RegFix

Finanzdienstleistungsgesetz, Beraterregister
Loi sur les services financiers, Registre des conseillers
Legge sui servizi finanziari, Registro dei consulenti

FAQ – Frequently Asked Questions

In connection with the obligation to register in a FinSA client advisor register

As of the 5th of January 2023

This FAQ is aimed at financial service providers and client advisors and provides clarification on frequently asked questions regarding the obligation to register in the register of client advisors pursuant to Art. 22 of the Financial Services Act (FinSA). **RegFix** accepts no liability for the accuracy of the information in this FAQ. If there are any doubts regarding the obligation to register, we recommend that you have this checked by a legal advisor.

FINMA has taken note of the English version of this document.

I. GENERAL CONSIDERATIONS

1. Which activities are considered as a financial service under the Financial Services Act (FinSA)

The following activities carried out for clients are considered as a financial service as per art. 3 lit. c FinSA :

- *acquisition or disposal of financial instruments,*
- *receipt and transmission of orders in relation to financial instruments,*
- *administration of financial instruments (portfolio management),*
- *provision of personal recommendations on transactions with financial instruments (investment advice),*
- *granting of loans to finance transactions with financial instruments.*

In practice, notably the following activities are therefore considered as a financial service[1]:

- *investment advice (without any power of attorney over the account of the clients),*
- *portfolio management (management of individual portfolios),*
- *collective asset management (management of the assets of collective investment schemes or of pension funds),*
- *any activity addressed directly at certain clients (end clients) that is specifically aimed at the acquisition or disposal of any type of financial instruments (see question 2), including collective investment schemes and structured products.*

2. Which financial instruments can trigger the obligation to get entered into the client advisor register?

Financial instruments in scope of FinSA are:

- *equity securities:*
  - *securities in the form of shares including share-like securities allowing for participation or voting rights, such as participation certificates and dividend rights certificates*
  - *securities which, on conversion or exercise of the rights evidenced by them, enable the acquisition of equity securities, as set forth above, as soon as they have been registered for conversion,*
- *debt instruments: securities not classified as equity securities,*
- *units in collective investment schemes in accordance with Articles 7 and 119 of the Collective Investment Schemes Act (CISA),*
- *structured products, i.e. capital-protected products, capped return products and certificates,*

[1] Please note that certain activities such as the management of assets of collective investment schemes are subject to prior authorization by FINMA.

- *derivatives within the meaning of Article 2 letter c of the Financial Market Infrastructure Act,*
- *deposits whose redemption value or interest is risk- or price-dependent, excluding those whose interest is linked to an interest rate index,*
- *bonds: units in an overall loan subject to uniform conditions.*

II. DEFINITIONS

3. What is the definition of a financial service provider as per FinSA?

A financial service provider is an entity or a person who provides financial services on a professional basis in Switzerland or for clients in Switzerland, with the criterion of a professional basis being satisfied if there is an independent economic activity pursued on a permanent, for-profit basis.

4. What is a client advisor as per FinSA?

Client advisors are natural persons who perform financial services on behalf of a financial service provider or in their own capacity as financial service providers.

In other words, any natural person who provides a financial service, such as for example investment advice or any activity addressed directly at certain clients/end clients that is specifically aimed at the acquisition or disposal of any type of financial instruments, is deemed a client advisor.

Only natural persons in contact with the clients are considered as client advisors. Natural persons that are not in contact with clients or who only contribute to the financial services on a sub-altern basis (e.g. the assistant sending the documents by e-mail) are not considered as client advisors.

III. OBLIGATION TO REGISTER

5. Who must register in the client advisor register?

a. If you are a client advisor (see question4) of a Swiss based financial service provider (see question 3) :

Client advisors of Swiss financial service providers not subject to prudential supervision by FINMA (in accordance with Article 3 FINMASA) must register in the client advisor register.

Individuals/natural persons providing financial services, that are not subject to a prudential supervision by FINMA or act on behalf of a company not subject to a prudential supervision by FINMA, must register. In other words, the relevant criterion is whether the financial service provider for whom the client advisor works is subject to prudential supervision in Switzerland (or not).

For example:

- *individuals providing investment advice (without a power of attorney to execute transactions in financial instruments on behalf of his or her clients) must register, whether they act on their own behalf or if they work for a company that is not subject to prudential supervision in Switzerland.*
- *individuals having an activity addressed directly at certain clients (end clients) that is specifically aimed at the acquisition or disposal of any type of financial instruments (e.g. collective investment schemes or structured products) must register, whether they act on their own behalf or if they work for a distributor of financial instruments that is not prudentially supervised i,*

b. If you are a client advisor (see question4) of a foreign based financial service provider (see question 3)

As opposed to client advisors of Swiss based financial service providers (see question 5.a above), client advisors of foreign financial service providers carrying out their activity in Switzerland may benefit from an exemption, i.e. they will not be required to register in the client advisor register, if the following two requirements are met cumulatively (Art. 31 FinSO):

(1) The foreign financial service provider is subject to prudential supervision abroad; and

(2) Clients in Switzerland are exclusively professional or institutional clients according to FinSA definition.

6. Can prudentially supervised foreign financial service providers whose clients change their status from private clients to professional clients within the meaning of Art. 5 FinSA (opting-out) make use of the exemption from the registration requirement within the meaning of Art. 31 FinSO?

No, according to Art. 28 FinSA the Federal Counsel may exempt client advisors of prudentially supervised foreign financial service providers from the duty to register if the services they provide in Switzerland are exclusively targeted at professional or institutional clients within the meaning of Art. 4 FinSA. Therefore, client advisors of prudentially supervised foreign financial service providers whose clients change their status from private clients to professional clients within the meaning of Art. 5 FinSA (opting-out) cannot make use of the exemption of the registration duty[2].

7. When is a client advisor considered as carrying out activities in Switzerland?

A client advisor is considered to be carrying out activities in Switzerland when she or he provides financial services, on a professional basis, in Switzerland or for clients in Switzerland.

The following are deemed not to be provided in Switzerland:

[2] Please note the specialist information by the State Secretariat for International Finance (SIF) of 9 November 2020 regarding the limitation on the ombudsman affiliation requirement, https://www.sif.admin.ch/sif/en/home/dokumentation/fachinformationen/ombudsstelle.html.

- *financial services provided by foreign financial service providers under a client relationship entered into at the express initiative of a client;*
- *individual financial services requested of a foreign financial service provider at the express initiative of clients.*

8. What does prudentially supervised mean?

Prudentially supervised means that a Swiss or non-Swiss financial service provider is comprehensively supervised i.e. for capital and liquidity requirements as well as for conduct rules such as, e.g., adherence to the duties of conduct under the FinSA or the duties of due diligence under the AMLA).

9. What is the "principle of reverse solicitation"?

The principle of reverse solicitation within the ambit of Art. 2 para. 2 FinSA states that the obligations under the Swiss Financial Services Act (FinSA) do not apply to the provision of financial services on a cross-border basis for clients in Switzerland if they have been provided:

a. under a client relationship entered into at the express initiative of a client; or

b. in case of individual financial services requested of a foreign financial service provider at the express initiative of clients.

10. I am working as a relationship manager in private banking with a bank in Germany and provide asset management services to clients domiciled in Switzerland, do I have to get entered into the client advisor register?

Yes, if my client has not explicitly requested that I am providing him/her asset management services (principle of reverse solicitation) and is a private client (i.e. not a professional client).

11. I am a client advisor working for an asset manager in Paris and have a client that regularly visits St. Moritz over the Christmas break, am I in scope of FinSA?

FinSA sets forth the principle of territoriality, meaning that anybody providing financial services on Swiss territory or to clients on Swiss territory (either physically, by email, or in writing) is subject to the scope of application of FinSA.

FinSA can generally also apply to situations where a client is only for a limited time on Swiss territory. The application of FinSA requires however that the client is either on Swiss territory or that the client advisor has knowledge that the client is on Swiss territory when he/she is providing financial services.

12. Do all the employees of a financial service provider need to be entered in such register?

No. Only the client advisors (see definition under question 4) of such financial service provider must be registered in the client advisor register.

13. Do client advisors of Swiss branche offices of foreign financial service providers need to register in the client advisor register?

No. Indeed, such branches are prudentially supervised by FINMA. However, all other obligations under FinSA must be complied with.

14. Do client advisors of Swiss representative offices of foreign financial service providers need to register in the client advisor register?

Art. 82 of the draft DLT Ordinance provides that representations of foreign financial institutions are no longer subject to prudential supervision by FINMA, but are instead required to have their client advisors entered in the register of advisors pursuant to Art. 28 FinSA if they provide financial services to retail clients (including high-net-worth retail clients who declare that they wish to be treated as professional clients (opting out)). It is expected that the DLT Ordinance will enter into force in August 2021. Until then, representations of foreign financial institutions are considered prudentially supervised and their client advisors do not have to be entered in the register of advisor.

15. Do financial instrument distributors need to register in the client advisor register?

In principle, an activity that is specifically aimed at the acquisition or disposal of any type of financial instruments (e.g. collective investment schemes or structured products) is considered a financial service within the meaning of FinSA and, accordingly, any client advisor carrying such activity needs to register. However, in this context, only direct interaction with the end client qualifies as a financial service (article 3 alinea 2 FinSO).

In other words, the provision of information on financial instruments to supervised financial intermediaries is generally not regarded as a financial service, unless such supervised financial intermediary is acting on its own behalf (e.g. for its nostro account). As a consequence, an individual only carrying out such kind of activity will not need to register in the client advisor register, as this activity does not constitute a financial service.

16. Do client advisors of portfolio managers of individual client assets or trustees have to register in the client advisor register?

No, provided that the portfolio manager or trustee (if the latter also provides financial services) have obtained an authorization from FINMA as such or are in the process thereof, in accordance with the applicable transitional period provided for in the Financial Institution Act (FinIA).

17. Do representatives of foreign collective investment schemes have to be entered in the client advisor register if they provide financial services?

No. Indeed, since representatives of foreign collective investment schemes require an authorization from FINMA, they are considered to be prudentially supervised by FINMA in accordance with Art. 3 FINMASA. Therefore, it is not necessary to register the employees of representatives of foreign collective investment schemes in the Register of advisors. However, all other obligations under FinSA

must be complied with if a representative of foreign investment schemes also provides financial services under FinSA.

18. Do independent portfolio managers have to be entered in the client advisor register?

Independent asset managers who are subject to an authorization from FINMA, notably as portfolio manager for individual client portfolios within the meaning of art. 2 para. 1 lit. a FinIA and art. 17 para. 1 FinIA, do not have to register (see question 16).

19. Do self-employed, independent financial service providers have to enter themselves in the client advisor register?

Client advisors who provide financial services on their own behalf and not on behalf of a corporate financial services provider subject to prudential supervision must register in the client advisor register (for further information please refer to question 1).

20. I am creating and distributing market research with regards to financial instruments, am I in scope?

No, unless is presented as a personal recommendation, financial research addressed to the general public does not trigger a duty to register with the client advisor register and does not constitute a financial service.

21. I am a financial planner, do I have to get entered into the client advisor register?

It depends whether you are providing financial services or not. The creation of an asset allocation qualifies may amount to a personal recommendation of a transaction relating to financial instruments and, hence, qualify as investment advice or not. We recommend taking a conservative approach and registering with the client advisor register.

22. I am providing M&A advice to companies, am I in scope of FinSA?

No, the following services are not deemed a financial service within the meaning of Article 3 letter c FinSA:

a) consultation on structuring or raising capital as well as on business combinations and the acquisition or disposal of participations and the services associated with such consultation;

b) the placement of financial instruments with or without a firm commitment as well as the associated services;

c) financing within the scope of services provided in accordance with letters a and b;

d) the granting of loans to finance transactions with financial instruments within the meaning of Article 3 letter c item 5 FinSA if the credit-granting financial service provider

is not participating in these transactions, unless it is aware that the loan is used solely for financing such transactions.

23. Does a natural person registered in the register for insurance intermediaries has to register with the register for client advisors if he or she intends to provide financial services?

Yes. Though insurance intermediaries are registered with FINMA their regulation and supervision do not include the provision of financial services according to FinSA. Therefore, they have to register with the register for client advisors if they intend to provide financial services.

24. *Does the provision of financial services by means of software-based applications require registration in the client advisor register?*

The purpose of registration in the client advisor register is to ensure a minimum standard of investor protection in the event of the involvement of financial service providers who are not subject to prudential supervision. This purpose must be ensured irrespective of the chosen form of provision of the financial service.

The provision of financial services by means of software-based applications without the direct involvement of a human being (e.g. robo-advisor or neo-broker) triggers the obligation to register in the client advisor register. Instead of the natural person missing at the point of sale, the following persons are to be entered in the client advisor register as substitutes:

(1) the person(s) primarily and technically responsible for the provision of the financial service[3].

or, if (1) does not exist

(2) the member of the executive board responsible for the financial service to be provided.

The persons to be registered as substitutes must fulfil all the requirements necessary for registration in the client advisor register.

When taking out professional liability insurance, the amount of coverage must be chosen so that it corresponds to the amount that would result if the financial service provider were to provide the financial services through natural persons rather than software-based applications (Art. 32 para. 3 FinSO).

[3] Examples: Robo-advisor: The natural person(s) responsible for the financial service or asset allocation; Neo-broker: The natural person(s) who primarily organises the execution of transactions and brings the knowledge required to comply with the conduct obligations under the FinSO.

Substitutes must submit a signed confirmation "Financial services by means of software-based applications" with their application for registration. A template for such a confirmation is provided by the registration offices.