financial Services Act ("FINSA") and the Financial Institutions Act ("FINIA") will come into force on 1 January 2020. While FINSA primarily aims to improve client protection in the provision of financial services and the offering of financial instruments, FINIA regulates the requirements for the authorization of independent asset managers ("IAM"), trustees, managers of collective assets and fund management companies as well as investment firms.

On the one hand, the obligations of professional financial service providers vis-à-vis their clients in their advisory or asset management activities and the obligations of providers of financial instruments will be more uniformly and partially even newly regulated.

On the other hand, the probably most far-reaching amendment requires that IAM now be subject to prudential authorization and supervision by FINMA and that investment advisors without a power of attorney must also comply with supervisory obligations.

In addition to this, an ombudsman's office for disputes with clients will be established. Finally, investment advisors and client advisors from foreign financial service providers must also be entered in a new advisor register.

New regulation for financial service providers

In particular IAM and trustees (the latter defined in accordance with the Hague Trust Convention) as well as investment advisors are obliged by FINSA and in the case of IAM and trustees also by FINIA to comply with comprehensive supervisory regulations for their activities.

Notwithstanding the above, financial service providers already subject to prudential supervision, such as banks, securities houses, fund management companies and managers of collective assets, are also affected by the new regulations and must comply in particular with the rules of conduct laid out in the FINSA. However, the FINIA does not result in any significant changes for investment firms, fund management companies and managers of collective assets compared to

the current legal situation. Banks are completely excluded from the scope of application of the FINIA.

Effects on IAM and trustees

According to FINIA, IAM and trustees will no longer be supervised by a self-regulatory organization but will be directly licensed by FINMA and prudentially supervised by a supervisory organization as an extended administrative arm of FINMA, not only with regard to AMLA. This supervisory organization reports to FINMA, which is also responsible for withdrawing the license. FINIA provides for narrow exceptions to the licensing requirement, which may be particularly relevant in the area of single-family offices.

In the case of power of attorney-based asset management for clients, IAM have new obligations in dealing with the client. These include the classification of clients into the segments of private clients, professional clients and institutional clients, whereby clients with certain qualifications can also overturn the classification into the respective segment envisaged by law as the standard (opting-out or opting-in). Like the provisions of FINSA and FINIA in general, the criteria for classification are similar, but not fully congruent with MiFID II.

Based on this customer segmentation, there is a different level of protection for customers. As the client's professionalism increases, the IAM has fewer regulations for checking the appropriateness or suitability of the investment strategy and decisions as well as the information, documentation, accountability, transparency and due diligence obligations.

In addition, FINSA also places requirements on the organization and the qualification of employees of an IAM. Likewise, every financial service provider must join an ombudsman's office, which attempts to mediate in pre-trial disputes between clients and financial service providers.

In the context of approving an IAM, FINMA checks compliance with legal provisions, in particular in the areas of guarantee, organization and risk management, the qualifications of the management team, which generally consists of at

least two persons, and minimum capitalization and capital adequacy requirements.

If the formal and material requirements are met, FINMA issues a license as an IAM or as a trustee. It delegates ongoing supervision to a supervisory organization which, as an extended arm of FINMA, constantly monitors compliance with the applicable regulations. If any licensing-relevant regulations are severely violated, the supervisory organization reports this violation to FINMA, which then enforces the financial services provider's compliance with the applicable regulations.

Impact on investment advisors

Investment advisors that are acting without a power of attorney still do not require a license from FINMA. On the other hand, they are fully subject to the obligations under FINSA due to their business activity and further also require an affiliation with an ombudsman's office. In contrast to financial service providers that are licensed by FINMA, investment advisors require an entry in the advisor register, which also verifies that certain requirements are met when they are registered.

Upcoming decisions

Despite some generous transitional periods, in particular IAM, trustees and investment advisors will have to make directional decisions in legal and operational terms in the coming months in order to determine their best strategy going forward. In addition, IAM and Trustees will have to fulfil their first obligations by June 2020.

Elements of a regulatory strategy	• Regulation
	• Transitional periods
	• Corporate structures
	• Up: Partnerships / Platforms / AM-CIS
	• Out: Advisory / Company sale
	• Organisational & staffing structure
	• AMLA and compliance models
	• CRM with FINSA / FINIA / AMLA
• Education	

Modular Offering of Mercury Compliance AG:

Strategy	• Advising to find the suitable regulatory strategy for financial service providers.	✓
Gap Analysis	• Assessment of gaps regarding the compliance with FINSA and FINIA.	✓
License	• Drafting the license request to FINMA as well as the necessary processes and contractual frameworks.	✓
Compliance	• Supporting of the compliance funktion in its tasks according to FINSA, FINIA and AMLA.	✓
Pre-Audits	• Preparation of the licensee and its executives for supervisory audits.	✓
Education	• Tailor made regulatory education for executives and client advisors.	✓

About Mercury Compliance AG

Mercury Compliance AG is a leading law firm in the field of supervisory law and compliance in Zurich.

We offer our clients specialized advice in all areas of supervisory law and compliance as well as in selected questions of business law and support our clients on a strategic, conceptual and operational level. We represent them before supervisory authorities and self-regulatory bodies and are available as an outsourcing partner for supervisory tasks.

In order to provide our clients with the best possible support in international and interdisciplinary projects, we rely on a competent and proven network of selected partner companies and specialists at home and abroad.

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