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Newsletter – Revision of the Swiss Collective Investment Schemes Act

I. Introduction

The Swiss parliament passed several amendments to the Federal Act on Collective Investment Schemes Act (**CISA**) in its 2012 fall session. A referendum was not launched and the revised CISA will enter into force on 1st of March 2013. The Ordinance on Collective Investment Schemes (**CISO**) was revised as well and will enter into force at the same time.
Two areas of legislation will not enter into force on 1 March 2013. The new legislative provisions on qualified investors will enter into force on 1 June 2013. The new provision on mandatory record-keeping within the framework of codes of conduct for its part will enter into force at both the act and ordinance level on 1 January 2014.
The revised CISA (revCISA) takes into consideration the changed requirements in respect to investors' protection and competitiveness and it shall grant to Swiss asset managers access to the European market. Furthermore, it adopts the newly developed international standards in the areas of management, custody and distribution of collective investment schemes.
The purpose of this newsletter is to inform in particular on such amendments to the CISA which are relevant for foreign collective investment schemes.

II. Amendments to the Distribution of Collective Investment Schemes

1. New definition of the term "Distribution"

The revCISA does no longer use the term „public marketing". In lieu thereof, the revCISA introduced a comprehensive definition of the term "distribution" as follows: Any offering of and any promotion for collective investment schemes, which is not exclusively addressed to regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of collective investment schemes, central banks or regulated insurance institutions is to be considered as distribution (Art. 3 para. 1 revCISA). Because this new definition mentions the collective investment schemes in general, this definition applies to both Swiss and foreign collective investment schemes, which are distributed in Switzerland, as well as to the distribution of foreign collective investment schemes from Switzerland which are not exclusively reserved for qualified investors according to Swiss law or the respective foreign law.
The following activities do explicitly not qualify as distribution and are, therefore, not subject to the revCISA (Art. 3 para. 1 and 2 revCISA):

- The distribution exclusively addressed to regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of collective investment schemes, central banks or regulated insurance institutions;
- The provision of information and the acquisition of collective investment schemes upon the investor's own initiative, in particular in the context of long-term, non-gratuitous written advisory agreements as well as the simple execution of transactions;
- The provision of information and the acquisition of collective investment schemes in the framework of a written asset management agreement with regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks;
- The provision of information and the acquisition of collective investment schemes in the context of a written asset manage-

ment agreement with an independent asset manager who fulfils certain requirements[1];
- The publication of prices, rates, net asset values and tax data by supervised financial intermediaries, provided that no contact details are published;
- The offering of participation plans in the form of collective investment schemes to employees.

2. Distribution to qualified investors

The distribution to qualified investors is not subject to an authorization of the FINMA (Art. 13 para. 1 revCISA e contrario). Foreign collective investment schemes exclusively distributed to qualified investors may only be distributed by a financial intermediary adequately supervised in Switzerland or in its home country (Art. 19 para. 1bis revCISA). Therefore, foreign offerors who distribute foreign collective investment schemes exclusively to qualified investors do not need a distribution licence of the FINMA, provided that they are adequately regulated in their home country.

The list of qualified investors under the revCISA changed in comparison to the current CISA in particular regarding high net worth individuals and investors with an asset management agreement. High net worth individuals no longer qualify as qualified investors, as soon as they declare to own financial investments in the amount of at least CHF 2 million. The revCISO provides that any individual deems to be a qualified investor, provided that he/she fulfils the following conditions at the moment of the acquisition of a collective investment scheme:

- The investor proves that she/he has knowledge of the market that is necessary to understand the risks of the investments based on her/his personal education and personal professional experience or based on a comparable experience in the financial sector and that he/she has funds of at least CHF 500,000; or
- the investor confirms in writing to own financial investments of at least CHF 5,000,000.

The revised law provides that high net worth individuals in the aforementioned meaning have to declare in writing that they would like to qualify as qualified investors (so called "opting in"). Without such opting in they are not qualified investors.

Furthermore, investors who entered into a written asset management agreement with banks, securities dealers, fund management companies, asset managers of collective investment schemes or with an independent asset manager who fulfils certain conditions[2] are still considered to be qualified investors. However, under the revCISA they may declare in writing that they do not want to be a qualified investor (so called "opting out"). The financial intermediary or the asset manager with whom the investor entered into a written asset management agreement have to draw the investor's attention to the fact that he/she qualifies as qualified investor and explain the consequences and risks resulting from this status. In particular, it has to be explained to such investors that they can profit from the enforced investors' protection by declaring an opting out.

Asset managers of collective investment schemes and central banks are now also considered as qualified investors under the revCISA.

Regulated financial intermediaries such as banks, securities dealers, fund management companies, regulated insurance institutions, public entities and retirement benefits institutions with professional treasury operations as well as companies with professional treasury operations are still considered to be qualified investors. Furthermore, the Federal Council may deem other categories of investors to be qualified.

Transitory period:

- High net worth individuals, who did not opt in within two years after the entry into force of the revCISA, will no longer be able to invest in collective investment schemes reserved to qualified investors (Art. 158e revCISA).

[1] The independent asset manager must be subject to the Federal Act on Anti Money Laundering and to the rules of conduct of an organisation of his/her industry which are recognized as minimal standard by the FINMA and the asset management agreement must comply with the guidelines of an organisation of its industry, recognized as minimal standard by the FINMA

[2] the independent asset manager must be subject to the Federal Act on Anti Money Laundering and to the rules of conduct of an organisation of his/her industry which are recognized as minimal standard by the FINMA and the asset management agreement must comply with the guidelines of an organisation of its industry, recognized as minimal standard by the FINMA

3. Distribution to non-qualified investors

Any distribution which is not addressed to qualified investors (see section II.2 above) and which does not qualify as an activity which is not to be considered as distribution (see section II.1 above, Art. 3 para. 2 revCISA) is considered to be as distribution to non-qualified investors (to the public).
The distribution of collective schemes to non-qualified investors requires an authorization of the FINMA.

4. Distribution of foreign collective investment schemes

4.1 Distribution of foreign collective investment schemes to non-qualified investors in Switzerland or from Switzerland

According to Art. 120 rev CISA, the distribution of foreign collective investment schemes to non-qualified investors in Switzerland or from Switzerland requires an authorization of the FINMA prior to their distribution (Art. 120 revCISA). The Swiss representative (or its attorney at law on the basis of a power of attorney) submits to the FINMA the relevant documents such as the prospectus, the statutes or the fund management regulations. According to Art. 120 para. 2 revCISA, the conditions that must be fulfilled in order to obtain the FINMA approval did change to that extent,

- that not only the collective investment scheme, but the fund management company or the company respectively, the asset manager of the collective investment scheme and the custodian as well must be subject to a public supervision intended to protect investors;
- that the organization, investor rights and investment policy not only of the fund management company or the company respectively, but also of the custodian are equivalent to the provisions of the revCISA;
- that an agreement on cooperation and information exchange between the FINMA and the foreign regulator for the distribution exists. The FINMA publishes a list of the countries with which it entered into such agreement.

In addition to these amended or new conditions the following still valid conditions must be fulfilled as well: (i) the designation "collective investment scheme" may not give reason for confusion or deception and (ii) a representative and paying agent must be appointed for the distribution of the units in Switzerland. As a new rule under the revCISA, the Swiss representative and Swiss paying agent may only terminate their mandate with the prior approval of the FINMA (Art. 120 para. 2bis revCISA).

Transitory period:

- These foreign collective investment schemes have to comply with the new requirements of Art. 120 para. 2 revCISA within one year since the revCISA came into force (Art. 158d para. 5 revCISA).
- The Swiss representatives have to submit to the FINMA declarations of all respective foreign regulators, wherein the relevant regulators in the home country of the foreign collective investment schemes undertake to cooperate and to exchange information with the FINMA, unless such declarations are already in force. The Swiss representatives have to submit such declarations to the FINMA within one year since the coming into force of the revCISA (Art. 158d para. 3 revCISA).

4.2 Distribution of foreign collective investment schemes to qualified investors in Switzerland or from Switzerland

Foreign collective investment schemes, which shall exclusively be distributed to qualified investors (see section II.2 above), may only be distributed by a financial intermediary who is adequately supervised in Switzerland or in his/her home country (Art. 19 para. 1bis revCISA). A distributors' licence of the FINMA is not required.
Foreign collective investment schemes that are only distributed to qualified investors do not need an authorization of the FINMA, but as a new rule they have to appoint a Swiss representative and a Swiss paying agent for the distribution of the units in Switzerland. Both the Swiss representative and the Swiss paying agent may not terminate their mandate without the prior consent of the FINMA. Furthermore, the designation "collective investment scheme" may not provide reasons for confusion or deception.
The Swiss representative of such foreign collective investment schemes may only enter into distribution agreements with financial intermediaries who are adequately supervised

either in Switzerland or in their home country. With this rule it shall be avoided that the foreign promoter directly enters into distribution agreements with adequately supervised financial intermediaries without assignment of a Swiss representative. The distribution agreements have to oblige the financial intermediary to exclusively use such documents of the foreign collective investment scheme in Switzerland which mention the Swiss representative, the Swiss paying agent and the place of jurisdiction. Moreover, the distribution agreements must be governed by and construed according to Swiss law.

The Swiss representative has to ensure that the relevant documents are available at his office.

Compared to the Swiss representative of foreign collective investment schemes which are distributed to non-qualified investors, the Swiss representative of foreign collective investment schemes which are exclusively distributed to qualified investor is not subject to the duties of publication and notification of any amendments to the fund documents to the FINMA.

Transitory period (Art. 158d para. 1, 2 and 4 revCISA):

- Within two years since the coming into force of the revCISA, these foreign collective investment schemes have to appoint a Swiss representative and Swiss paying agent and must provide the Swiss representative with all necessary information which the Swiss representative needs in order to fulfil his duties. They, furthermore, have to ensure within the same period of time that the designation of the collective investment scheme does not give reason for confusion or deception (Art. 158d para. 4 in connection with Art. 120 para. 4 and 123 revCISA).
- Representatives of foreign collective investment schemes and distributors who have not yet been subject to the CISA, have to contact the FINMA within six months since the coming into force of the revCISA. They have to comply with the requirements of the revCISA and to apply for authorization with the FINMA within two years since the coming into force of the revCISA (Art. 158d para. 1 and 2 revCISA).

5. Amendments to the rules of conduct for all authorized parties

The rules of conduct that apply as before to all authorized parties such as distributors and Swiss representatives of foreign collective investment schemes and their agents were tightened in terms of the duty of disclosure. In addition to the duty to provide transparent financial statements and appropriate information about the collective investment schemes and their risks, the authorized parties will now have to disclose to the investors the directly or indirectly charged fees and costs as well as their use. Furthermore, they will have to inform the investors in a complete, truthful and comprehensible manner on the compensations for the distribution in the form of commissions, broker's fees and other monetary benefits (Art. 20 para. 1 lit. c rev.CISA).

Moreover, as a new rule, the authorized persons and third parties entrusted with the distribution must record in writing the needs of their clients as well as the reasons of a recommendation for the subscription to a certain collective investment scheme. These written minutes have to be handed over to the client (Art. 24 para. 3 revCISA). This provision will enter into force on 1st of January 2014.

III. Asset Managers

1. Asset managers who must have an authorization of the FINMA and exemptions of this requirement

Under the revCISA not only asset managers of Swiss collective investment schemes need an authorization of the FINMA, but also asset managers of foreign collective investment schemes.

Individuals are no longer accepted as asset managers of Swiss collective investment schemes.

As a new rule, the Swiss branch of a foreign asset manager of collective investment schemes can be asset manager of collective investment schemes with registered office in Switzerland, provided that

- the foreign asset manager including the Swiss branch is subject to an adequate supervision in its home country,
- the foreign asset manager is sufficiently organized and disposes of sufficient funds and qualified staff in order to run a branch in Switzerland, and

- an agreement about cooperation and information exchange exists between the FINMA and the respective foreign regulator.

The FINMA can fully or partly exempt asset managers of collective investment schemes from the provisions of the revCISA in justified cases, if:

- the purpose of protection of the CISA is not adversely affected; and
- only fund management companies, SICAVs, limited partnerships for collective investment schemes, SICAFs, other asset managers of collective investment schemes or foreign fund management companies or companies, which are subject to an equivalent supervision in terms of organisation and investors' rights, delegated the asset management of collective investment schemes to the asset manager.

2. Asset managers who are not subject to the revCISA (de minimis rule)

Asset managers of collective investment schemes, whose investors are qualified investors, are not subject to the revCISA, if they fulfil one of the following conditions (Art. 2 para. 2 lit. h revCISA):

- The managed assets, including assets acquired by leveraged financing, amount to maximum CHF 100 million in total.
- The managed assets of the collective investment schemes consist of non leveraged financed collective investment schemes, which may not exercise redemption rights for a period of 5 years after the first investment in each of these collective investment schemes and amount to not more than CHF 500 million.
- The investors are exclusively group companies of a group to which the asset manager belongs.

However, these asset managers may voluntarily submit themselves under the revCISA and apply for a licence of the FINMA, if this is required in the country where the foreign collective investment scheme is set-up or distributed (Art. 2 para. 2bis revCISA).

3. Transitory period

Asset managers of foreign collective investment schemes who are newly subject to the revCISA, have to contact the FINMA within 6 months since the revCISA came into force. They have to comply with the legal requirements and apply for a licence with the FINMA within two years since the entry into force of the revCISA.

IV. Domicile of Management Companies and fund

Under the current law the fund management company or the investment scheme company respectively on the one hand and the fund of a foreign collective investment scheme on the other hand must have the same country of domicile. Otherwise the fund would not have been authorised from the FINMA.
According to the revised Art.120 para. 2 a the authorisation to distribute foreign collective investment schemes in and from Switzerland is granted when the collective investment scheme, the fund management company or the investment scheme company respectively, the asset manager of the collective investment scheme and the custodian as well are subject to a public supervision intended to protect investors. The restriction that the management company or the investment scheme company respectively, and the fund must have the same country of domicile is no longer required.

V. Master–Feeder-Structures

According to Art. 73a revCISO master–feeder–structures are now allowed in Switzerland. A collective investment scheme qualifies as a feeder-fund, if it invests at least 85% of the fund's assets in units of the same target fund.

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