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CAPITAL MARKETS BRIEFING

UPDATE ON THE SWISS RULES ON THE DISTRIBUTION OF FOREIGN COLLECTIVE INVESTMENT SCHEMES

Dunja Koch and Martina Kessler

Since our newsletter of February 2013 advising on the main provisions of the new Collective Investment Schemes Act (CISA) many issues triggered by the CISA have been discussed in the market and brought to the attention of the Swiss Financial Market Supervisory Authority FINMA. The eagerly awaited Circular on the Distribution of Investment Schemes has now been published and the same replaces the old Circular on Public Advertising. As the name of the Circular says, it sets out clearly the fundamental shift under the new CISA to drop the criteria of public distribution vs. private placement and focus on just the distribution itself, or rather, on the type of investor targeted.

In this update we summarise the key elements of the CISA described in the new Circular and flag issues worth bearing in mind for foreign funds or financial intermediaries.

Distribution or No Distribution

As explained in our last newsletter, in principle if not made on the basis of a strict reverse solicitation all kind of offering of, or advertisement for, collective investment schemes, whether foreign or Swiss, are considered to be a distribution under the CISA and trigger the application of the CISA and FINMA regulations.

The Circular explains explicitly that the means and forms of distribution are not material, i.e. distribution can be in print or electronically, by direct mails, information sheets, press conferences, road shows, fairs, or information to financial intermediaries for onward mailings, cold calls or personal visits, sponsored events, and all forms of e-commerce including subscription forms sent by email. Importantly the distribution also includes indirect distribution, namely the offering or advertising of managed accounts which can economically be comparable to fund of funds. Lastly, websites can be considered to be a distribution too if they are accessible to investors who are not super qualified investors (see below) or do not have a clear disclaimer that appears before prospective investors enter the site.

The Circular confirmed that the funds may rely on the information received by investors.

Since the concept of distribution is so wide, it is the status of the actual investors that matters. Under the CISA there are not only qualified and not qualified investors (retail investors). Within the category of qualified investors, there are certain investors which one could call "super" qualified investors.

These super qualified investors are regulated financial intermediaries or regulated insurance institutions. Regulated financial intermediaries under the CISA are banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks supervised by the FINMA. Any offering, however informal or formal, to these investors would not be considered a distribution and fall outside the CISA. Also, any offering by regulated financial intermediaries to their clients based on a written discretionary management agreement would fall outside the CISA provided the clients have not declared to "opt-out".

Qualified Investors

There are other categories of qualified investors to which the offering of funds is considered a distribution covered by the CISA, but does not require an authorisation from the FINMA, provided that these investors can be considered as qualified investors because they are (i) public entities or retirement benefit institutions with a "professional treasury department" within the meaning of the CISA (i.e. most

pension funds), and (ii) any other companies with a professional treasury department (i.e. most family offices). Further, certain high net worth individuals within the meaning of the CISA and the Swiss Federal Ordinance on Collective Investment Schemes ("CISO") (with bankable assets of at least CHF 500,000 and market knowledge based on individual education and professional experience or alternatively with financial assets of at least CHF 5 million) may "opt-in" to be treated as a qualified investor under the CISA.

Although for the distribution of foreign funds to these qualified investors the funds do not require a FINMA authorisation, they will need to appoint a Swiss representative and a Swiss paying agent.

In addition, under the CISA foreign financial intermediaries may only distribute funds to qualified investors if they are subject to a supervision that is considered to be an adequate supervision in their home state. The CISA and the Circular do not set out what would be deemed an adequate supervision. It could be argued that whilst foreign financial intermediaries must be supervised by a regulator in their home State, it suffices that they satisfy all requirements in their home State that are necessary to distribute the funds to qualified investors. In other words, foreign distributors would have to ensure that the funds may be distributed to qualified investors in their home State without having to show that such foreign supervision constitutes a supervision that from a Swiss regulatory perspective is adequate, i.e. deemed equivalent to Swiss standards. Sadly this important issue has not yet been formally confirmed or ruled by the FINMA.

Retail Investors

Distribution of foreign funds to retail investors additionally requires an authorisation from the FINMA.

Duty to Maintain Records

For foreign funds or their foreign financial intermediaries who appoint a Swiss representative under the new CISA the Circular confirms the newly introduced duty to maintain records of the investors. The record keeping duties will enter into force on 1 January 2014. The Swiss Funds and Asset Management Association (SFAMA) will publish guidelines on this topic in due course.

Transitional Provisions

A few provisions of the CISA have been clarified by the Circular in connection with the transitional provisions.

Recurring issues relating to the status of qualified investors led the FINMA to explain in the Circular that investors who were investors of funds offered to qualified investors only under the old CISA would not be required to sell their investment under the new CISA even if they cannot be considered as qualified investors under the new CISA. In other words, there is not compulsory sale requirement.

Investors who received information on funds under the old CISA and who contact the funds today will be considered doing a reverse solicitation, and foreign funds would be allowed to provide such information on request without being caught by the CISA.

Similarly, investors who subscribed funds under the old CISA are allowed to receive information related to their funds (namely NAV, exit issues, yearly reports etc.). All other information, not strictly related to their fund, may only be provided on a strict reverse solicitation basis as mentioned above.

Summary

Given the crucial criteria of the status of investors, foreign funds would be advised to request Swiss investors to confirm their status in order for them to know what kind of investors they are, i.e. whether a distribution would (i) fall outside the CISA (regarding regulated financial institutions and regulated insurances) or (ii) be caught by the CISA but would still be a permitted a distribution to qualified investors. These confirmations may feature as an appendix to subscription agreements.

Those funds which are distributed in Switzerland to qualified investors may have still some time to organise themselves to appoint a Swiss representative and paying agent by March 2015 – provided that (i) they have a record keeping duty in their home State and (ii) they have already offered funds in Switzerland before 2013. The detailed terms and duties of the representative are not known and it remains to be seen whether the Swiss Funds and Asset Management Association (SFAMA) will publish guidelines on this topic in due course.

Dunja Koch
dkoch@froriep.ch
Tel. +44 20 7236 6000

Martina Kessler
mkessler@froriep.ch
Tel. +44 20 7236 6000

OUR CAPITAL MARKET SPECIALISTS

Dunja Koch, London
dkoch@froriep.ch
Tel. +44 20 7236 6000

Dr. Ansgar Schott, Zurich
aschott@froriep.ch
Tel. +41 44 386 60 00

Dr. Catrina Luchsinger Gähwiler, Zurich
cluchsinger@froriep.ch
Tel. +41 44 386 60 00

Raffaele Rossetti, Zurich
rrossetti@froriep.ch
Tel. +41 44 386 60 00

Patrick W. Vogel, Geneva
pvogel@froriep.ch
Tel. +41 22 839 63 00

Jean-Luc Herbez, Geneva
jherbez@froriep.ch
Tel. +41 22 839 63 00

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We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.

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GENEVA
4 Rue Charles-Bonnet
CH-1211 Geneva 12
Tel. +41 22 839 63 00
Fax +41 22 347 71 59
geneva@froriep.ch

ZURICH
Bellerivestrasse 201
CH-8034 Zurich
Tel. +41 44 386 60 00
Fax +41 44 383 60 50
zurich@froriep.ch

ZUG
Grafenaustrasse 5
CH-6304 Zug
Tel. +41 41 710 60 00
Fax +41 41 710 60 01
zug@froriep.ch

LAUSANNE
9a Place de la Gare
CH-1003 Lausanne
Tel. +41 21 863 63 00
Fax +41 21 863 63 01
lausanne@froriep.ch

LONDON
17 Godliman Street
GB-London EC4V 5BD
Tel. +44 20 7236 6000
Fax +44 20 7248 0209
london@froriep.ch

MADRID
Antonio Maura 10
ES-28014 Madrid
Tel. +34 91 523 77 90
Fax +34 91 531 36 62
madrid@froriep.ch