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NEWSLETTER

FEBRUARY 2024

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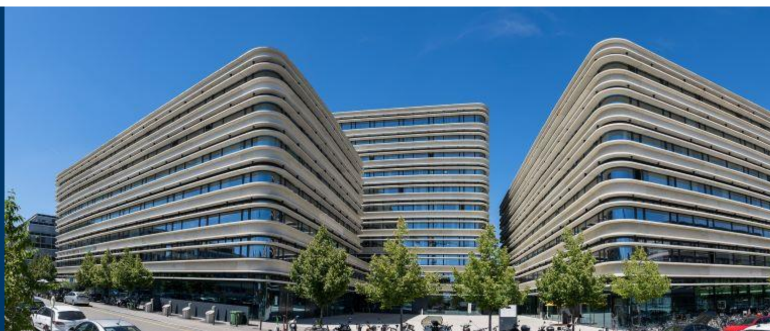

Key Changes of the Collective Investment Schemes Act (CISA) and of the Collective Scheme Ordinance (CISO)

The revised CISA and the amended CISO will enter into force on 1 March 2024. The main topic of the revision is the introduction of the Limited Qualified Investor Fund (L-QIF), a new category of Swiss funds, which is available exclusively to qualified investors and which will require neither an approval nor an authorization by the FINMA. Furthermore, the revision was also used to implement international standards, to follow the developments of the market and to increase legal certainty. This newsletter highlights in a first part the most important changes besides the L-QIF and in a second part the characteristics of the L-QIF and in a third part the most relevant amendments in the Financial Institutions Ordinance (FinIO).

I. Revised Topics other than the L-QIF

1. Definition of Collective Investment Schemes and the "Family Ties" Provision

Collective investment schemes are assets provided by at least two mutually independent investors for the purpose of collective investment and managed externally. Art. 5 para. 6 CISO newly states that fund management companies are responsible for ongoing compliance with the definition of a collective investment scheme.

Following the consultation of the draft legislation, the introduction of a clarification stating that investors are not independent if they have family ties was waived. The FINMA will, therefore, continue to examine on a case-by-case basis whether the criteria of third-party management and collectivity are met when authorizing collective investment schemes in case of exclusively family-affiliated investors.

2. Fees and Incidental Costs

The list of fees and incidental costs in Art. 37 CISO remains exhaustive in the interest of legal certainty. However, in order to take account of market developments, the existing list of fees and incidental costs was supplemented with further appropriate incidental costs, such as costs for the registration or renewal of the Legal Entity Identifier with domestic and foreign registration authorities, costs and fees in connection with the listing of funds, etc.

The decision of the legislator to keep the list of fees and incidental costs exhaustive was criticized in the industry. It is to be expected that the discussion on

this point will continue, in particular in the light of a recent decision of the Swiss Federal Supreme Court, wherein the Federal Supreme Court emphasized that, when interpreting Art. 37 CISO it is also important to bear in mind Art. 38 para. 1 lit. b and c FinIA, according to which the fund management company is entitled to an exemption from any liabilities which may have arisen in the course of the proper execution of its tasks and to receive reimbursement of the expenses incurred in connection with such liabilities. This indicates that it is not exhaustively ruled out that in certain cases and subject to the conditions of Art. 38 para. 1 lit. b and c FinIA, expenses not specifically listed in Art. 37 CISO may also be reimbursed from the fund's assets if this is objectively justified.

3. Liquidity Risk Management

The new provision of Art. 78a CISA in connection with Art. 108a CISO explicitly anchors the duties with regard to the liquidity risk management of all open-ended Swiss collective investment schemes. These relate in particular to an appropriate process for the early identification of liquidity risks, the ongoing monitoring and regular assessment of liquidity and other risks, the performance of stress tests (if the net assets of the collective investment scheme exceed CHF 25 Mio.) and the formulation of a crisis plan.

The fund management companies or SICAVs must take measures to obtain knowledge of the investor profiles (type of investors, the relative size of the respective investments and the redemption conditions that apply to these investors) so that, in particular, any investor concentrations can be considered in liquidity management.

4. Side Pockets

In exceptional cases and upon justified request of the fund management company or the SICAV, the FINMA may approve the segregation of certain illiquid investments of a Swiss collective investment scheme (side pocket) according to Art. 110a CISO. The possibility of side pockets must be embedded in the fund contract or investment regulations and the side pocket must be in the interests of all investors. The decision about the segregation of illiquid in-vestments has to be published after FINMA's approval.

5. Active Violations of Investment Regulations

In the event of an active violation of the investment regulations, in particular by way of acquisitions and sales, Art. 67 para. 2bis CISO requires that the investments are reduced to the permitted level without delay. Furthermore, it has to be verified whether such event caused any damages to the investors. If this is the case and the investors shall not be compensated for the resulting loss, the violation has to be published immediately and the auditor has to be informed without delay. Furthermore, any active violation of investment regulations must be reported in the annual report. This is a codification of the FINMA's current practice.

6. Exchange Traded Funds (ETFs)

Im Art. 106 CISO newly introduces a legal definition for Swiss ETFs. In particular, it is now possible for an open-ended collective investment scheme to contain both ETF and non-ETF share classes (a so-called "**Mixed Fund**"). In case of a Mixed Fund, the ETF share classes must bear "ETF" in their name. Moreover, the fund documents such as prospectus and KIDs as well as promotionional materials must contain the information that the fund contains both ETF and non-ETF share classes.

Based on the new specific provision concerning foreign ETFs in Art. 127b CISO, foreign Mixed Funds will also have to list only ETF shares or ETF share classes in Switzerland. Non-ETF share classes of a foreign Mixed Fund no longer need to be listed in Switzerland in order to be offered to non-qualified investors.

7. Securities Lending and Repurchase Agreements

Art. 76 CISO now implements the recommendation of the Financial Stability Board to reduce the risks in connection with securities lending and repurchase agreements. Accordingly, it is required that the fund agreement or the investment regulations and the prospectus contain information (i) on whether the fund may use these investment instruments, (ii) about the absolute and relative maximum limits for these investment instruments and (iii) about the risks related to such investment instruments.

8. Transition Period

The fund documents of existing Swiss collective investment schemes must be adapted to the requirements concerning securities lending and repurchase agreements as well as ETFs until 1 March 2026. Existing Swiss collective investment schemes must fulfil the requirements concerning liquidity risk management until 1 March 2026 as well.

II. The L-QIF

With the L-QIF, Switzerland can offer promotors a flexible type of collective investment scheme, not subject to authorization or approval by the FINMA, and which can, therefore, be launched to market within a shorter time and cost efficiently.

With this new fund category, the competitiveness of Switzerland as fund location shall be strengthened compared to similar alternative and innovative fund products in the European Union, in particular the Luxembourgish Reserved Alternative Investment Fund (RAIF).

1. No New Legal Form and Set-Up

The L-QIF will not constitute a new legal form but can be established in the legal form of a contractual investment fund, the externally managed SICAV or of the limited partnership for collective capital investments. So, the L-QIF will be available to open-end and closed-end funds.

The institute responsible for the management of the L-QIF has to apply for registration of the L-QIF with the Federal Department of Finance ("FDF"), in order to make clear for third parties, in particular the FINMA, that the fund wants to be considered as an L-QIF and explicitly waives the FINMA's authorization and approval. Such an application must be filed within 14 days from signature of the relevant fund documents by the institute responsible for the management of the L-QIF. The FDF will keep a public register of the L-QIFs.

2. Available Exclusively to Qualified Investors

A L-QIF will be permitted to be offered to qualified investors exclusively in the meaning of CISA, i.e., professional clients in accordance with Art. 4 para. 3-5 or Art. 5 para. 1 and 4 FinSA (Art. 10 para. 3 CISA). This also includes high net worth private clients, and private investment structures established for them, who declare that they wish to be considered professional clients. Retail clients with a written portfolio management or investment advice contract with a prudentially supervised financial intermediary or an insurance company according to the Insurance Supervision Act are also considered qualified investors, unless they have declared that they do not wish to be considered qualified investors (Art. 10 para. 3ter CISA).

However, L-QIFs investing directly in real estate will be available to per se professional clients according to Art. 4 para. 3 FinSA only. Therefore, they are neither available to qualified investors according to Art. 10 para 3ter CISA, nor to high-net-worth private clients, and private investment structures established for them, who declare that they wish to be considered professional clients (Art. 5 para. 1 and 4 FinSA).

3. Legal Requirements

The name of the L-QIF must include either the full name "Limited Qualified Investor Fund" or the abbreviation "L-QIF". Furthermore, the first page of the fund documents and the advertisements must use the designation "Limited Qualified Investor Fund" or "L-QIF" and they must contain a note that the L-QIF is neither authorized nor approved nor supervised by the FINMA. As a consequence, the legal documents of the L-QIF are not approved by the FINMA.

Although the L-QIF will not be authorized, approved, or supervised directly by the FINMA, the institute managing the L-QIF will need to be an entity with a registered office in Switzerland which is authorized and supervised by the FINMA. For this reason, it will not be possible to set up an L-QIF in the form of a self-managed SICAV.

The investment restrictions and investment techniques foreseen by the CISO are quite liberal. The L-QIF will be open to all kind of investments. But the possible investments and the risk diversification must be disclosed in a transparent manner in the fund documentation.

A warning clause regarding special risks associated with the investments must be placed on the first page of the fund's documents and the advertising material.

It will be possible to convert an L-QIF in a collective investment scheme with FINMA authorization. This will permit a quicker launch of the fund and enable it to obtain the FINMA authorization in a second step.

III. Changes in the Financial Institutions Ordinance (FINIO)

The most relevant amendment in the FinIO is linked to the capital adequacy requirements of managers of collective assets. So far, Article 44 para. 1 FinIO stipulated an absolute upper limit of CHF 20 Mio. for the required capital of managers of collective assets. However, in a few exceptional past situations, higher

capital requirements would have been appropriate for a small number of institutions with extremely large assets under management. Due to the missing legal basis, the FINMA was unable to enforce these higher capital requirements. Therefore, the existing Art. 44 FinIO was supplemented by para. 6 so that the FINMA may, in justified cases, impose stricter (or less strict) capital adequacy requirements on managers of collective assets and adjust these in line with changes in the volume of assets under management.

The content of this newsletter does not constitute legal advice and may not be used as such. For personal advice, please contact your contact person at Suter Howald Attorneys at Law or one of the authors:

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