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FUNDS BRIEFING

SWITZERLAND'S PROPOSED NEW RULES ON FOREIGN COLLECTIVE INVESTMENT SCHEMES

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On 2 March 2012 the Swiss Federal Council has published a draft amendment to the Swiss Collective Investment Schemes Act (CISA) which surprised the fund industry and triggered among those who understood its implications fierce reactions. Rightly so, as the new rules initially instituted to match the EU's alternative investment fund manager directive will shape a totally new Swiss fund landscape.

ASSET MANAGERS

Today, save for anti-money laundering regulations, independent asset managers as well as managers of foreign funds are not regulated and hence do not need an authorisation by the Swiss Financial Market Supervisory Authority (FINMA).

Under the new CISA, such asset managers shall be regulated. If the new CISA is accepted, they would need to notify FINMA within six months and apply for an authorisation within two years from the day the new CISA becomes effective.

Small asset managers (whose managed assets do not exceed CHF 100 million, or who are managing non leveraged assets of maximum CHF 500 million and may not exercise redemption rights for a period of five years) may benefit from certain authorisation exemptions.

Further the new CISA provides that foreign asset managers may set up a Swiss branch, although given their capacity as managers of foreign funds, such branches will require a FINMA authorisation.

DISTRIBUTION

Currently, distribution of foreign funds by way of private placements and distribution to qualified investors do not require an authorisation by the FINMA.

Under the new CISA the criteria of "public advertisement" is dropped. Any distribution whether public or private, to non-qualified investors and to certain qualified investors will be caught by CISA. Some distribution activities however remain exempted, such as the purchase of funds (i) exclusively upon solicitation by the investor or (ii) within the framework of a written asset management agreement with regulated financial intermediaries or with an independent asset manager

which is subject to Swiss anti-money laundering regulations and the code of conduct of a recognised professional organisation and also provided that the asset management agreement itself complies with this code of conduct.

As regards the qualified investors, under the new CISA high net worth individuals benefit from the "qualified investors" status only if they declare in writing that they want to be deemed to be "qualified investors" (the Federal Council may stipulate further criteria for such individuals in order to become "qualified investors", such as professional skills).

Further and unlike under the current CISA a written advisory asset management agreement with a regulated financial intermediary would in itself not suffice anymore for the investor to be considered a qualified investor.

In addition, the distribution of foreign funds to qualified investors will only benefit from the FINMA authorisation exemption if:

- the fund or the managers and the custodian are subject to equivalent supervision with regard to organisation, investor rights and investment policy;
- the label "collective investment scheme" does not provide reason for confusion or deception;
- the fund employs a representative and a paying agent in Switzerland; and
- FINMA has entered into a information sharing agreement with the foreign supervisory authority.

Hence, the proposed amendment of the CISA would lead to a significant change in the CISA's concept of distribution to qualified investors currently in force. In particular, the foreign fund would need to appoint a FINMA authorised representative who would have to adhere to certain duties, such as regularly check if the fund, its manager and the custodian are (i) supervised by a recognised foreign supervisory authority (ii) subject to regulations equivalent to the provisions of CISA; and (iii) a cooperation and information sharing agreement is in place.

Swiss representatives would be liable for damages to investors, the fund and creditors.

CONSEQUENCES

Whereas the changes in the concept of the definition of "distribution activities" and the slightly amended list of "qualified investors" would not seriously jeopardize the distribution of foreign funds in or from Switzerland, the new regulation for distribution to qualified investors and two new additional conditions for any distribution of foreign funds most definitely will do so as (i) it is not foreseeable with which (offshore) jurisdictions the FINMA would enter into a cooperation and information sharing agreement and (ii) it is not yet clear who would be able and willing to provide services as a representative to foreign funds, considering the new increased responsibilities.
Without a Swiss representative and a cooperation and information sharing agreement, any distribution of foreign funds in or from Switzerland would be prohibited and foreign funds would have to amend the language of the disclaimers included in their prospectus accordingly.

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OUTLOOK

The lobby of the fund sector has now become active and already triggered much discussions in the competent commission of the Parliament. As of today, the commission expressed proposals to tone down the new regulations, in particular by replacing the requirement of "equivalent supervision" of the foreign funds by "adequate supervision", waiving (at least partially) the requirement of information sharing agreements between FINMA and the foreign supervisory authority or refrain from increasing the duties of Swiss representatives. Finally, it is proposed to state that investors having a written asset management agreement with a regulated financial intermediary shall be considered as being qualified investors unless they declare in writing that they do not wish to be considered as qualified investors.

The draft bill will be discussed in Parliament this Summer. It remains to be seen whether the strict regulatory regime as intended by the government will be approved or if the more liberal powers will prevail.