



PEAK REGULATION

FABIANNE DE VOS BURCHART REVIEWS HOW THE REGULATION OF TRUSTEES IN SWITZERLAND WILL AFFECT THE CROSS-BORDER PROVISION BY FOREIGN TRUSTEES OF SERVICES ON SWISS SOIL

FOR THE TIME being, the activities carried out by trustees on Swiss soil are not subject to any regulatory requirements, except compliance with anti-money laundering (AML) legislation.

However, the Swiss Federal Assembly (FA) adopted on 15 June 2018 two pieces of legislation that, on entry into force, scheduled for 1 January 2020, will bring about significant changes to the regulatory and supervisory framework of the country's financial market. One of these changes is that trustees will become prudentially regulated financial institutions.

This new denomination will affect not only Swiss trustees, but also foreign trustees active in Switzerland. What will this entail for the latter?

WHO IS A FOREIGN TRUSTEE?

The Swiss *Financial Institutions Act* (FinIA) defines a trustee as 'a person who manages or disposes of a separate fund for the benefit of a beneficiary or for a specified purpose based on the instrument creating a trust within the meaning of the Hague Trusts Convention'.¹ In other words, a trustee manages and disposes of a fund that is separate from their own assets and constitutes a trust under the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (Hague Trusts Convention), and does so for the benefit of either someone else or a cause.

In addition to the above, and in order to be subject to the upcoming regulatory framework, the trustee will have to carry out their activities 'on a professional basis' (by way of business). The FinIA provides that a trustee act on a professional basis from the moment their activity constitutes an independent economic activity that is designed to achieve regular income.²

A foreign trustee is a trustee (as defined above) located outside Switzerland, meaning they are either incorporated or domiciled abroad and have limited interactions with Switzerland.

'RELEVANT PHYSICAL PRESENCE' IN SWITZERLAND

Switzerland takes a fairly liberal approach to the exercise of regulated activities on its financial market by foreign institutions. Indeed, foreign institutions are subject to Swiss regulations only if they establish a 'relevant physical presence'³ on Swiss soil. By contrast, a foreign financial institution acting exclusively on an offshore basis is generally not subject to Swiss regulatory requirements.

Under the FinIA, a foreign trustee will be deemed to have established a relevant physical presence in Switzerland if they employ persons in Switzerland on a permanent and professional basis. They may do so by opening either a branch office or a representation office. Their physical presence in Switzerland will constitute a branch if the persons they employ carry out the activities of a trustee, conclude transactions or manage client accounts in their name. On the other hand, if the persons they employ act in another manner than as a branch, such as if the employees represent the foreign trustee for marketing purposes, it will constitute a representation office.

A foreign trustee wanting to establish a branch on Swiss soil will, as a rule, need to request and obtain an authorisation to do so from the Swiss Financial Market Supervisory Authority (FINMA). In addition, they will need to comply with a set of financial, personal, organisational and regulatory requirements, both at the foreign trustee and branch level. Finally, the foreign trustee's local supervisory authority should not object to the

establishment of a branch and will need to agree to collaborate with FINMA.

The FinIA provides for a lighter regulatory regime as regards the establishment of representation offices in Switzerland by foreign trustees. Although, as with a branch, the foreign trustee will need to request and obtain an authorisation from FINMA to open a representation office, the number of requirements they will need to comply with will be more limited, and the FinIA does not impose any regulatory requirements at the level of the representation office. Last, the consent and cooperation of the foreign trustee's local supervisory authority will, as for branches, also be required.

Altogether, it may be stated that the upcoming regulation of foreign trustees active on Swiss soil is a side effect of the regulation of Swiss trustees, the latter being something that the Swiss trust industry has requested ever since the country ratified the Hague Trusts Convention in 2007. However, due to the strong connections between the Swiss trust industry and foreign jurisdictions and legislations, stemming from the fact that Switzerland does not have its own trust law (as of yet – a motion for the adoption of a Swiss trust law was approved by the FA in April 2018), the enactment of the new regulatory and supervisory framework is likely to impact just as many foreign trustees as it does Swiss trustees.

¹ art.17 para.2 FinIA ² art.3 FinIA ³ See art.52 FinIA for branches and art.58 FinIA for representation offices.



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