

The New FINMA Outsourcing Circular





BACKGROUND AND KEY POINTS

On December 5, 2017, the Swiss Financial Market Supervisory Authority (FINMA) published the new circular 2018/3 “Outsourcing – Banks and Insurance Companies”. The revised outsourcing circular will enter into force on April 1, 2018 and defines the regulatory requirements to be met by banks, securities dealers and insurance companies when outsourcing material business functions to third-party service providers.

Based on the feedback of banks, securities dealers and insurance companies during the last year’s consultation process, the original draft of the outsourcing circular, which was published by FINMA in December 2016, has been modified substantially.

More so than the current circular, the new regulatory framework follows a principle-based approach and aims to be technology-neutral in order for in-scope financial institutions to be able to implement the outsourcing requirements in a way that takes into account their specific business models and risks. Under the new regime, the individual responsibility of in-scope financial institutions is strengthened – a change which will likely be welcomed by the industry. However, the new approach also raises questions which are no longer answered in the circular itself. The Swiss Financial Market Supervisory Authority further indicated that it does not intend to publish specific “FAQs” or other guidance relating to the interpretation of the new circular.

The main changes compared to the current circular 2008/7 “Outsourcing Banks” are the following:

- The new outsourcing circular does not only apply to Swiss banks and securities dealers and Swiss branches of foreign banks and securities dealers, but also covers insurance companies having their legal domicile in Switzerland as well as Swiss branches of foreign insurance companies.
- The criterion of materiality which is relevant for the determination of whether an outsourcing falls within the scope of the circular has been defined in an abstract manner. It is the responsibility of each in-scope entity to decide whether a function is material having regard to the specific business model of the entity in question. The separate annex to the current circular which sets out specific examples of material outsourcings falling within the scope of the regulatory regime will no longer be part of the circular. Under the new circular, a function is deemed to be “material” where – based on an assessment of the financial institution – compliance with the objectives and provisions of financial market supervision legislation significantly depends on it. However, according to FINMA, the addressees of the new circular may still rely on the existing supervisory practice when determining whether a function is material or not.
- The references to the requirements under current data protection and banking secrecy legislation are no longer included in the outsourcing circular. However, the relevant requirements will still apply to any outsourcing arrangements.
- In-scope financial institutions have to keep an up-to-date inventory of the outsourced functions. The inventory has

to include a description of the outsourced function, specify the provider or providers (including any subcontractors) and recipient(s) of the outsourcing services, and indicate which unit is responsible for the outsourcing within the outsourcing company. Keeping this inventory will impose an additional burden on financial institutions.

- Before the outsourcing takes place, the outsourcing company has to conduct a risk analysis with respect to the outsourcing.
- The new circular does not provide for any specific exceptions for intragroup outsourcing arrangements. With regard to certain regulatory requirements, affiliations within the group may, however, be taken into account, provided that in the intragroup context (i) the risks typically associated with an outsourcing demonstrably do not exist, (ii) the respective requirements are not relevant or (iii) the respective requirements are otherwise regulated.
- For outsourcings of functions to foreign service providers, the outsourcing company must no longer be able to demonstrate that its external auditor under bank and stock exchange laws and FINMA are able to assume and enforce their specific audit rights by producing a legal opinion or a confirmation from a competent foreign supervisory authority. However, each outsourcing company is still responsible for ensuring that itself, its auditors as well as FINMA are in a position to inspect and audit the outsourced function at any time.
- The former requirement to inform customers in case of outsourcings of customer data to a foreign service provider has been eliminated. Based on existing data protection and banking secrecy laws it may however still be necessary to inform customers about the fact that client identifying or personal data is disclosed to a third party (see “Data Protection and Banking Secrecy” below).

In contrast to the draft outsourcing circular which has been published by FINMA in December 2016, the final version of the circular no longer contains specific requirements with respect to the outsourcing of functions of systemically important banks. However, such institutions still have to ensure that the outsourcing of material functions does not lead to a conflict with their obligation to maintain systemically relevant functions in an emergency scenario and to address this aspect in their emergency plan. Furthermore, they have to demonstrate that the outsourcing would not make it more difficult to restructure or wind-up the relevant financial institution.

The revised circular will enter into force on April 1, 2018. For *banks* and *securities dealers*, a transition period of five years applies. During this period, in-scope entities have to amend existing outsourcing agreements and must make sure that they correspond to the new regulatory requirements by April 1, 2023 at the latest. If a bank or a securities dealer concludes a new or amends an already-existing outsourcing agreement, the circular applies immediately after its entry into force. From April 1, 2018, new *insurance companies* will immediately be subject to the revised circular. Existing insurers are subject to the new rules only if there is a change in their regulatory business plan.

CONTENT OF THE NEW CIRCULAR

1. Purpose

The new outsourcing circular stipulates the supervisory requirements which apply to the organisation of outsourcing arrangements of banks, securities dealers and insurance companies. Its purpose is to reduce the risks related to outsourcing arrangements.

The circular no longer addresses aspects relating to data protection as well as customer and banking secrecy in order to avoid any inconsistencies with applicable data protection, criminal and private laws governing these topics. Data protection and banking secrecy legislation will, however, still have to be taken into account when outsourcing a business area to a third-party service provider.

2. Terms

An *outsourcing* as defined in the new circular occurs where an in-scope financial institution mandates a third-party service provider to independently and permanently perform a function, either wholly or in part, that is material for the relevant company's business activities.

For the purposes of the outsourcing circular, a *company* is a bank, securities dealer or an insurance company.

In contrast to the current circular, the revised circular refers to the out-sourcing of a *function* rather than to the outsourcing of a *service*. According to FINMA, this change does not have the effect of altering the subject of the circular but is merely a matter of terminology. The requirements according to which the function has to be performed *independently* and *permanently* remain unchanged.

For the applicability of the circular, whether the outsourcing has to be considered material or not is still decisive. In contrast to the current regime, the term *material* is described in an abstract manner. Under the new regime, a function is deemed to be material where compliance with the objectives and provisions of financial market supervision legislation significantly depends on it. It is the responsibility of each in-scope financial institution to determine whether this is the case. Unlike the previous circular, the new circular does not include a separate annex which sets out specific examples of material and non-material outsourcings. However, according to FINMA, banks may still rely on the existing supervisory practice when determining whether a function is material or not. With regard to insurance companies, all functions that are inseparably linked to the operation of the insurance company have to be qualified as being material in the sense of article 4 section 2(j) of the Federal Insurance Supervision Act. These functions include the production, the inventory/contract administration, the settlement of claims, the accounting, the asset management and investment as well as the information technology. In addition, based on article 96 section 4 of the Ordinance on the Supervision of Private Insurance Companies, FINMA takes the view that the risk management and compliance functions qualify as material functions for the purposes of the new circular.

For banks, an outsourcing will in any case be deemed to be material where the outsourcing provider obtains access to mass client-identifying data (CID).¹ Granting access to limited client-identifying data does, however, not qualify as being material. For insurance companies, in order to determine whether or

not an outsourcing which relates to client-identifying data is material one has to take into account to what extent the interests of the insured persons are affected.

3. Scope

As under the current regime, the revised circular applies to banks and securities dealers having their legal domicile in Switzerland as well as to Swiss branches of foreign banks and securities dealers. In addition, Swiss insurance companies and branches of foreign insurers who are subject to approval by FINMA are in scope of the circular. The reason why Swiss branches of foreign financial institutions are subject to the regime is that these entities are supervised by FINMA.² Accordingly, the regulator must be able to verify whether the outsourcing is in line with the supervisory requirements.

Financial groups and conglomerates as such are no longer in the scope of the circular as they (as an economic group) cannot be a party to an outsourcing arrangement. However, for such groups of financial institutions, the risks associated with an outsourcing must be evaluated on a consolidated basis.

Furthermore, the circular does not apply to the (original) outsourcing of material functions of foreign subsidiaries or foreign branches of financial institutions having their legal domicile in Switzerland. In this case, the outsourcing arrangement is subject to the supervision of the competent foreign supervisory authority.

The proposal made in the consultation process to regulate outsourcing arrangements of insurance companies in a separate outsourcing circular based on the fact that the Federal Insurance Supervision Act already contains specific provisions relating to the outsourcing of business operations as well as a general authorisation requirement for business plans (see article 4 section 2(j) and article 5 section 2 of the Federal Insurance Supervision Act) has not been taken into account by FINMA. Furthermore, FINMA did not implement a general exception for financial market infrastructures (such as SIX Group AG) acting as provider of outsourcing services. This means that the outsourcing of functions to financial market infrastructures is also subject to the provisions of the circular.

4. Authorisation Requirements and Permissibility

(a) Authorisation Requirements

Banks and securities dealers are permitted to outsource material functions without the prior approval of FINMA. The outsourcing of material business functions of insurance companies is considered to be relevant for the business plan of the insurer in accordance with article 4 section 2(j) and article 5 section 2 of the Federal Insurance Supervision Act and therefore (as this was already the case under the current regime) subject to the approval of FINMA.

(b) Permissibility

Generally, all material functions of a bank, a securities dealer or an insurance company may be subject to an outsourcing arrangement. There are, however, a number of exceptions.

As is already the case under the current regime, it is impermissible to outsource (i) the overall management, supervision and control by the supreme management body of the company (*board of directors*), (ii) key management tasks of the management board as well as (iii) decisions relating to the commencement and discontinuation of business relationships.

¹ Note 53 of annex 3 to the FINMA circular 2008/21 "Operational Risks - Banks" defines *mass client-identifying data (CID)* as quantities of CID which in relation to the overall number of accounts / total size of private client portfolios are considered to be significant.

² To date, the outsourcing of functions by insurance companies was subject to the circular 2017/8 "Business Plans Insurance Companies" and further explanatory notes published by FINMA.

In addition, functions relating to strategic decisions may not be outsourced. However, as this function will likely be covered by the overall management of the company, this restriction will in practice not be of material significance. The reference in the new circular to decisions relating to the commencement and discontinuation of business relationships seems to be rather far reaching. This restriction should be construed in a way that the business relationships in question have to be of a certain importance for the relevant in-scope institution.

In addition, it is not permitted to outsource risk management and compliance tasks other than those which are operational in nature. These functions must stay within the financial institution and have to be designed in a way that the latter is able to control and supervise any function which is subject to an outsourcing arrangement. For companies falling into supervisory categories 1 to 3, the risk management and compliance tasks are carried out by an independent control body. For companies falling into supervisory categories 4 and 5, it is sufficient to designate a member of the management board as the responsible person for risk management and compliance issues. The operational risk management and compliance tasks (i.e. the "day-to-day operation") may be outsourced. If the risk management and compliance tasks are performed at a group level, it is further possible to explore synergies on a lower (entity) level, it being understood that the supreme management body and the senior management of each legal entity will still be responsible for an adequate risk control on the level of the relevant entity.

The new regime enhances the outsourcing capabilities of insurance companies who have only been able to outsource two out of three of their core functions under the current outsourcing regulation.

Further facilitations apply to the outsourcing of management and control functions of insurance captives. Firstly, it is possible to outsource the management of direct and reinsurance captives domiciled in Switzerland (including central management functions of the executive board) to specialised captive management companies. Secondly, the management of branch offices of foreign direct insurance captives may be outsourced to another group company or to a specialised captive management company, provided that the outsourcing does not limit the supervisory function of the general representative. These rules applying to insurance captives correspond to FINMA's current practice.

5. Requirements for Outsourcing Companies

(a) Inventory of Outsourced Functions

As a new element, the outsourcing circular provides for the duty to establish an inventory of the outsourced functions; in-scope entities have to keep an up-to-date inventory of all outsourced functions which meet the materiality threshold (see "2. Terms" above).

The inventory has to include a description of the outsourced function, specify the service provider or service providers (including any subcontractors) and recipient(s) of the outsourcing services, and indicate which unit is responsible for the outsourcing within the company. In order to determine whether a subcontractor has to be included into the inventory, one has to assess whether the tasks performed by such subcontractor are material in the sense of the circular. The materiality threshold may also be met if the subcontractor

is only responsible for tasks which are repetitive in nature or which can be replaced easily. The obligation to designate a responsible unit within the company directly relates to the obligation of in-scope entities to integrate the outsourced business unit into the company's internal control system (see "5.(e) Security" below). According to FINMA, the description of the outsourced function or the service provider has to include information regarding the outsourcing of mass client-identifying data to a foreign service provider, if applicable.

In order to fulfil their obligation to keep an up-to-date inventory of the outsourced functions, in-scope entities have to make sure that their third-party service providers provide them with the necessary data. This is particularly relevant with regard to the identity of the deployed subcontractors. From the service provider's point of view, this means that it has to ensure a higher degree of transparency than is the case under the current regime.

Insurance companies have to maintain the inventory in their business plan form J.³ The inventory or any changes to it are not per se subject to the reporting or approval requirement. This is only the case for the outsourcing agreements themselves and those elements of the inventory that are expressly designated as such in the business plan form J (parts highlighted in blue). A request made in the consultation process to establish a template form of the inventory to be maintained by banks (similar to the business plan form J) was not implemented by FINMA.

(b) Selection, Instruction and Monitoring of the Service Provider

The standards for the provision of the outsourcing services have to be defined prior to entering into the outsourcing agreement. In contrast to the current regime, it will not be necessary to specify these standards precisely. The respective regulatory requirement has been slightly eased. The definition of the standards for the provision of the outsourced function includes a risk analysis that takes into account the main economic and operational considerations and deals with the risks and opportunities associated with the outsourcing in question. By including economic and operational considerations, the set of requirements also includes items which are per se not relevant from a prudential supervisory perspective. However, it has to be noted that the circular only requires in-scope entities to take into account the *main* economic and operational considerations.

When selecting the relevant service provider, the financial institution must carefully consider and assess the provider's professional capabilities as well as its financial and human resources. Furthermore, if several functions are outsourced to the same third-party provider, potential concentration risks have to be considered. The reference to concentration risks was criticised in the consultation process as the selection of one single source may also have several advantages and may not only reduce the costs of the outsourcing but also the complexity for the outsourcing company. Even though this aspect has not been written down in the circular, there are valid reasons to also take into account the advantages of receiving a service package from one single source when evaluating an outsourcing arrangement. An example of such an advantage may be the reduction of interface risks in the IT area. Finally, it has to be noted that the outsourcing of several functions to the same service provider does not per se lead to

³ Accessible under <<https://www.finma.ch/de/bewilligung/versicherungen/geschaeftsplan/>>.



an impermissible concentration risk. One further aspect which has to be taken into account when selecting the third-party service provider is the potential impact of changing the service provider. It has to be ensured that the outsourced function can be reintegrated in an organised way. Finally, the service provider must ensure that it will be able to offer the offered services permanently.

In addition, the new circular requires that the responsibilities of the outsourcing company and the service provider are laid down and clearly defined in a written agreement, which has to deal with the responsibilities of each party, among other things, and lay down the rules for the handling of interfaces.

As is already the case under the current regime, the outsourced function must be integrated into the outsourcing company's internal control system. Material risks in connection with the outsourcing have to be systemically identified, monitored, quantified and managed. The outsourcing entity has to define an internal unit in charge of monitoring and evaluating the service provider on an ongoing basis in order to ensure that the necessary measures can be taken in a timely manner. Finally, the outsourcing company must ensure that the outsourcing agreement contains the required instruction and control rights.

(c) Intragroup Outsourcings

The new outsourcing circular also applies to outsourcings within a group of companies. However, intragroup affiliations may be taken into account when determining the circular's requirements regarding the selection, instruction and monitoring of the service provider (see "5.(b) Selection, Instruction and Monitoring of the Service Provider" above) as well as the establishment of the contractual arrangements between the outsourcing company and the service provider (see "5.(h) Agreement" below), provided that in the intragroup context (i) the risks typically associated with an outsourcing demonstrably do not exist, (ii) some of these requirements are not relevant or (iii) some of these requirements are otherwise regulated.

For example, less strict requirements may apply in an intragroup situation to the selection of the relevant service provider, particularly if the intragroup service provider has a proven track record of a high-quality service. Furthermore, it can be taken into account that it may be easier for the outsourcing entity to exercise its monitoring rights in an intragroup context, particularly if the service provider is a subsidiary. Furthermore, the risk analysis which has to take place before a function is outsourced may be different and the documentary requirements may be lower if the service provider is a group company (see "5.(h) Agreement" below). Finally, the concentration risk as well as the change risk (see II.5.(b) above) are, from our point of view, not relevant in the case of an outsourcing to a group company.

Despite the examples cited above, it may be difficult for an outsourcing entity to define whether the conditions for taking into account intragroup affiliations are fulfilled. To ensure that the facilitations in an intragroup context will not remain meaningless in practice, the standard to be applied should not be too high. In the case of financial conglomerates which are subject to the supervision of a foreign regulatory authority, the applicable foreign regulatory requirements relating to the outsourcing of business areas should from our point of view be taken into account.

(d) Responsibility

The outsourcing entity is not released from its responsibility with regard to the outsourced function. Furthermore, the circular requires the outsourcer to ensure the proper conduct of its business at all time.

(e) Security

In the case of security-relevant outsourcing arrangements (especially in the IT area), the outsourcing company and the service provider have to contractually define the security requirements applying to the outsourcing. These requirements have to be monitored by the outsourcing entity. Furthermore, the parties have to establish a contingency plan which ensures that the outsourced function may be continued in the case of an emergency. When establishing this contingency plan, the outsourcing entity has to apply the same level of care that it would apply if it were performing the outsourced services in-house.

In line with the new principle-based and technology-neutral approach, the circular leaves room for the determination of the security requirements and does not set specific standards in this regard. Furthermore, the obligation to determine specific security requirements is limited to *security-relevant* outsourcings. Whether this is the case has to be determined by the outsourcing company. According to FINMA, the security requirements have to be implemented on an institution-specific basis taking into account the outsourced function, the specific risks as well as the systems and technologies used in the specific case.⁴

Compared to the current circular, the standards which apply to the contingency plan have been reduced. Under the new regime, the contingency plan must not cover all foreseeable emergencies but "only" ensure the continuation of the outsourced function in an emergency scenario. The scope of the contingency plan has to be defined by the outsourcing entity in the course of its risk analysis. At a minimum, the relevant in-scope entity has to comply with the applicable self-regulation standards issued by the Swiss Insurance Association or, in the case of banks, the Swiss Bankers Association.

⁴ If client-identifying data is subject to the outsourcing arrangement, the outsourcing entity is based on applicable data protection laws obliged to take adequate technical and organisational measures to protect the out-sourced data and to make sure that the relevant security requirements are also implemented by the service provider. Furthermore, the outsourcing entity has to monitor whether the service provider applies the relevant security measures (see "Data Protection and Banking Secrecy" below).

(f) Audit and Supervision

As is already the case under the current regime, the company, its auditors as well as FINMA must be in a position to review and assess the service provider's compliance with applicable supervisory regulations. For this reason, the contractual arrangement has to include specific audit and inspection rights which can be freely exercised in full at any time. The audit activities may be delegated to the service provider's external auditors, provided that they possess the necessary professional expertise to perform this task. The new circular does not contain a specific reference to the internal audit function of the outsourcing entity anymore. As the internal audit function is a part of the outsourcing entity as such, this does, however, not change the general scope of the audit right requirement. Apart from the above, the audit and supervision requirements introduced by the new circular largely correspond to the relevant requirements set forth in FINMA circular 2008/7.

In response to the criticism expressed by market participants with respect to the requirement that the audit and inspection rights can be exercised "freely", "in full" and "at any time", FINMA clarified that these terms have to be interpreted based on the principle of proportionality. According to FINMA, it is acceptable if the audit rights can be exercised with adequate advance notice only. Furthermore, it was clarified that the audit and supervision rights only relate to facts which are relevant from a supervisory perspective. Finally, FINMA clarified that the ability to freely exercise the audit and supervision rights does only relate to the outsourced function and that this requirement is also fulfilled if the audit and supervision rights can only be exercised while respecting the general business secrets of third parties. Finally, FINMA indicated that, particularly with regard to outsourcings in the IT area (for example in connection with the use of cloud infrastructure), on-site presence will not be necessary in any case. In such cases, it would in fact also be possible for the audit rights to be exercised from a distance.

(g) Outsourcings to Foreign Service Providers

Outsourcings to foreign service providers are generally permitted, provided that the outsourcing entity can explicitly guarantee that itself, its auditors and FINMA are able to exercise and enforce their audit and supervision rights.

The requirement to provide evidence of the possibility to exercise the relevant audit and supervision rights by way of a legal opinion or (alternatively) a confirmation from the competent foreign supervisory authority no longer exists. This is attributable to the fact that there were many cases where it was not possible to produce a legal opinion or where the opinion was heavily qualified (e.g. in the case of outsourcings to Germany). Confirmations from foreign supervisory authorities were not relevant at all in practice.

Despite the fact that the former evidence requirements no longer apply, in-scope entities are still responsible for "adequately verifying" whether the audit and supervision rights may be exercised abroad in the case of an outsourcing to a foreign service provider. From our point of view, the requirement to "adequately verify" the possibility to exercise these rights is already fulfilled if this is confirmed by an in-house counsel of the company or the foreign service provider who is familiar with the legal system in question.

The new circular requires that the restructuring and/or winding-up of the outsourcing entity in Switzerland must be ensured. The information which is necessary for this purpose must be accessible in Switzerland at any time. With regard to banks, this requirement is deemed to be fulfilled if it is possible to access the required data *from* Switzerland. For digital data, this will usually be the case.

If mass client-identifying data is transmitted to a foreign service provider, this fact has to be included into the description of the outsourced function or the service provider in the inventory which is to be maintained by the outsourcing entity (see "5.(a) Inventory of Outsourced Functions" above).

(h) Agreement

Like the current circular, the revised circular requires that the outsourcing arrangement be governed by a written agreement, which has to include a description of the outsourced function and certain other content. Among other things, the agreement has to stipulate that the engagement of subcontractors exercising material functions requires the prior consent of the outsourcing company. Furthermore, such subcontractors have to comply with all obligations and warranties of the third-party service provider which are necessary to ensure compliance with the circular. In contrast to the current regime, the consent of the outsourcing company to the engagement of a subcontractor does not have to be in writing. The fact that the consent requirement only applies if *material* functions are outsourced to subcontractor is a further relief compared to the current regime.

Furthermore, a number of other contractual arrangements have to be made to comply with the requirements of the circular. These are the following:

- Stipulation of specific supervision and inspection rights for the benefit of the outsourcing entity.
- Stipulation of security requirements in the case of security-relevant outsourcing arrangements (especially in the IT area).
- Stipulation of contractual audit and inspection rights for the benefit of the outsourcing company, its auditors and FINMA.
- Stipulation of a contractual obligation of the service provider to provide FINMA with all required information and data relating to the outsourced function. An exception applies if the outsourcing provider itself is subject to the prudential supervision of FINMA.
- Stipulation of rules which enable the outsourcing company, its auditors and FINMA to exercise their audit and inspection rights and which ensure that the information necessary for the restructuring and/or the winding-up of the outsourcing entity is accessible in Switzerland in the case of outsourcings to foreign service providers.

The request of certain market participants to introduce certain exceptions from the documentation requirements for intragroup outsourcings has not been implemented. However, intragroup affiliations may be taken into account when establishing the contractual arrangements between the outsourcing company and the service provider, provided that in the intragroup context (i) the risks typically associated with an outsourcing demonstrably do not exist, (ii) certain requirements are not relevant or (iii) certain requirements are otherwise regulated. Depending on the relevant intragroup situation, the contractual requirements may therefore be lower than the requirements which have to be met between

unrelated parties. For example, it should be sufficient to implement internal guidelines and directives which govern the relevant outsourcing arrangement.

Finally, as under the current circular, the outsourcing company has to establish an internal approval process for outsourcing projects and define the responsibilities to conclude the relevant outsourcing agreements.

6. Conditions and Exemptions

As under the current regime, FINMA may completely or partially exempt certain institutions from the requirements under the circular or impose additional or other conditions on a company. With regard to insurance companies, the possibility to grant exemptions is limited based on article 4 section 2(j) of the Federal Insurance Supervision Act.

7. Entry into Force and Transitional Rules

The new circular will enter into force on April 1, 2018 and directly applies to outsourcing arrangements of banks and securities dealers which are entered into or amended after this date. Existing outsourcing arrangements of banks and securities dealers will be grandfathered during a transition

period of five years ending on April 1, 2023. By then, all arrangements have to be amended in a way that they comply with the requirements of the circular.

Accordingly, banks and securities dealers have to be aware of the fact that each amendment of an existing outsourcing agreement has the effect that the requirements of the new circular become immediately applicable to such agreement. However, even if the circular does not explicitly state so, minor amendments of existing outsourcing agreements as for example a change of prices or quantities (e.g. the replacement of price sheets) or a change of contact details should not trigger the obligation to implement the requirements of the new outsourcing circular.

For insurance companies, a different regime applies. New insurance companies will immediately be subject to the circular. Existing insurance companies will be subject to the new regime if they apply for a change of their existing business plan. According to FINMA, the reason for the different treatment of insurance companies and banks/securities dealers is that insurance companies have not been subject to an outsourcing circular so far and that the new circular largely codifies the established regulatory practice for insurers.

DATA PROTECTION AND BANKING SECRECY

In contrast to the current outsourcing circular, the new circular no longer addresses data protection and banking secrecy issues in order to avoid any inconsistencies with applicable data protection, criminal and private laws governing these topics.

However, in-scope entities will still have to take into account data protection and banking secrecy legislation when outsourcing a business area to a third-party service provider,

particularly if they enter into an outsourcing arrangement with a foreign outsourcing provider. For example, it is still necessary to take adequate technical and organisational measures to protect client identifying and personal data which is transmitted to an outsourcing provider. Furthermore, outsourcing companies have to take into account the applicable disclosure and approval requirements in connection with the outsourcing of such data.

NEED FOR ACTION FOR BANKS, SECURITIES DEALERS AND INSURANCE COMPANIES

The new circular 2018/3 "Outsourcing – Banks and Insurance Companies" results inter alia in the following need for action for in-scope banks, securities dealers and insurance companies:

- Financial institutions have to define the format of the inventory of the outsourced functions to be established. Furthermore, they have to make sure that the inventory meets the requirements of the new circular.
- Financial institutions need to assess whether their internal procedures are structured in a way that makes it possible to comply with the requirements of the new circular. Among other things, this is relevant with respect to the risk analysis to be performed before a function is outsourced.
- If necessary, financial institutions have to modify their IT infrastructure to ensure that the information necessary to successfully restructure or wind up the outsourcing company is accessible in Switzerland at any time.
- It should be evaluated at an early stage which changes have to be made to existing outsourcing agreements.

From April 1, 2018, all in-scope entities have to ensure that the requirements of the new circular are complied with when entering into a new outsourcing agreement or amending an existing arrangement. Against this background, one has to evaluate whether, based on the new materiality concept, certain outsourcing arrangements which would not have been in the scope of the previous regime would now fall within the scope of the revised circular.



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