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New Swiss Rules on the Distribution of Foreign Collective Investment Schemes in Switzerland – What Distributors Should Be Aware of

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The Swiss Act on Collective Investment Schemes (**"CISA"**) has recently been amended and will in its revised version enter into force on 1 March 2013 together with a revised version of the Ordinance on Collective Investment Schemes (**"CISO"**).

Both, the revised CISA and the revised CISO contain new rules governing the distribution of foreign collective investment schemes in Switzerland. Some key aspects of these new rules are set out below.

1. What are the new rules in a nutshell?

Under the existing rules, the distribution of foreign collective investment schemes in or from Switzerland does not require the approval by the Swiss Financial Market Supervisory Authority FINMA (**"FINMA"**), provided that they are not "publicly distributed". A distribution is not considered to be a "public distribution" if the investors are exclusively qualified investors (so-called qualitative safe harbour rule) and/or a small group of investors (so-called quantitative safe harbour rule).

Under the new rules:

– The concept of "public distribution" will be replaced by a new concept: No requirements must be satisfied if the placement of collective investment schemes, whether foreign or Swiss, does not constitute a "distribution", which is a defined term under the revised CISA (see 3. below).
– The distribution of foreign collective investment schemes to qualified investors only does not require an authorization from FINMA, provided that certain requirements are met (see 2. below).
– The definition of "qualified investors" has become more restrictive (see 4. below).
– It is uncertain whether the quantitative safe harbour rule, which related to the public element, still applies. A prudent distributor should only distribute foreign collective investment schemes to non-qualified investors on the basis of strict reverse solicitation (see 3. below).

2. What action needs to be taken to comply with the new legal regime, and by when?

Firstly, it has to be determined whether the selling activity qualifies as distribution, as defined in 3. below. If the selling activity does not qualify as distribution, no action needs to be taken.

Secondly, if the selling activity does qualify as distribution, it has to be determined whether the foreign collective investment schemes will be distributed to qualified investors only (see 4. below). Should this be the case:

– a Swiss representative and a Swiss paying agent must be appointed by the foreign collective investment scheme within two years of the entry into force of the revised CISA (i.e. by 1 March 2015);

– a foreign financial intermediary who distributes the foreign collective investment schemes needs to (i) be authorised to distribute collective investment schemes in the state of its statutory seat and (ii) have entered into a written distribution agreement with the Swiss representative agent of the relevant foreign collective investment schemes within two years of the entry into force of the revised CISA (i.e. by 1 March 2015);

– regarding Swiss financial intermediaries the new rules are contradictory. We believe that the above-mentioned requirements only apply to foreign financial intermediaries. As a consequence, as under the existing rules, Swiss distributors do not require an authorization from the FINMA; and
– the distribution documentation (incl. disclaimers and selling restrictions) and websites may need to be amended to reflect the revised definition of qualified investors (see. 4 below) as per 1 June 2013.

If foreign collective investment schemes will be distributed (also) to non-qualified investors in or from Switzerland, both the distributor and the foreign collective investment schemes must be authorized by the FINMA, and a Swiss representative and paying agent must be appointed. Should the foreign collective investment schemes have been approved by the FINMA for the distribution to non-qualified investors already under the existing regime, the new, more restrictive approval requirements have to be satisfied within one year of the entry into force of the revised CISA (i.e. by 1 March 2014).

3. What will be considered as distribution?

All kind of offering of, or advertisement for, collective investment schemes, whether foreign of Swiss, will be considered as distribution under the new CISA, unless such offering or advertisement is made:

– exclusively to a regulated financial institution such as a bank, securities dealer, fund management company, asset manager of collective investment schemes or central bank (each a **"Regulated Financial Institution"**) or a regulated insurance institution;
– on the basis of a strict reverse solicitation;
– by an asset manager to a Regulated Financial Institution on the basis of a written asset management agreement; or
– by an independent asset manager to its client on the basis of a written asset management agreement, provided that the independent asset manager is subject, (i) as financial intermediary, to the Swiss laws on anti-money laundering, and (ii) to the recognized conduct of business rules of an organisation in the financial sector (a **"Recognized Independent Asset Manager"**), and the asset management agreement is in compliance with the recognized standards of the afore-mentioned organisation.

Further, the publication by regulated financial intermediaries of current prices, net asset values and tax data does not constitute a distribution of collective investment schemes, provided that such publication does not include any contact details. Finally, the revised CISA exempts to a certain extent the offering of participation plans to employees through collective investment schemes.

4. Who will be treated as a qualified investor?

As of 1 June 2013, the following entities will be treated as qualified investors by operation of law:

– Regulated Financial Institutions and regulated insurance institutions;
– public entities and retirement benefits institutions with professional treasury operations; and
– companies with professional treasury operations.

Further, certain individual investors have the right to opt in or opt out, respectively:

– An investor who has concluded a written management agreement with a Recognized Independent Asset Manager or a Regulated Financial Institution will be deemed to be a qualified investor, provided that it does not declare that it wants to be treated as a non-qualified investor (opting out). The investor has to be informed of its status as qualified investor, the relevant risks involved, and its right to opt out before 1 June 2013;
– A high net worth individual (who does not fall within the above-mentioned category) may declare in writing that it wants to be treated as a qualified investor (opting in), provided that it (i) may demonstrate the knowledge necessary to understand the risks in connection with the investment based on individual education, professional experience or similar experience in the financial sector,

and that it possesses bankable assets of at least CHF 500,000; or (ii) confirms in writing and demonstrates that it possesses financial assets of at least CHF 5 million. These are higher standards than those under the current legal regime, which require financial assets of (only) CHF 2 million, but no proof of market knowledge. As of 1 March 2015, persons that are deemed high net worth individuals under the existing CISA which do not meet the above requirements may no longer enter into investments in collective investment schemes available to qualified investors only.

Any distribution to qualified investors has to be made by means customary for such specific investor base.

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