The Duty to Register for Client Advisors of Foreign Financial Service Providers

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Key takeaways

- **Pursuant to Art. 28 para. 1 FinSA, client advisors of domestic financial service providers that are not supervised, pursuant to Art. 3 FINMASA and client advisors of foreign financial service providers must, in principle, file with a Swiss advisor register.**
- **Client advisors of foreign financial service providers may be exempt from the registration duty under certain conditions.**
- **Thesestipulations , in particular that of foreign prudential supervision, must not be considered in a generalised manner; rather, a case-by-case analysis is appropriate, taking both the type of financial service provider and the jurisdiction concerned into consideration.**

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Introduction

According to Art. 28 para. 1 of the Financial Services Act (FinSA), both client advisors of domestic financial service providers not supervised under Art. 3 of the Financial Market Supervision Act (FINMASA) and client advisors of foreign financial service providers must file with a register of advisors before being allowed to carry out their activities in Switzerland.

Nevertheless, client advisors of foreign financial service providers are not obliged to file with a register of advisors in every case: Art. 28 para. 2 FinSA allows the Federal Council to exempt client advisors of foreign financial service providers those subject to prudential supervision from the obligation to register – as long as they provide their services in Switzerland exclusively to per se professional or institutional clients. The Federal Council has made use of this possibility in Art. 31 of the Financial Services Ordinance (FinSO).This does not, however, include high net worth individual retail clients who have declared their wish to be considered professional clients.

While according to Art. 28 para. 3 FinSA the exemption from the registration duty may depend upon the reciprocity of the home state of the financial service provider, the Federal Council has chosen not to opt for this reciprocity requirement.

The individual prerequisites as well as the procedure in connection with this exemption shall be explained in more detail below.

Exemption from the Registration Duty

The aforementioned exemption provision of Art. 28 para. 2 FinSA in conjunction with Art. 31 FinSO depends on the following three criteria, which must be satisfied cumulatively: (i) the client advisors must act for a foreign financial service provider, (ii) the financial service provider must be subject to prudential supervision abroad (i.e., in its home jurisdiction), and (iii) the client advisors of the foreign financial service provider may provide their services solely to per se professional or institutional clients.

Client Advisor of a Foreign Financial Service Provider

The term "foreign financial service provider" is not defined further in either the FinSA or the FinSO. Rather, it is taken as in line with the term "domestic financial service provider": Hence, this latter term must be examined first. It must be emphasised that the financial service provider - and not the client advisor – is the reference. Therefore, neither the place of work nor the residence of the client advisor is relevant here.

Domestic financial service providers are financial service providers that (i) are established as legal entities under Swiss law or (ii) are domiciled in Switzerland as natural persons.

In contrast, all financial service providers that are not considered domestic financial service providers, according to the above definition, are considered foreign financial service providers. This applies, in particular, to all financial service providers performing cross-border activities into Switzerland from abroad.

Prudential Supervision Abroad

The prerequisite of a prudential supervision of the financial service provider comes from the concept of investor protection guiding the registration duty. The fact of being subject to prudential supervision abroad is intended to achieve a certain minimum level of investor protection –to this end, however, the foreign supervision must meet certain requirements.

Prudential supervision is determined by means of a Swiss standard; therefore, foreign law cannot determine what constitutes prudential supervision within the meaning of Art. 28 para. 2 FinSA. Indeed, foreign law sets the basis – i.e., the supervisory regime – of such examination. Nevertheless, only Swiss law determines whether this supervisory regime qualifies as prudential supervision. To qualify as such , the foreign supervision must be examined both in terms of its local extension as well as the breadth of regulation.

The criterion of local extension ensures that foreign supervision – regardless of its quantity and quality – extends to financial services activities in Switzerland. Without this local extension of foreign supervision to activities throughout Switzerland, from the outset, investor protection could not be achieved.

In contrast, the examination of the breadth of regulation refers to the scope (and to a limited extent the depth) of the foreign supervisory regime. Specifically, it shall be examined whether the foreign supervisory regime contains provisions (i) for ensuring solvency and liquidity, (ii) for managing risk, (iii) and for complying with rules of conduct (comparable to the rules of conduct of the FinSA or the due diligence obligations under the AMLA).

As mentioned above, for the purposes of Art. 28 para. 2 FinSA in conjunction with Art. 31 FinSO, it is primarily the breadth – not the depth – of regulation that is decisive. Furthermore, these foreign regulations are not to be scrutinised for their adequacy or equivalence.

Furthermore, a general assessment of foreign prudential supervision – even in the harmonised environment of EU law – is not possible. Instead, the assessment must be made on a case-by-case basis for each type of foreign financial service provider and for each jurisdiction.

Provision of Services to per se Professional or Institutional Clients

The investor protection concept is also at the root of the very limiting of the exemption from the registration duty to provide services to certain client categories; after all, the legislator has stipulated the principle of a differentiated need for protection.

Against this background, it is hardly surprising that merely providing services to per se professional or institutional clients, deemed to have a lesser need for protection, is eligible for an exemption from the registration duty – but not providing services to private clients and high net worth individuals, that have declared their desire to be treated as professional investors.

The wording of Art. 28 para. 2 FinSA refers only to per se professional or institutional clients according to Art. 4 FinSA; in contrast, Art. 31 FinSO does not contain such a reference. Against the background of investor protection, as a guiding principle of the exemption provision, one may argue whether the implied irrelevance of an opting-out or opting-in,

pursuant to Art. 5 FinSA, is actually appropriate.

Nevertheless, all three FINMA-approved registrars assume that only per se professional or institutional clients, pursuant to Art. 4 FinSA, are to be taken into account. Thus , if services are provided to high net worth individuals who have declared under Art. 5 para. 1 FinSA that they wish to be treated as professional clients, registration in a Swiss register of advisors is still required.

Evidence Relating to the Prerequisites for an Exemption from the Registration Duty

To benefit from an exemption from the registration duty, the foreign financial service provider in question must demonstrate that the above criteria are met. In particular, it is incumbent upon the foreign financial service provider to provide evidence that prudential supervision abroad indeed exists. For example, this evidence may be provided by means of a confirmation from the competent foreign regulator or supervisory authority or by means of a legal opinion from an appropriately qualified law firm.

Conclusion

As set out above, the foreign financial services provider must demonstrate that it qualifies for an exemption from the registration duty of its client advisors.

In this context, it should generally be feasible to prove that the financial service provider in question is foreign and that it provides its services exclusively to per se professional or institutional clients, according to Art. 4 FinSA. In contrast, the question of whether a specific foreign supervisory regime constitutes prudential supervision -within the meaning of Art. 28 para. 2 FinSA- cannot be answered quite so easily. In this regard, a detailed case-by-case analysis is warranted. Against this background, it would be desirable if the client advisers' register were to publish lists of foreign financial service providers, such as SEC registered investment advisor firms or sub-threshold alternative investment fund managers under AIFMD II to indicate whether they qualify for an exemption from the registration requirement.

In light of the potential imponderables regarding the requirements for an exemption from the registration duty, pursuant to Art. 28 para. 2 FinSA, in cases of doubt, it is prudent to assume that there is certainly a duty to register and that the client advisors concerned are registered accordingly under Art. 28 para. 1 FIDLEG.

Finally, it must be emphasised that even in the case of an exemption from the registration duty, pursuant to Art. 28 para. 2 FinSA, the other provisions concerning client advisors – and evidently also the provisions of the FinSA beyond the regulation of client advisors – must nevertheless be complied with.

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No legal or tax advice

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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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