

Newsletter No.

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The revised insurance intermediation regime introduced by the partially revised Swiss Federal Insurance Supervision Act will enter into force on 1 January 2024. The revised law will bring considerable changes to both Swiss and foreign insurance intermediaries that provide insurance intermediation services from abroad to clients in Switzerland on a cross-border basis. In particular, the new rules will introduce a **comprehensive set of new requirements** regarding physical presence, personal and organisational matters as well as skills and knowledge that untied insurance intermediaries will have to fulfil going forward.



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The Revised Insurance Intermediation Regime at a Glance: New Requirements for Insurance Intermediaries

The revised insurance intermediation regulations, as contained in the partially revised Swiss Federal Insurance Supervision Act, will come into effect on 1 January 2024. These revisions will establish new requirements for both Swiss and foreign insurance intermediaries that provide insurance intermediation services to clients in Switzerland. In particular, foreign insurance intermediaries currently providing their services on a mere cross-border basis will be required to establish a physical presence in Switzerland. In addition, Swiss and foreign insurance intermediaries will be required to fulfil enhanced educational requirements.

Background

On 1 January 2024, the partially revised Swiss Federal Insurance Supervision Act (the **nISA**) together with its partially revised implementing ordinance, the Swiss Federal Insurance Supervision Ordinance (the **nISO**), will come into effect.

The revised regulations will bring considerable changes to the Swiss insurance intermediation regime as currently in force under the Swiss Federal Insurance Supervision Act (the **ISA**) and will have an impact on both Swiss and foreign insurance intermediaries that provide insurance intermediation services to clients in Switzerland on a cross-border basis. In particular, the revised regulations introduce new requirements concerning the presence of foreign insurance intermediaries, personal and organisational matters as well as new obligations regarding the skills and knowledge that untied insurance intermediaries will need to fulfil going forward. Considering the stricter regulatory standards and the relatively brief transition periods, insurance intermediaries are advised to proactively implement steps well in advance to ensure timely compliance with the new requirements.

On 21 August 2023, FINMA published administrative guidance for insurance intermediaries that outlines potential actions to be considered and taken by insurance intermediaries with a view to comply with the new regime under the nISA and nISA (FINMA Guidance 04/2023 "Action plan for insurance intermediaries", 21 August 2023, para. 2.3; the **FINMA-Guidance**).

Revised Scope of Insurance Intermediation

Insurance intermediaries are defined in art. 182a para. 1 nISO which states that insurance intermediaries are, in particular, persons that:

- (a) give advice to insurance takers with a view to conclude an insurance contract; or
- (b) propose insurance contracts.

Based on current legal doctrine and practice, the nISO clarifies that advisory activities directed at specific insurance takers and specifically aimed at the conclusion of an insurance contract are also covered by the scope of insurance intermediation activities. Insurance intermediation usually takes place at the point of sale, but the corresponding actions can also take place elsewhere in the value chain,

depending on the business model. Employees without direct customer responsibility, such as back office or reception staff, are not covered by such scope. In particular, such employees are not subject to any obligation to undergo training and continuing education pursuant to art. 43 nISA.

In addition, art. 182a para. 2 nISA holds that insurance intermediaries are also persons that have a commercial interest in offering or concluding insurance contracts via a website or another electronic medium and:

- (a) provide information on the basis of individualised criteria on one or more insurance contracts that a policyholder may choose via this website or this other electronic medium; or
- (b) compile a ranking list of insurance products, including price and product comparisons.

The latter criteria suggests that certain consumer comparison platforms may characterise as untied insurance intermediaries under the new regime. The nISO thereby highlights the principle of technology neutrality as the intermediation of an insurance contract can take place not only through direct customer contact but also, in the absence of direct customer contact, for example via a mobile app or a website. In terms of content, this clarification also corresponds to the thrust of the relevant European Directive (ABL L26/19).

The nISA still differentiates between tied and untied insurance intermediaries but introduces a new concept in relation thereto. Pursuant to the nISA, untied insurance intermediaries are defined as persons having a fiduciary relationship with the policyholders and must therefore act in their interests (art. 40 para. 2 nISA). All other insurance intermediaries are considered tied insurance intermediaries (art. 40 para. 3 nISA). In this context, cases in which a person has a fiduciary relationship with an insurance company,

e.g., as an employee or agent, are particularly relevant. Whether a person qualifies as a tied or untied insurance intermediary continues to depend on the circumstances of the individual case. Moreover, a combination of tied and untied by one insurance intermediary will no longer be permissible.

New Registration Requirements for Insurance Intermediaries

As under the current regime, untied insurance intermediaries remain subject to the registration requirement in the insurance intermediaries' register of FINMA (art. 41 nISA). Tied insurance intermediaries will no longer be able to register on a voluntary basis unless they can establish that they wish to take up an activity in another jurisdiction for which a registration in Switzerland is required by the target jurisdiction (art. 42 para. 4 nISA).

For the registration in the insurance intermediaries' register, untied insurance intermediaries will need to demonstrate that they (art. 41 para. 2 nISA):

- (a) have their registered office, their place of residence or a branch in Switzerland;
- (b) enjoy a good reputation and are fit and proper (*Gewähr*) to fulfil the obligations in accordance with the nISA;
- (c) have the professional skills and knowledge required for their activities according to the requirements under art. 43 nISA, or, if they are employers, that sufficient employees meet this requirement; and
- (d) have professional liability insurance.

With these new requirements, FINMA's supervision of insurance intermediaries will be significantly expanded compared to the supervisory regime currently in place. For instance, FINMA will carry out on-going supervision of insurance intermediaries, which will include compliance with the requirements described above.

New Physical Presence Requirement for Foreign Insurance Intermediaries

The nISA introduces a physical presence requirement for untied foreign insurance intermediaries. Foreign untied insurance intermediaries are required to have their registered office, domicile or establishment (*Niederlassung*) in Switzerland.

The Federal Council justifies the new physical presence requirement with the need to grant FINMA effective and enforceable supervision within its jurisdiction.

This new requirement may affect the business models of foreign untied insurance intermediaries that are currently registered in the insurance intermediaries' register of FINMA and provide their insurance intermediation services in Switzerland merely on a cross-border basis. If such foreign insurance intermediaries decide to continue to do business in Switzerland, they will be required to establish a physical presence before the end of the transition periods (see below).

The wording of the nISO and the FINMA-Guidance suggest that such establishment may take the form of a branch (*Zweigniederlassung*) that is registered in the commercial register. With a view to current Swiss corporate law provisions regarding the registration of a branch, it seems necessary that at least one individual, holding single signing authority, would need to be a Swiss resident to fulfil corporate law branch registration requirements. However, other staff members engaged in insurance intermediation activities for the branch would not be required to be Swiss residents. Nonetheless, the insurance intermediation activities must be conducted through the Swiss branch, which may involve considerations related to work permits. Accordingly, the nISO appears to provide for some flexibility in organising a branch, such as appointing a Swiss resident as the "branch manager", while allowing staff that render insurance

intermediation services in Switzerland to remain residents abroad. In any event, any proposed organisation of a branch should be tested with the commercial registry of the Canton in which the branch would be established as regulatory and corporate law requirements on branches are not fully aligned.

There are only few exemptions to the presence requirement, i.e., in particular, where foreign insurance intermediaries only broker reinsurance contracts in Switzerland. In this context, the FINMA-Guidance notes that foreign insurance intermediaries are required to provide FINMA with a domicile for service (correspondence address) in Switzerland.

New Skills and Knowledge Requirements

Under the existing ISA, insurance intermediaries need to demonstrate sufficient professional qualifications. FINMA has published guidance what degrees and diplomas it recognises as proof for sufficient professional qualifications. Pursuant to the wording of the nISA, insurance intermediaries will be required to have the necessary skills and knowledge to perform their activities, and insurance companies and insurance intermediaries will be required to establish, by means of industry organisations, industry-specific minimum standards for initial and continuing education in relation thereto.

The nISO, as a principle-based statement, holds that such minimum standards for initial and continuing education will need to accommodate considerations on professional practice and on the protection of insurance takers. Moreover, the nISO enumerates the criteria that these minimum standards must address:

- (a) skills, in particular in the area of customer acquisition, customer advice and customer service;
- (b) basic insurance knowledge;
- (c) depending on the activity, knowledge in the area of (i) property, personal

and asset insurance, (ii) legal and regulatory requirements, and (iii) product knowledge.

Initial and continuing education in accordance with these minimum standards will need to be evidenced by a respective degree or diploma. The minimum standards issued by industry organisations will need to be recognised by FINMA. Industry organisations will be required to monitor compliance with their minimum standards. Industry organisations will also have an obligation to notify FINMA in the event an insurance intermediary no longer complies with the continuing education requirements. It will be interesting to see if and to what extent existing degrees and diplomas offered by third-party providers under the ISA may, in form or in substance, be accommodated under the new, more SRO-style, regime of the nISA.

Call for Action

FINMA in its recent FINMA-Guidance encourages insurance intermediaries to comply with the new requirements in due time. FINMA notes, amongst other things, the following steps for existing insurance intermediaries to ascertain compliance with the nISA in view of the transition periods (see table below).

The FINMA-Guidance emphasises that untied insurance intermediaries that are not listed in the FINMA register as of 1 January 2024 and that provide insurance intermediation activities on an untied basis will act without authorisation. FINMA further notes that it will take action against persons rendering unauthorised activities and will, where indicated, initiate enforcement proceedings.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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| <i>1 January 2024</i> | <i>Last day to update current information on the insurance intermediaries' register of FINMA (if updates are required)</i> |
| <i>ASAP; before 31 December 2023</i> | <ul style="list-style-type: none"> • <i>Clarify whether the activity is performed on a tied or untied basis</i> • <i>Prepare and finalize follow-up documentation</i> • <i>Notify FINMA in case of cessation of insurance intermediation activities</i> |
| <i>1 January 2024</i> | <i>Comply with new nISA-obligations*</i> <i>* untied insurance intermediaries listed in the insurance intermediaries' register of FINMA as of 1 January 2024 are permitted to continue their activities but have to submit follow-up documentation to FINMA within the deadline</i> |
| <i>30 June 2024</i> | <ul style="list-style-type: none"> • <i>Last day to submit follow-up documentation to FINMA</i> • <i>Foreign insurance intermediaries: Comply with presence requirements, i.e., establish a presence in Switzerland or provide FINMA with a domicile for service in Switzerland</i> |
| <i>31 December 2025</i> | <i>Fulfil the new skills and education requirements</i> |