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FINSA/FINIA – New Regulation for Foreign Trustees in Switzerland

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In the light of the international trends to regulate and supervise financial services and its providers (MiFID II, Prospectus Directive, PRIIP), the Financial Services Act (FINSA) and the Financial Institutions Act (FINIA) entered into force in Switzerland on January 1, 2020.

The new Swiss regulation introduces prudential supervision for asset managers and trustees who have only been subject to AML regulation in Switzerland until now.

Foreign trustees will also be affected by the FINSA/FINIA if they engage in activities in Switzerland. This article provides a high-level outline of the new regulatory playing field for foreign trustees in Switzerland.

I. Background

The FINSA and FINIA make part of the new Swiss financial market architecture, which aims at increasing customer protection in the financial market.

The FINSA provides cross-sector rules for offerings of financial services and distributing financial instruments. In material terms, the provisions are equivalent to the respective EU directives (MiFID II, Prospectus Directive, PRIIPs). Financial

service providers are required to provide their customers appropriate explanations and advice (and will have to document such). However, FINSA does not apply to trustees who are only providing trust services as defined in Art. 17 para. 2 FINIA, because such services are not financial services for the purposes of FINSA.

The FINIA sets forth a revised supervisory regime for financial institutions, now including professional trustees. The supervision will be exercised by one or more supervisory organizations, which are independent from but authorized by the Swiss Financial Market Authority ("FINMA").

The core changes affect trustees in the following areas:

- *Prudential supervision*
- *Organizational requirements*
- *Internal control system*
- *Minimal capital requirements*

II. What activities are in scope of the new Swiss regulation?

Switzerland does not (yet) have its own substantive trust law. Thus, the Swiss financial regulation refers to the definitions of the Swiss international private law in order to qualify a trustee who is subject to Swiss regulation:

A trustee is a person who, on the basis of a trust deed of a trust according to the Hague Convention on the Law Applicable to Trusts and on their Recognition (1 July 1985; SR. 0.221.371) manages or disposes of assets

professionally for the benefit of beneficiaries or for a particular purpose (Art. 17 para 2 FINIA).

Trustees are subject to the FINIA, if they are pursuing a commercial activity (Art. 3 and 17 FINIA). The FINIO specifies that this is the case if a trustee (Art. 19 FINIO):

- *generates gross earnings over CHF 50'000 per year,*
- *enters into or maintains more than 20 business relationships with counterparties per year, or*
- *has permanent power of disposition of third-party assets exceeding CHF 5 mil at any time.*

III. When does the new Swiss regulation affect a foreign trustee?

A Swiss licensing requirement arises if a trustee is active in Switzerland by (i) formally registering a business in Switzerland (ii) or in fact operating a branch or representative office in Switzerland. We discuss below two additional scenarios where Swiss regulation should be considered as well.

a) Swiss branch (Art. 52 et seq. FINIA)

For the purposes of FINIA, trustees with their registered domicile outside of Switzerland are deemed having established a branch and require a license if they engage staff who, permanently and commercially, are performing the activities of a trustee, transact business or manage accounts on behalf of the foreign trustee.

Renting offices and employing staff on a permanent basis are strong indicators of a branch. On the other hand, auxiliary services or only very limited powers (e.g. the power to replace the trustee or veto powers in relation to investment management decisions) will not trigger a licensing requirement under the FINIA.

b) Representative office (Art. 58 FINIA)

For the purposes of FINIA, foreign trustees are deemed having established a representative office and require a license if they engage staff who, permanently and commercially, process client orders or represent the foreign trustee for promotional or other purposes.

c) Foreign trustee managed and controlled out of Switzerland (Art. 76 para. 2 FINIO)

A foreign trustee is considered a domestic trustee if it is managed and controlled ("geleitet", Art. 10 FINIA) out of Switzerland or if it is transacting business exclusively or predominantly out of Switzerland. In such a scenario, the foreign trustee must be incorporated pursuant to substantive Swiss law and will be subject to regulation as a Swiss trustee.

d) Sporadic activities in or into Switzerland?

A relationship manager of a foreign financial services provider is obliged to register with FINMA, if he is active in Switzerland for a very limited number of days (e.g. for a road show or client visits)

or if he is serving clients in Switzerland from abroad (Art. 28 FINSA).

As mentioned above, trust services are not considered financial services for the purposes of the FINSA. Arguably, therefore, sporadic activities in or into Switzerland on behalf of foreign trustees do not require registration with FINMA. However, where the activities are not limited to trust services and do qualify as financial services, also employees of foreign trustees are required to register.

IV. What are the requirements?

a) Swiss branch (Art. 53 FINIA)

Organizational requirements of the foreign trustee (Art. 53 lit. a FINIA):

The foreign trustee must (i) be sufficiently organized, have appropriate financial resources and qualified personnel. Furthermore, (ii) it must demonstrate that it is subject to appropriate (foreign) supervision, which includes the branch itself, and (iii) make sure that the name of the branch is available in the Swiss cantonal commercial register.

Regulatory requirements of the foreign trustee (Art. 53 lit. b FINIA):

FINMA partially relies on the foreign supervisory authority of the foreign trustee. Accordingly, the foreign supervisory authority must (i) not object to the establishment of the Swiss branch, (ii) undertake to notify the FINMA about circumstances that may compromise the inter-

ests of the beneficiaries and (iii) generally grant the FINMA administrative assistance.

Organizational requirements of the Swiss branch (Art. 53 lit. c FINIA):

The branch itself must comply with the general licensing requirements set out in Art. 7 to 11 FINIA. These require inter alia that the trustee's management must be duly organized. The trustee must implement appropriate governance, including an effective risk management and control framework. Furthermore, the persons entrusted with the administration and management of the branch must warrant the proper conduct of the branch's business, must be in good standing and provide the professional qualifications required for the function.

It is further worth noting that the license for a branch of a foreign trustee is depending on a security or collateral (Art. 56 FINIA).

b) Swiss representative office

Standards for foreign trustees are lower when establishing a local representative office.

A license is granted if (i) the foreign trustee is subject to adequate local supervision, (ii) the competent foreign supervisory authority do not object to the establishment of the Swiss representative office and (iii) the persons entrusted with its management are in good standing and warrant proper conduct of business (Art. 53 lit. c FINIA).

V. Timelines

The law provides for a gracious transition period. Trustees that are already operating in Switzerland simply need to notify FINMA prior to 30 June 2020.

Thereafter, not later than 31 December 2023, the application must be submitted with FINMA. In the interim the trustee must be supervised by a self-regulation organization ("SRO") according to the Swiss Anti-Money Laundry Act. Notably, the option of a direct supervision by FINMA for AML purposes is no longer available.

In contrast, trustees who take up operations in Switzerland after 1 January 2020 must immediately notify FINMA and initiate the licensing procedure.

It is also worth noting that the submissions with FINMA can be made online via the FINMA Portal.

VI. Conclusion

The FINIA increases the regulatory and compliance burden for foreign trustees in Switzerland. However, the accomplishable standards allow even very small trustees to meet the regulatory expectations of the FINIA in time.

On the upside, the new regulation offers more clarity. This is helpful, especially in a cross-border context, where expectations by the different competent regulators are sometimes difficult to align. A stringent operational setup (for example in respect to intra-group services) is key to minimize the administrative burden.

For trustees with presences in several jurisdictions, including Switzerland, the time is right to review the operational setup and trim it for the future. It is rec-

ommended to start with this strategic exercise now, so that the trustees can make the most of the transition period and submit a well-rounded application to FINMA ahead of time.

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