

## Draft Comments

### Core Issue

#### FinSO Art 31 Exemption from Registration Duty

The draft Ordinance restricts the exemption to staff of foreign group entities of a Swiss financial firm subject to consolidated supervision by the FINMA. This is more restrictive than Art 28 Par 2 of the law. The article shall be worded such as to grant the same rights to all FINMA-supervised financial intermediaries, irrespective of whether they are subject to consolidated supervision or not. A level-playing field shall be established.

The Article shall offer the following circumstances:

- The foreign-based staff of a financial group shall be entitled to offer financial products and provide financial services to professional and institutional clients (professionelle Kunden und institutionelle Kunden / clients professionnels et clients institutionnels) in Switzerland.  
This is to assure that clients in Switzerland do have access to a varied offering of services and products.
- This entitlement is equally available to foreign-based staff of Swiss- and foreign-owned financial intermediaries, which belong to a group that maintains a FINMA-supervised entity.

Kundenberaterinnen und -berater von ausländischen Finanzdienstleistern, die im Ausland einer prudentiellen Aufsicht unterstehen und die Teil einer Finanzgruppe sind, welche eine ~~welcher~~ gesetzlich der konsolidierten Aufsicht der Eidgenössischen Finanzmarktaufsicht (FINMA) ~~untersteht~~unterstellte Einheit umfasst, sind von der Registrierungspflicht ausgenommen, soweit sie ihre Dienstleistungen in der Schweiz ausschliesslich gegenüber professionellen oder institutionellen Kunden erbringen und sie durch den für die Kundenbeziehung verantwortlichen Kundenberater begleitet sind.

Les conseillers à la clientèle de prestataires de services financiers étrangers assujettis à une surveillance prudentielle à l'étranger et faisant partie d'un groupe dont une entité est assujettie à la surveillance consolidée de l'Autorité fédérale de surveillance des marchés financiers (FINMA) sont exemptés de l'obligation d'enregistrement, pour autant qu'ils ne fournissent leurs services en Suisse qu'à des clients professionnels ou institutionnels et qu'ils sont accompagnés par le conseiller à la clientèle en charge de la relation.

### Other Issues

#### FinSO Art 4 Par 2

2 Sind an einem Vermögen mehrere Kundinnen oder Kunden berechtigt, so sollen ~~sind~~ sie für dieses gemeinsam einem Kundensegment ~~auswählen~~zuzuweisen; mindestens einer der berechtigten Kunden muss die Zuordnungskonditionen zu diesem Segment erfüllen. Die Abs. 3 und 4 sowie Art. 5 Abs. 3 sind vorbehalten. Treffen die Kundinnen und Kunden keine Auswahl, so nimmt der Finanzintermediär die adäquate Segmentierung vor.

2 Si une fortune compte plusieurs clients ayant droit, ceux-ci sélectionnent conjointement doivent tous être classés dans la même catégorie pour ce qui est de la fortune en question; au moins un des clients ayant droit doit satisfaire les conditions d'accès à la catégorie en question. Les al. 3 et 4 et art. 5 al. 3 sont réservés. L'intermédiaire financier applique la segmentation adéquate si les clients ne font pas de choix.

It shall be confirmed that in the context of a relation with multiple contracting parties clients can among themselves select the segment they want to belong to. This follows the analogy of Par 4 where clients can designate a delegate

and thus obtain segmentation upon knowledge and experience of the representative. If the clients do not themselves determine segmentation, the financial intermediary does on their behalf and upon the information it has available.

### **FinSO Art 4 Par 3**

It is understood that a corporation / private investment company is considered as professional client if itself satisfies the relevant criteria. Knowledge and experience as well as asset tests are performed at the level of the entity rather than its beneficial owners.

### **FinSO Art 4 Par 4 (in relation with Art 16)**

Requirements should be clarified. Art 4 shall clarify that its scope does not exclusively encompass external asset managers but any sort of power of attorney. Also it shall provide for classification based upon knowledge and experience of the authorised person (bevollmächtigte / fondé de pouvoirs) rather than the beneficial owner of the assets. This is in line with Art 16, which establishes that knowledge and experience of the representative (vertretende Person / représentant) should be taken into account for suitability and appropriateness testing.

Furthermore terminology of Art 4 and 16 shall be aligned. Clarification is needed with respect to the distinction between authorised person and representative as well as on whether the suitability and appropriateness testing is valid for a single transaction, a specific relation or the entirety of relations of one specific client.

Art. 4 Abs. 5 Verwahrstellen sind von der Pflicht zur Kundenklassifizierung ausgenommen, sofern die Kundin bzw der Kunde einen der Aufsicht der FINMA unterstellten Finanzdienstleister bevollmächtigt hat und selbst nicht beratend involviert ist.

Art. 4 al. 5 Les dépositaires sont exemptés de l'obligation de classification des clients pour autant que le client a mandaté un intermédiaire financier assujéti à la surveillance FINMA et que le client ne participe pas activement à l'élaboration du conseil.

### **FinSO Art 7 Information on Financial Services and Financial Products**

The information on financial services, financial products, and related risks shall be provided at specific points in time, i.e. at the commencement of the banking relation / at the first offering of such a product. Therefore a specific paragraph shall clarify that information needs to be provided once at inception only.

5 Die in Alinea 1-4 beschriebene Information wird dem Kunden bei Beziehungsaufnahme bzw. beim ersten Angebot des Finanzproduktes abgegeben. Während der laufenden Beziehung kann der Kunde die Information jederzeit erneut verlangen.

5 L'information visée sous les al. 1-4 est fournie au moment de l'entrée en relation respectivement au moment où le produit financier est proposé pour la première fois au client. Elle ne doit être fournie ultérieurement qu'à la demande expresse du client.

### **FinSO Art 8 Par 1: Cost Information**

There needs to be clarification with respect to the extent of obligation to inform on cost and on the distinction between cost of the financial instrument and of the financial services provider respectively. Furthermore potential inconsistencies between FinSA Art 8 Par 2 and FinSO Art 8 Par 1-3 since the Law refers to cost related to the financial service and the Ordinance to the financial instrument.

Art 8 Par 1 requires information on one-time and ongoing cost; while one-time cost is clear to determine, this is not possible for ongoing cost unless a duration for counting is defined. Further there should be clarification that only service costs and not product costs (such as the TER of a fund) have to be disclosed.

~~Art 8 Par 2 is understood such as to introduce distinction between disclosure of cost levied on the services provided (which may encompass cost for transactions) and cost of the product itself, which the product provider itself shall inform on. The latter may be disclosed in the product documentation.~~

1 Die Information über die Kosten enthält insbesondere Angaben zu den einmaligen und laufenden Kosten, die bei der Erbringung der Finanzdienstleistung beziehungsweise beim Erwerb oder, bei der Verwahrung bzw. bei der Veräusserung des betreffenden Finanzinstruments beim Finanzinstitut entstehen. Diese Information wird vor der Ausübung der Transaktion gegeben.

1 L'information sur les coûts contient en particulier des indications sur les coûts uniques et sur les coûts récurrents auprès de l'établissement financier qui sont liés à la prestation des services financiers respectivement à l'acquisition-ou, la détention et l'aliénation des instruments financiers concernés. Cette information est fournie avant l'exécution de la transaction.

### **FinSO Art 10 Information on the Offering**

An additional paragraph shall clarify that the information needs to be provided once at inception of the relation, when the specific financial product is offered for the first time or upon explicit request from the client.

4 Die Unter den Alinea 1-3 erwähnte Information wird bei Beziehungsaufnahme oder bei erstmaligem Angebot des spezifischen Finanzprodukts abgegeben. Sie muss nicht später erneut abgegeben werden, ausser der Kunde verlangt sie erneut.

4 L'information visée sous les al. 1-3 est fournie au moment de l'entrée en relation respectivement au moment où le produit financier est proposé pour la première fois au client. Elle ne doit être fournie ultérieurement qu'à la demande expresse du client.

### **FinSO Art 11 Execution or Transmission of Client Orders (in relation with Art 8 Par 4 FinSA)**

Art 8 Par 4 FinSA exempts the financial intermediary from handing a Base Information Sheet to the client in case of execution only transactions, unless such a document is available:

... ausser wenn bereits ein Basisinformationsblatt für das Finanzinstrument vorhanden ist.

... sauf lorsqu'une feuille d'information de base existe déjà pour l'instrument financier.

This obligation is excessive and impossible to comply with since the financial intermediary cannot at the same time assure timely execution (best execution) of a transaction initiated spontaneously by one of its clients and providing product information according to the drafted legal standards. The Ordinance shall clarify that the obligation of providing such documentation applies only if it is available with the financial intermediary.

... ausser wenn der Finanzintermediär bereits über ein Basisinformationsblatt für das Finanzinstrument verfügt vorhanden ist.

... sauf lorsque l'intermédiaire financier dispose existedéjà d'une feuille d'information de base sur l'instrument financier.

### **FinSO Art 15 Par 3 Advice among Absent Persons**

There needs to be a minimum formal requirement for the revocation of such an agreement. Since consent to receive the documentation only ex-post is being made in writing or similar ways, it appears appropriate to apply the same formal requirements to the revocation of such consent.

Die Zustimmung nach Absatz zwei kann jederzeit schriftlich, oder in einer anderen Form die den Nachweis durch Text ermöglicht, widerrufen werden.

Le consentement selon l'al. 2 peut être révoqué à tout moment en la forme écrite ou sous toute autre forme permettant d'en établir la preuve par un texte.

### **FinSO Art 16 Representation**

It is unclear why only natural persons should be entitled to nominate a representative; therefore the scope of the Art shall be extended.

Lässt sich eine natürliche oder eine juristische Person vertreten ...

Si une personne physique ou morale désigne un représentant ...

### **FinSO Art 19 Account**

In Par 1 clarification is needed with respect to the distinction between lit b and c. In particular clarification should be given with regards to the difference between Kundenvermögen / avoires du client and Kundendepots / dépôts du client.

In Par 2 the wording needs to be reviewed to avoid contradiction / impose excessive reporting obligations upon the financial intermediary, which do not meet the initial intention of the duty.

2 Sie erfolgt auf einem dauerhaften Datenträger:

- a. zu den mit der Kundin oder dem Kunden vereinbarten Zeitintervallen; ~~und~~oder
- b. auf deren Anfrage hin.

2 Il s'effectue sur des supports de données durables

- a. à la fréquence convenue avec le client, ~~et~~ou
- b. à la demande de ce dernier

### **FinSO Art 41 Notification Duty**

Client advisors are required to report the changes as per Art 41 to the registration authority. There shall be clarification that the reporting deadline of 14 days regards business days as opposed to calendar days.

Die Kundenberaterinnen und -berater ~~oder der Finanzdienstleister~~ melden der Registrierungsstelle innert 14 Werktagen:

Les conseillers à la clientèle ~~ou le prestataire de services financiers~~ déclarent les faits suivants à l'organe d'enregistrement dans un délai de 14 jours ouverts.

### **FinSO Art 89 Language**

It is not clear why documentation of collective investment schemes cannot be provided in English, as documentation of other financial products. If this is due to the Law and Ordinance on Collective Investment Schemes then they should be aligned accordingly. It is inconsistent to admit English and the client language for some but not all documents of financial products.

Admitting publication of documents in English or the language of the client assures that all financial products are subject to the same rules; that communication with the client is easy and the needs of the internationality of the Swiss financial centre are taken into account; that documentation of different products is easy to compare.

Thus Art 89 Par 2 shall be waived.

### **FinSO Art 104 Required Knowledge**

It is not clear what is understood under the "required knowledge" as no standards are provided neither in the Ordinance, nor in any of its annexes. Given this has to be implemented within one year of the entry into force certain standards and equivalence should be provided.

Additionally, under Art 29 FinSA, Par 1, Let. 1 the foreign client advisors need to prove that they comply with the requirements of Art 6 to be added to the advisors' register. The requirements should therefore be more concrete.

### **FinSO Annex 14 Foreign Documents judged as equal in the sense of Art 87**

Numerous US-products are classified as PRIIPS but do not provide a standardised base information sheet. An equivalence standard should be established for such products.