



Franc assessment

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PROPOSED REFORMS TO REGULATION OF SWISS FINANCIAL INSTITUTIONS

UNDER THE INFLUENCE of European regulatory initiatives, notably the *Markets in Financial Instruments Directive*, Switzerland is remodelling regulation of its financial institutions.

On 4 November 2015, the Swiss Federal Council issued a dispatch to parliament regarding two new pieces of legislation, the draft *Financial Services Act* (FinSA) and the draft *Financial Institutions Act* (FinIA), which are likely to enter into force in 2018 or 2019. They aim to create a level playing field between Swiss and European financial institutions. It is hoped this will reinforce the reputation and competitiveness of Switzerland's financial centre, and enhance client protection. Following enactment of this legislation, independent asset managers and trustees, who currently carry out their activities unregulated (except regarding compliance with anti-money laundering legislation), will be subject to prudential regulation.

Although Swiss trustees have been calling for some form of prudential oversight of their activities for several years, the regulation of trustees within the ambit of the FinSA and the FinIA came as a surprise to part of the industry. Swiss authorities, largely unfamiliar and uneasy with the concepts of trust, common law and equity, had given up on the idea of regulating trustees, notwithstanding their significant presence in Switzerland, when they ratified the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (the Hague Trust Convention) in 2007.

NEW TRUSTEE AND FINANCIAL INSTITUTION REGIME

The draft legislation is currently under review by the Swiss parliament, so the final regulatory regime applicable to trustees and other financial institutions is still unknown. The main features of the new regulatory framework may, however, be outlined, as parliament should not profoundly alter them at this point.

The FinIA defines a trustee as 'a person who on a commercial basis manages or disposes of a separate fund for the benefit of a beneficiary or for a special purpose based on a restricted grant given namely in the instrument creating a trust within the meaning of the [Hague Trust Convention]';¹ and applies to those who have their registered office or place of residence in Switzerland.²

Departing from the current sectorial approach, the FinIA will introduce a regulatory pyramid, under which independent asset managers and trustees will benefit from the lightest regulatory framework, followed by collective asset managers, securities houses (the new denomination for securities dealers) and fund managers. At the top are banks, which remain governed by the 1934 *Federal Act on Banks and Savings Banks*.

Swiss trustees will be under a duty to request and obtain an authorisation in order to carry out their activities.³ They will also be required to:

- **take one of the following legal forms: sole proprietorship, commercial enterprise or cooperative;**⁴
- **be listed in the commercial register;**⁵ and
- **have adequate collateral or take out professional liability insurance.**⁶

The FinSA, meanwhile, sets out the requirement for client advisors to undergo basic training and continuing professional development, to perform a suitability or appropriateness review, or to comply with a series of organisational measures, which will apply to trustees insofar as they act as financial services providers. Financial services providers are defined as 'any persons who provide financial services on a professional basis in Switzerland or for clients in Switzerland';⁷ and a financial

service shall consist of any of the following activities carried out for clients:

- **acquisition or disposal of financial instruments;**
- **receipt and transmission of orders in relation to financial instruments;**
- **administration of assets (asset management);**
- **provision of personal recommendations on transactions with financial instruments (investment advice); and**
- **granting of loans to finance transactions with financial instruments.**⁸

Finally, client advisors of foreign trustees wishing to provide cross-border financial services in Switzerland will be obliged to join a register of advisors before carrying out their activities.⁹ Foreign trustees who wish to open a branch or representation office in Switzerland will need to request authorisation.¹⁰

FINAL DETAILS PENDING

Although the full extent and scope of the regulation is still being debated in parliament, and the details of the regulatory framework will be known only when the implementing ordinance is adopted, the requirement to obtain authorisation will very likely remain, as will the rules applicable to the provision of financial services. How this will affect or shape the way the industry carries out its activities remains to be seen.

¹ *Financial Institutions Act* (FinIA), article 16(2)

² *Ibid.*, article 17(1)

³ *Ibid.*, articles 2(1)(b) and 4(1)

⁴ *Ibid.*, article 17(1)

⁵ *Ibid.*, article 17(2)

⁶ *Ibid.*, article 19(1)

⁷ *Financial Services Act*, articles 2(1)(a) and 3(e)

⁸ *Ibid.*, article 3(d)

⁹ *Ibid.*, article 30

¹⁰ FinIA, articles 48 and 54



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