

FINMA Guidance 02/2023

Status of the licensing process for portfolio managers and trustees

30 January 2023

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1 Status of the licensing process

1.1 Expiry of the transitional period

Portfolio managers and trustees have been subject to a licence requirement since the Financial Institutions Act (FinIA, SR 954.1) entered into force on 1 January 2020. The Act granted existing portfolio managers and trustees¹ a transitional period of three years in which to fulfil the licensing conditions and submit a licence application (Art. 74 para. 2 FinIA). The transitional period expired at the end of 2022.

In its press release of 16 September 2021 as well as FINMA Guidance 01/2022 and 02/2022, FINMA pointed out the end of the transitional period, explained the licensing procedure and recommended that action be taken in good time. FINMA also clarified that it can extend the statutory transitional period only in special cases. Institutions wishing to lawfully continue their business activities in 2023 that are subject to a licence requirement were required to submit a licence application to FINMA before expiry of the transitional period, after having first obtained a confirmation of their eligibility for affiliation with a supervisory organisation (SO).

1.2 Latest figures

By the end of 2022, FINMA had received 1,699 licence applications in total, which included 1,534 applications from portfolio managers and 165 from trustees. As at 31 December 2022, FINMA had granted licences to 670 institutions (642 portfolio managers, 22 trustees and six institutions acting as portfolio managers and trustees).

The average fee invoiced for the FINMA licensing procedure amounted to CHF 5,891 per case. In each case, the total amount invoiced is calculated on the basis of FINMA's actual time expenditure.

To date, the average time taken by FINMA to process a licence application was 129 days, although this included days during which the applications had been returned to the applicants to correct deficiencies in the application. In the fastest case, the licence was granted after nine days. So far, the longest licensing process lasted 550 days.

In total, 1,060 institutions have informed FINMA that they will not be submitting an application (as at 3 January 2023). Most of those institutions are either adapting their business model or continuing their business activity below the commerciality threshold. In such cases, the business model must actually be adapted and not simply the designation of the service.

The majority of the licensed portfolio managers and trustees are microenterprises in the legal form of an *Aktiengesellschaft* (company limited by shares) with fewer than five full-time positions. Across all legal forms, the

¹ Portfolio managers and trustees that under prior law are not subject to a licence requirement but are newly subject to a licence requirement at the time of FinIA coming into force.

total amount of the assets under management was CHF 121 billion. This corresponds to an average of CHF 180 million per institution, although major differences can be seen. In the case of four licensed companies, the total assets under management amounted to more than CHF 2 billion.

Legal form	Number of companies	Median number of full-time positions	Avg. assets under management (in CHF millions)
<i>Aktiengesellschaft</i> (company limited by shares)	618	3.0	188
<i>Gesellschaft mit beschr. Haftung</i> (GmbH, limited liability company)	26	2.0	63
Sole proprietorship	16	1.0	46
Other	10	2.4	183
Total	670	3.0	180

Statistical summary of the licensed portfolio managers and trustees.
(Source: company details/application forms; licensing status: 31 December 2022)

1.3 Deadline extension

The Act only provided for deadline extensions in special individual cases (Art. 74 para. 4 FinIA) in which the deadline could not be met through no fault of the applicant. Accordingly, FINMA granted deadline extensions only for those institutions that were able to demonstrate that they had taken all necessary steps in good time before expiry of the transitional period to ensure that they would meet the deadline. This was the case if, for example, it appeared likely that the institution would miss the deadline due to exceptional circumstances such as illness, death or force majeure events.

FINMA approved nine applications for a deadline extension. Five applications proved unnecessary as the licence application had been submitted in the meantime. A few, incomplete applications are still being processed by FINMA. To date, FINMA has not rejected any applications for a deadline extension.

1.4 Late applications

As at the end of 2022, approximately 20 applications were still undergoing a preliminary review by an SO. Most of these institutions had submitted the licence application to an SO for preliminary review only after FINMA's recommended deadline of 30 June 2022. Consequently, it was not possible for the preliminary review to be completed in good time. Subject to a successful application for a deadline extension, these institutions have failed to comply with the transitional deadline.

Delays in submitting the application may make it harder to demonstrate fulfilment of the licensing conditions, particularly the guarantee of irreproachable business conduct. FINMA will therefore take account of delays and their underlying reasons when assessing the licence applications. Furthermore, late submissions generally give rise to supervisory investigations or enforcement measures (see further information on the measures in section 2.2). In view of its obligation to report criminal offences, FINMA also reports unauthorised operators to the Criminal Law Division of the Federal Department of Finance (FDF).

1.5 Non-responsive companies

In early November 2022, FINMA contacted 685 institutions which had registered as a portfolio manager or trustee on the survey and application platform (“EHP”), but had neither submitted an application to an SO or FINMA, nor otherwise communicated with FINMA.² More than one in ten of those contacted institutions stated that they were still planning to submit a licence application to FINMA.

Nearly half of the contacted institutions did not respond. FINMA will take the answers and non-replies into account during its investigations of any institutions operating without a licence.

2 Supervisory measures

2.1 Looking back: enforcement until 2022

Any person who had commenced a commercial activity as a portfolio manager or trustee for the first time in 2020 was required to have become affiliated with an SO and to have submitted a licence application to FINMA by 6 July 2021 at the latest (Art. 74 para. 3 FinIA). Institutions that failed to apply for a licence during this transitional period, or which are pursuing a commercial activity as a portfolio manager or trustee without an appropriate licence, are operating intentionally or negligently without a licence. They are liable to be subjected to supervisory measures as well as penalties under criminal law. The prosecuting and adjudicating authority is the FDF. Even in cases of negligence, the financial penalties or fines could be as high as CHF 250,000.

Since 2020, FINMA has opened 307 investigations based on suspicion of unauthorised activity as a portfolio manager or trustee. Moreover, by 31 December 2022 FINMA had lodged 27 criminal complaints with the FDF based on suspicion of operating an unlicensed portfolio management or trustee activity. In addition, FINMA placed 153 institutions on its warning list³, which it uses to publish details of institutions which have failed to comply with their duty to disclose information to FINMA and which do not have a licence.

2.2 Outlook: enforcement 2023

Institutions that were already operating before FinIA entered into force and which submitted an application to FINMA before the end of the transitional period (Art. 74 para. 2 FinIA) may continue their activity by law following expiry of the transitional period until a decision on their licence application has been taken, provided that they are members of a self-regulatory organisation (SRO). The situation is different for institutions that failed to

² These were primarily institutions that complied with their reporting obligation in 2020 (Art. 74 para. 2 FinIA) as well as those that registered only on the EHP as a portfolio manager or trustee.

³ www.finma.ch > Authorisation > Warning list.

submit an application to FINMA within the transitional periods, as well as for those institutions that have already commenced their commercial activity prior to receiving their licence but are not covered by the transitional periods. Any person who operates intentionally or negligently without a licence may be subjected to penalties under supervisory and criminal law. For the purposes of determining the appropriate measures to be taken, significant factors include, among others, the duration of the unlicensed activity and whether the institution submitted a licence application to FINMA (even if it was submitted late) or – more seriously – failed to submit an application and FINMA discovered that an unlicensed activity was being carried out. As FINMA is under an obligation to report offences, it will report such cases to the law enforcement authorities and conduct its own investigations.⁴

Upon receipt of late licence applications, FINMA will call upon the institutions to confirm that they will, pending a decision on their licence application, restrict their portfolio management activity to those actions that are strictly necessary in order to maintain the value of the assets of their existing clients. FINMA will not continue assessing the licence applications until the institutions have provided the above-mentioned confirmation.

If the licensing conditions are not fulfilled or if an orderly state of affairs cannot be restored, FINMA will order supervisory measures to be taken, which could extend to the liquidation of the institution.

3 Outlook for the licensing process in 2023

If an institution that is still a member of an SRO has submitted its application, including a confirmation of affiliation with an SO, to FINMA by the end of the transitional period, it may continue to conduct its business activity pending the decision on whether to grant it a licence.

3.1 Current trends

In line with expectations, FINMA received a very large quantity of licence applications by the end of the transitional period. As at 31 December 2022, there were over 1,000 pending applications. FINMA was organisationally prepared for this larger number of applications. However, due to the large number of pending cases, a longer FINMA licensing process and longer (initial) response times must be expected. The processing time for an individual application, as well as its corresponding costs, also depend on its quality and complexity.

⁴ Article 44 of the Financial Markets Supervision Act (FINMASA) in conjunction with Article 50 FINMASA. See also FINMA Guidance 01/2022, section 3.3.

3.2 Status confirmation

FINMA has created the following means for applicants to keep themselves informed regarding their licence application and its status.

- a) **Phase 1 / Submission of the application:** Upon receipt of the application by FINMA, the persons responsible for the application and their representatives will promptly receive an automatically generated confirmation email as proof.⁵
- b) **Phase 2 / FINMA licence assessment:** Since November 2022, applicants have been able to generate an up-to-date status confirmation autonomously via the EHP and then download this as a PDF, as soon as the application has been submitted to the SO or FINMA. An example of such a confirmation is presented in Annex 1.
- c) **Phase 3 / Licence decision:** FINMA publishes all licensed portfolio managers and trustees on its website.⁶ The corresponding lists are kept updated.

Due to official secrecy requirements, FINMA cannot disclose to third parties or the public any information regarding pending applications, the status of the licensing process, or negative orders.

⁵ See also section 3.1 in conjunction with Annex 2 to FINMA Guidance 01/2022:

www.finma.ch > Documentation > FINMA Guidance.

⁶ www.finma.ch > Authorisation > Portfolio managers and trustees.

Annex 1

Example of a status confirmation following submission of a licence application to FINMA via the EHP. For further details, see the EHP Release Notes⁷ of 25 November 2022.

Statusbestätigung Confirmation de statut Conferma dello stato Status confirmation		 <small>Schweizerische Eidgenössische Finanzmarktaufsicht FINMA Autorité fédérale de surveillance des marchés financiers FINMA Autorità federale di vigilanza sui mercati finanziari FINMA Swiss Financial Market Supervisory Authority FINMA</small>
<p>This status confirmation was created on 24.11.2022 16:25 by [REDACTED]</p>		
<p>Status information of the submission</p>		
ID:	[REDACTED]	
Name of the institution:	[REDACTED]	
Type of licence:	Portfolio manager	
Name of the submission:	Bewilligung für Institute nach FINIG (Aufsicht AO)	
Current status:	Checking by FINMA (since 24.11.2022)	
First submission to FINMA:	24.11.2022	
<p>Further information on the supervisory organisation</p>		
Supervisory organisation:	AOOS - Schweizerische Aktiengesellschaft für Aufsicht	
First submission to SO:	30.06.2022	
Confirmation SO:	Yes	
<p>Important Information: Please note that this document shall not be deemed a delivery note.</p>		

⁷ www.finma.ch > FINMA > Extranet > EHP survey and application platform > Support > EHP Release Notes (Version 1.15 of 25.11.2022).