LOYENS & LOEFF

BANKING & FINANCE
INVESTMENT MANAGEMENT

Swiss FinSA and FinIA effective as from 1 January 2020

Overview of transitory provisions

1. Introduction

In a meeting on 6 November 2019, the Federal Council decided that the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), together with the corresponding ordinances, will enter into force on 1 January 2020. On the same date, the definitive text of the respective ordinances, the Financial Services Ordinance (FinSO) and the Financial Institutions Ordinance (FinIO), was published. The amended text of the ordinances addresses numerous open questions regarding the transitory provisions.

This newsletter provides an overview of the transitory provisions of the FinSA and FinIA, with a strong focus on their impact on the Collective Investment Schemes Act (CISA). It is not intended to cover all particular aspects of the transitory provisions.

1.1 Why transitory provisions?

Transitory provisions exist mainly where the implementation of the new laws is more complex for the market participants. While most of the FinSA provisions are subject to transitory provisions due to the fact that they mainly entail new obligations, the FinIA provisions will be applicable as from 1 January 2020, except where financial institutes are confronted with a new licence or new licensing requirements.

1.2 General implications of transitory provisions

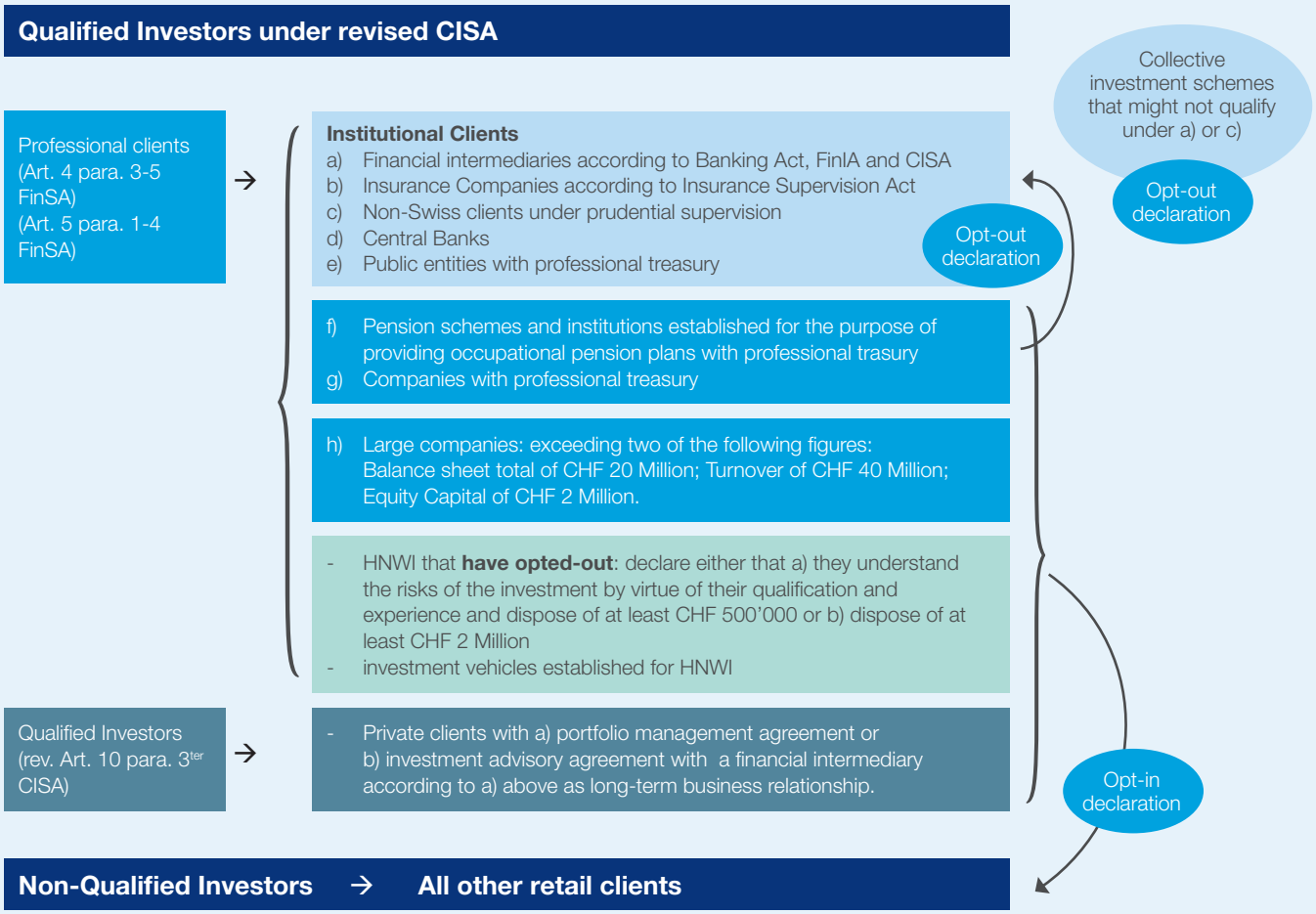
Most of the transitory provisions of the FinSO will apply for two years after its entry into force. This had already been anticipated by the Federal Department of Finance (FDF) on 9 September 2019. However, the industry was still awaiting the more specific transitory provisions as the initial drafts of the FinSO and the FinIO did not provide the required level of detail.

In principle, provisions which are subject to transitory provisions can, in the absence of specifications to the contrary, be voluntarily applied as from 1 January 2020. However, several transitory provisions prevent so-called *cherry picking* by linking the applicability of certain new provisions to the application of others. It is therefore advisable to make checks and balances of the *whole package* before deciding when to implement them.

1.3 Terminology

Before discussing the subject matter, it is worth clarifying some definitions. When referring to *old* or *previous* in connection with a legal provision, we actually mean the version prior to implementation of FinSA and FinIA. Therefore, when reference is made to a *revised* or *new* provision, we mean the FinSA and FinIA provisions, including the corresponding amendments made by them to other laws.

The definition of *Qualified Investor* and *Non-Qualified Investor* for the purposes of CISA is made with reference to the client segmentation in the FinSA. In order to avoid lengthy definitions and explanations of the client segmentation, the overview below shows more clearly which groups of clients exist and how the definitions of FinSA and CISA are interconnected.



2. Transitory Provisions

2.1 Rules of Conduct, Organizational Measures, Client Segmentation and Basic Training

The transitory period lasts for two years from the date FinSO enters into force, i.e. it starts on 1 January 2020 and ends on 31 December 2021. As outlined in the explanatory report of the Federal Department of Finance on the FinSO and FinIO dated 6 November 2019, it may not be advisable for new players starting their activities after 1 January 2020, to use the transitory provisions, but instead to start implementing the new provisions directly. However, according to the law, all players will have the same right to apply the transitory provisions, including new market players.

The FinSA rules of conduct, organizational measures, client segmentation and basic training duties for client advisors are interdependent to some extent as it will be outlined below. Even though there is no express obligation to implement all of these rules, measures and duties at the same time and the explanatory documentation on the final text of the FinSO and FinIO refers explicitly to the possibility of implementing the rules of conduct separately from the organizational measures, a careful analysis needs to be carried out to determine in which instances a staggered implementation is reasonable for the financial services provider in question.

First of all, the client segmentation (Art. 4 FinSA and 103 FinSO) is, from a practical point of view, a precondition for the application of the rules of conduct, even if the rules of conduct can also be complied with by treating all clients as retail clients as provided by Art. 4.7 FinSA. Provided that the definition of Qualified Investor according to the revised CISA refers to the FinSA, the new definition of Qualified Investor can only be used if the client segmentation of the FinSA is applied.

Furthermore, in our view a staggered implementation rules of conduct according to Art. 7-18 FinSA and organizational measures according to Arts. 21-27 FinSA during the transitory period is only worth consideration if the old CISA and the old Stock Exchange and Securities Trading Act (SESTA) rules of conduct do not apply, as outlined below.

2.2 Implementation of Rules of Conduct and Organizational Measures

In connection with the FinSA rules of conduct in accordance with Arts. 7-18 FinSA (duty of information, suitability and appropriateness, record keeping and reporting as well as transparency and care when executing client orders), financial services providers who voluntarily decide to implement the rules of conduct before January 2022 must inform their regulatory auditor accordingly in writing. Likewise, financial services providers that wish to implement the FinSA organizational measures (Arts. 21-27 FinSA) before 1 January 2022 will be able to do so by communicating their intention in writing to their regulatory auditor (Art. 106 (2) FinSO). The previously applicable rules of conduct and organizational measures of the old CISA and the old SESTA will remain in place up to the chosen date of implementation or until 31 December 2021 at the latest.

In particular, the transitory regime of Art. 105 and Art. 106 FinSO can be presented as follows (based on the differences between applying the rules of conduct and organizational measures at a later stage or immediately):

a. As long as the FinSA conduct rules and organizational measures are not applied, the following applies (if relevant to the particular case) until at the latest 31 December 2021:

   - Art. 11 SESTA (duty of information, duty of care, duty of best execution, duty of loyalty, consideration of client profiles)
   - Art. 20 old CISA (duty of loyalty, duty of care, duty of information)
   - Art. 21-23 CISA (investment policy to follow fund documentation, compensations, duty of best execution)
   - Art. 24 old CISA (objective advice, delegation rules)
   - Art. 120 (4) old CISA (the distribution of foreign funds in Switzerland to qualified investors requires a Swiss representative and a Swiss paying agent).

   An insight into the effects of the above on Art. 120 CISA may be of particular interest. The following table represents the situation in which a non-Swiss fund is offered in Switzerland and the new FinSA rules of conduct and organizational measures are not applied during the transitory period.

Transitory provisions until 31 December 2021 Alternative 1 - applying old provisions	Distribution to Non-QI	Distribution to QI (excluding those falling under art. 3 (1) and 3(2) old CISA	Unsolicited investment: a) in the context of LT investment advisory agreement with regulated FI or independent AM subject to AMLA; b) for execution-only transactions; or c) investor requests information or purchases units without prior action of the AM, distributor or representative (art. 3(2) a old CISA).	Offering or marketing is conducted within discretionary AM agreement with a FINMA licensed FI or independent AM governed under AMLA and minimum standards - information provided by licensed FI (art. 3(2) b & c *old* CISA)	Investor is licensed FI or insurance institution (art. 3(1) *old* CISA)
FINMA approval of fund including fund documentation	Yes art. 120(1) & 120(2) CISA	No art. 120(4) *old* CISA	N/A	N/A	N/A
Appointment of **Swiss representative and Swiss paying agent**	Yes art. 120(2)d CISA	Yes art. 120(4) *old* CISA	N/A	N/A	N/A
Fund, AM, fund management or company and depository subject to **foreign supervision for purposes of investor protection**	Yes art. 120(2)a CISA	No art. 120(4) *old* CISA	N/A	N/A	N/A
Fund management or company & depository subject to **equivalent prudential supervision**	Yes art. 120(2)b CISA	No art. 120(4) *old* CISA	N/A	N/A	N/A
Designation no grounds for **confusion or deception**	Yes art. 120(2)c CISA	Yes art. 120(4) *old* CISA	N/A	N/A	N/A
Agreement **for cooperation and exchange of information** between FINMA and foreign authority supervising offeror	Yes art. 120(2) e CISA	N/A	N/A	N/A	N/A
Conduct rules which mostly stay with CISA, as applicable (duty of loyalty, care and information, duty to follow inv. policy of fund, compensations, own investment at arm's length)	Yes art. 20 *old* CISA and 21 *new* CISA	Yes art. 20 *old* CISA and 21 *new* CISA	N/A	N/A	N/A
Conduct Rules of CISA which will be superseded by FinSA conduct rules	Yes art. 23 *new* CISA and 24 *old* CISA	Yes art. 23 *new* CISA and 24 *old* CISA	N/A as out of scope of CISA (transitory provisions 105(4) and 106(4) FinSO)		
Minimum standards recognized by FINMA: SFAMA Guidelines on Distribution and SFAMA Conduct Rules	Yes art. 105(3) f FinSO	Yes art. 105(3) f FinSO			
Affiliation to **Ombudsman/ Registration as client advisor:** 1 July 2020 or 6m after designation if offer qualifies as **fin. serv.**	Yes	Yes	Yes	Yes	Yes

b. Application of the FinSA rules of conduct and organizational measures (at the latest on 1 January 2022)
If, on the contrary, the financial services provider decides to apply the new rules of conduct and organizational measures before the end of the transitory period, it will be able to apply the new rules regarding the offering of non-Swiss funds to Switzerland as set out in the revised CISA.

It should be noted in this regard, that if no rules of conduct or organizational measures apply (for instance because the activity does not qualify as a financial service under Art. 3 lit. c FinSA), there will be no reason to argue that the new provisions of revised Art. 120 CISA will not apply. Art. 120 of the revised CISA refers to an *offer*, which does not necessarily qualify as a financial service in which case no rules of conduct and no organizational regulations apply. However, if an offer is linked to a structure where advice is provided, or if the offer also qualifies as *acquisition or disposal* because it is directly addressed to specific clients according to Art. 3 (2) of the FinSO, then the corresponding revised rules of conduct and organizational measures will apply. The table below might help to assess the requirements applicable to the offering (including marketing) of units of a non-Swiss fund in Switzerland or to investors in Switzerland under the new rules introduced by the FinSA and the FinSO.

According to the table below, the offering of non-Swiss funds exclusively to qualified investors other than high net-worth individuals (HNWI) under the new rules introduced by the FinSA and the FinIA does neither require an approval nor a designation of a Swiss representative or Swiss paying agent (Art. 120 revised CISA *e contrario*). It is important to bear in mind that private clients that have signed a long-term investment advisory agreement or an asset management agreement with a prudentially supervised financial services provider are also included in the group of Qualified Investors, unless they ask to be treated differently (Art. 10(3)[ter] revised CISA).

A similar effect applies to an offer of non-Swiss collective investment schemes to HNWI – who have issued an opt-out declaration within the framework of a long-term investment advisory relationship (Art. 129a revised CISO). The only requirement of the CISA which still applies in the latter case is that the designation of the fund must not be misleading or create confusion.

While no rules of conduct apply to financial services performed for institutional investors, and while professional investors may waive the application of certain rules of conduct towards them, all financial services providers are obliged to comply with the organizational measures of the FinSA.

Transitory provisions until 31 December 2021 Alternative 2 – implementation of new provisions	Non-QI (incl. HNWI with no Opt-out)	HNWI Opted-out	HNWI Opted-out & LT Inv. Adv. Agr.	QI (excl. HNWI) (incl. private clients with LT inv. adv. or AM agreement with prud. supervised FI)
FINMA Approval of fund incl. fund documentation	Yes	No	No	No
Swiss representative	Yes	Yes	No	No
Swiss paying agent	Yes	Yes	No	No
Fund, AM, fund management or company and depository subject to **foreign supervision for purposes of investor protection**	Yes	No	No	No
Fund management or company & depository subject to **equivalent prudential supervision**	Yes	No	No	No
Agreement **for cooperation and exchange of information** between FINMA and foreign authority supervising offeror	Yes	No	No	No
Designation no grounds for **confusion or deception**	Yes	Yes	Yes	No (although other legal provisions may apply)
Application of FinSA **conduct rules** (Art. 7-18 FinSA) **if** the **offer** is directly made to specific clients and qualifies as **acquisition or disposal**, i.e. as financial service it triggers: Information duty, record keeping and reporting, transparency and care Mere offer triggers issuance of **KID**	Yes No KID if within asset management agreement	Yes but client can renounce to the application of the information and documentation duty No KID	Yes but client can renounce to the application of the information and documentation duty No KID	Institutional clients: No Professional Clients: Yes but can renounce to the application of the information and documentation duty No KID, No prospectus Private clients: Yes No KID if within asset management agreement
Application of FinSA **organizational measures** (Art. 21-27 FinSA) by the person providing a **financial services** (same reasoning as above) Employees, involvement of third parties, chain of providers, conflicts of interest	Yes	Yes	Yes	Yes
Affiliation to **Ombudsman/ Registration as client advisor**: 1 July 2020 or 6m after designation if offer qualifies as **fin. service**	Yes	Yes	Yes	Yes

2.3 Client Advisory Registry and Affiliation to an Ombudsman

The duty to register with a client advisory registry is subject to a special transitory period of 6 months. This period will start as soon as the FINMA or the Federal Council have given their approval for an organization to maintain the register, at the earliest on 1 January 2020. The same rules apply to affiliation to an Ombudsman (Arts. 107 and 108 FinSO). The obligation to register with a client advisory registry and the duty of affiliation to an Ombudsman apply to the provision of financial services (and therefore not necessarily to a mere offer or advertising as depicted in the chart above).

2.4 Prospectus and KID

Article 95 (4) of the FinSA stipulates that the provisions of Title 3 will apply two years after the FinSA has entered into force in case of

- securities for which the public offer or the request for admission to trading were made before the Act came into force; and
- financial instruments offered to private clients before the Act came into force.

For securities and financial instruments for which the respective offer or the request for admission to trading are made after 1 January 2020, the FinSA prospectus obligation will become applicable six months after the approval of a prospectus reviewing body by FINMA, but no earlier than 1 October 2020 (Art. 109 (1) FinSO). Up to this date, the prospectus obligation will, unless a prospectus pursuant to FinSA is produced, continue to be regulated by Arts. 652a and 1156 of the Swiss Code of Obligations, as well as by the applicable rules and regulations of the particular trading venue, respectively.

In connection with the offer of securities and funds which require the issuance of a KID and which are offered after 1 January 2020, the obligation to publish a KID will only become mandatory on 1 January 2022. During the transitory period, either a KID will be issued or:

- for real estate funds, alternatively, a simplified prospectus may be issued according to Annex 2 of the Collective Investment Schemes Ordinance (old CISO) (Art. 110 FinSO);
- for securities funds and other funds for traditional investments, alternatively, a simplified prospectus for securities funds and other funds for traditional investments according to Annex 3 of the old CISO may be issued (Art. 110 FinSO);
- for structured products, alternatively, a simplified prospectus in accordance with Art. 5 (2) old CISA may be issued (Art. 111 FinSO).

For financial instruments other than those mentioned above for which a KID is required under the FinSA, no KID has to be issued before the end of the transitory period.

However, given that the KID and the prospectus are part of the duty of information according to Art. 8 FinSA, the rules of Arts. 105 and 106 FinSO also apply to them and therefore a decision to apply the new provisions of CISA as outlined above is attached to compliance with the KID and the prospectus rules of the FinSA (for the latter as soon as the law makes it possible).

2.5 Marketing

In Switzerland, no marketing passport or filing will be required. However, from January 2020 onwards, marketing activities in connection with the provision of financial services will have to comply with the following requirements:

- Marketing (or advertising) has to be designated as such and be clearly recognizable.
- If a prospectus (and/or a KID) is required for the particular financial instrument, marketing must refer to such documents and the place where they can be obtained. In such cases, the information on marketing materials must correspond to and be coherent with the information contained in the prospectus (and/or the KID), respectively.

Pursuant to Art. 127a of the revised CISO the marketing of a non-Swiss fund in Switzerland will have, for the purposes of the applicable Swiss regulatory requirements, the same effect as an offer according to Art. 120 CISA (reference is made to the explanations above).

2.6 Portfolio Managers and Trustees

Under the new regulations, former independent asset managers and trustees will be required to: 1) request a licence from FINMA (Art. 5 (1) FinIA) and 2) be supervised by a supervisory organization in the sense of revised Art. 43a of the Financial Markets Supervision Act (FINMASA). Such organization will supervise compliance with the relevant laws by the portfolio managers and trustees. The transitory provisions for portfolio managers and trustees stipulate that, if they start their activities during the year 2020, they must promptly contact FINMA and fulfill the licensing requirements, except for the supervision by a supervisory organization according to revised Art. 43a FINMASA, which has to be complied with within one year from the approval by FINMA of such an organization (Art. 74 (3) FinIA).

Given that the supervision by the supervisory organization in the sense of revised Art. 43a FINMASA is a requirement for granting the FINMA license, Art. 103 (2) FinSO also stipulates that, during the period in which portfolio managers and trustees are not officially licensed by FINMA (due to the fact that no supervisory organization has yet been appointed or the corresponding transitory provisions are still in place), such portfolio managers and trustees will nevertheless qualify for consideration as professional clients as if they had already been granted such a licence from FINMA. The sole requirement for this qualification is that the portfolio managers and trustees in question are affiliated to a self-regulatory organization in accordance with Art. 24 Anti Money-Laundering Act (AMLA) for purposes of compliance with this Act and are registered with the Registry of Commerce.

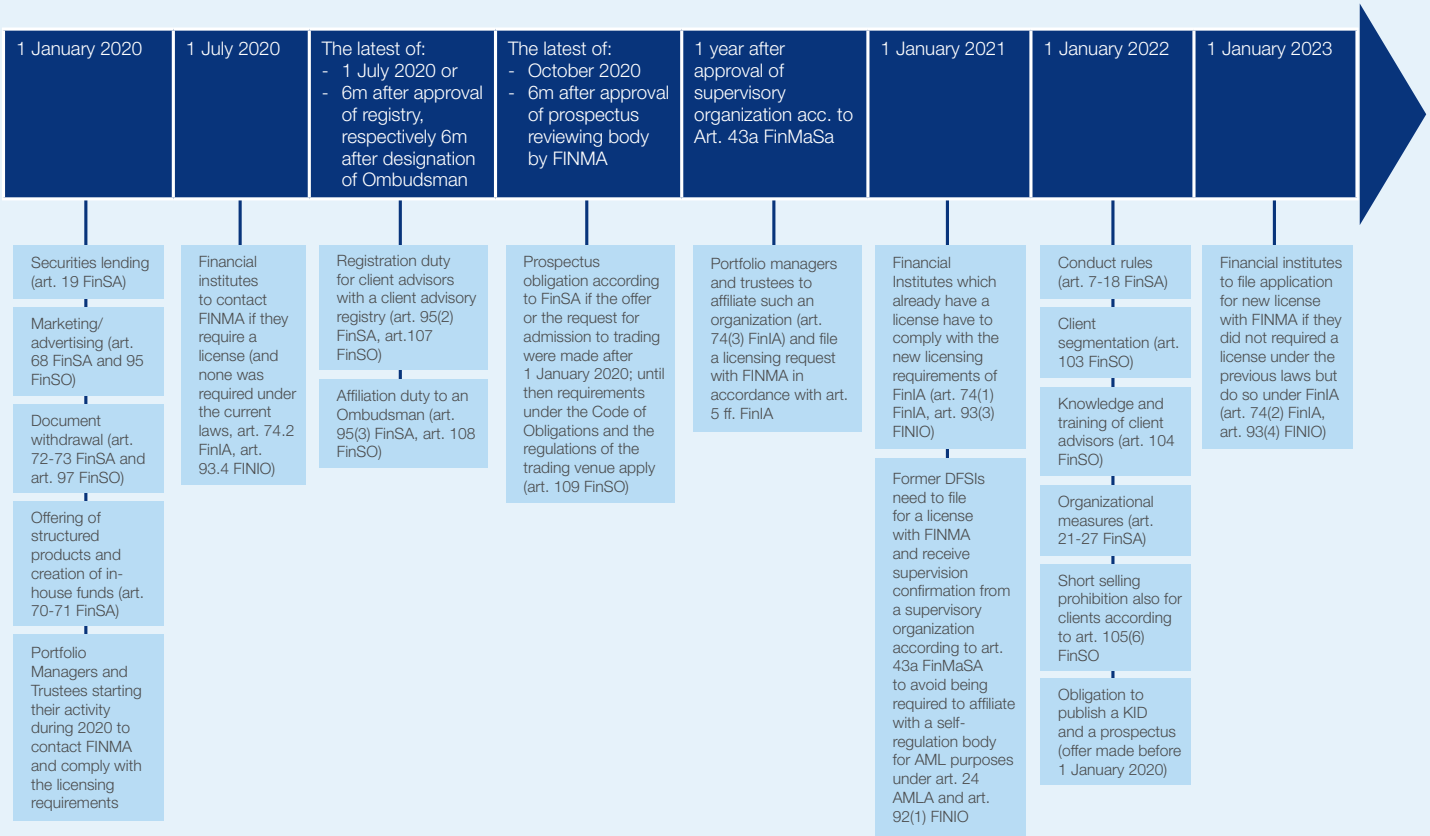
Independent asset managers previously had two alternatives: a) be supervised by a self-regulatory organization for AML supervision or b) be directly supervised by the FINMA. Those who selected option b) and were directly subordinated financial intermediaries to FINMA (DSFI), will have to change this status and be supervised by a supervisory organization in the sense of revised Art. 43a FINMASA given that the FinIA will cancel this option and all financial intermediaries will be obliged to become affiliated with a separate supervisory organization. The corresponding supervision can cover both, supervision of compliance with the overall regulations and compliance under the AMLA.

During the period between the entry into force of the FinSA and the FinIA and the approval of the supervisory organization in the sense of revised Art. 43*a* FINMASA by the FINMA, so-called DSFI will not be obliged to affiliate any self-regulatory organization in the sense of Art. 24 AMLA if they get confirmation of supervision by the supervisory organization in the sense of revised Art. 43*a* FINMASA and file for a licence with the FINMA by 1 January 2021.

Other financial intermediaries that still qualify under Art. 2 (3) AMLA (like for instance investment advisors who execute transactions or financial intermediaries who provide securities depository services), will have to affiliate to a self-regulatory organization exclusively for the purposes of compliance with AMLA in the sense of Art. 24 AMLA or alternatively be entitled to be supervised by a supervisory organization in the sense of revised Art. 43a FINMASA if certain conditions are met (Art. 14 (2) revised AMLA).

3. Overview of Transitory Provisions

The following table provides a high-level overview of the transitory provisions of the FinSA and the FinIA, as detailed by the respective ordinances. It has to be born in mind that the Federal Council has the option, in certain cases, of making changes to transitory provisions at a later date.



4. Future regulation and Further Implementing Provisions by FINMA

It is expected that the FINMA will issue implementing technical provisions, for instance by updating its Anti-Money Laundering Ordinance and Collective Investment Schemes Ordinance and/or issuing and updating circulars. According to FINMA the consultation on these provisions will take place during the first quarter of 2020.