

Briefing January 2021

FinSA: Exemption from the Registration Duty for Client Advisers of Foreign Financial Services Providers

Under the Swiss Financial Services Act (FinSA), client advisers of foreign financial services providers that render financial services in Switzerland or to Swiss based clients are required (as individuals) to register in a client adviser register maintained by an admitted Swiss registration body. Financial services providers that are already active in Switzerland must ensure that their client advisers apply for registration by 19 January 2021. After this date, a completed registration will be required before a client adviser starts its activities.

An exemption from the client adviser registration duty applies to client advisers of foreign financial services providers that are prudentially supervised in their home jurisdiction and that render their services in Switzerland exclusively to professional and institutional clients as defined in the FinSA. In December 2020, an FAQ was published by the three admitted Swiss client adviser registration bodies that created considerable uncertainty in the market. The concern arose because of the statement that the exemption from the client adviser registration duty should, in the view of the client adviser registration bodies, *not* apply if a foreign prudentially supervised financial services provider (also) serves *elective* professional clients, *i.e.* Swiss based retail clients who have *elected* to be treated as professional clients.

In our view, the client adviser registration bodies' position is not convincingly supported by the letter of the law, its implementing ordinance and the legislative materials. More generally, the extraterritorial application of financial regulation embodied in parts of the FinSA is a concept foreign to Swiss law that should be interpreted restrictively. **There are numerous arguments that the exemption should be available to foreign prudentially regulated financial services providers serving all types of professional and institutional clients in Switzerland. That said, a measure of uncertainty remains, which is why concerned financial services providers should carefully consider their approach and the risk of non-compliance in light of the approaching registration deadline.**

The exemption from the client adviser registration requirement

Pursuant to the FinSA, in order to be allowed to provide financial services in Switzerland or to clients in Switzerland, client advisers of foreign financial services providers (*i.e.* the client-facing individuals providing financial services on the provider's behalf) are in principle required to register with a client adviser register maintained by one of the Swiss registration bodies admitted by FINMA (art. 28 para. 1 FinSA). However, the second paragraph of the relevant provision of the FinSA empowers the Swiss Federal Council (*Bundesrat*; the executive body of the Swiss government) to exempt client advisers of **prudentially supervised foreign financial services providers** from the duty to register if they exclusively provide their services in Switzerland to **professional or institutional clients within the meaning of art. 4 FinSA** (art. 28 para. 2 FinSA).

The Swiss Federal Council made use of the delegation in the FinSA and included the exemption from the client adviser registration duty in the Financial Services Ordinance of 6 November 2019 (FinSO). While it was at the drafting stage of the ordinance envisaged to limit the exemption to foreign prudentially supervised financial services providers subject to consolidated supervision by FINMA, this limitation was dropped following resistance during the consultation process. The exemption now simply states that **client advisers of foreign financial services providers prudentially supervised abroad are exempt from the duty to register if the services they provide in Switzerland are rendered exclusively to professional or institutional clients** (art. 31 FinSO). Neither the draft ordinance nor the final text of the FinSO make any distinction between the various types of institutional or professional clients.

According to art. 4 FinSA, professional clients include, in particular, regulated financial intermediaries (such as banks, securities firms, insurance companies, asset managers, trustees, managers of collective assets, fund management companies and collective investment schemes), central banks, large

companies and certain entities with professional treasury operations ("*per se* professional clients"). Clients that do not qualify as professional clients are considered to be retail clients. A subset of professional clients and certain additional client types qualify as institutional clients.

Pursuant to art. 5 FinSA, high-net worth individuals and their private investment structures have the right to opt out of the retail client regime and elect instead to be treated as professional clients ("opting-out professional clients" or "elective professional clients"). This opting-out right is subject to certain thresholds and requirements being met, and is not generally available to all retail clients.

The FAQ of the registration bodies

In the regulatory framework of the FinSA, the operation of the Swiss client adviser registers is delegated to private registration bodies that have to be recognised by FINMA to act in this capacity (art. 31 para. 1 FinSA). The recognition is not associated with any ongoing prudential supervision of the registration bodies by FINMA and the former's powers to issue formal decrees are in principle limited to what is required for the purposes of recording entries into and deletions from the client adviser register (art. 32 para. 1 FinSA).

The currently recognised registration bodies BX Swiss AG (regservices.ch), Association Romande des Intermediaries Financiers (ARIF) and PolyReg Services GmbH (RegFix) each published an FAQ at around the same time in December 2020 with materially the same content, addressing questions around the definition of financial services and the registration requirement for client advisers.¹ All three registration bodies state that FINMA has "taken note" of the FAQ in its English language version, without further specifying what the effect of this would be.

Question 6 of the FAQ refers to the specifics of the exemption from the registration duty for client advisers of a prudentially regulated foreign financial

¹ [regservices.ch FAQ](#); [ARIF FAQ](#); [RegFix FAQ](#) (all links visited on 12 January 2021).

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services provider. According to the answer in the FAQ, such client advisers *cannot* make use of the exemption if the prudentially regulated foreign financial services provider also serves elective professional clients in Switzerland (see above).

The position taken by the registration bodies in the FAQ is mainly based on a literal reading of art. 28 para. 2 FinSA empowering the Federal Council to enact the exemption within the scope set by the law. The FinSA here refers to service provision in Switzerland "exclusively for professional or institutional clients within the meaning of Article 4 [FinSA]" (see above). In the view of the registration bodies, this excludes elective professional clients because the opting-out right is set out in art. 5 FinSA.

FINMA has so far not issued any statements regarding the FAQ of the registration bodies. However, on its website, FINMA also provides some additional information on the client adviser registration requirement, stating that client advisers of foreign financial services providers have to register in a Swiss client adviser register "provided that the financial service provider is not subject to prudential supervision in its country of origin, or if the services are also offered to *individuals* in Switzerland" (emphasis added).² FINMA's statement is rather confusing as it does not refer to any client category of the FinSA nor to the wording of the exemption as such, but appears to distinguish between natural persons and legal entities.

Why the scope of the exemption also includes the service provision to elective professional clients

The position taken in the FAQ is in our view not convincing. There are **various arguments supporting a less restrictive interpretation of the exemption**, among which are the following:

- Art. 28 para. 2 FinSA, which provides the basis for the exemption, was introduced into the draft law in the course of the parliamentary deliberations. The

original draft of the provision was merely slightly rearranged in the final version, and at no point in the discussions in the Swiss parliament was any distinction between elective and *per se* professional clients discussed for the purposes of this provision. Also, regarding the implementing provision in art. 31 FinSO, the explanatory report of the Federal Department of Finance makes no reference to any such distinction, simply stating that the exemption is justified by the reduced need for protection of professional (and institutional) clients.

- Furthermore, while the Federal Council could conceivably have limited the scope of the rule when implementing the exemption in the FinSO under the power delegated to it, it did not do so in any way.
- As a general matter, the extraterritorial scope of the client adviser registration requirement (and other provisions of the FinSA) is an uncommon and unusual concept in Swiss financial regulation and Swiss law in general. Where there are ambiguities in the law, a restrictive interpretation limiting the extraterritorial application must be favoured. Against this background, the reference in art. 28 para. 2 FinSA to professional and institutional clients "in the meaning of art. 4 FinSA" should be understood as a general reference to the client classification system, the *sedes materiae* of which is in art. 4 FinSA. Art. 4 para. 1 lit. a-c FinSA sets out the basic distinction between retail clients, professional clients and institutional clients, while art. 4 para. 2, para. 3 and para. 4 FinSA, respectively, define the criteria for financial services providers to allocate their clients among the three "buckets". Art. 5 FinSA merely builds on that system, setting out the eligibility conditions under which a retail client may declare that he/she/it wishes to be treated as a professional client. However, once such client has effectively declared an opting-out, he/she/it is – for all intents and purposes – a professional client in the sense of art. 4 para. 1 lit. b FinSA (conversely, a professional client having opted *into* the retail client regime

² [FINMA information on the registration bodies](#) (link visited on 12 January 2021).

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must be considered a retail client also for the purposes of the client adviser registration exemption, again even though the opting-in right is set out in art. 5 para. 5 FinSA).

- The preceding point is further reinforced by the fact that *per se* and elective professional clients are treated equally in all respects (or, rather, not differentiated at all) under the FinSA when it comes to the duties of diligence to be observed by financial services providers and their client advisers. It is the very idea of the opting-out right – available to eligible high-net worth clients and their investment structures – to have the opportunity voluntarily to waive a certain level of client protection and dispense with limitations associated with the otherwise applicable retail client status. This should clearly also include access to foreign financial services providers that serve professional clients in Switzerland only.
- In the context of a broader legislative project concerning distributed ledger technology (DLT), amendments have been proposed to the Banking Ordinance (BankO) and the Financial Institutions Ordinance (FinIO). The proposed new provisions would stipulate that (FINMA licensed) Swiss representative offices of foreign banks or foreign financial institutions that provide financial services in the meaning of the FinSA have to register their client advisers in a Swiss client adviser register if they provide financial services to retail clients. While the provisions are still subject to a consultation process, they do show a continuation of the line of thinking pursuant to which the provision of financial services to retail clients is the key trigger for the registration duty as applicable to client advisers of foreign financial services providers.
- To support the position of the registration bodies, the FAQ also references (in a footnote) recent amendments to the FinSA (entering into force on 1 February 2021) exempting certain financial services providers from the duty to join an ombudsman's organisation. However, the ombudsman exemption is clearly different from the client adviser registration exemption as the former is drafted more narrowly within the FinSA itself –

referring only to professional and institutional clients pursuant to art. 4 *para. 3 and 4* FinSA – and is available to both domestic and foreign financial services providers without regard to their regulatory status. This is an important distinction as the exemption from the client adviser registration duty is available for client advisers of foreign *prudentially regulated* financial services providers only, ensuring a certain level of client protection by way of reliance on the foreign regulatory regime.

Potential consequences of non-compliance if a restrictive interpretation of the exemption were to prevail

Neither the registration bodies nor FINMA are competent to render a binding interpretation of the exemption pursuant to art. 28 para. 2 FinSA and Art. 31 FinSO. To do so would be the prerogative of the Federal Department of Finance (FDF) as prosecution authority with respect to the designated violations of Swiss financial market laws that are subject to criminal law sanctions. However, the FDF does not issue general guidance on the interpretation of the relevant laws.

A person who wilfully carries out an activity that requires a registration under the financial market laws (without the required registration) may become liable to a custodial sentence of up to three years or to a monetary penalty; in the case of negligence the penalty may consist of a fine of up to CHF 250,000 (art. 44 of the Financial Market Supervision Act; FINMASA). Therefore, if the restrictive interpretation of the client adviser registration requirement set out in the FAQ were to be adopted by the FDF in its practice as prosecution authority, **foreign prudentially regulated financial services providers serving Swiss based elective professional clients without having their client advisers registered may potentially expose the latter to criminal liability in Switzerland.**

Conclusion

While there are strong arguments against the reductive interpretation of the exemption from the client adviser registration duty applied by the registration bodies in their FAQ, and while the registration bodies might potentially have a commercial interest in a broader application of the registration duty, the weight of their published views and the "taking note" of FINMA should not be entirely discounted given that accepted practices regarding many aspects of the FinSA are still only developing.

That said, the position taken in the FAQ is in our view short-sighted and, were it to prevail, could have a highly detrimental effect on Switzerland as a financial marketplace due to the limitations placed on access to the Swiss market by specialised foreign financial services providers.

Given the lack of conclusive guidance on the interpretation of the exemption and taking into account the risks of non-compliance with the registration requirement, foreign prudentially regulated financial services providers active into Switzerland on a cross-border basis should carefully consider their approach depending on the composition of their Swiss client base and should continue to monitor the developing legal practice in Switzerland.

If the decision is taken to pursue a registration of client advisers, *submission* of applications to a registration body by the deadline of 19 January 2021 – or, by some sources, 20 January 2021 – is sufficient, with the possibility to postpone the submission of evidence regarding the required professional knowledge of the client adviser until the end of 2021.³

No registration requirement applies to client advisers of FINMA licensed branches of foreign banks or foreign financial institutions, but FINMA licensed representative offices of foreign banks or foreign financial institutions should monitor any developments in connection with the planned amendments to the BankO and the FinSO.

³ See also our [July 2020 briefing](#).

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