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FinSA). Ombuds institutions shall publish annual reports on their activities (Art. 86 FinSA).

4) Conclusion

What had started with an attempt to significantly strengthen the means of retail clients of financial service providers to litigate claims against service providers, produced little more than a restatement of the status quo.

The provisions governing the right of clients to be provided with a full documentation of records relevant to the client relationship with the service provider mirror the existing provisions governing the agency contract in the Code of Obligations, and the right of a person to be provided with copies of records held by an organization pursuant to the Data Protection Act.

As regards the provisions governing the ombuds system, the expansion of the system to cover all providers of financial services will not resolve the substantial and procedural problems clients have been facing when litigating claims against service providers.

With respect to the lack of tools for clients to pursue claims collectively, the decision to try to devise new collective action instruments within the general framework of the Civil Procedure Code – as opposed to an industry-focused approach in the FinSA – may be regarded as a wise one (c.f. *Werlen/Decurtins, The Proposed Strengthening of Group Action in Swiss Civil Procedure*, in: *CapLaw-2018-44*). However, in light of the current debate on the basis of the preliminary draft revision of the Civil Procedure Code published on 2 March 2018, it is unlikely that a consensus on a comprehensive collective action regime will be found in the immediate future.

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FinSA: New Registration Duty for Client Advisers

Reference: *CapLaw-2018-61*

The Financial Services Act (FinSA), which is expected to enter into force on 1 January 2020, will introduce a new registration duty for client advisers of Swiss financial service providers not subject to prudential regulation and client advisers of foreign financial institutions. Today, no such registration requirement exists with the exception of similar obligations for untied insurance intermediaries, who have to register with the public register kept by the Swiss Financial Market Supervisory Authority (FINMA).

Under the new regime, client advisers will be required to register in a register maintained by one or more registration bodies licensed by FINMA. To register, they must evidence sufficient knowledge of the rules of conduct under the FinSA and the necessary expertise to perform their duties, adequate financial means as well as affiliate themselves to an ombudsman's office. Clients may check the register at any time to verify that their adviser has the required qualifications. The registration will, however, not imply any prudential or ongoing supervision by FINMA. If a client adviser no longer meets the registration requirements, the adviser will be deleted from the register by the competent registration body and may, consequently, no longer engage in activities as a client adviser.

By Martin Peyer

1) Introduction

Client advisers play an important role in implementing the new rules of conduct in articles 7 ff. FinSA. They are usually the primary point of contact for clients with their financial service provider and only if they have sufficient knowledge of the new rules, they can comply with them in practice.

The responsibility to ensure that its client advisers will comply with the requirements of the FinSA lies with the financial service providers. In particular, they must ensure that their advisers have an appropriate education and the necessary skills for the specific services they provide (article 6 FinSA). For prudentially supervised financial service providers, FINMA or a supervisory organization pursuant to the Financial Institutions Act (FinIA) will monitor that client advisers comply with these requirements. No such controls exist, however, for Swiss and foreign financial service providers that are not supervised by FINMA.

To bridge this gap, the FinSA will require client advisers of Swiss financial service providers who are not prudentially supervised (such as insurance intermediaries and financial advisers) and financial service providers domiciled abroad to register themselves in the new register of advisers that will be established under the FinSA (article 28 (1) FinSA) (see Dispatch by the Federal Council on the Financial Services Act and the Financial Institutions Act of 4 November 2015, Bundesblatt 2015 (Dispatch FinSA), page 8901 ff., page 8967). In addition, to protect clients, client advisers who have seriously breached the rules of conduct in the past will not be allowed to register themselves and, thus, to provide financial services. Further, advisers – or the financial service provider for which they work – must guarantee that they have sufficient financial resources to carry out their business activities (see Dispatch FinSA, page 8922).

The registration will, however, not imply any prudential or ongoing supervision by Swiss authorities. It only seeks to ensure that client advisers are aware of the rules of conduct and treat clients fairly. Yet, clients may check the register at any time if they have doubts about the qualifications or integrity of their client adviser (article 32 (5) FinSA),

and, therefore, the new register is also expected to increase clients' confidence in their client advisers.

2) Duty to Register for Client Advisers

a) Definition of Client Adviser

According to article 3 (e) FinSA, a client adviser is a natural person who performs financial services on behalf of a financial service provider or in its own capacity as financial service provider. In most cases, the adviser is not identical with the financial service provider for which it acts. Only if a natural person provides financial services, it may at the same time be both, a client adviser and a financial service provider (Dispatch FinSA, page 8922 and 8947 f.).

The term "client adviser" has to be interpreted broadly and includes persons that carry out transactions in financial instruments for clients or advise them in connection with their investments such as asset managers, financial advisers and insurance intermediaries. It is further likely that the distribution of collective investment schemes to clients also constitutes a financial service pursuant to the FinSA if it is carried out on a professional basis. Thus, distributors of collective investment schemes may also have to register in the register of advisers (unless an exemption applies).

However, not every employee of a financial service provider is deemed a client adviser. Employees who have no direct contact with clients or who support the provision of financial services only to a minor extent, *e.g.* by sending product information to a client in response to an expression of interest, coordinating meetings or working in technical support functions, have no duty to register (Dispatch FinSA, page 8948). In this context, it remains to be seen how persons who have contact with clients under the direct and ongoing supervision of a client adviser, such as a financial analyst providing specialist advice in a meeting conducted by a client adviser will be treated. Further, corporate finance experts, for example, who advise a company in an IPO in Switzerland will likely not fall in the scope of the new rules as long as they do not provide investment advice or other financial services pursuant to article 3 (c) FinSA at the same time.

b) Scope

Only client advisers who are not acting for a financial service provider that is prudentially supervised in Switzerland need to register, regardless of whether they carry out their business in Switzerland or from abroad or whether they are dealing with retail or professional clients (Dispatch FinSA, page 8918 and 8967). The requirement that all client advisers would have been obliged to register in the register of advisers proposed in the consultation draft of the FinSA (see article 29 of the consultation draft) has been dropped after criticism during the consultation process.

The Federal Council may exempt certain foreign client advisers from the scope of the registration duty (article 28 (2) FinSA). According to the current proposal, the exemption applies only to client advisers of prudentially supervised foreign financial service providers that are members of a financial group which is subject to consolidated supervision of FINMA if they provide their services in Switzerland exclusively to professional clients (including institutional clients) (article 31 of the draft Financial Services Ordinance (Draft-FinSO)). The scope of the proposed exemption is, thus, very limited. Most foreign institutions are not eligible for the exemption because they are not under FINMA's consolidated supervision and, thus, will need to ensure that their client advisers who provide financial services on a cross-border basis will be registered in the Swiss register of advisers. According to the explanatory report, the Federal Council does not intend to extend the exemption in the absence of reciprocity by the European Union (see Explanatory Report of the Federal Council dated 24 October 2018 (Explanatory Report), page 31).

3) Requirements for Registration

Client advisers will only be registered in the register if they meet the conditions of article 29 FinSA. According to this provision, they must prove that they have sufficient knowledge of the rules of conduct set out by the FinSA and the necessary expertise to perform their duties, that they have adequate insurance coverage or equivalent financial guarantees and that they in their capacity as a financial service provider or the financial service provider for which they act are affiliated to an ombudsman's office (see article 74 FinSA).

The Federal Council proposed that the liability insurance must cover damages resulting from a breach of the statutory obligations set out in the FinSA of at least CHF 500,000 per year and client adviser (article 32 (1) – (3) Draft-FinSO). Additional contractual liabilities to the client can be excluded from the insurance coverage (see Explanatory Report, page 31 f.). Alternatively, a financial guarantee in the same amount must be deposited with the consent of the registration body with a Swiss bank. For prudentially supervised foreign financial service providers, a minimum capital equivalent to at least CHF 10 million is considered adequate as a financial surety (article 33 Draft-FinSO). If a client adviser is employed by a financial service provider, the latter can arrange for the insurance coverage or the financial guarantee (article 29 (3) FinSA).

Article 29 (2) FinSA further requires client advisers to prove that they have not seriously breached the rules of conduct in the past by providing an extract from the register of criminal records to the registration body. Client advisers who have been convicted of offenses pursuant to article 89-92 FinSA (e.g. by providing false information or withholding material facts in connection with the information duties of article 8 FinSA, seriously violating the duties to assess appropriateness and suitability pursuant to article 14 ff. FinSA or violating the provisions regarding compensations from third parties in

article 26 FinSA), article 86 of the Insurance Supervision Act or offences against property will not be entered into the register. This also applies to persons that have been banned from acting in a management capacity of a financial institution or from trading in financial instruments or acting as a client adviser (articles 33 and 33a of the Financial Market Supervision Act).

4) Registration Body

The register of advisers will be maintained by one or more privately organized registration bodies, which will have to be licensed by FINMA (article 31 (1) and (2) FinSA). The registration body must have its domicile in Switzerland and must be organized in a way to ensure independence in fulfilling its tasks. For this purpose, the register must implement adequate internal rules to prevent, *inter alia*, conflicts of interests of the persons concerned with the management and an internal control system ensuring compliance with the FinSA and the implementing ordinance (articles 36 ff. Draft-FinSO; Explanatory Report, page 34 f.).

If no privately organized operator is found to maintain the register, the Federal Council will designate a public registration body (article 31 (6) FinSA). According to the dispatch, however, this scenario is unlikely (Dispatch FinSA, page 8969) although no market participant has publicly announced yet that it will apply for being licensed as registration body.

5) Content of the Register

As minimum content, the register entry must include at least the name and the business address of the client adviser, its position within the financial service provider and its fields of activity, information about education and completed trainings, the name of the ombudsman's office to which it is affiliated and the date of the register entry. This basic information allows clients to verify that their client adviser has the required knowledge and skills. In case of a dispute between the financial service provider and the client, the register entry also permits the latter to identify the competent ombudsman to initiate a mediation proceeding pursuant to article 74 ff. FinSA (see Dispatch FinSA, page 8968).

6) Maintaining the Register and Notification Duty

The registration body verifies that the requirements for registering a client adviser are met and issues a decree (in the sense of article 5 of the Administrative Procedure Act (APA)) confirming the registration (article 32 (1) FinSA). Registered client advisers and the financial service providers for which they work must notify the registration body of all changes that are relevant for the registration (including outstanding certificates of unpaid debts (*Verlustscheine*), convictions for relevant criminal offences or a ban by FINMA from an activity in the financial industry or similar foreign measures) within 14 days (article 32 (2) FinSA and article 41 Draft-FinSO).

If the registration body becomes aware that the registration requirements are no longer met, it will issue a decree and deregister the respective client adviser from the register (article 31 (4) FinSA). The adviser may consequently no longer engage in activities as a client adviser. The decree of the registration body is subject to appeal to the Federal Administrative Court.

7) Applicable Rules of Procedure and Registration Fees

The procedure for the registration is governed by the APA (article 34 FinSA). If the registration body approves a registration of a client adviser, it is not required to provide a reasoning (article 35 (3) APA). However, if it rejects the registration without providing the applicant the possibility to amend the application, the applicant has a right to be heard (article 30 (1) APA; Dispatch FinSA, page 8970).

To cover the operating expenses, the registration body may charge cost-covering fees in line with the general principles applicable to levy fees by public authorities (article 33 (1) FinSA; Dispatch FinSA, page 8970). The Federal Council proposes a fee of CHF 500-2,500 for an entry into the register. For urgent requests, a 50 percent surcharge may be applied (article 42 (2) Draft-FinSO).

8) Outlook

Overall, the registration duty will affect non-regulated Swiss financial service providers and in particular foreign financial institutions which currently offer financial services or products to Swiss clients based on the current liberal inbound cross-border regime of Switzerland. Going forward, foreign financial service providers will be required to either register their client advisers in the register of advisers or establish a regulated branch or subsidiary in Switzerland.

The scope of the registration duty, however, is not entirely clear yet. It remains to be seen whether certain advisory services provided by foreign financial institutions will be qualified as financial services under the FinSA and, thus, the persons providing such services on a cross-border basis will have to be registered in the register of advisers. It is unclear, for example, whether financial analysts that support a client adviser in a client meeting or foreign based corporate finance experts who advise a company in an IPO in Switzerland will fall in the scope of the new rules.

It is currently expected that FinSA and FinIA, together with their implementing ordinances, will enter into force on 1 January 2020. If this timing holds, client advisers who have to register pursuant to article 28 FinSA will have time until 1 July 2020 to file their application with the registration body (article 95 (2) FinSA), although there is no guarantee that a registration body will be up and running by then.

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