SPINEDI & STREET Associés

Switzerland: existing and upcoming rules pertaining to family offices

Today, family offices represent perhaps the fastest-growing segment of investment vehicles at a global scale. This trend is due to a range of factors, especially (i) the mounting concentration of capital held by very wealthy families; and (ii) their desire to have a higher degree of control over their investments and fiduciary affairs while reducing complexity. This need for greater control has emerged largely in the aftermath of the financial crisis when wealthy families wanted to lessen their concerns about dealing with a wide range of external products and service providers.

Over the recent years, Switzerland has become a favourite place of incorporation for family offices. Several specific reasons account for the success of the Alpine country, such as (i) the availability of qualified specialists; (ii) the quality of the available infrastructure and banking sector services; (iii) the high level of legal and political stability; (iv) attractive taxation regimes in many cantons; and (v) the overall quality of life.

Swiss law does not provide a legal definition of the term "family office". In principle, a family office may use any of the legally available forms for commercial companies. However, in practice, it is either a company limited by shares or limited liability company as both entities allow for the limitation of the personal liability of their board members and managers.

At present, the Anti-Money Laundering Act (AMLA) and the Collective Investment Schemes Act (CISA) are the most important laws in respect to family offices. In January 2020, two additional legislations that contain relevant rules will enter into effect, namely, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). In Switzerland, there is no general requirement for family offices to be authorised. The need to obtain an authorisation and to comply with further regulations depends on the services that the entity at issue intends to offer.

Anti-money laundering

Typically, family offices effect payments for the principal or administer his or her assets. Pursuant to the AMLA, "financial intermediaries" are persons who on a professional basis accept or hold on to deposit assets belonging to others or help them to invest or transfer such assets. The financial intermediary's activity occurs on a professional basis if it satisfies one of the following criteria:

- the gross profit earned annually exceeds 50,000 Swiss Francs;
- contractual relations are commenced or maintained with more than 20 contracting parties per year;
- an indefinite power of disposal exists over other peoples' assets with a value of more than 5m Swiss Francs; or
- transactions are conducted with a total volume in excess of 2m Swiss Francs per year.

As a financial intermediary subject to the AMLA, a family office is under a number of obligations. The most important of these is either (i) to join a self-regulatory organisation (SRO) to combat money laundering or (ii) to submit directly to the Swiss Financial Market Supervisory Authority (FINMA). In addition, the family office needs to appoint a responsible person for AMLA who must receive adequate training, keep specific customer records (AMLA files), and fulfil a duty of notification.

Asset management

Currently, asset managers in Switzerland do not require authorisation. Other than the potential supervision under AMLA, they are not subject to any prudential supervision by a supervisory authority. However, asset managers may voluntarily join a professional organisation for asset managers. In such a case, they must abide by the regulations of the organisation. Moreover, the asset management contract must comply with the minimum requirements of FINMA or the organisation at issue.

According to the FinIA, the provision of asset management services necessitates authorisation, while asset managers are subject to new prudential supervision. Nonetheless, the upcoming law provides for an exemption for asset managers who only manage assets owned by persons linked to them economically or by family ties. Pursuant to the dispatch the Swiss government published with respect to the FinIA, this exemption concerns the members of the family that work in, as well as managers that are employed by, a single-family office.

Investment advice and other financial services

Under the FinIA, investment advice on its own does not require authorisation either. However, the FinSA imposes stricter requirements on all providers of financial services. It enshrines a broad definition of financial services, covering not only investment advice but also asset management, and the acquisition or sale of financial instruments on behalf of clients. By way of consequence, most family offices are likely to come under the scope of the new law.

Specifically, FinSA sets out (i) obligations to provide information; (ii) a requirement to examine investments in relation to their suitability and appropriateness for clients; (iii) documentation and accountability rules; (iv) organisational responsibilities; and (v) duties of transparency and care. However, in the case of financial service providers who do not require authorisation, compliance with the aforementioned obligations will not be monitored.

According to the FinSA, a family office may employ only those customer advisers who are properly listed on the proposed new register. The new law foresees certain simplifications in the provision of services to professional clients. Under the FinSA, professional clients include companies with professional treasury operations and high-net worth private individuals who have declared that they would like to be treated as professional clients. The classification of clients in the FinSA is largely identical with the one in the CISA. With regard to family offices, it is

important to note that the principal will generally meet the criterion of a high-net worth private individual.

Distribution of collective investment schemes

The CISA requires distributors of Swiss or foreign collective investment schemes to obtain an authorisation from FINMA. Its widely-cast definition of "distribution" includes every incidence of an offer of a collective investment scheme, as well as any advertising for them. Moreover, it comprises any reference to collective investment schemes. As a consequence, investment advisers are also considered as distributors if they recommend collective investment schemes to their clients.

Nonetheless, the CISA foresees a number of exemptions from the obligation to obtain distribution authorisation, including in the following cases:

- independent asset managers who (i) are subject to the AMLA and an industry body recognised by FINMA; and (ii) use an asset management contract that complies with the minimum standards of such an industry body;
- the provision of information and the subscription of collective investment schemes at the instigation of or on the own initiative of investors (especially in the context of investment advisory agreements or for execution-only transactions);
- the distribution of exclusively Swiss collective investment schemes to qualified investors; and
- the distribution of foreign collective investment schemes that are exclusively offered from Switzerland to qualified investors abroad.

With regard to Swiss family offices, the question if an authorisation is needed for distributing collective investment schemes requires an individual analysis of the services and products offered.