Authorisation requirements for portfolio managers

01.12.2020

Introduction

The entry into force of the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) on 1 January 2020 sees the activities of independent portfolio managers comprehensively regulated for the first time. Since then, independent portfolio managers have been required to get authorisation to carry out their activities and must provide evidence that they are supervised by a supervisory organisation (SO).

Independent portfolio managers already operating in such a capacity before FinIA came into force must meet the requirements of FinIA within three years, i.e. by 31 December 2022, and apply to the Swiss Financial Market Supervisory Authority (FINMA) for authorisation within this period.

Independent portfolio managers who commence operations by the end of 2020 must meet the requirements of FinIA from the time they commence operations and submit an application for authorisation to FINMA no later than one year after FINMA has approved a SO.

To date, five SOs have received authorisation from FINMA, with the first SOs being approved on 6 July 2020. The deadline for affiliating to a SO will therefore expire on 6 July 2021. Independent portfolio managers should now consider affiliating to a SO and should prepare their application for authorisation.

The aim of this legal update is to provide an overview of the authorisation requirements and set out how independent portfolio managers should proceed in practice in order to ensure that they are successful in affiliating to a SO and applying for authorisation.

Affiliation to a SO

In order to apply for authorisation in accordance with FinIA, a portfolio manager must first affiliate to a SO. The SO's confirmation of affiliation must be enclosed with the application for FINMA authorisation (Art. 7 para. 2 FinIA).

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The procedure of affiliating to a SO begins with submission of the authorisation application on the FINMA survey and application platform (EHP). After registration and notification, where the respective SO can be selected, the full authorisation application must be completed. Applicants may engage consultants to support the process. The authorisation application is first submitted to the selected SO for review, which typically takes four to eight weeks. If the review outcome is successful, the respective SO uploads confirmation of affiliation to the authorisation application, which can then be sent to FINMA via the EHP.

The authorisation requirements according to FinIA must therefore already be met at the stage of affiliating to a SO.

Authorisation requirements for portfolio managers

The authorisation requirements for independent portfolio managers are set out in FinIA and its associated ordinance (FinIO). Any party that meets the defined conditions for authorisation is legally entitled to authorisation. (Art. 7 para. 1 FinIA).

Organisational requirements

From an organisational point of view, portfolio managers must be organised either as sole proprietorships, commercial enterprises or cooperatives and be registered in the commercial register (Art. 18 FinIA). The minimum capital of portfolio managers and trustees must amount to CHF 100,000 and be paid up in cash. In addition, there must be adequate collateral or professional liability insurance (Art. 22 FinIA). The law then stipulates that own funds must amount to at least one quarter of the fixed costs reported in the most recent annual financial statement and no more than CHF 10 million (Art. 23 FinIA). The portfolio manager must be managed from Switzerland (Art. 10 FinIA).

In order to prove that these conditions are met, the application for approval must be accompanied by the articles of association. These must provide information on the portfolio manager's legal form, registered office and capital. In addition, they must specify the financial year and indicate that the company is subject to the provisions of the Swiss Code of Obligations as well as the FinIA provisions applicable to portfolio managers. Furthermore, the application for authorisation must be accompanied by the insurance policy of a professional liability insurance.

The organisational regulations must define win precise terms what the portfolio manager’s business activity entails, including, but not limited to, the factual and geographical scope of activity. Then the bodies must be designated, their tasks assigned and the decision-making process defined. If tasks are delegated to third parties (outsourcing), this must also be laid down in the organisational regulations.

Finally, an excerpt from the commercial register, an excerpt from the debt collection register and a sample asset management contract must also be submitted.

In order to guarantee compliance with the authorisation requirements, the portfolio manager must issue a set of directives. This should include, on the one hand, directives on the internal organisation, but also those covering risk management, the internal control system, compliance

and the Anti-money Laundering Act. This is covered in more detail in the following section. Other directives to be issued relate to personnel requirements, such as a directive on customer acceptance or one on information, loyalty and due diligence obligations. These will be discussed in more detail below.

Requirements regarding corporate governance and control as well as risk management

Independent portfolio managers must establish appropriate corporate governance rules and be organised in such a way that the legal obligations can be met. To this end, risks should be evaluated and effective internal controls established, which, ensure, among other things, compliance with legal and internal provisions (Art. 9 and Art. 21 FinIA). This risk management and internal control must in principle be independent of the management or executive management, unless the portfolio manager (i) has five or fewer full-time positions or annual gross earnings of less than CHF 2 million and (ii) adheres to a non-high-risk business model (Art. 26 para. 2 FinIO). Risk management should always be independent in the case of management of collective investment schemes.

In order to prove that these conditions are met, the portfolio manager must provide information on the company's financial circumstances. These include, for example, a business plan for the next three financial years, existing financial statements and any loan agreements. Furthermore, it must be shown how the appropriate organisation can be documented. This requirement can be met by directives on internal organisation, compliance or risk management.

Personnel requirements

The portfolio manager itself and the and the persons responsible for its management must provide a guarantee of irreproachable business conduct, enjoy a good reputation and have the specialist qualifications required for their functions (Art. 11 para. 1 and 2 FinIA). In addition, the portfolio manager's management must in principle consist of at least two qualified persons (Art. 20 para. 1 FinIA). This means that if the portfolio manager is structured as a company limited by shares, at least two members of the board of directors must be appointed. The chair or vice-chair must be resident in Switzerland. A person is qualified for management if they have five or more years of professional experience and undergo continuous training. In addition, the residence of the managers must be at a place from which the management can actually be exercised. If the size of the portfolio manager or the nature and scope of its activities so demand, FINMA may require it to designate, in addition to the management, a body responsible for governance, supervision and control (Art. 23 para. 3 FinIO). The body responsible for governance may not consist of exactly the same people entrusted with management.

In order to prove this, the portfolio manager must enclose the relevant documents or provide corresponding information with the authorisation application. These include information on nationality, domicile and any court proceedings. Copies of passports, curricula vitae, references such as work certificates, degrees and diplomas, as well as excerpts from criminal and debt enforcement registers must also be submitted. These documents are to be submitted for each person entrusted with the portfolio manager's management, as well as for each member of the body responsible for governance (if any). In addition, a declaration of all additional mandates of the managers and of any qualified participations held by the managers

must be enclosed. Portfolio managers should also ensure that the conduct obligations of the FinSA can be complied with. This can be done, for example, by means of the corresponding directives.

Furthermore, the portfolio manager must ensure that qualified participants in its business also enjoy a good reputation and guarantee that their influence is not detrimental to prudent and sound business activity (Art. 11 para. 3 FinIA). Therefore, when applying for authorisation, the portfolio manager must provide information on the qualified participation (direct/indirect and quorums) and disclose any agreements or possibilities which could influence the portfolio manager's business activity. The application should be accompanied by the FINMA forms concerning the declaration of qualified participations as well as the above-mentioned documents proving the good reputation of the qualified participant.

Next steps

In order to join a SO and subsequently obtain FINMA authorisation, portfolio managers must meet a number of requirements. Portfolio managers should use the transition period to critically review their current business model and make fundamental decisions regarding their future organisational structure and activities. Internal processes also need to be revised and formalised, while a lean and appropriate system of directives should be created. At the same time, it is important to proceed with a sense of proportion and to implement the new legal provisions without triggering regulatory overkill. The application for authorisation must be submitted to FINMA by 31 December 2022 at the latest. Prior to this date, the SO must also have conducted a preliminary review, which will also take some time, especially in view of the expiry of the transition period and the expected flood of applications.

Our team has many years of experience with authorisation applications and would be happy to provide you with further information.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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