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# Supervisory Organisations: What can the supervised expect?

Since the beginning of 2020, trustees and independent portfolio managers must join a supervisory organisation (SO for short) for ongoing supervision. This is a consequence of the newly enacted Financial Institutions Act (FINIA), which we [reported on earlier](#). Both the supervisory regime and the SOs themselves are new, and thus there remain uncertainties and unanswered questions.

This article aims to answer the main questions about the ongoing supervision of SOs from the perspective of supervisees. To this end, Alithis has contacted OSFIN, one of the new SOs, to provide a first-hand account of what a supervisory organisation does.

Many questions about the new supervisory regime will only be answered over time and in practice. For supervised entities, on the other hand, they arise now, as they are confronted with the transition in light of the new supervision. Therefore, this article aims to provide answers to the following questions: What is a supervisory organisation? How does the supervision work? What can the supervisees expect?

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## Who needs to join a SO?

As of January 1, 2020, the new Financial Institutions Act (FINIA) has entered into force. As a result, the activities of trustees and portfolio managers will be subject to authorization and ongoing supervision. While FINMA issues the license, the SOs are responsible for ongoing supervision.

Every professionally operating trustee and portfolio manager must join an SO to obtain authorization from Swiss Financial Market Supervisory Authority (FINMA). A Trustee or portfolio manager is deemed to be operation on a commercial basis if it has assets of more than CHF 5 million at its disposal, enters into or maintains business relationships with more than 20

contracting parties or generates an annual income of more than CHF 50,000. The asset under management criterium, however, does not apply to trustees as per guidance from FINMA. The supervised parties can choose themselves which SO they would like to join.

### What is a SO?

SOs are organizations created by the above-mentioned amendment to the law and perform prudential supervision of trustees and portfolio managers.

In the case of affiliation with an SO, the SO is responsible for ongoing supervision and auditing of the supervised entities. FINMA, on the other hand, is responsible for the authorization and for any enforcement. FINMA is regularly informed by the SO regarding its supervised entities.

The SOs are not authorities, but organizations under private law, yet independent of the supervised parties. Switzerland has thus remained true to its tradition of dualistic supervision in the financial sector.

Until now, trustees and portfolio managers were supervised by self-regulatory organisations (SROs) and only with regard to money laundering legislation. The SOs replace the SROs in the supervision of financial institutions. At the same time, the field of supervision expands to include prudential supervision. An overview of the new obligations for trustees under FINIG is provided in [this article](#) by Alithis.

The first SOs were approved by FINMA in summer 2020. For this article, Alithis contacted one of the early SOs: OSFIN Financial Services Supervision Organisation.

### What does a SO do?

An SO supervises its members' compliance with financial market laws. In particular, these are the organizational, behavioural and due diligence obligations set out in the Financial Institution Act (FINIA), the Financial Services Act (FINSa) and the Anti-Money Laundering Act (AMLA).

The SO performs this supervision on an ongoing basis. The one-time authorization is the responsibility of FINMA. With regard to this authorization, however, the SO carries out a preliminary examination at the time of subordination to determine whether the authorization requirements are met.

### When the SO discovers deficits

The primary task of the SO is to determine whether a member is behaving in accordance with the law. If the SO determines that a supervisee is not complying with the law, the SO sets a deadline. By that time, the supervisee must remediate the deficiencies and return to compliance with the law.

If the SO's intervention remains unsuccessful, it cannot impose sanctions itself. In this case, the SO informs FINMA, which takes over the enforcement of the financial market laws. FINMA can then take action against the supervised party in its own proceedings and take the necessary

measures to restore the lawful state of affairs.

The SO thus acts as a buffer between the supervised parties and FINMA. Nevertheless, the SO remains a supervisory authority for the supervised parties.

### What the SO does not do

This constellation means that the SO is not responsible for certain tasks and therefore cannot perform them.

- **Legal advice:** An SO cannot advise its supervised parties on financial market law. In particular, it cannot answer questions as to whether a particular business model is permissible or whether a particular financial service provider is subject to licensing.

The decision-making authority for such issues lies with FINMA, and an SO cannot make legally binding judgments. For legal advice, financial institutions can turn to a compliance service provider such as Alithis.

- **Customer complaints:** Dissatisfied customers should contact the ombudsman office to which the relevant financial institution is affiliated. This, however, does not apply to trustees! An SO can take customer complaints as an opportunity to check whether obligations under financial market law have not been complied with. However, it cannot advise customers, nor is it responsible for enforcing claims for damages.
- **Technical responsibility:** The SO uses an online platform in its supervision (see below). However, this is op-

erated by FINMA, which is responsible for technical issues.

## How does the SO exercise its oversight?

Supervision is divided into two phases: in a first step, the one-time subordination to an SO takes place, which has as its goal the authorization of FINMA. The second step is ongoing supervision, which the SO performs mainly through periodic audits.

### One time subordination

If a trustee or portfolio manager wishes to apply for a license from FINMA, they must first submit to an SO. To do this, the financial institution registers on the online portal set up by FINMA: the Survey and Application Platform (EHP). On this platform, it must register and upload all required documents directly. Afterwards, it can issue a power of attorney to the SO of its choice so that it can view the documents.

The SO now checks whether all the requirements for subordination are met, i.e. whether the financial institution fulfils the legal requirements. The SO carries out a corresponding preliminary check. If the SO considers the requirements to be met, it subordinates the financial institution and issues a confirmation of subordination. With this confirmation, it can apply to FINMA for authorization. FINMA decides on this independently of the SO.

### Ongoing supervision

As soon as FINMA grants the license, the SO begins with the ongoing supervision. This includes, among other things, a duty

to inform on the part of the supervised party: if the information provided at the time of subordination changes, the supervised party must inform the SO accordingly. The most important instrument of ongoing supervision, however, are the periodic audits of the supervised entities.

### What do the periodic audits look like?

These audits are carried out regularly at the supervised entities (see below for the time intervals). In principle, an SO can carry out the audit itself or have it carried out by an audit firm. At OSFIN, supervised entities can select one from a list of approved audit firms.

#### Test criteria

The audits themselves generally follow a uniform scheme, but the SO may specify a particular audit focus. Audit criteria are basically all relevant financial market laws (for lawyers: in particular FINIA, FINSA, AML, possibly CISA). For example, the new requirements (by FINIA/FINSA) for the internal organization and the information duties towards the customer (e.g. regarding Kick-Backs, basic information sheet etc.) can be audited.

After the audit, the SO evaluates the audit report. In doing so, it may consult with the supervised party directly or with the audit firm and obtain further information. If deficiencies are identified, the SO sets a deadline for the supervised party to restore compliance with the law. If this deadline is not met, the SO informs FIN-

MA, which may initiate enforcement proceedings (see above).

#### Frequency of the audits

In principle, the audits cover the same criteria for all supervised entities, insofar as they are relevant. However, the audit periodicity is related to the risk of the business activity: The greater the risk, the more frequently the SO will initiate the audit.

For example, SOs will have an annual audit performed on all subordinates for the first two years. If these two audits do not reveal an increased risk, the audit periodicity can be increased to up to four years.

#### Risk criteria

An example of a typical risk criterion is the cross-border nature of a supervised entity's business model. For **trustees**, this means: Since a foreign connection is likely to be present in most cases, a classification in a higher risk category is to be expected. This also results in the probability of a correspondingly higher audit periodicity for trustees. According to OSFIN, however, it will only become clear in practice how the classification into the different risk categories will be made.

### How much effort does supervision impose on a supervisee?

The **time required** is difficult to estimate at this stage. For the approval and the first check, an increased effort is certainly to be expected, but over time the processes will settle in and the effort should decrease.

It is also difficult to make a general estimate of the **financial outlay involved**. In addition to the fees for the SO, there are also the costs of the audit firm, the ombudsman's office (not applicable to trustees), and the costs for FINMA to issue the license.

For orientation: Depending on the size of the supervised company, the one-time subordination with OSFIN costs between CHF 1,650 and CHF 4,650. The annual supervision fees after the subordination amount to CHF 1,200 to CHF 4,200, expenditure-dependent fees can be added.

## With whom does the SO share its results?

The primary communication platform is FINMA's online tool mentioned above, the EHP. This is where the supervised party uploads all documents relevant to supervision. The data, which may also include sensitive information about the company and its employees, is stored there in encrypted form. FINMA, the SO and the supervised party have access to this data. The latter must designate at least one person with authorization responsibility who has access to EHP.

The SO communicates only with FINMA and the supervised party, so it does not pass on any information to foreign supervisory authorities, for example. Conversely, however, it would be conceivable for an SO to investigate a matter concerning a supervised party based on information from abroad transmitted by FINMA

## What are a supervisee's obligations to the SO?

Key duties include:

- The obligation to report changes relevant to supervisory law;
- The duty to respond to inquiries from the SO related to supervision; and
- The obligation to undergo the periodic inspections.

### Contact OSFIN

If you have any questions about OSFIN, please contact:

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**OSFIN**

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