Duty to register client advisers of foreign financial service providers – “To be, or not to be”

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Introduction

The transitional period regarding the registration duty of client advisers expired on 20 January. Client advisers of prudentially supervised foreign financial service providers that were already operating with retail clients in Switzerland had to apply for registration with one of the three Swiss registration bodies by this date.

Only recently, a legal discussion arose as to whether prudentially supervised foreign financial service providers that limit the provision of financial services to professional clients, including ‘elective professional clients’, are obliged to have their client-facing employees registered with a Swiss registration body. Elective professional clients are high-net-worth individuals and/or their private investment vehicles that have declared that they want to be treated as professional clients.

The discussion revolves around whether, or not, the Swiss legislator intended to exclude from the registration obligation any client adviser of prudentially supervised foreign financial service providers that renders financial services not only to ‘per se professional clients’, but also to ‘elective professional clients’.

Ongoing legal discussion

The interpretation by the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss registration bodies of Article 28 (2) and Article 4 of the Swiss Financial Services Act (FinSA) suggests that the registration exemption shall apply only if the customers of the prudentially supervised foreign financial service providers consist of ‘per se professional investors’ (including institutional investors).

Such interpretation is apparently supported by reference to the amendments to FinSA (which enter into force on 1 February 2021) and a statement of the State Secretariat for International Finance (SIF) dated 11 December 2020 in relation to the exemption to affiliate with a Swiss ombudsman’s office.

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Literally, the registration exemption itself is set out in Article 31 of the Swiss Financial Services Ordinance (FinSO). Article 31 FinSO states that, "Client advisers of foreign financial service providers which are prudentially supervised abroad are exempted from the duty to register if the services they provide in Switzerland are exclusively for professional or institutional clients".

A strict reading of this provision implies that, for its application, the Federal Council makes no difference between 'per se professional clients' and 'elective professional clients'. Such interpretation may be supported by the explanatory report of the Federal Department of Finance (FDF), which does not mention any such distinction at all.

The legislative material reflecting FinSA's genesis does not suggest any other conclusion. The main purpose of FinSA is to protect retail clients as much as necessary and, for any other client category, as little as possible in accordance with the respective category and protection level.

For example, the conduct rules explicitly distinguish between institutional clients and professional clients. While applicability of the conduct rules is, by operation of law, excluded for institutional clients, financial service providers may waive certain conduct rules, such as the information and documentation duty, only if professional investors expressly agree. Noteworthy is that this statutory exemption does not distinguish between 'per se professional clients' and 'elective professional clients'.

However, the newly adopted exemption to affiliate with an ombudsman, if read literally, makes such a distinction as it refers to professional clients pursuant to Article 4 (3) and (4) FinSA, which seems to exclude 'elective professional clients' pursuant to Article 5 FinSA (in conjunction with Article 4 (1) FinSA). Also in contrast to the client adviser registration duty, the exemption to affiliate with an ombudsman applies irrespective of the foreign financial service provider being prudentially regulated.

Apart from these distinctions, the Swiss Collective Investment Schemes Act (CISA) makes a distinction in relation to the marketing of foreign collective investment schemes in Switzerland. If foreign investment funds are marketed to qualified investors, including 'elective professional clients', the foreign fund must appoint a Swiss representative and paying agent.

In other words, if such professional clients are excluded, the appointment of a Swiss representative is not required. Nevertheless, CISA also treats such professional clients as prudent investors, like any other qualified investors.

Practical implications

In light of the legal discussion, regulatory uncertainty exists for foreign financial service providers (also) soliciting 'elective professional clients' in relation to the applicability of the Swiss client adviser registration obligation. Prudent business conduct may require that client advisers be registered with one of the Swiss registration bodies.

Deciding against registration could have severe consequences. Even though it can be argued – with sound reasons – that the intention of the Swiss legislator is to exclude such foreign

financial service providers as well, it is unclear whether the Swiss courts would uphold this view and apply the same (or a similar) rationale as to the new ombudsman affiliation exemption (or the current marketing regime under CISA).

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No legal or tax advice

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