

Update

Newsflash November 2019

Relevant changes for trustees in final ordinance of the Financial Institutions Act

On November 6, 2019, the Swiss Federal Council adopted the final version of the implementing ordinance of the Swiss Financial Institutions Ordinance ("FinIO"). The final version of the FinIO contains various relevant changes for trustees compared to the initial draft ordinance, which was published on October 24, 2018.

1. Introduction

On June 15, 2018, the Swiss Parliament adopted the new Swiss Financial Institutions Act ("FinIA" or the "Act") and the new Swiss Financial Services Act ("FinSA"). For an overview of the key features of the new legislation regarding trustees, we refer to our [Newsflash of May 2019](#).

On October 24, 2018, the Swiss Federal Financial Department ("FFD") published draft implementation ordinances to FinIA and FinSA as part of the formal consultation process involving the Swiss finance industry. The consultation ended on February 6, 2019. The FFD received many submissions, which led to several amendments to the implementing ordinances. On September 9, 2019, the FFD published a list of key amendments to the draft FinIO (see also our [Newsflash of September 2019](#)).

On November 6, 2019, the FFD published the final version of the implementing ordinances of both FinIO and FinSO as adopted by the Swiss Federal Council. These ordinances will enter into

force on January 1, 2020 together with the FinIA and FinSA. The purpose of this Newsflash is to provide a summary of the changes made in the final implementing ordinance to FinIA compared to the version published last year for consultation and which are relevant to Trustees.

2. 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 specified purposes based on an instrument creating a trust within the meaning of the Hague Convention of July 1, 1985 on the Law Applicable to Trusts and on their Recognition.

The "professional basis" criterion is defined in the implementing ordinance. According to the final implementing ordinance, a trustee is acting on a professional basis if the trustee meets any of the two following criteria:

- (i) has a gross turnover exceeding CHF 50'000 per year; or
- (ii) has business relationships with more than 20 contracting parties.

The criterion that trustees who execute transactions with an aggregate value of over CHF 2 million per year are acting on a professional basis no longer appears in the implementing ordinance.

The revised, more narrow, definition of acting on a "professional basis" may in practice be relevant for private trust companies ("PTCs").

3. Family Offices and PTCs

Swiss and foreign trustees acting on a professional basis in Switzerland must now obtain a license to carry on their activities. However, FinIA contains some exceptions. One exemption 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.

The initial draft of the implementing ordinance contained a narrow exception for family offices and PTCs and it was unlikely that many family offices and PTCs would be able to benefit from the exemption. The final implementing ordinance contains several welcome amendments which, together with the revised criterion for acting "on a professional basis" as mentioned above, offer more opportunities for family offices and PTCs to be exempted from the scope of FinIA.

Firstly, the definition of persons between whom family ties exist was amended. In the initial draft of the implementing ordinance, the definition referred to relatives in a collateral line up to the third degree. This was widened in the final version of the implementing ordinance to relatives in a collateral line up to the fourth degree, which includes cousins.

Secondly, the initial draft of the implementing ordinance required that the family office or PTC was ultimately controlled by family members. A typical PTC ownership structure, whereby the shares of the PTC are owned by a purpose trust or foundation, was therefore not covered by the exemption. The final version of the implementing ordinance now provides that the family ties exemption also applies if the trustee, who administers assets for a family, is directly or

indirectly controlled by a trust or foundation that was established by a family member. We do note that if the PTC is ultimately controlled by a (purpose) trust it should be assessed if the trustees of such (purpose) trust require a license under FinIA.

Thirdly, under the initial draft of the implementing ordinance the family ties exemption would not apply if a trust, apart from family members, included charities as potential beneficiaries. The final version of the implementing ordinance now confirms that having charities as beneficiaries does not affect the applicability of the exemption.

Lastly, under the final version of the implementing ordinance, FINMA may exempt trustees, at their request, from obtaining a trustee license, if they meet the following requirements:

- (i) The trustee is a trust company owned and supervised by a trustee that holds an authorisation from FINMA to act as trustee; and
- (ii) The trustee only acts as trustee of trusts which have been created by the same person or have been established for the benefit of the same family

This exemption covers the so-called "dedicated trust companies" and was not included in the initial version of the implementing ordinance.

4. Qualified Directors

One of the requirements which Swiss trustees must meet in order to obtain a license from FINMA is that at least two of the trustee's directors or managers must have proper experience and qualifications. The initial draft of the implementing ordinance was much criticized in this respect, as it required that qualified directors had the same level of experience and qualifications as auditors that effect audits of trustees.

The final version of the implementation ordinance contains a different and clearer test. Essentially, a qualified director meets the requirements concerning experience and qualifications, if:

- (i) he or she has a minimum experience of 5 years in the field of trusts; or
- (ii) he or she has had relevant training of at least 40 hours in the field of trusts.

5. Other

The final version of the implementing ordinance corrects and clarifies various other issues that were identified during the consultation phase. It contains for example more precise rules regarding the delegation to third parties and the provision, which stated that trustees could no longer opt-out from a limited audit, was deleted. Certain thresholds were also amended. For example, trustees with annual gross proceeds of less than CHF 2 million do not need to appoint an independent risk manager. In the initial draft of the implementing ordinance, the threshold was set at CHF 1.5 million.

Another point, which was much criticized, namely the obligation for trustees to affiliate to a mediation body has been dealt with separately. On March 22, 2019, the FFD published draft legislation relating to Fintech and as part thereof, it proposes to amend art. 16 FinIA so that the obligation to affiliate to a mediation body will no longer apply to trustees. The implementing ordinance confirms this by stating that only financial institutions that provide financial services (which does not include trustees) should, within 6 months after a mediation body has been approved by FINMA, apply to such mediation body for affiliation.

6. Timing

The Swiss Federal Council has confirmed that both FinIA and FinIO enter into force on January 1, 2020. Existing trustees will need to notify FINMA of their intention to apply for a license before June 30, 2020. They will then have until December 31, 2022 to affiliate to a Supervisory Organization, comply with the statutory requirements and apply for a license from FINMA. During such period, trustees may continue to provide trustee-services, provided they remain affiliated to a Self-Regulatory Organization for anti-money laundering compliance purposes.

Swiss and foreign trustees are well advised to assess whether they fall within the scope of FinIA. If so, they will need to take the necessary steps to ensure compliance with the license requirements. As mentioned in our [Newsflash of May 2019](#), the license requirements impose various financial and organizational obligations on trustees.

The main changes between the final version of the implementation ordinance and the initial draft of the implementation ordinance concern the family ties exemption. PTCs and family offices are therefore well advised to assess whether they, based on the wording of the final implementation ordinance, fall within the scope of the FinIA or if they can rely on an exemption.

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.

Your contacts

Geneva / Lausanne

Mark Barmes
mark.barmes@lenzstaehelin.com
Tel: +41 58 450 70 00

Leonard Vijverberg
leonard.vijverberg@lenzstaehelin.com
Tel: +41 58 450 70 00

Zurich

Stefan Breitenstein
stefan.breitenstein@lenzstaehelin.com
Tel: +41 58 450 80 00

Alexander Greter
alexander.greter@lenzstaehelin.com
Tel: +41 58 450 80 00

Our offices

Geneva

Lenz & Staehelin
Route de Chêne 30
CH-1211 Genève 6
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Zurich

Lenz & Staehelin
Brandschenkestrasse 24
CH-8027 Zürich
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

Lausanne

Lenz & Staehelin
Avenue de Rhodanie 58
CH-1007 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com