

Reminder: be prepared for your next regulatory audit

Delegation of regulatory material tasks (art. 66 CISO-FINMA) must be reflected in your organisational documents

Contacts

Günther Dobrauz

Partner, Leader Legal FS
Regulatory & Compliance
Services
guenther.dobrauz@ch.pwc.com
+41 58 792 14 97

Sabine Bartenschlager-Igel

Senior Manager, Legal FS Regulatory
& Compliance Services, Head Asset
Management
sabine.bartenschlager-igel
@ch.pwc.com
+41 58 792 28 73

Anne Batliner

Manager, Legal FS Regulatory &
Compliance Service
anne.batliner@ch.pwc.com
+41 58 792 29 55

Rules in relation to any kind of delegation had been introduced by Art. 66 CISO-FINMA in 2015 to provide a similar requirement for CISA licensees as set out for banks in the FINMA Circular 2008/7 “Outsourcing – Banks” (which is currently under revision). The licensees covered by Art. 66 CISO-FINMA are fund management companies, investment Companies with variable capital (SICAVs), asset managers of collective investment schemes and representatives of foreign collective investment schemes (hereinafter “the licensee(s)”).

Organisational requirements relating to the delegation of regulatory material tasks are now explicitly defined, hence the licensees must set out the delegated tasks as well as information on the scope for further delegation in their organisational regulations. Starting as of 1 January 2017, licensees also have to list delegated tasks as well as principles governing the possibility of further delegation in their corresponding organisational documents and in case material tasks are delegated to service providers abroad, the licensees have to comply with additional requirements.

Tasks are deemed to have been delegated if a licensee transfers material tasks (e.g. portfolio management, risk management, compliance or IT) to a third party and if this results in a change to the circumstances and organizational rules under which the authorisation was granted. No legal definition of what exactly is deemed a material task has been provided in the ordinance. Hence, it is in FINMA’s and the licensee’s discretion to decide which tasks have to be seen as material to the business of the licensee.

As the delegation of material tasks requires the fulfilment of specific conditions in order to maintain the appropriateness of the licensee’s organisational structure, the licensee has the obligation to obtain FINMA’s approval for this change of circumstances under which the license had been granted.

The licensee shall appoint only those persons who are properly qualified to execute the task and ensure they receive the instruction, monitoring and control required for the implementation of the tasks assigned. Furthermore and as a general principle, any person who assigns the fulfilment of a task to a third party is liable for the losses caused by that third party unless they prove that they applied the degree of diligence with regard to the selection, instruction and monitoring required in the given circumstances. Exception to this general rule applies to the fund management company where the latter is liable for the actions of its agents as if they were its own.

The licensee shall set out the tasks delegated to third parties in written agreements. This shall include a precise description of the delegated tasks as well as the powers and responsibilities, any authorities in respect of further delegation, the agent’s duty to give an account of its activities and the control rights of the licensee. In addition, the SFAMA Code of Conduct sets out that the contract must also include appropriate and specific provisions on contact persons as well as liability issues.

Further, any delegate of a licensee must demonstrate the expertise, personnel and allow access to the regulatory auditor or FINMA. Additional requirements are set out for tasks that are delegated abroad: the licensee must be able to demonstrate that it, the

regulatory audit company and FINMA are able to exercise their respective rights and enforce them under the law. The regulatory audit company must review the confirmatory documentation before outsourcing takes place.

Please note that fund management companies, SICAVs, both self-managed and externally managed, asset managers of collective investment schemes or representatives of foreign collective investment schemes may have to fulfil different requirements depending on the delegated tasks and their respective substance requirements.

A fund management company may only delegate investment decisions to asset managers of collective investment schemes which are subject to a recognised supervision, provided this is in the interest of efficient management, and may delegate specific tasks (e.g. fund accounting, risk management, compliance, operations of IT systems, etc.) to properly qualified third parties, provided this is in the interest of efficient management. Where foreign law requires an agreement on cooperation and the exchange of information with foreign supervisory authorities, it may only delegate investment decisions to asset managers abroad where such an agreement exists between FINMA and the relevant foreign supervisory authority.

A SICAV may only delegate investment decisions to asset managers of collective investment schemes subject to recognised supervision based in Switzerland or outside Switzerland. If the board of directors delegates the administration, investment decisions or distribution to third parties, the rights and responsibilities of the contracting parties must be described in a written contract.

An asset manager of collective investment schemes may only delegate tasks such as risk management, compliance, operations of IT systems, etc., provided this is in the interest of efficient management, and may also only delegate investment decisions to asset managers of collective investment schemes who are subject to recognised supervision. Where foreign law requires an agreement on the cooperation and the exchange of information with foreign supervisory authorities, they may only delegate investment decisions to asset managers abroad where such an agreement exists between FINMA and the relevant foreign supervisory authority.