

Revision of the Federal Act on Collective Investment Schemes

Need of adaption to the new legislation in the EU, in particular the Directive on Alternative Investment Fund Managers (AIFM Directive), the financial crisis, and various financial scandals triggered a substantial revision of the Federal Act on Collective Investment Schemes (CISA) that was passed in Parliament on September 28, 2012. Unless a referendum is held the revised CISA is expected to come into effect as of January 1, 2013. The revision contains several substantial changes mainly in the areas of asset management, custody, and distribution of collective investment schemes that have significant impact on the fund industry. The short time frame and transition period will require immediate action.

Introduction

The revised CISA bases on a draft for consultation proposed by the Federal Department of Finance issued in July 2011. Based on the consultation report the Federal Council proposed a draft of the revised CISA in March 2012 that was treated in the Swiss Parliament as legislative body.

This fast-track revision of the CISA was suggested as a reaction to the financial crisis but more importantly as a measure to adapt to the recent developments in other jurisdictions, in particular the AIFM Directive. Compliance regarding the AIFM Directive will be a requirement for Swiss financial service providers (asset managers) that act for EU-based alternative investment funds.

The following core deficits to be addressed in the new legislation were defined:

- In Switzerland asset managers are not subject to authorisation or supervision except asset managers of Swiss collective investment schemes;
- The provisions regarding the custody of collective investment schemes are rather general and do not correspond to international standards;
- The distribution of foreign collective investment schemes to qualified investors in or from Switzerland is not regulated.

The draft of the revised CISA proposed by the Federal Council was criticised as exceeding the requirements regarding compliance with the AIFM Directive and introducing a burdensome Swiss finish. In the course of the parliamentary discussions the proposed draft of the revised CISA was modified substantially and these modifications were included in the passed revision of the CISA. Some modifications are unclear or even contradictory. It remains to be seen whether the Ordinance on CISA (CISO) that will be revised by the Federal Council and should be enacted together with the revised CISA will clarify these issues. Further, it remains to be seen whether the adopted revision of the CISA will be recognized as sufficiently compliant with the AIFM Directive.

The adopted revision of the CISA affects in particular the areas of (1) asset management, (2) custody, and (3) distribution of collective investment schemes.

Asset Management

In this area noteworthy changes are:

- So far asset managers of Swiss collective investment schemes were supervised by FINMA and needed an authorisation. The revised CISA introduces supervision and authorisation requirements basically for all asset managers of all collective investment schemes with certain exceptions. This leads to an authorisation requirement for asset managers of foreign collective investment schemes.
- No authorisation is required if the investors are qualified investors and the liquid assets (including leverage) amount to CHF 100 million at maximum or the illiquid assets amount to CHF 500 million at maximum. These asset managers may opt-in under certain circumstances.
- Further, FINMA may exempt asset managers of collective investment schemes from authorisation requirements under certain circumstances.
- FINMA may assume coordinated supervision for asset managers that are part of a financial group/conglomerate if this is required according to international standards.
- The revised CISA introduces the possibility for Swiss branches of foreign asset managers of collective investment schemes to obtain an asset manager authorisation (if certain requirements are met).

According to the transitional provisions asset managers that are newly subject to the revised CISA have to notify FINMA within six months after the entering into effect of the revised CISA. They have to comply with the legal requirements and have to submit an application for authorisation within two years after the entering into effect of the revised CISA.

Custody

In this area noteworthy changes are:

- An explicit requirement for custodian banks to implement an appropriate organisation is introduced in the revised CISA.
- The custodian bank may delegate certain tasks to third parties. In case of delegation the liability of the custodian bank is extended.
- The revised CISA introduces the requirement for investment companies with fixed capital (SICAF) to appoint a custodian bank.

Distribution

In this area noteworthy changes are:

- So far the marketing of collective investment schemes based on the term public advertising. The term public advertising was not clearly defined in the CISA and led to uncertainties and discussions. It was intended to eliminate these by introducing a new concept and clear definition of distribution that should also grant more investors' protection. In the course of the parliamentary discussions the concept was modified mainly to reduce the restrictions. This led to some inconsistencies in the legislative text. It remains to be seen whether the revised CISO and the corresponding FINMA Circulars can eliminate these inconsistencies.
- Under the revised CISA distribution is newly defined as any offering or advertising. The revised CISA explicitly excludes various activities from the term distribution:
 - Offering or advertising exclusively addressed to supervised financial intermediaries and supervised insurance institutions;
 - Provision of information and acquisition of collective investment schemes based on the initiative of the investor (e.g. execution-only, advisory);
 - Provision of information and acquisition of collective investment schemes in the context of a written asset management agreement with supervised financial intermediaries or independent asset managers (subject to certain requirements);
 - Publication of prices, quotes, net asset values, and tax data by supervised financial intermediaries;
 - Offering of employee participation plans in the form of collective investment schemes.
- It is distinguished between distribution to qualified investors and to non-qualified (retail) investors. However, both types of distribution are regulated. The term qualified investor is revised and now includes:
 - Public entities and employee welfare institutions (pension funds) with a professional treasury department;
 - Enterprises with a professional treasury department;
 - High net worth individuals only if they declare in writing that they elect to be deemed a qualified investor.
- In relation to the distribution of foreign collective investment schemes various restrictions are introduced:
 - So far the marketing of foreign collective investment schemes to qualified investors was not regulated. Under the revised CISA distribution of foreign collective investment schemes to qualified investors is regulated and subject to various requirements that restrict distribution compared to the actual situation;

- Distribution to qualified investors requires appointment of a representative and paying agent and that the designation of the collective investment scheme does not give rise to deception or confusion;
- Distribution to qualified investors does not require distributor authorisation but requires that the distributor (financial intermediary) is adequately supervised in Switzerland or in the home country;
- Requirements for distribution to non-qualified (retail) investors remains basically the same subject mainly to the new requirement that a cooperation and information exchange agreement between the relevant foreign supervisory authorities and FINMA exists;
- Information and recording duties were introduced for holders of authorisations.

There are various transitional provisions regarding the distribution of foreign collective investment schemes. They include various actions within different time frames (depending on the relevant action) such as notification of FINMA within six months, compliance with the new requirements within one or two years, submitting required declarations within one year, and/or submitting an application for authorisation within two years after the coming into effect of the revised CISA.