



New Regulations for Trustees and Family Offices

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Key Take-aways

- 1.** With the Financial Institutions Act (FinIA), which came into force on 1 January 2020, trustees and independent asset managers are now subject to an authorisation requirement and supervision.
- 2.** The new regulation affects trustees and asset managers who carry out their activities on a professional basis in or from Switzerland for persons without family or economic ties.
- 3.** Existing trustees and asset managers must report to FINMA by 30 June 2020 and must meet the legal requirements by 31 December 2022.

1 Overview

In contrast to other financial centres, trustees and so-called independent or external asset managers in Switzerland have so far not been subject to any authorisation requirement or specific supervision but only had to comply with the provisions of the Anti-Money Laundering Act (**AMLA**). With the entry into force of the Financial Institutions Act (**FinIA**) and the associated Financial Institutions Ordinance (**FinIO**) on 1 January 2020, this has changed fundamentally. In an effort to increase the competitiveness of the Swiss financial market by aligning the Swiss legal framework with European legislation (in particular with the MiFID II regulatory framework) and to improve client protection, the parliament has enacted **new regulatory requirements** for asset managers and trustees. In addition, the provisions of the AMLA continue to apply. This newsletter summarizes the new regulation introduced by FinIA and FinIO and shall provide an overview of the effects it has on trustees and family offices.

The Financial Services Act (**FinSA**), which also came into force on 1 January 2020 and which sets out provisions relating to the conduct and the organisation of financial service providers, is not covered by this newsletter. In this regard, reference is made to Schellenberg Wittmer's newsletters of January and February 2019. However, please note that **FinSA** does not apply to trustees, but it does apply to family offices.

2 New authorisation requirement and supervision

Trustees and independent asset managers henceforth require **FINMA's authorisation** to carry out their activities in Switzerland. In order to obtain an authorisation, trustees and asset managers must meet various **personal, financial and organisational requirements** (cf. Section 4).

Ongoing compliance with the regulatory requirements after granting of an authorisation will be overseen by **supervisory organisations (SOs)** set up by the respective industry sector and authorised by FINMA. Besides ensuring compliance with the regulatory requirements of FinIA, the SOs will also oversee compliance with the due diligence obligations under the AMLA. The SOs are not state but private bodies and have no power to issue any orders. Such power lies exclusively with FINMA.

3 Trustees and family offices in scope

FinIA and FinIO regulate the activities of trustees and asset managers who carry out their activity (1) on a **professional basis**, (2) **in or from Switzerland** and (3) for persons with whom they do not have any **family or economic ties**.

3.1 Professional activity

The activity carried out by trustees and asset managers is deemed professional if, on a yearly basis, they:

- i. earn a gross income of **more than CHF 50,000**; or
- ii. establish or maintain **business relationships with more than 20 contractual parties**, which are not limited to a single activity; or

- iii. have control over third-party assets for an unlimited period exceeding the amount of **CHF 5 million** at any time.

For trustees and family offices it is important to note that:

- the **activity for persons with economic or family ties** (cf. below) is **not taken into account** for the assessment of these thresholds;
- the threshold which had been included in the draft ordinance, according to which service providers with a total transaction volume of more than CHF 2 million annually are per se considered to act professionally, has been dropped.

Foreign trustees may be subject to the new regulation.

3.2 Professional activity carried out in or from Switzerland

FinIA and FinIO are applicable to trustees and asset managers who operate in or from Switzerland. The **location of the registered office or domicile** of the service providers and the location of the assets under management are thus **not the primarily decisive factors**. A service provider (formally domiciled abroad) may be considered a domestic trustee or asset manager for regulatory purposes if, based on the overall circumstances, it is established that it is in fact **managed in or directed from Switzerland**. As a domestic financial service provider, it must therefore meet all the requirements under FinIA.

Also trustees and asset managers who do not carry out activities in or from Switzerland within the meaning of FinIO and who do therefore not qualify as domestic but as **foreign financial service providers**, will be subject to an **authorisation requirement** if:

- a **branch** exists in Switzerland which employs individuals, who on behalf of the foreign financial service provider, either manage assets or act as trustee on both a permanent and professional basis;
- individuals are active for them in any other manner on a permanent and professional basis in Switzerland and, for example, forward mandates to them, so that these persons are deemed **representatives** within the meaning of the law.

However, the **authorisation requirements for foreign trustees and asset managers** with Swiss branches or representatives are **less extensive** than those for domestic trustees and asset managers.

If, on the other hand, the activity of a foreign financial service provider consists solely in the offering of its services from abroad on a cross-border basis (so-called cross-border

activity), no Swiss authorisation is required.

Furthermore, a Swiss-domiciled person's power to remove the trustee or such person's veto power in relation to the trustee's investment or distribution decisions (e.g. as protector) does not lead to an application of FinIA.

3.3 Exemption from the authorisation requirement in case of economic or family ties

Trustees and asset managers who exclusively manage the assets of persons to whom they have **economic or family ties** are exempt from supervision and the authorisation requirement under FinIA.

An **economic tie** exists between companies or entities in a group insofar as group members provide financial services or services as trustee or asset manager for other companies or entities within the same **group**, meaning in particular services provided between parent, subsidiary and sister companies.

A **family tie** in particular exists in cases where the trustee or asset manager manages assets for relatives, related by blood or marriage, in lineal kinship or up to the **fourth degree** in collateral kinship. This includes amongst others spouses, registered partners, cohabiting partners and cousins. Also a legal entity can have family ties in the sense of FinIA and FinIO if it exclusively manages the assets of persons who are linked to one another by family ties and if the legal entity is controlled directly or indirectly by:

- third parties who also have respective family ties; or
- a trust, foundation or similar legal structure established by a person with respective family ties.

It is furthermore of **practical relevance** that the family ties are not lost by the fact that alongside individuals/legal entities with family ties also institutions with a public or charitable purpose are benefitting.

In light of the above, many **private trust companies** and **family offices** are likely to be exempt from the authorisation requirement under FinIA and FinIO due to family ties:

- A **Private Trust Company (PTC)** which manages the assets of a family as a trustee is considered to have family ties if it is directly or indirectly controlled either by family members or by a legal structure (typically by a so-called purpose trust) which is itself established by a person with family ties.
- A family member's activity for his family's **Family Office** and the administration of a Family Office by employees will qualify as an activity for a person with family ties, if the Family Office is controlled by family members. While Single Family Offices are thus regularly exempted from the scope of FinIA and FinIO, Multi Family Offices fall within the scope of FinIA (and FinSA).

Finally, it should be noted that a trustee may be exempted from the authorisation requirement if (i) it is held and supervised by a FINMA licensed trustee and (ii) it acts exclusively as a trustee for trusts established by the same person or for the benefit of the same family (e.g. managed or dedicated trust companies).

4 Authorisation requirements

In order to obtain an authorisation, asset managers and trustees administered in or from Switzerland must meet various requirements. In particular, they must:

- have an adequate **organisation** including **risk control** with respect to legal and reputational risks and guarantee proper management; these compliance responsibilities must be performed by a qualified director or employee or delegated to a qualified external body;
- provide evidence that they are supervised by an **SO**;
- be **registered in the Commercial Register** as sole proprietorship, commercial enterprise or cooperative;
- have a management consisting of at least **two qualified persons** having joint signature power at two, **five years of professional experience** as well as **40 hours of training** in the field of trust or asset management;
- be able to be represented by a **Swiss resident person**;
- have a **minimum capital** of CHF 100,000 and at all times own funds amounting to at least one quarter of the fixed costs of the last annual financial statement, but at the maximum CHF 10 million;
- have adequate **collateral** or provide for **professional liability insurance**.

5 Required action for trustees and family offices

Existing trustees and asset managers affected by the new authorisation requirement must notify FINMA by **30 June 2020**. **By 31 December 2022** they must comply with the legal requirements and submit a formal authorisation application to FINMA, which must contain the information and documents listed in Art. 9 FinIO. Trustees or asset managers may continue their activity until the decision of FINMA on the authorisation, provided the trustee or asset manager remains affiliated to a self-regulating organisation according to the AMLA.

New trustees and asset managers must notify FINMA **immediately** and must meet the authorisation requirements from the start of their activities, but are exempted from the obligation to affiliate with a SO as long as no SOs exist.



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