

FINMA in the time of the FinSA and FinIA

BÄR
& KARRER

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Where do we stand?

- The FinSA and FinIA were enacted by the Swiss Federal Assembly on 15 June 2018.
- After a consultation process in 2019, the implementing ordinances
- The acts and ordinances entered into force on 1 January 2020, subject to extensive transitional regime.

Next steps:

- FINMA still has to open consultation proceedings on the FinIA-FINMA (Q1), entry in force Q3
- FINMA has to adapt its circulars to the new regulatory framework
- Determination on the future of self-regulation in the age of FINMA

FinSA

Overview

- Federal Act of Financial Services of 15 June 2018 ("**FinSA**") entered into force on 1 January 2020, with various phasing-in periods.
- FinSA introduces various duties for **financial service providers** and a **duty to prepare a prospectus and KID**

Client Segmentation

Rules of Conduct

- Duty to inform clients (including fees and costs)
- Duty to verify suitability (portfolio management and investment advice that extends to the portfolio) or appropriateness (investment advice that does not extend to the portfolio)
- Duty to document and account
- Acting in good faith, best execution and use of client instruments

Organisational rules

- Appropriate organisation
- Employees
- Rules on chain of service providers
- Rules on conflicts of interest

Duty to register client advisors

(of non-supervised Swiss financial service providers and foreign financial service providers)

Duty to join an ombuds-organisation and to submit to ADR

Issuers/offerors:

Duty to prepare a prospectus and a KID

The Swiss Financial Institutions Act (FinIA) will introduce a **new licensing requirements for Swiss financial institutions**

- **Portfolio managers and trustees to ongoing prudential supervision and require them to obtain a licence from the Financial Market Supervisory Authority FINMA**
- Managers of pension fund assets are subject to prudential supervision and required to obtain a licence from FINMA as a manager of collective assets
- New regulatory framework for fund management companies and securities houses,

Two questions for today

- What is the impact of the FinSA and FinIA on FINMA?
 - New regulatory framework
 - New financial institutions which need to be licensed – others are no more supervised
 - New duties for existing financial institutions
 - Supervision and enforcement of the FinSA
- What does this mean for financial market participants?

11 years ago, FINMA was created to have a **single supervising the entire financial market**:

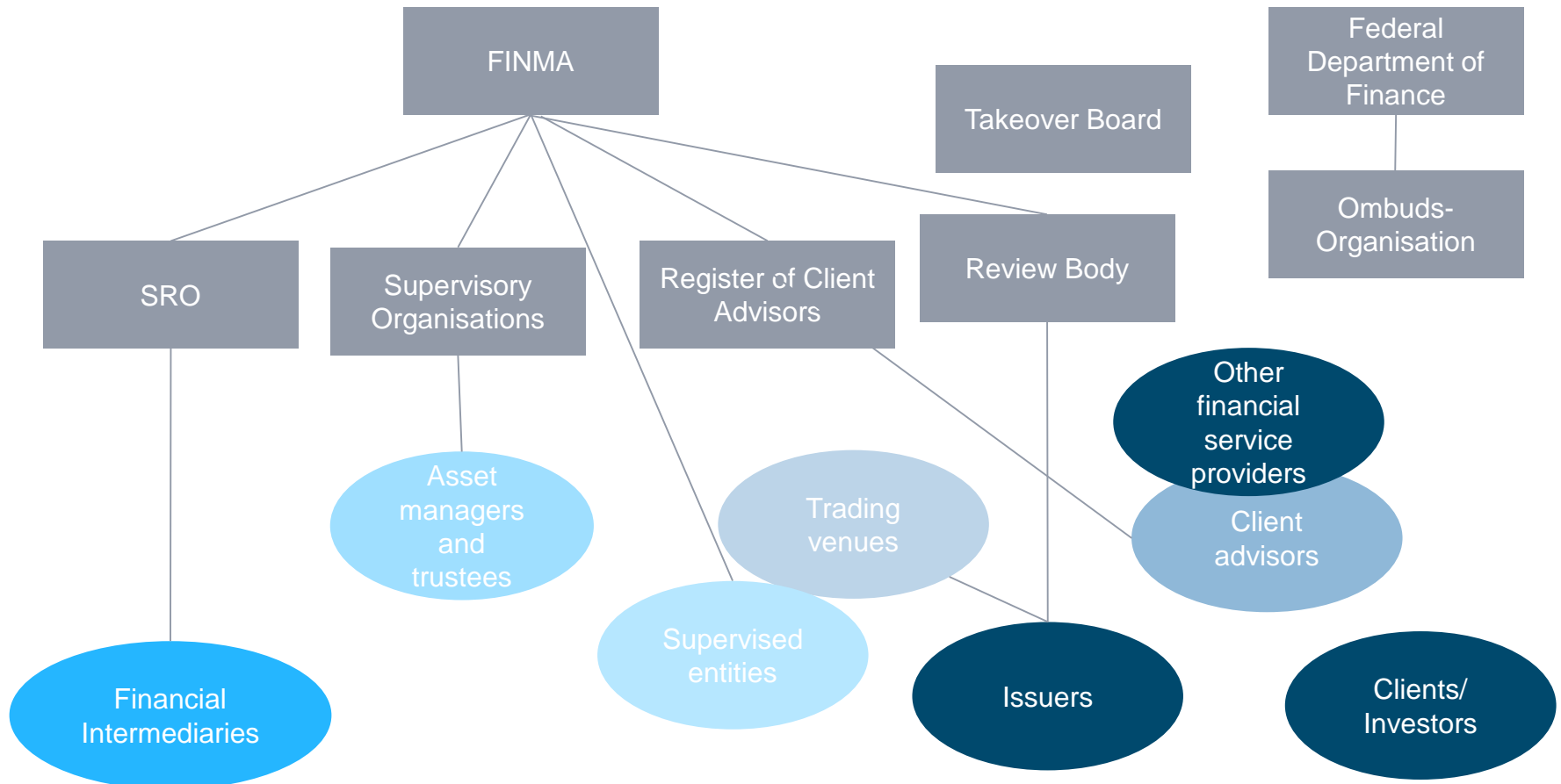
- FINMA supervised
 - Banks
 - Securities dealers
 - Insurances
 - Mortgage Bond Banks (central issuer for mortgage bonds, *centrale d'émission de lettres de gage*)
 - Fund management companies, asset managers for collective investment schemes, distributors depository banks, contractual funds, SICAVs, SICAFs, LP for collective investments,
 - Self-regulatory organisations and directly supervised financial intermediaries and group entities
 - Financial market infrastructures (stock exchanges and multi-lateral trading facilities, central-counterparties, central depositories, trade registries, payment systems)

- + all investors in connection with
 - Administrative assistance in financial markets
 - Disclosure of substantial shareholdings (and takeovers)
 - Market abuse

New Regulatory Framework

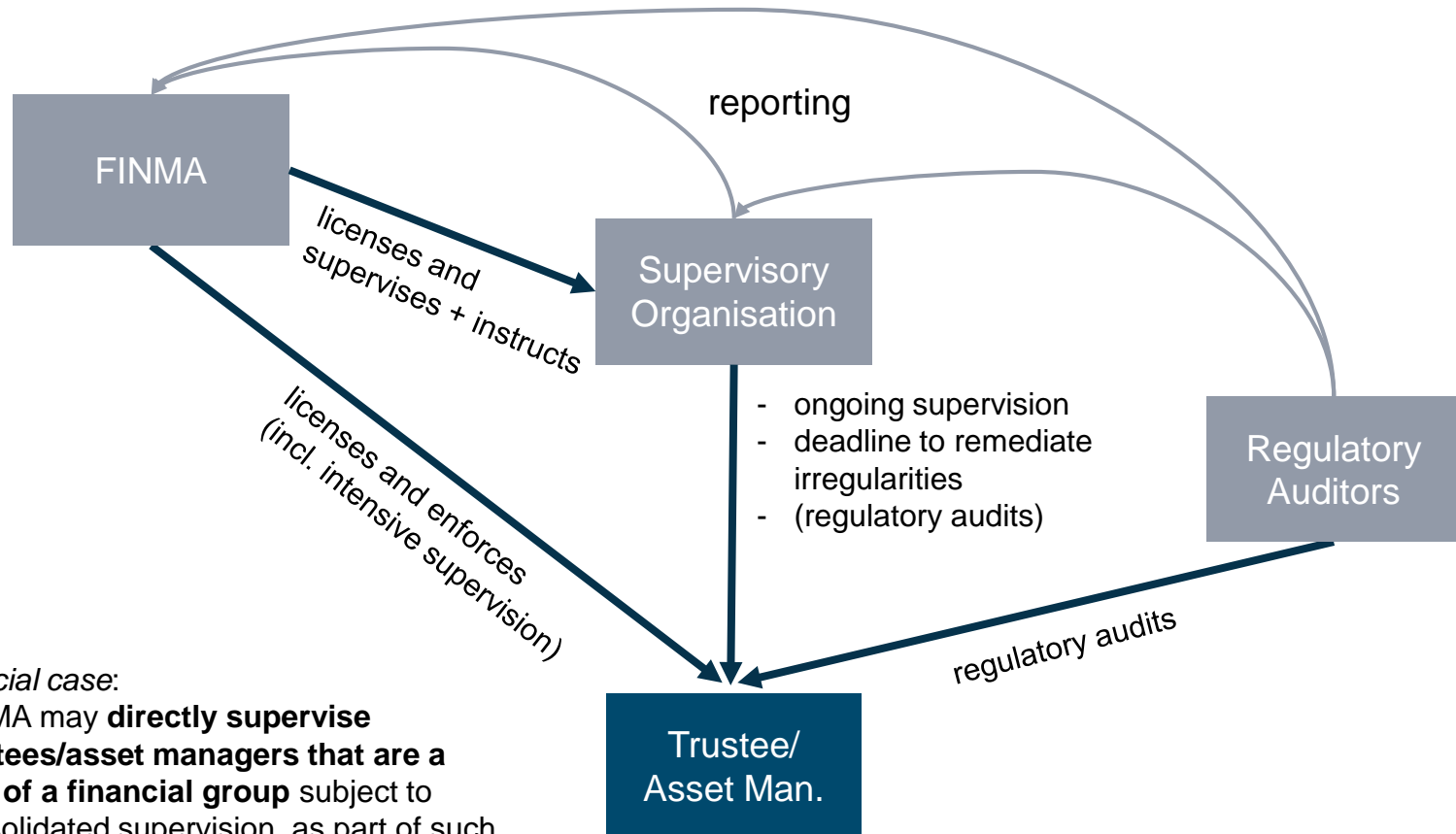
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 - Administrative assistance in financial markets
 - Disclosure of substantial shareholdings
 - Market abuse
 - +
 - Authorisation of financial institutions under FinIA
 - Admission of register(s) of client advisors (FinSA 31)
 - Admission of review bodies (FinSA 32 I)
 - License of supervisory organisations (FINMASA 43c ff.)
- Federal Department of Finance recognizes omubdsorganisation

New Regulatory Infrastructure



Supervision of trustees and asset managers

Two-tiered supervisory model



Special case:
FINMA may **directly supervise trustees/asset managers that are a part of a financial group** subject to consolidated supervision, as part of such consolidated supervision

Supervision of Trustees

Two/three-tiered supervisory model

Supervisory model (article 61 (1) FinIA)

- **FINMA** is responsible for licensing trustees and taking formal enforcement action + intensive supervision
- **Supervisory organisation** is responsible for the ongoing prudential supervision (article 61 (2) FinIA)
 - **monitor compliance with the licensing requirements** under the FinIA (and with the rules of conduct under the FinSA)
 - deadlines to remedy irregularities (article 43b (2) FINMASA), and
 - reporting serious irregularities and non-remediated issues to FINMA (article 43b (2) FINMASA)
- **Regulatory audits** will be carried out by the supervisory organization or by a regulatory auditor
 - (annual) prudential audits (article 62 (1) FinIA)
 - audit cycle can be reduced to an audit every four years, provided the trustee files a report on compliance with applicable laws and regulations (article 62 (2) FinIA)

Supervisory organization

- private organisations licensed and supervised by FINMA (article 43a (2) FINMASA), who are also allowed as a **self-regulatory organization (SRO)** monitoring compliance with anti-money laundering duties if recognised as such by FINMA (article 43a (3) FINMASA)

Financial service providers are subject to duties under the FinSA.

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Case 1: Financial service provider that is subject to prudential supervision

FinSA is a financial service law under FINMASA. FINMA is responsible for the supervision and can take enforcement action in case of serious breaches.

FINMA will be informed of proceedings in front of civil courts and ombuds-organisation

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Case 2: Financial service provider that is not subject to prudential supervision

FINMA is **NOT** responsible for the supervision of the financial service providers that are not licensed, approved, etc. by FINMA (see LFINMA 3) and **cannot** take (**direct**) enforcement action in case of serious breaches.

Case 2: Financial service provider that is not subject to prudential supervision

- Indirect enforcement through administrative criminal law:
- Fine of CHF 100'000 :
 - False information or omission of important fact in connection with the performance of the information duties pursuant to FinSA8
 - Serious breaches of duties to check appropriateness/suitability pursuant to FinSA 10-14
 - Breaches the duties on handing over benefits
 - Breaches obligation to provide a KID
- **Exception:** does not apply to supervised institutions and persons acting for them
- A criminal conviction under the FinSA entails the de-registration from the register of client advisers (LSFin 32 IV)
- Prosecuting authority: Federal Department of Finance (FINMASA 50)
- Statute of limitation : seven years (FINMASA 52)
- Corporate criminal liability: a fine can be ordered against the corporate entity in cases which call for a fine of no more than CHF 50'000 (FINMASA 49)

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