

Factsheet for Trustees

Important Consequences for Trustees under FinIA and FinSA

The Financial Institutions Act of 15 June 2018 (“FinIA”), the Financial Services Act of 15 June 2018 (“FinSA”) and their implementing ordinances entered into force on 1 January 2020. Most of the requirements go into effect in January 2022. Financial Institutions therefore still have time to make their compliance arrangements during 2021.

While FinIA governs the requirements for financial institutions, FinSA seeks to protect the clients of financial services providers and to establish comparable conditions for the provision of financial services by financial service providers. Due to the uncertainties regarding the application of FinIA and FinSA to trustees, this factsheet comments on the questions STEP Zurich is frequently asked.

(1) Are trustees subject to FinSA?

FinSA does not apply to trustees provided they are only providing trustee services as defined in Art. 17 para. 2 FinIA – “A trustee is a person who on a commercial basis manages or holds a separate fund for the benefit of the beneficiaries or for a specified purpose based on the instrument creating a trust within the meaning of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition”. Thus, a trustee who manages investments held on trust under his administration is not providing a financial service for the purposes of FinSA.

However, if a trustee carries out additional activities that are in scope of FinSA, this trustee is subject to FinSA due to his provision of in-scope financial services.

The Federal Department of Finance states explicitly in its explanatory report 24 October 2018 (page 86) and its supplemental explanatory report on the implementation ordinances of 6 November 2019 (page 91; <https://www.news.admin.ch/news/message/attachments/58956.pdf>) that trustee activity does not fall under the definition of portfolio management according to Art. 3 (c) (3) FinSA.

(2) When is a trustee subject to FinIA?

Art. 19 FinIO stipulates the criteria to assess whether trustees are acting on a commercial basis and therefore subject to licensing requirements. Accordingly, trustees are deemed to pursue their activities on a professional basis within the meaning of anti-money laundering legislation if they:

- (a) Generate gross income of more than CHF 50,000 per calendar year; or
- (b) Establish business relationships with more than 20 contractual partners per calendar year, each of which is not a once-only activity, or they maintain at least 20 such relationships per calendar year.

A third condition of having unlimited power of disposal over assets in excess of CHF 5 million at any given time and assets belonging to others does not apply to trustees and their trustee activity. The Federal Department of Finance confirmed in its supplemental explanatory report of 6 November 2019 (page 90; <https://www.news.admin.ch/newsd/message/attachments/58956.pdf>), the third criterion does not apply to trustees, because the assets managed in the capacity of a trustee do not belong to others.

FINMA has confirmed this position in individual rulings obtained by trustees on a case-by-case basis.

(3) Are trustees required to affiliate with an ombudsman's office?

Article 16 paragraph 1 FinIA requires all financial services providers to be affiliated with an ombudsman by 25 December 2020. On 20 September 2020, Swiss Parliament adopted amendments FinSA and FinIA in connection with the ombudsman affiliation requirement. The ombudsman affiliation requirement will no longer apply to financial services providers serving solely institutional or professional clients. Financial institutions, such as trustees, providing no financial services whatsoever do not have to be affiliated with an ombudsman.

The Financial Market Authority (FINMA) confirms in its latest specialist information:

<https://www.sif.admin.ch/sif/en/home/dokumentation/fachinformationen/ombudsstelle.html>

that a supervisory authority will not enforce this requirement in the period from 26 December 2020 to 31 January 2021 to avoid a situation whereby a trustee must affiliate with an ombudsman, only to be released from this requirement a few months later. The referendum deadline for the limitation on the ombudsman affiliation requirement decided by Parliament shall be brought into force on the earliest possible date. The referendum deadline expires on 1 February 2021.

STEP Zurich Committee

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