

Reverse solicitation under Swiss law

Par M^e Frédéric Bétrisey et Vera Waldburger, Etude Bär & Karrer

Reverse solicitation designates the circumstances in which a foreign financial intermediary provides certain services to a client upon the latter's request, without prior solicitation by the financial intermediary. Where the financial intermediary can rely on reverse solicitation, it generally avoids local licensing requirements and regulatory duties.

While the reverse solicitation exemption may play a significant role under the new Swiss financial services legislation, the exemption remains narrowly defined. Reliance on such exemption cannot constitute a business model. Reverse solicitation will not be an efficient tool for foreign asset managers (and other financial services providers) if they wish to compete with local players on the Swiss financial centre.

Reverse solicitation has assumed increased importance since the coming into force on 1 January 2020 of the Swiss Financial Services Act (FinSA). Together with implementing regulations, the FinSA aims to create a level playing field at the point of sale for all financial service providers, and to upgrade the Swiss financial legislation so that it comes closer to the European (MiFID II) standards.

In the past, the Swiss regulatory framework focused on the supervision of institutions (banks, securities firms, fund management companies and financial market infrastructures) and the regulation of certain financial products (collective investment schemes and structured products). Portfolio managers, such as the members of the Swiss Asset Management Association, although they constitute a large portion of the Swiss financial centre, were not subject to such supervision, which limited the importance of reverse solicitation. Foreign financial service providers offering services in Switzerland were not caught by the Swiss supervisory framework, except under the somewhat limited scope of the Swiss Collective Investment Schemes Act (CISA), which practically assimilated reverse solicitation to execution only.

The new legislation shifts that historical regulative system so as to extend the scope of licensing requirements to all asset and portfolio managers and to subject pure financial advisers (who have no discretionary authority over their clients' assets) to registration duties. Foreign asset managers who serve Swiss clients (other than per se professional or institutional clients) are also required to register their advisers with one of the three registries of advisers approved pursuant to the FinSA. The FinSA furthermore introduces a series of minimum requirements applicable to all financial service providers, including foreign institutions when they serve Swiss clients.

As a result of these legislative changes, the scope and definition of the reverse solicitation exemption have evolved.

As to *scope*, the reverse solicitation exemption has accrued greater importance, since it enables, for instance, foreign asset managers to propose the (newly regulated) services to Swiss investors, without being subject to FinSA requirements unlike their Swiss counterparts. Reliance on reverse solicitation will also permit the avoidance of the obligation for foreign funds to appoint a representative and paying agent when the scope of potential investors includes elective professional clients, as provided in the Financial Services Ordinance. Given that the distribution of collective investment schemes is generally deemed a financial service, the exemption applies under both the CISA and the FinSA.

As to *definition*, the exemption now applies to all financial services that are provided at the express initiative of the client, whether the financial service is granted on an isolated basis or in the framework of a pre-existing clientele relationship. In the latter case, this implies that the client relationship itself has been established at the express initiative of the client. Furthermore, a response to a request for proposal made by a Swiss investor falls within the scope of the reverse solicitation exemption, as does an increase of an investment previously made by a client at their own initiative. The old condition of the absence of prior contact with the potential client is not expressly set out in the FinSA, but it continues to be relevant.

In view of the foregoing, our recommendation to our foreign clients has not fundamentally changes. Reverse solicitation cannot be considered as a business model; it is an *exemption* that should be regarded as an *exception*, on which one can rely at restrictive conditions only.

The entities regulated under the FinSA have been granted a transitional period of two years, running until 31 December 2021, to adapt their procedures and satisfy the new requirements set out in the FinSA. After the transitional period, old and new financial services will be potentially subject to the FinSA requirements, unless the financial service provider can rely on the reverse solicitation (or another) exemption.

For client relationships dating back to the period where Switzerland had a large cross-border exemption for financial services, there was no need to collect evidence that the relationship was established at the client's initiative; it may be very difficult to retrieve it now. We can, therefore, expect that most foreign asset managers cannot rely on reverse solicitation in relation to their existing clientele and thus have to comply with the FinSA requirement to register client advisers with an approved registry of advisers. This should be rather good news for Swiss portfolio managers...

Biographie

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Frédéric Bétrisey est avocat, associé de l'étude Bär & Karrer à Genève. Sa pratique s'étend à tous les aspects de la réglementation bancaire et des services financiers, y compris les normes applicables aux placements collectifs de capitaux et de produits financiers. Il assiste également ses clients dans leurs opérations de financement et la rédaction de leur documentation contractuelle, notamment celle relative à leurs mandats de gestion de fortune et de conseil en placement. Il intervient aussi en tant que conseil juridique dans le cadre de programmes de titrisation et de *covered bonds*.

Biographie

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Vera Waldburger est titulaire d'une maîtrise universitaire en droit de l'Université de Genève et a rejoint Bär & Karrer en qualité d'avocate-stagiaire en mars 2020. Elle assiste les établissements bancaires et les prestataires de services financiers dans le cadre de leurs activités courantes et réglementaires. Elle est par ailleurs également active dans les domaines du droit des sociétés et des fusions et acquisitions.