Legal clarification regarding the limitation on the ombudsman's affiliation requirement for financial service providers serving institutional and professional clients

20.11.2020

Key takeaways

- **Duty of financial service providers serving retail clients to affiliate with an ombudsman's office by 25 December 2020 at the latest**
- **Exemption for financial service providers serving solely institutional or professional clients approved by the Swiss Parliament and transitional status until enactment of the law clarified through recent communication of the State Secretariat for International Finance ("SIF")**

Overview

The Financial Services Act (FinSA) provides for an ombudsman procedure for clients of financial service providers where disputes regarding legal claims between the client and the financial service provider shall be settled by way of mediation. According to Article 77 FinSA, all financial service providers or financial institutions subject to FinSA must affiliate to an ombudsman's office by no later than 25 December 2020. Only financial service providers serving solely institutional or professional clients shall be exempt from such duty according to legal amendments adopted by the Swiss Parliament on 25 September 2020. In view of the still running referendum deadline, a recent communication by SIF has clarified the legal situation applicable to service providers serving solely institutional or professional clients until the expiration of the referendum deadline and the entry into force of the law on 1 February 2021.

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

Legal clarification regarding the limitation on the requirement to affiliate to an ombudsman for financial service providers serving institutional and professional clients until 1 February 2021

In its recent communication, SIF clarified the legal uncertainty of financial service providers serving solely institutional or professional clients with respect to their duty to affiliate to an ombudsman.

The legal uncertainty was based on the fact that under the current legal situation, all financial service providers are required to be affiliated to an ombudsman by 25 December 2020 whilst at the same time Article 16 para. 1 FinIA is currently being revised but not yet in force, according to which financial intermediaries are released from the obligation to affiliate if they exclusively serve institutional or professional clients (excluding high-net-worth retail clients who have declared themselves to be professionals). Pestalozzi informed on this in our legal update of 22 July 2020.

In order to avoid a situation whereby financial service providers serving solely institutional or professional clients have to be affiliated to an ombudsman initially, only to be released from this requirement a few months later, the limitation on the ombudsman affiliation requirement approved by the Swiss Parliament shall be put into force as soon as possible. In consideration of the referendum deadline, this will be on 1 February 2021. Given that the affiliation requirement for financial service providers serving solely institutional or professional clients would be contrary to the clear intention of the Swiss Parliament, it has been agreed with FINMA that the supervisory authority will not enforce this requirement in the period from 26 December 2020 to 31 January 2021. The Swiss Federal Council is expected to make its decision in mid-December 2020. The Federal Department of Finance, and SIF, already communicated at this stage in order to grant the sector greater planning certainty.

Further steps

It is to be welcomed that the legal situation for financial service providers of professional and institutional clients has been clarified and that the latter are exempt from the duty of affiliation. In contrast, financial service providers serving also retail clients should be aware of imminent affiliate requirement as of 25 December 2020 and – if they have not yet done so – must urgently submit their application for affiliation.

Contributor: Daniela Fritsch (Associate)

No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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Oliver Widmer

Partner
Attorney at law
Head Financial Services

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 42
oliver.widmer@pestalozzilaw.com



Andrea Huber

Partner
Attorney at law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 41
andrea.huber@pestalozzilaw.com

