

Switzerland

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Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

The Federal Financial Market Supervisory Authority (FINMA) is the single regulator with supervisory authority for insurance and reinsurance businesses domiciled in Switzerland and the activities of foreign insurers in Switzerland. A licence to transact insurance business in or from Switzerland or for a reinsurance business domiciled in Switzerland is issued by the FINMA.

The primary sources of law governing the supervision of insurers and reinsurers are:

- the Federal Law on the Federal Financial Market Supervision of 22 June 2007 (the Financial Market Supervision Law);
- the Federal Law concerning the Supervision of Insurance Businesses of 17 December 2004 (the Insurance Supervision Law);
- the Regulation on the Supervision of Private Insurance Businesses of 9 November 2005 (the Insurance Supervision Regulation);
- the Regulation of the FINMA on the Supervision of Private Insurance Businesses of 9 November 2005; and
- the Circular Letter 2008/18 Investment Guidelines for Insurers of 20 November 2008.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Insurance businesses transacting business in or from Switzerland and reinsurance businesses domiciled in Switzerland must be licensed. Foreign reinsurers (including the Swiss branch of a foreign reinsurer) may transact reinsurance business in Switzerland without a licence. Foreign insurance businesses domiciled abroad and which do not have a branch in Switzerland are not subject to supervision in Switzerland if they only provide coverage for: risks in connection with marine transport, air transport and cross-border transportation; risks located outside Switzerland; or war risks. An insurance business which engages in insurance activities in Switzerland which are of slight economic importance or which affect only a small group of insureds may, if special circumstances justify it, be exempted from supervision by the FINMA.

A licence must be obtained for each line of business the insurance business intends to write. A licence to write a line of insurance includes a licence to write reinsurance for the same line. Life insurers may not write non-life business and non-life insurers may not write life insurance. A Swiss insurer or reinsurer may not engage in business activities that are unrelated to its insurance and reinsurance business without the consent of the FINMA.

The applicant for a licence to engage in the business of insurance or reinsurance must be organised as either a corporation or

a mutual company (Genossenschaft) and must be able to demonstrate that it will meet its obligations, as evidenced by an effective business management structure, the quality of its management and its solvency.

If the applicant is incorporated in Switzerland, it must have a minimum capitalisation in a range from 3 million to 20 million Swiss francs, depending on the lines of business it writes. In addition to the minimum capitalisation requirement for Swiss corporations or mutual companies, any applicant must have sufficient free and unencumbered capital resources in relation to all of its activities (a solvency margin). This solvency margin is determined on the basis of the risks the insurer is exposed to, the lines of business that it writes, the geographic scope of its activities and 'fundamental international standards'. An applicant also must have an organisational fund in Switzerland which is sufficient to fund the costs of establishing and developing the business in Switzerland. This fund normally is an amount equal to 50 per cent of the minimum capitalisation requirement.

The application for a licence must be submitted to the FINMA together with the applicant's business plan. The business plan is the focal point of the licensing process and for most applicants must include:

- a copy of the applicant's articles of incorporation;
- a description of the geographic scope of the applicant's business and, if the applicant is the member of an insurance group or conglomerate, of such group or conglomerate;
- if the applicant transacts insurance or reinsurance business outside Switzerland, a copy of each licence from each supervisory authority;
- information about the applicant's financial resources and a statement of its reserves;
- the applicant's financial statements for the past three years, or if none, its initial balance sheet;
- the identity of each person or entity that owns 10 per cent or more of the applicant's capital or voting rights or which in any other way can significantly influence its management;
- the identity of the persons responsible for the ultimate management, supervision and control of the applicant, or if the applicant is a foreign business establishing a branch in Switzerland, the identity of its general agent in Switzerland;
- the identity of the responsible actuary (a position required by the Insurance Supervision Law);
- the identity of the external auditors (including the identity of those responsible for the audit assignment) and, if the applicant is a member of an insurance group or conglomerate, the identity of the external auditors for the group or conglomerate;
- copies of contracts or other agreements for the outsourcing of significant business functions;
- the lines of insurance the applicant intends to write and the nature of the risks it will insure or reinsure;

- the reinsurance plan, or if the applicant is a reinsurer, its retrocession plan;
- the expected cost of establishing the company or branch in Switzerland;
- pro forma income statements and balance sheets for the first three financial years; and
- a description of how risks are recognised, monitored and limited.

For some of the information requested set forth above, the FINMA provides standardised formats that need to be used, completed and, as the case may be, signed by the applicant. An insurance business must notify amendments to its business plan to the FINMA before they are implemented and in some cases the FINMA's prior approval is required before such amendments are implemented.

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

A Swiss or foreign insurance business engaging in insurance business in or from Switzerland must have a licence to transact the relevant lines of insurance business. A foreign reinsurer may enter into contracts of reinsurance with Swiss cedents without a licence.

The licensing process is essentially the same for foreign and Swiss insurers. In addition, a foreign insurer intending to transact insurance business in or from Switzerland must:

- be licensed as such in its jurisdiction of incorporation;
- establish a branch in Switzerland and appoint a general agent to manage the branch who is authorised to legally bind the insurer;
- have in its home jurisdiction a solvency margin that complies with the requirements of the Insurance Supervision Law;
- establish an organisational fund in Switzerland (to cover the costs of establishing the business in Switzerland); and
- provide a security deposit in Switzerland in an amount equal to the share of the solvency margin attributable to the business written in or from Switzerland.

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

The key issue for the FINMA is that the board of directors and management are capable of assuring the sound supervision and management of the business. The names of the members of the board of directors and the executive board of the insurer or reinsurer must be submitted along with their curricula vitae and an organisational chart to the FINMA for approval with the licence application or as the composition of the board or directors or executive board changes. As a matter of corporate law, it must be possible for the corporation to be represented by a member of the board of directors who is resident in Switzerland.

5 Capital and surplus requirement

What are the capital and surplus requirements for insurance and reinsurance companies?

A supervised insurer or reinsurer is required to have sufficient free and unencumbered capital in relation to all of its activities and specifically taking into account the risks the insurer is exposed to, the lines of business it writes, the geographic scope of its activities and 'fundamental international standards'.

Two methods are used to evaluate the solvency of insurers:

- the 'Solvency 1' method, which relies on a determination of the required free and unencumbered capital based on the volume of the insurer's business (a required solvency ratio) and the free

and unencumbered capital of the insurer (an available solvency ratio); and

- the 'Swiss Solvency Test' (SST), which relies on a determination of required free and unencumbered capital based on the insurer's risks (target capital) and the free and unencumbered capital of the insurer (risk-bearing capital).

Both methods must be used independently of each other and must be applied each year.

It is not possible to provide a summary of the Solvency 1 method and the SST within this chapter. In general, the Solvency 1 method is based on indexes of premium volumes and insurance losses; the SST requires the insurer to take into account all of its risks, not only actuarially determined insurance risks as reflected in reserves for reported claims and incurred-but-not-yet-reported claims, but also market risks with respect to investments (interest rate and investment portfolio price changes), etc. Each insurer must develop its own comprehensive risk-quantification model for use in applying the SST.

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

The Insurance Supervision Law requires each supervised insurance business to establish sufficient insurance technical reserves to cover all of its expected liabilities and equalisation reserves sufficient to offset the volatility of its business. The supervised insurance business must specify the circumstances in which reserves will be created or released in its business plan and reserves must be calculated on a gross basis, ie, without taking into account the effect of reinsurance.

Insurance technical reserves are to be established by:

- life insurers and reinsurers for, among other things, future policyholder benefit liabilities, unearned administrative cost premiums, unearned premiums, incurred-but-not-paid claims (case reserves), interest rate guarantees and policyholder dividends; and
- property and casualty insurers and reinsurers for, among other things, unearned premiums, unpaid claims (case reserves and incurred-but-not-yet-reported claims) and claims expenses and policyholder dividends.

These insurance technical reserves, any additional reserves prescribed by the business plan, any additional regulatory reserves required by the FINMA and the regulatory surcharge set by the FINMA, must be backed by investments in restricted assets. Life insurers are required to have at least 750,000 Swiss francs in restricted assets; for property and casualty insurers the minimum is 100,000 Swiss francs. Insurance businesses are required to calculate the required amount of restricted assets as of the end of each financial year. This amount and an inventory of restricted assets must be delivered to the FINMA within three months after the close of the financial year. If the calculation of the required investment within restricted assets shows a deficiency, then the insurer or reinsurer must allocate additional assets to restricted assets immediately. Additional assets also must be allocated to restricted assets in the course of the year if developments indicate the required amount is no longer covered.

Investments within restricted assets must be specifically identified as such, so that the insurer or reinsurer is able to immediately show which of its investment assets are restricted assets and that the required amount of restricted assets is available.

The FINMA has issued a comprehensive directive specifying the types of investments that may be made within restricted assets, the permissible amount or concentration of such investments within each category of permitted investment and how such investments are to be valued. These guidelines emphasise the safety

of the investments, diversification, liquidity and the achievement of a reasonable, stable return on investment.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

Insurance products offered in or from Switzerland may only be offered by a duly licensed insurer. There is no overlapping regulation of insurance products.

8 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers and directors of the acquirer subject to background investigations?

Mergers, divestitures and restructurings must be approved by the FINMA, which has broad discretion to require the provision of information relating to such transactions. Note that mergers, divestitures and restructurings of a Swiss insurance or reinsurance business will also be subject to the requirements of the Federal Law on Merger, Divestiture, Restructuring and Asset Transfer of 3 October 2003.

9 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

As noted in response to question 2, the identity of each person or entity that owns 10 per cent or more of the applicant's capital or voting rights or that in any other way can significantly influence its management is an element of the business plan. If a change in the business plan relating to the identity of any of these persons is contemplated, this must be notified to the FINMA and the proposed change will be considered approved unless the FINMA notifies the insurer or reinsurer within four weeks after the notification that it intends to review the change more closely. Further, the financial condition of an insurer or reinsurer is subject to the FINMA's ongoing review and a change of control which has an effect on the financial condition of the business is a natural subject for regulatory scrutiny.

It also should be noted that Swiss corporate, tax and insolvency laws may limit transactions which are considered upstream, cross-stream or downstream financial assistance, so financing arrangements which rely on payments, loans or guarantees from a shareholder, sister company or parent company to a subsidiary (including an indirect subsidiary) or a sister company, or vice versa, may not be feasible or allowed.

10 Foreign investment

What are the requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

There are no restrictions on foreign investors, whether natural persons or legal entities. A list of shareholders including the extent of their shareholdings must be submitted to the FINMA with the licence application.

11 Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

There are no statutory or regulatory requirements with respect to reinsurance ceded by a Swiss company to a foreign or domestic

reinsurer or assumed by a Swiss reinsurer from a foreign or domestic cedent. As noted in response to question 2, reinsurance agreements are reviewed as part of the FINMA's assessment of the business plan.

12 Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

The FINMA requires a ceding insurer to retain a percentage of the risk it has written, usually at least 10 per cent of the risk exposure. The burden of satisfying this requirement normally falls on the ceding insurer because the reinsurance plan must be approved by the FINMA as part of its review of the business plan and compliance with the required level of risk retention is an annual audit item. The rationale for the rule is that 100 per cent fronting would permit unlicensed foreign insurers to circumvent licensing requirements.

13 Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

None, but as noted in response to question 2, reinsurance agreements made by a supervised insurance or reinsurance business are reviewed as part of the FINMA's assessment of its business plan.

14 Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

The Insurance Supervision Law contains specific provisions applicable to insurance or reinsurance businesses in liquidation or bankruptcy. The FINMA has the right to appoint the liquidator in proceedings for the liquidation of a supervised insurance business. Bankruptcy proceedings for a supervised insurance business cannot be commenced without the consent of the FINMA and the Insurance Supervision Law provides that the FINMA should give its consent when it is not possible to rehabilitate the insurer or reinsurer. Under the Federal Law on the Insurance Contract of 2 April 1908 (the Insurance Contract Law), insurance policies (other than life insurance policies and reinsurance agreements) terminate automatically four weeks after the commencement of bankruptcy proceedings, but existing claims under such policies remain unaffected.

The FINMA also can appoint a special bankruptcy administration in bankruptcy proceedings for a supervised insurance business and the FINMA can assign all of the rights of creditors to the special bankruptcy administration. In the first instance, claims under insurance policies are to be paid from the proceeds of the restricted assets of the insurance business. After the payment of claims, excess proceeds from restricted assets may be applied to the remaining debts of the business.

If the home supervisory authority of a foreign insurance business has restricted its ability to dispose of its assets, the FINMA is authorised by the Insurance Supervision Law, upon the request of the foreign supervisory authority, to impose the same measures in respect of the insurer's business in Switzerland.

15 Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

The Insurance Supervision Law defines insurance intermediaries as persons who offer or conclude insurance policies on behalf of insurance businesses or other persons. Intermediaries may not transact business for the benefit of unlicensed insurance businesses.

The Insurance Supervision Law prescribes the creation of a registration system for insurance intermediaries and requires intermediaries that are not legally or otherwise tied to a specified insurer to be registered (other intermediaries may register voluntarily). Only intermediaries who can demonstrate sufficient professional qualifications and who have professional liability insurance (or have met security deposit requirements) can register. The Insurance Supervision Law also prescribes minimum procedures to be observed when the intermediary contacts an insured.

Insurance claims and coverage

16 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

The Insurance Contract Law does not grant third parties a cause of action against insurers, but there are special situations in which a direct action by a third party may be possible, such as under the Road Transportation Law of 19 December 1958, which grants a third party who has been injured or damaged a direct action against the insurer of the responsible driver or under the Federal Law of 4 October 1963 on Pipeline Facilities for the Transport of Liquid or Gas Fuels, which also grants a third party who has been injured or damaged a direct action against the insurer of the pipeline facility.

17 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

There is no precedent in Switzerland on the issue of whether the reinsurer must show prejudice from late notice of a reinsurance claim. The insurer may specify in the insurance policy that timely notice is a condition precedent to its obligation to pay a claim.

18 Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

Except for fraud and wilful misconduct, no non-contractual claims for fraud or wilful misconduct are permitted if the claimant can show he or she has been damaged because the insurer engaged in unlawful conduct for which it was legally responsible and the unlawful conduct was the cause of the claimant's damage. Nevertheless, the successful claimant is likely to obtain a better recovery under a claim for breach of contract rather than under a claim for non-contractual damages.

19 Defence of claim

What triggers a liability insurer's duty to defend a claim?

This depends on the terms of the insurance policy.

20 Indemnity policies

For indemnity policies, what triggers the insurer's indemnity obligations?

This depends on the terms of the insurance policy.

21 Incontestability period

Is there an incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

Unless otherwise agreed in the policy, the insurer's right to contest the policy lapses four weeks after the insurer learns of the misrepresentation.

22 Punitive damages

Are punitive damages insurable?

Yes, if they are insurable in the jurisdiction where they are awarded.

23 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

This depends on the terms of the insurance agreement.

24 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

This will be determined by the terms of the policies.

25 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

If the same insurable interest is insured against the same risk for the same period of time and the aggregate of the coverage limits exceeds the insured value, then the insured is required to give notice of this fact to all of the insurers. If the insured intentionally fails to give such notice or if the insured has obtained duplicate insurance coverage in an attempt to gain an illegal financial advantage, then each of the insurers is entitled to rescind its policy.

The treatment of overlapping coverage under other circumstances will be determined by the terms of the policies.

Reinsurance

26 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers tend to prefer business solutions for their disputes without formal proceedings?

Reinsurance disputes are rarely litigated in Switzerland and there is a dearth of judicial decisions relating to reinsurance. Arbitration is the more common formal method of dispute resolution in Switzerland, but it is believed that most reinsurance disputes are resolved through negotiation.

27 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

The issues giving rise to reinsurance disputes generally are not unique to Switzerland. As elsewhere, disputes often involve issues of contract formation and the scope of the reinsurance and questions about proper notice and settlement of reinsured claims.

28 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Yes. Moreover, Swiss arbitration law requires, with respect to both international and domestic arbitration, that the award include the reasoning for it unless the parties have expressly waived this requirement.

29 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

As a rule, arbitrators do not have powers over non-parties. In rare and special circumstances, however, the arbitration agreement may be extended to a non-party. Furthermore, the arbitral tribunal may apply to the state judge for judicial assistance. In this way, the arbitral tribunal may, for instance, request that the state court examine a witness who is unwilling to appear before the tribunal or order a third party to produce certain documents which the party has refused to disclose to the tribunal.

30 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

An action for annulment of an award rendered in international arbitration conducted in Switzerland may only be brought before the Federal Supreme Court. The possible grounds for an annulment under article 190(2) of the Federal Law on Private International Law of 18 December 1987 are very limited. Review of the tribunal's decision on the merits is excluded unless the award is contrary to public policy. If neither party to the arbitration is Swiss, then the parties also may expressly agree to fully waive an action for annulment. An award in a domestic arbitration is subject to an annulment action brought before the appellate court of the relevant canton and an appeal to the Federal Supreme Court.

An award rendered in Switzerland becomes final and binding upon its notification. Arbitral awards issued in Switzerland are considered to have the same force as court judgments and they are enforced as if they were court judgments. Foreign awards are recognised and enforced under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In essence, a foreign arbitral award will be enforced if it is established that the parties agreed to submit the relevant dispute to arbitration and the award of the arbitral panel was within its jurisdiction.

Reinsurance principles and practices**31 Obligation to follow cedent**

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

No.

32 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

The duty of utmost good faith is not an implied term of a reinsurance agreement under Swiss law. Under the Insurance Contract Law, an insured under an insurance policy has a duty to disclose all facts relevant to the assessment of the risk insured and to submit truthful claims, but reinsurance agreements are specifically exempted from the scope of this law. Article 2 of the Swiss Civil Code of 10 December 1907 does require each person to act in accordance with fidelity and good faith in the exercise of his or her rights or in the performance of his or her obligations.

33 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

No.

34 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

No.

35 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

A reinsurer has no statutory obligation to pay claims to the insureds of an insurance business it has reinsured and reinsurers are well-advised not to enter into contracts that provide for such payments.

36 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer?

The notice and information requirements are those specified in the reinsurance agreement. There is no precedent in Switzerland on the issue of whether the reinsurer must show prejudice from late or inadequate notice in order to deny coverage.

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37 Allocation of underlying claim payments or settlements

In the case of multi-year occurrences, such as pollution, how are underlying claim payments or settlements allocated among policy years covered by multiple reinsurance agreements?

The answer to this question will depend on the terms of the reinsurance agreements.

38 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

These issues are not addressed directly by statutes or regulations. The answer to this question will normally depend on the terms of the reinsurance agreements.

39 Reimbursing of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

Commutation is not addressed directly by statutes or regulations. The answer to this question will turn on the terms of the reinsurance agreements.