



Swiss Association
of Trust Companies

FinIA, FinSA and trustees: a few (important) clarifications

Certain misunderstandings and inaccurate information regarding the impact on trustees of the new regulatory regime introduced by the Financial Institutions Act of 15 June 2018 (“FinIA”), the Financial Services Act of 15 June 2018 (“FinSA”) and their implementing ordinances have been brought to the attention of the Swiss Association of Trust Companies (“SATC”).

The SATC would therefore like to clarify a few important points in that respect as follows:

1. Trustees not subject to FinSA

Trustees are not subject to the provisions of FinSA, unless they carry out an activity that is itself in scope of FinSA, in addition to their trustee activity. In particular, the management by a trustee of investments held in trusts under its administration does not represent an activity subject to FinSA.

This results unambiguously from the explanatory report of the Federal Department of Finance dated 24 October 2018 regarding the implementing ordinances, which states that, whilst the activity of a trustee falls within scope of the Anti-Money Laundering Act, it does not fall under the definition of “portfolio management” pursuant to article 3 letter c item 3 FinSA and is therefore not subject to FinSA (comments to article 13 draft FinIO, page 86 in the German version; comments to article 77 draft FinIO, page 106 in the German version).

This was confirmed by the Federal Department of Finance in its supplemental explanatory report on the implementing ordinances dated 6 November 2019, which was issued following the consultation on the draft ordinances (comments to article 21 draft FinIO, page 91 in the German version; comments to article 84 draft FinIO, page 110 in the German version).

2. Trustees not required to be affiliated with an ombudsman’s office (mediation body)

Pursuant to article 16 paragraph 1 FinIA, financial institutions have to be affiliated with an ombudsman’s office at the latest when starting their activity.

Neither the law nor the ordinance contain an express carve-out for trustees in respect of this obligation. However, article 16 paragraph 2 FinIA refers to the provisions regarding the ombudsman’s office contained under Title 5 FinSA. It is clear, based on both the systematic and the purpose of the law, that trustees who are not providing services subject to FinSA should not be subject to the obligation to be affiliated with an ombudsman’s office.

This has been recognized in the draft legislation on distributed ledger technology, which proposes to amend article 16 paragraph 1 FinIA so that only financial institutions providing services within the meaning of article 3 letter c FinSA have to be affiliated with an ombudsman’s office.

This legislation has been adopted by the Swiss Parliament last week, on Thursday 10 September 2020 (for further details, please see <https://www.linkedin.com/pulse/swiss-trustees-officially-required-affiliate-office-de-vos-burchart/?trackingId=o%2FIZzhRNRF%2BmG9HhoZVFpg%3D%3D>).

However, because this new legislation will not enter into force before 2021, it is not entirely clear whether trustees can already rely on it now.

This ambiguity has been very helpfully dissipated by FINMA, who confirmed that trustees do not need an affiliation with an ombudsman's office if they do not provide services subject to FinSA.

3. Criteria to assess if activity is carried out on a commercial basis

The criteria to assess whether trustees and portfolio managers are acting on a commercial basis (and therefore need a licence) are contained in article 19 FinIO, which provides that:

Portfolio managers and trustees are deemed to pursue their activities on a commercial basis and, within the meaning of anti-money laundering legislation, on a professional basis if they:

- a. thereby generate gross earnings of more than CHF 50,000 per calendar year;
- b. establish business relationships with more than 20 contractual partners per calendar year, each of which relationships is not limited to a once-only activity, or they maintain at least 20 such relationships per calendar year; or
- c. have unlimited power of disposal over assets belonging to others, which assets exceed CHF 5 million at any given time.

The first two criteria, i.e. the gross earnings of CHF 50,000 and the 20 business relationships per calendar year apply equally to portfolio managers and trustees.

However, the third criterion, i.e. the unlimited power of disposal over assets in excess of CHF 5 million, does not apply to trustees in respect of their trustee activity, because the assets they manage in that capacity are not "belonging to others", but are owned by themselves as trustees.

This is confirmed in the supplemental explanatory report of the Federal Department of Finance dated 6 November 2019 regarding the implementing ordinances, see comments to article 19, paragraphs 1 and 2 FinIO (page 90 in the German version).

Philippe de Salis, Chairman

Neuchâtel, 18 September 2020