

FINMA Guidance 01/2024

Status of the licensing process and supervision for portfolio managers and trustees, plus new approach to thresholds for the commercial activity of trustees

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1 Status of the licensing process

1.1 Latest figures

FINMA Guidance 02/2023¹ provided an initial assessment after the end of the transitional period. By the end of 2022, FINMA had received a total of 1,699 licence applications, 1,534 of which were from portfolio managers and 165 from trustees.

In 2023, FINMA received a further 78 licence applications from new entrants to the market, of which 70 were from portfolio managers and 7 from trustees, with one application for a dual licence.

By 31 December 2023, 1,195 licences had been granted to 1,187 institutions², of which 8 obtained a dual licence both as a portfolio manager and a trustee:

- Out of the 1,699 licence applications received by the end of 2022, 1,149 institutions were licensed (70%³; 1,085 portfolio managers, 64 trustees), of which 7 institutions were licensed both as portfolio managers and trustees; and
- out of the 78 licence applications received since the beginning of 2023, 38 institutions were licensed, with one institution licensed as both portfolio manager and trustee.

The fees for the licensing process levied by FINMA amounted to an average of CHF 6,411 per application. The amount charged reflects the time spent by FINMA in processing each application.

1.2 Features of the licensed population

The majority of licensed portfolio managers and trustees are microenterprises in the legal form of a société anonyme/Aktiengesellschaft (company limited by shares) with fewer than three full-time positions. The total assets under management of the institutions licensed at 31 December

¹ www.finma.ch > Documentation > FINMA Guidance

² For more details, please consult the following lists, which are updated regularly:

- the list of portfolio managers and trustees licensed by FINMA and monitored by a supervisory organisation, and
- the list of portfolio managers and trustees licensed and supervised by FINMA (domestic group companies under FinIA),

at www.finma.ch > Authorisation > Portfolio managers and trustees.

³ Including licence applications withdrawn by 31 December 2023.

2023 amounted to around CHF 216 billion,⁴ although there are large variations from one institution to another.

FINMA continues to monitor trends relating to the delegation of control functions, i.e. the second line of defence (risk management and compliance). When – for reasons relating to risks or the size of the institution – risk management and compliance need to be independent of revenue-generating activities, the trend continues: Overall, more than half of portfolio managers and trustees choose to implement this organisational requirement by delegating second-level control functions to external service providers. Historically, the majority of staff at these service providers has a legal background and is competent in the compliance field in particular. However, there is less experience and training in risk management and control, and also, know-how in relation to trusts is less common. While FINMA does not accredit or supervise external service providers, FINMA nevertheless is required to assess the organisation of every institution that is subject to authorisation. This includes the outsourcing of essential tasks as well as the delegation of control functions.

1.3 Update on confirmation of application status

The processing of applications submitted up to the end of 2022 that benefit from the transitional period will continue in 2024. Around 50 portfolio managers and trustees who submitted their application by the end of 2022, have therefore not yet received any notification from FINMA.

As a reminder: If an institution that is still affiliated to a self-regulatory organisation (SRO) has submitted its licence application to FINMA together with proof of its affiliation to a supervisory organisation (SO) before the end of the transitional period, it may continue to carry out its activities until FINMA has made a decision regarding the issuing of a licence.

As set out in FINMA Guidance 02/2023, institutions can generate a confirmation of the current status of their application on the survey and application platform (EHP) and download this in PDF format. This confirmation acts as proof for business partners that a licence application is being processed by FINMA.

1.4 Licence applications under review

As regards licence applications in the review process, FINMA notes that in 2023 institutions were sometimes slow in responding to its questions, with some institutions taking several months and needing to be reminded by FINMA. Moreover, the applications submitted at the end of 2022 were

⁴ The assets under management / trust are calculated on the basis of the information provided in the licence forms.

generally of lower quality. This can be explained primarily by the approaching end of the transitional period, but it implies that FINMA faces extra work in the licensing process due to additional analysis and supplements to files. After the review by the supervisory organisation, processing a licence application requires on average 3 to 4 items of additional information being submitted by an institution. This additional information can relate to an institution's precise activities or certain aspects of the organisation, including changes to the organisational regulations and articles of association, or the documentation relating to board and management staff.

Since the end of 2023 and to speed up the processing of applications, FINMA has set an adequate time limit for institutions to respond to enquiries. In justified cases, institutions may request an extension of the time limit.

1.5 Withdrawals of licence applications

As at 31 December 2023, 63 of the 1,699 licence applications received by the end of 2022 (4%) had been withdrawn. The main reasons for withdrawal are

- a targeted change in the business model which leads to a situation where a licence is no longer needed;
- a liquidation or merger.

It is worth pointing out that some withdrawals and/or mergers were directly connected to licensing requirements imposed on the institution by FINMA, which the institution did not wish to comply with.

1.6 Change requests

Processing change requests subject to authorisation in parallel with licence applications by portfolio managers and trustees represents an important workload for FINMA. As at 31 December 2023, FINMA had received a total of 994 change requests for the year 2023. The most common reasons for changes are changes in board and management staff required to provide guarantees of irreproachable business conduct (42%), as well as changes in organisational and company documents (32%) and in delegated tasks (20%).

The licensing requirements must be met at all times. Hence licensed portfolio managers and trustees are obliged to report any change in circumstances that affects their FINMA licence. All changes of material significance as defined by Article 8 para. 2 of the Financial Institutions Act (FinIA; SR 954.1) and Article 10 of the Financial Institutions Ordinance (FinIO; SR 954.11) are considered to be changes requiring authorisation.

Changes fall into the following three categories (i) changes that have no influence on the circumstances on which the licence is based and do not need to be declared (ii) non-material changes that only need to be declared to the SO, which communicates them periodically to FINMA (iii) changes subject to authorisation by FINMA. The distinction between changes subject to authorisation and declaration depends on whether the change has a significant impact on the institution's risk profile, such as when new business activities are launched.

The institution must communicate changes requiring authorisation to FINMA via the EHP in the form of a change request. Institutions should send the change request to the SO first. After an initial examination by the SO, the institution then submits the change request to FINMA. Once the circumstances communicated to FINMA lead to a decision, the institution is required to pay a fee.

2 Supervisory measures

FINMA has initiated 463 investigations in connection with suspicions of unauthorised activities as a portfolio manager or trustee since 2020. In addition, at 31 December 2023 FINMA has filed 43 criminal complaints with the Federal Department of Finance (FDF) on grounds of suspicion of unauthorised activities. FINMA has also put 234 institutions on its warning list, which it uses to alert investors to institutions which have failed to comply with their duty to disclose information to FINMA and are operating without the requisite licence.

Furthermore, in 2023 five institutions operating on a commercial basis that were late in submitting a licence application to FINMA (i.e. after the end of the transitional period) were asked to confirm that they would restrict their activity as portfolio manager or trustee to actions strictly necessary for the purposes of the safekeeping of assets.

3 Thresholds for operating as a trustee on a commercial basis

Following a decision by the Federal Criminal Court⁵, FINMA has re-examined the legal status of trustees, in particular in connection with Article 19 para. 1 let. c FinIO. Given that trust assets are economically separate and are not part of the trustee's personal assets, even though the trustee

⁵ Ruling of the Federal Criminal Court of 17 October 2022, SK 2020.47.

may appear to third parties as the formal owner of the trust assets,⁶ FINMA believes that trustees must hold a licence not only if they generate gross earnings of more than CHF 50,000 per calendar year from their activities (let. a) or establish or maintain business relationships with more than 20 contractual partners per calendar year that are not limited to once-only activity (let. b), but also if they have unlimited power of disposal over trust assets, i.e. assets belonging to others, exceeding CHF 5 million at any given time (let. c).

Therefore, FINMA will also apply Article 19 para. 1 let. c FinIO to trustees from now on.

Trustees who are henceforth obliged to obtain a licence in accordance with FinIA are required to submit a licence application to FINMA before the end of 2024. It should be noted that in order to submit an application to FINMA, the institution must have a confirmation of its affiliation to an SO. In order to obtain this confirmation, a completed licence application must be submitted to the SO beforehand. Institutions should allow sufficient time for the process of affiliation with an SO in order to be able to implement possible changes or improvements required by the SO. For planning purposes, the institutions concerned are also requested to inform FINMA that they fall under the licensing obligation by the end of June 2024 (asset.management@finma.ch).

FINMA will contact all the trustees it is aware of who could be affected by this change. Trustees who are uncertain about whether they are subject to FinIA may contact FINMA to obtain clarification.

4 Supervision

4.1 Two-tier supervisory model

In the two-tier supervisory model for portfolio managers and trustees, the ongoing supervision (including the audit activity) of portfolio managers and trustees is carried out by the SOs (except for domestic group companies, which are supervised by FINMA in accordance with Art. 83 FinIO). After issuing a licence, FINMA is responsible for approving any change in circumstances on which the licence is based and for intensive supervision of the supervised entities, including taking enforcement action to impose sanctions and remedial measures to restore compliance with the law. It is also responsible for authorising and supervising the SOs. The two-tier supervisory model therefore leads to costs both at SO level (including its audit firms) and FINMA level (cf. section 4.2 below).

⁶ Art. 2 and 11 of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (SR **0.221.371**).

This division of responsibilities requires close coordination.⁷ Regular exchange of information between FINMA and the relevant SO allows the SO to carry out appropriate ongoing supervision of the institutions based on FINMA's requirements.

With five licensed SOs at present, a considerable amount of time and effort goes into coordinating with them. To avoid a supervisory arbitrage between the five SOs, FINMA lays down uniform requirements they must follow when carrying out their supervision.⁸ The SOs implement these statutory requirements independently. This in turn means, for example, that the SOs currently have differing IT systems and require individual supervision.

4.2 FINMA's supervisory costs

This new area of supervision has created a population that is supervised not just with regard to compliance with anti-money laundering legislation, but is also subject to more comprehensive prudential supervision. This has a positive effect on the financial market, strengthening its reputation along with the confidence of clients and other market participants. This more comprehensive supervision inevitably involves higher costs.

The costs of financial market supervision are borne entirely by the supervised entities. The Financial Market Supervision Act stipulates that supervised institutions are required to pay an annual supervisory levy for each supervisory area to defray costs that are not covered by fees (Art. 15 para. 1 Financial Market Supervision Act of 22 June 2007, FINMASA; SR 956.1). The supervisory levy for an SO is based on the number of institutions it supervises as a proportion of the total number supervised by all SOs. The supervisory levy also covers any costs incurred by FINMA that are caused by the supervised institutions and are not covered by fees (Art. 15 para. 2 let. e FINMASA).

FINMA's total costs are made up of the costs it incurs directly through its supervision in the different supervisory areas and the costs that cannot be directly allocated to an individual supervisory area (cf. Art. 2 of the FINMA Ordinance on the Levying of Supervisory Fees and Charges of 15 October 2008 FINMA-GebV; SR 956.122). The supervised institutions are also required to pay for the accumulation of reserves which FINMA must form within a reasonable period (Art. 16 FINMASA, Art. 11 para. 3 FINMA-GebV).

The direct costs of the SO supervisory area consist of the directly attributable staff and operating costs. This includes FINMA's expenses for licensing and supervising the SOs and for licensing, approving changes, intensive supervision and enforcement of the portfolio managers and

⁷Art. 85 FinIO

⁸Art. 84 FinIO

trustees supervised by the SOs, where these are not already covered by fees (cf. Section 4.1 above).

As expected, a range of fundamental questions arose during the start-up period of the new SO area of supervision, particularly regarding the licensing process for financial institutions. The cost of dealing with fundamental legal questions cannot be passed on in full to the individual financial institution making the application. These costs are allocated directly to the SO area as a whole and recovered via the supervisory levy.

FINMA's supervisory levies are based on the total expenses of the prior year (Art. 11 para. 3 FINMA-GebV) and will be distributed by the SOs between the FinIA institutions affiliated to them at the end of the prior year (Art. 31b FINMA-GebV), which means the costs are allocated to those responsible for them.

Over 60% of portfolio managers and trustees decided to submit their licence applications to FINMA only in the last six months of 2022. This concentration of applications at the end of 2022 also leads to a concentration of costs for FINMA in the years after the end of the transition period. These costs have to be borne by the supervised institutions concerned in accordance with the polluter pays principle. The start-up period for which there is no separate fee provision will result in higher supervisory levies for the supervisory area over the years 2024 to 2026. The exact figures for the supervisory levy in 2024 will be set out in FINMA's financial statements for 2023, which are expected to be published at the end of the first quarter of 2024.