

# Legal Compass

## Banking and Finance

August 23, 2022



## FINMA Authorization for Independent Asset Managers

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### Introduction

The deadline, 31 December 2022, is approaching. By then, all Swiss asset managers who wish to remain active in their profession must submit a licence application to FINMA.

On 1 January 2020, the Financial Institutions Act "FinIA" and the Financial Services Act "FinSA" entered into force. While the FinSA sets forth uniform conditions for financial services of all kinds, the FinIA specifies uniform requirements for asset managers, trustees, managers of collective assets, fund management companies and securities firms. It particularly affects independent asset managers, who were previously able to carry out their activities without a licence and are now subject to a licence requirement following the entry into force of the Act.

In principle, all persons who invest and manage assets for the account of third parties on a professional basis must obtain a licence from the supervisory authority. The FinIA provides for a cascade of licences: the higher level of authorisation now also covers the lower level of authorisation.

The requirements for financial service providers are formulated as cross-sectorally as possible, thus creating a level playing field for supervised entities. The licence granted to an asset managers will be regarded as a seal of quality in the future.

Asset managers who commenced their professional activities before 1 January 2020 must submit a licence application to FINMA by the end of 2022. Until the decision on the licence, they may continue their activity provided they are affiliated to a self-regulatory organisation (SRO) in accordance with Art. 24 of the Anti-Money Laundering Act and are thus supervised thereby.

Those asset managers who have newly commenced their professional activity in the course of 2020 must fulfil the licensing requirements as of the commencement of their activity, apart from the requirement of affiliation to a supervisory organisation (SO).

### 1. Asset Management

Asset managers are defined under the applicable law as persons who, on a professional basis and on the basis of a mandate, dispose of the assets of clients on their behalf or manage assets of collective investment schemes or pension schemes below certain thresholds. Asset managers are only subject to a licensing requirement if they carry out their activity on a professional basis.

An activity is considered professional if one of the following criteria is met:

- gross income of more than 50,000 Swiss francs is achieved per calendar year - or -

- business relations, which are not limited to a one-off activity, are entered into with more than 20 contracting parties per calendar year or at least 20 such relations are maintained per calendar year - or -
- there is an indefinite power of disposal over third-party assets exceeding CHF 5 million at any time.

The activity of a financial services provider in which he/she only makes a recommendation and has no decision-making power over assets qualifies as investment advice, which is not subject to the licensing requirement, but only to a registration requirement (i.e., in the adviser register).

## **2. Authorisation requirement**

In order for FINMA to grant a license, asset managers must meet various licensing requirements, in particular they must:

- have the legal form of a sole proprietorship, a commercial company or a cooperative and be entered in the Commercial Register;
- have an appropriate organisation for the activity, adequate risk management and internal controls;
- they must have adequate equity capital (at least CHF 100,000) or equivalent collateral;
- describe their business area precisely in terms of subject matter and geography in the relevant documents;
- provide evidence in the form of a confirmation of affiliation, proving that they are supervised by a supervisory organisation.

Asset managers who exclusively manage the following contexts of assets are exempt from the licensing requirement:

- persons (natural or legal) economically or personally related to them (e.g. within a group, single family office, relatives);
- in connection with employee participation plans;
- are active within the scope of a legal mandate (e.g. advance care directive, execution of will);
- lawyers and notaries insofar as the activity is subject to professional secrecy,

New prudential licensing requirements entail financial, personnel and organisational requirements. Certain applicants may have to adapt their structure and business model. Some institutions will either not submit an application or will not easily receive a licence with their existing structures.

## **3. Risk-based authorisation approach**

A risk-based authorisation review has been introduced, which serves to ensure a uniform quality standard. Simple business models are to be treated in a standardised manner, while complex and risky models are to be examined in greater depth.

Asset managers with high-risk business models must implement appropriate risk mitigating measures and have adequate risk management in place.

The licence requires appropriate limitation and control of inherent risks. FINMA will not grant a licence without implementing the necessary adjustments (build-up of resources, separation of risk and compliance, outsourcing through the involvement of external service providers, etc.). These regulatory requirements are met by appointing a qualified management, qualified employees or the delegation to a qualified external body.

In principle, persons performing risk management tasks may not be involved in the activities they supervise. The independence of risk management and internal controls from profit-oriented activities is not required if the asset

manager (i) has a company size of no more than five full-time employees or an annual gross income of less than CHF 2 million; as well as (ii) has a business model without increased risks.

#### 4. Deadlines

Asset managers who commenced their professional activity before 1 January 2020 must apply for a licence from FINMA by the end of 2022 and prove that they are affiliated to a supervisory organisation.

By way of reminder, anyone who took up a new professional activity as an asset manager in 2020 was required to join a supervisory organisation and submit a licence application to FINMA by 6 July 2021 at the latest.

#### 5. Process

1. analysis of the specific need for action and corresponding implementation
2. registration on the FINMA survey and application platform and preparation of the application
3. SO affiliation/supervision
4. Submission of a licence application

Attention: Anyone who misses the deadline (31 December 2022) is operating without authorisation which is criminal offence.

The volume of applications is expected to peak in the second half of 2022. This means that FINMA will be busy with audits well into 2023.

#### **Eversheds Sutherland Ltd. will be happy to advise you**

We will be happy to determine your individual needs for action and submit appropriate implementation proposals. We support you in the authorisation process and prepare your application, carry out the audit of the supervisory organisation and guide you through the FINMA authorisation procedure.

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