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In a nutshell

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Fintech in Switzerland: FINMA relaxes requirements for asset management agreements in the FINMA circular 2009/01

The Swiss Financial Market Supervisory Authority (FINMA) is currently reviewing its issued ordinances and circulars as to whether they put certain technologies at a disadvantage. The background to these developments is that technological advances in the financial industry should not be hindered and digital technologies should not be put at a disadvantage compared to traditional working methods.

On 3 March 2016, FINMA issued circular 2016/07 entitled «Video and online identification» [LINK]. This circular enables compliance with due diligence obligations when business relationships are entered into through digital channels. On 1 July 2016, FINMA modified its circular 2009/01, «Guidelines on asset management» [LINK], the modifications making it possible to conclude asset management agreements digitally. The present publication sets out the relevant changes.

I. What has changed?
Until now, FINMA's circular 2009/01 required the written form for the following documents, among others:

- the asset management agreement with the customer (para. 8 FINMA circ. 2009/01);
- the power of attorney for the asset manager (para. 19 FINMA circ. 2009/01);
- records of notification to the customer that the risk profile no longer corresponds to the customer's current situation (para. 17 FINMA circ. 2009/01)

Based on art. 13 of the Swiss Code of Obligations (SCO), FINMA understood the written form as a document containing the handwritten signatures of all parties. An electronic signature backed up by a qualified certificate from a recognized certification service in terms of the Federal Act on Electronic Signatures should have sufficed as well (art. 14 para. 2bis SCO; simple written form). This also corresponds to the recommendations of the Swiss Federal Tax Administration (FTA) for agreements on managing collective investment schemes (para. 5.2.1.3 MWST Branch Info 14).

What has changed is that these three documents may now be drawn up «in any other form verifiable by text».

No simplified form has been introduced for delegation agreements between the asset manager and potential third parties; the simple written form requirement continues to apply (para. 20 FINMA circ. 2009/01). The same standards thus apply to independent asset managers as apply to banks (para. 51 FINMA circular 2008/07, «Outsourcing Banks») and to fund management companies, SICAV, asset managers of collective investment schemes pursuant to the Federal Act on Collective Investment Schemes (CISA) and representatives (art. 66 para. 2 CISO-FINMA).

II. What does «any other form verifiable by text» mean?
It is likely that FINMA deliberately formulated the new form requirements in a broad way. What is clear is that the form must be verifiable by text and that this no longer necessarily means the written form. With this change, FINMA permits the further development of technology currently in use. It is unclear, however, what exactly the new requirement means.

Similar wording can be found in art. 358 of the Swiss Civil Procedure Code (CPC; any form verifiable by text), art. 21 para. 3 of the Swiss Private International Law Act (PILA; any other form verifiable by text) and in art. 178 para. 1 PILA (a form of transmission that allows verification of the agreement by text). The Federal Supreme Court has dealt with this form requirement in only one judgment so far; it concluded that the form requirement is fulfilled if the text form is used (4A_618/2015, cons. 4.3).

Based on this reasoning and on the purpose of the changes, which is to allow contracts to be concluded in new ways, this form requirement demands, in our opinion, that the documents be drawn up in a typeface that is permanently visually perceivable and physically reproducible, and whose sender is sufficiently identifiable. Forms that meet these requirements are, for example, e-mail, fax, telegram, SMS and MMS (as long as they are printable), but not voice messages or disappearing messages such as Snapchat.

These form requirements must be observed by both parties. It is not sufficient that only one party meets the form requirements and the other accepts the contract terms merely implicitly.

Furthermore, if these form requirements are met, this means that the applicable accounting provisions are also fulfilled. These provisions require that accounting records be stored in a way that the business transaction or facts underlying any entry can be understood at all times. This can occur on paper or in electronic or other comparable form (art. 957a para. 3 SCO; art. 3 Swiss Accounts Ordinance, GeBüV).

III. Who is directly affected?
FINMA circular 2009/01 does not directly address financial institutions. Rather, it addresses organizations active in the asset management industry that wish to have their rules of conduct recognized as a minimum standard (para. 1 et seq. FINMA circ. 2009/01). Therefore, asset management service providers are not directly affected by these changes. Instead, each service provider must check whether the industry organization with which it is affiliated has implemented the changes. Only if this is the case, can the service provider waive the written form requirement corresponding to the guidelines of its self-regulatory organization (SRO).

IV. Implementation of the facilitated provisions for independent asset managers
The SROs are free to choose how to implement these facilitated provisions. They can implement the changes immediately and do not have to have the changes approved by FINMA. They do, however, have to submit their modified regulations to FINMA (para. 34 FINMA circ. 2009/01).

The SROs would be well advised to precisely define the requirement of a «form verifiable by text» in their regulations. Otherwise, they risk confusion and legal uncertainty on the part of individual asset managers.

V. Implementation of the facilitated provisions for banks
As for banks, the guidelines for asset man-

agement of the Association of Swiss Bankers (version of December 2013) provide that asset management agreements must be in written form (art. 2). The implementing provisions further stipulate that the asset management agreement and any modifications to it require the signature of the customer (para. 11 et seq.). The simple written form in the sense of art. 13 SCO is thus required.

Banks may thus only deviate from the written form requirement (and the signature requirement) when and if the Association's guidelines for asset management are modified accordingly.

VI.Implementation of the facilitated provisions for CISA institutions

The press release on the changes to circular 2009/01 explicitly makes a reservation with respect to the form provisions in the field of collective investment and the general law governing mandates. Provisions in the laws on collective investment schemes (CISA, CISO, CISO-FINMA and SFAMA's self-regulatory provisions) that require the written form for asset management agreements are thus not been modified. This means the following:

- The asset management agreements between asset managers of collective investment schemes and their customers still require the written form. Customers are understood as both fund management companies/SICAV as well as individual customers (art. 25 CISO).
- In order for subscription of fund units by a financial institution or an asset manager for its asset management customers not to qualify as distribution pursuant to the CISA, the asset management agreement must be in written form (art. 3 para. 2(b) and (c) CISA). This will probably greatly reduce the scope of the present changes.
- Advisory agreements between a financial institution or an asset manager and its customer require the written form in order for advisory on subscription of fund units not to qualify as distribution (art. 3 para. 3(b) SICO).

The written form mentioned in these provisions is understood to be the simple written form pursuant to art. 13 SCO (cf. above, section I).

The rules of conduct of the Swiss Funds & Asset Management Association SFAMA (Code of Conduct, CoC) also belong to the applicable rules and regulations in the field of collective investments. They require the written form for the power of attorney based on which a CISA institution carries out asset management (para. 22 CoC) as well as for the asset management agreement (para. 90, 101 et seq. CoC, cf. also art. 25 CISO). The SFAMA can modify these rules of conduct based on the changed form provisions, but only for the power of attorney (para. 22 CoC). The form requirement for the asset management agreement must be changed in art. 25 CISO, which currently requires the simple written form in the sense of art. 13 SCO.

VII. Assessment

It remains to be seen whether FINMA has really succeeded in taking a big leap toward promoting digital technologies by introducing these changes. At this point in time, this is far from certain. Membership in an industry organization is not obligatory for independent asset managers, but is mandatory in order to be able to subscribe fund units for asset management customers without having to comply with the CISA distribution provisions (art. 3 para. 2(c) CISA). However, the simple written form continues to be required for these types of agreements.

In addition, the simple written form may still enjoy greater probative force in any civil proceedings that may arise as compared to an e-mail or SMS.

However, it is possible that these changes have paved the way for new technologies that have not yet been invented. With this in mind, the changes to the FINMA circular are certainly welcome.

VIII. Transitional provisions

These changes are effective immediately; there is no transitional period.

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