

Switzerland

The amended Swiss Collective Investment Schemes Act (CISA) came into force on 1 March 2013 and since then many issues have been discussed in the market and brought to the attention of the Swiss Financial Market Supervisory Authority FINMA (FINMA). The eagerly awaited FINMA Circular on the Distribution of Investment Schemes (the “FINMA Circular”) was published in September 2013 and sets out clearly the fundamental shift under the new CISA to drop the criteria of public distribution versus private placement and focus on just the distribution itself, or rather, on the type of investors targeted.

Distribution or No Distribution

The concept of distribution is very wide. In principle, if not made on the basis of a strict reverse solicitation, all kinds of marketing and 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 FINMA Circular explicitly provides that the means and forms of distribution are not material – for example, distribution can be in print or electronically, by direct mail, information sheets, press conferences, road shows, fairs, 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 are economically comparable to a fund. Lastly, information about foreign funds on websites can be considered to be a distribution if they are accessible to investors who are not regulated qualified investors (see below) or if the website does not have a clear disclaimer that appears before the prospective investors access the content of the website.

The FINMA 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 non-qualified investors (retail investors). Within the category of qualified investors there are two types of investors, namely the regulated qualified investors and the (ordinary) non-regulated qualified investors.

The regulated 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 scope of the CISA. Also, any offering by regulated financial intermediaries to their clients based on a written discretionary management agreement would fall outside the scope of the CISA provided the clients have not declared to “opt-out”.

Qualified Investors

For the other categories of qualified investors, namely the non-regulated qualified investors, the distribution of foreign funds is considered a distribution subject to the requirements of the CISA. It 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 (with financial 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 qualified investors under the CISA.

Although the distribution of foreign funds to these qualified investors does not require an authorisation from the FINMA, such funds need to appoint a Swiss representative and a Swiss paying agent.

In addition, under the CISA foreign financial intermediaries may only distribute foreign funds to qualified investors in Switzerland if they are subject in their home state to a supervision that is considered to be adequate. The CISA and the Circular do not set out what would be deemed an adequate supervision. It could be argued that

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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 they are allowed to distribute funds 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 ruled by the FINMA.

Retail Investors

Distribution of foreign funds to retail investors requires that the fund be authorised by and registered with the FINMA, in addition to being subject to stricter rules. Such requirements and rules are not dealt with in this contribution.

Duty to Maintain Records and Duty of Disclosure

For Swiss and foreign distributors of foreign funds in Switzerland, the FINMA Circular confirms the newly introduced duty to maintain records of the investors. The record keeping duties came into force on 1 January 2014. The Swiss Bankers Association published Guidelines on the duty to keep documentary records in November 2013 which have been recognised by the FINMA as a minimum standard in the industry. Crucial points are: (i) records have to be kept in writing and in the client's preferred language of correspondence; (ii) records have to include the client's investment objective and risk profile and (iii) records have to include the reasons behind each recommendation for buying units or shares in a fund. The Guidelines suggest that this duty only applies when an authorised institution provides individual advice to an investor, i.e. when a distributor makes a personal recommendation to buy units or shares in one or more collective investment schemes. In addition, all direct or indirect fees and costs that

will have been charged to the investors, as well as all compensations, commissions or other payments received for the distribution of funds must be disclosed to prospective investors.

Representatives and Paying Agents

As mentioned above, any distribution of foreign funds in Switzerland to qualified investors other than regulated qualified investors requires the appointment of a Swiss representative authorised by the FINMA and a Swiss paying agent, i.e. a Swiss regulated bank. Lists of authorised representatives and authorised banks are published on FINMA's website (<http://www.finma.ch/E/BEAUF SICHTIGTE/BEWILLIGUNGSTRAEGER/Pages/default.aspx>). Not all entities listed as representatives or banks provide representative or paying agent services to outside fund managers/funds, or they will provide them only as part of a more comprehensive service.

As its name suggests, a representative represents the fund in Switzerland and ensures that Swiss investors can receive the fund documentation from the representative. The representative must also enter into a distribution agreement with the distributors of the foreign funds which it represents. There is however no duty to register the foreign fund or to file any offering documentation with the FINMA. In addition, the representative has no duty to inform and notify the FINMA about the funds that it represents. The FINMA Circular further provides that the representative may terminate any appointment as a representative without seeking the prior approval of the FINMA.

The paying agent's role as a bank is mainly to receive payments in consideration of the investors' subscriptions and make any and all payments to investors.

The offering documents of funds distributed in Switzerland must provide for a selling restriction language and set out the names of the representative and paying agent, as well as the place of jurisdiction in Switzerland.

Transitional Provisions

A few provisions of the CISA have been clarified by the FINMA in connection with the transitional provisions. Foreign funds distributed to ordinary (non-regulated) Qualified Investors benefit from a transitional period of two years as of 1 March 2013 to appoint a representative and a paying agent. Recurring issues relating to the status of qualified investors led the FINMA to clarify in the FINMA Circular that investors who were investors of funds offered only to qualified investors under the old CISA would not be required to sell their investment even if they cannot be considered as qualified investors under the new CISA. In other words, there is not a compulsory sale requirement. Investors who received information on funds under the old CISA and who contact the funds today will be considered to be doing reverse solicitation, and foreign funds would be allowed to provide such information on request without being caught by the CISA.

Similarly, existing investors who subscribed funds under the old CISA are allowed to receive information related to the funds which they have subscribed (namely NAV, exit issues, yearly reports etc.). All other information, not strictly related to such funds, may only be provided on a strict reverse solicitation basis as mentioned above. Unless they comply with the requirements of the CISA, including the appointment of a representative and paying agent, foreign funds may not send anything to new non-regulated qualified investors except in the event of clear reverse solicitation. As the case may be, the funds should delete from their distribution list the prospective investors who from now on will have to explicitly reach out to foreign funds and request materials before such funds can provide any materials.

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 distribution to qualified investors. These confirmations may feature as an appendix to subscription agreements. Those funds which are distributed in Switzerland to unregulated qualified investors should organise themselves to appoint a Swiss representative and Swiss paying agent before 1 March 2015.

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