

Update

Newsflash May 2019

Trustees under the New Swiss Financial Institutions Act

On 15 June 2018, the Swiss Parliament adopted the new Swiss Financial Institutions Act ("FinIA" or the "Act") and the new Swiss Financial Services Act ("FinSA"). The new legislation which is expected to enter into force on 1 January 2020, will have a significant impact on Swiss and foreign trustees active in Switzerland. This newsflash summarizes certain key points of the new legislation that will affect trustees.

1. Current Regime

Under the current regime, trustees are supervised, as financial intermediaries, only in relation to their compliance with anti-money laundering obligations. The Anti-Money Laundering Act ("AMLA") obliges financial intermediaries, including trustees, to register with a self-regulatory organisation ("SRO") or submit to the direct supervision of the Swiss Financial Market Supervisory Authority (FINMA), which oversees trustees' compliance with anti-money laundering obligations. Apart from this affiliation, at present, no authorisation or licensing requirements apply to trustees.

2. New Regime

Once FinIA enters into force, Swiss trustees and foreign trustees active in Switzerland must obtain FINMA authorisation to carry out their activities. The act introduces a "split supervision" for trustees, exercised by FINMA and supervisory organisations ("SO") that will have been authorised by FINMA.

FINMA will be in charge of granting trustee licenses and will also be empowered to impose sanction and revoke licenses. However, FINMA will not be responsible for the day-to-day supervision of trustees – this will be entrusted to SOs. There will likely be several authorised supervisory organisations as some of the existing SROs will apply for such status in order to supervise trustees that are currently affiliated to them.

Under this new regime, FINMA will cease its direct supervision of financial intermediaries as regards compliance with the AMLA.

3. Scope

FinIA defines a "trustee" as "a person who on a professional basis manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose based on an instrument creating a trust within the meaning of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition."

The definition refers to trusts and not companies or foundations. Mere directorship or corporate administration services therefore do not fall within the scope of FinIA.

The "professional basis" criterion will be defined in more detail in the implementing ordinance. The draft ordinance refers in this respect to the tests applied in order to assess whether a financial intermediary is subject to the AMLA, namely:

- (i) gross turnover exceeding CHF 50'000 per year;
- (ii) business relationships with more than 20 contracting parties;
- (iii) power to dispose over third party assets with the valuation exceeding CHF 5 million; or
- (iv) transactions with a total volume of over CHF 2 million per year.

4. PTC

FinIA contains some exemptions. One of them provides that trustees who exclusively hold or manage the assets of persons with whom they have "family ties" are not subject to the Act and therefore do not require a license. Certain family offices and private trust companies may be covered by this exemption.

However, the definition of "family ties" as proposed in the draft ordinance is restrictive. In order to benefit from the exemption, the PTC or family office should –ultimately – be controlled by members of a single family who are the beneficiaries of the relevant trusts. In practice, many PTCs and family offices may therefore not be able to rely on this exemption.

The ordinance, which is expected to be published in November, should provide for further clarification and hopefully for an extension of the scope of the exemption.

5. Requirements

FinIA sets out the requirements which Swiss trustees must meet in order to obtain a license from FINMA. These standards are generally in line with those already in place for Swiss regulated financial institutions, including in particular:

- › The place of effective management of Swiss trustees must be in Switzerland;
- › Swiss trustees may only adopt certain legal forms (e.g. corporation);
- › Swiss trustees must comply with the minimum capital requirement of CHF 100'000;
- › Trustees should maintain an adequate collateral or professional liability insurance;
- › Trustees must always have a minimum eligible equity equal to one quarter of their fixed annual costs;
- › Trustees have to implement appropriate risk management and internal control mechanisms depending upon the size of the business;
- › Trustees must comply at all times with the proper business conduct requirement - this obligation applies not only to the trustee but also to its directors, managers and qualified participations;
- › At least two of the trustee's directors or managers must have proper experience and qualifications.

6. Foreign Trustees

Foreign trustees, which are active in Switzerland, may also fall within the scope of FinIA.

A foreign trustee falls within the scope of the Act if it exercises its business predominantly in or from Switzerland. This would for example be the case if a foreign trust company is managed and controlled out of Switzerland.

Representative offices of foreign trustees in Switzerland will be subject to a new authorisation regime. Similarly, the setting up by a foreign trustee of a Swiss branch or representative office also requires a prior authorization from FINMA. FINMA will only grant such authorization if the applicant can demonstrate that it

- (i) is properly organised to operate its business;
- (ii) has sufficient financial resources; and
- (iii) has personnel who are qualified to operate a branch office in Switzerland.

The foreign trustee will also need to demonstrate that it is subject to appropriate supervision in its home jurisdiction and that this supervisor does

not object to the establishment of the branch office.

The granting of an authorisation to a foreign trustee to establish a Swiss branch may be contingent upon Switzerland receiving certain assurances from the jurisdictions in which the foreign trustee or the foreigners holding a qualified participation in such foreign trustee have their seat or residence.

7. Delegation

FinIA provides that the trustee should have an "appropriate" organisation. A trustee may delegate activities (e.g. administration, compliance, accounting) but it should at all times ensure that it has sufficient human resources and technical know-how, necessary to properly elect, instruct and supervise third party agents. Certain activities can only be delegated to third parties that themselves have a trustee license.

Trustees will therefore need to review their current organisation and delegation or outsourcing arrangements they have put in place, to ensure that they comply with the new regime.

8. Timing

FinIA is expected to enter into force on 1 January 2020. The implementing ordinance is expected to be published in November of this year. Existing trustees will need to notify FINMA of their intention to apply for a license before **30 June 2020**. Within the same time frame, existing representative offices of foreign trustees will have to notify FINMA of their existence, with a three year transitional period to obtain an authorisation as representative office of a foreign trustee. They will then have until 31 December 2022 to register with a SO, comply with statutory requirements and apply for a license from FINMA. During such period, trustees may continue to provide trustee services, provided they remain registered with a SRO for AMLA compliance purposes.

Trustees starting business operations within one year from the entry into force of FinIA must notify FINMA and immediately comply with the licensing requirements. They will however have until one year after the recognition of a SO to become affiliated with one and apply for a license with FINMA. In the meantime, they may continue their business pending licensing provided they remain affiliated with a SRO for AMLA compliance purposes.

Swiss and foreign trustees would be well advised to assess whether they fall within the scope of FinIA. If so, they will need to take the appropriate steps to ensure compliance with the license requirements. As mentioned above, the license requirements impose various financial and organizational obligations on the trustees. The Act and the draft ordinance provide for rather strict requirements which are not always well adapted to the specific features of the trustee business. The final implementing ordinance will hopefully provide further clarifications for trustees.

Similarly, foreign trustees are advised to assess whether their activities conducted in or from Switzerland qualify as a branch or a representative office.

Finally, in relation to FinSA, we note that trustee services are not financial services as defined under FinSA. As a result, as long as trustees only provide trustee services, they do not need to comply with the rules of conduct and the organizational requirements applicable to financial service providers as set forth in FinSA. However, should a trustee, beside its activities as a trustee, provide financial services as defined in Article 3 lit. c FinSA (e.g. investment management services, investment advice), then the provisions of FinSA will also apply to such trustee.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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