AMMC Law

THE NEW SWISS LEGAL FRAMEWORK FOR THE DISTRIBUTION OF COLLECTIVE INVESTMENT SCHEMES TO QUALIFIED INVESTORS

On July 1st 2013, the provisions of the revised Swiss Collective Investment Schemes Act ("**CISA**") and the Swiss Collective Investments Schemes Ordinance ("**CISO**") relating to qualified investors ("**QI**") entered into force. These new provisions have been adopted in order to adapt Swiss legislation to the European Markets in Financial Instruments Directive ("**MiFID**"). Pursuant to the CISA, there are three main categories of QI.

The first category includes **regulated financial intermediaries** such as banks, including central banks, securities dealers, fund management companies as well as asset managers of collective investment schemes, regulated insurance companies, but also public entities, pension funds and companies with professional treasury departments.

The second category includes **investors who have entered into a written (discretionary) asset management agreement** with a regulated financial intermediary or with an Independent Asset Manager ("**IAM**"), unless they have declared in writing that they do not wish to be considered as QI (*opting-out*). This opting-out clause is a novelty of the revised CISA and in practice will have to be implemented in the contractual documentation remitted to the investor. Such obligation is compliant with the equivalent MiFID provision.

The third category includes **High Net Worth Individuals** ("**HNWI**") who have requested in writing to be considered as QI (*opting-in*). Consequently, pursuant the revised CISA and in line with the MiFID, HNWI are no longer automatically considered as QI.

The CISO defines an HNWI as an investor who:

- demonstrates having the necessary knowledge to understand the risks of the investment based on his/her education or professional experience or a comparable experience in the financial sector and owning assets of at least CHF 500,000, or

- confirms in writing owning assets of at least CHF 5 million (against CHF 2 million of financial investments previously), including no more than CHF 2 million in real estate.

Moreover, HNWI who do not "opt-in" and do not meet the requirements of the definition of QI by 31 May 2015 will no longer be allowed to invest in collective investment schemes ("**CIS**") reserved for QI.

In this context, the notion of "private placement" is no longer relevant in order to define the marketing of CIS unit(s)/share(s) to investors. The revision introduces a unique **notion of distribution** for both qualified and non-qualified investors with certain exceptions. The notion of "public advertising" has been abandoned. Accordingly, if the "safe harbor" rule has not been completely abolished, its requirements are more stringent, as a foreign CIS must, under the revised CISA, appoint a **representative and paying agent in Switzerland** when their unit(s)/share(s) are considered as a "distribution". On the other hand, the CIS itself (defined as a product) is not subject to any authorization of the FINMA, the Swiss regulatory authority.

A contrario, a foreign CIS is not obliged to proceed with the aforementioned appointments, when there is no distribution pursuant to the CISA and its ordinance. For instance, reverse solicitation, especially if it is performed under an advisory agreement as defined by the CISO with one regulated financial intermediaries or an IAM, execution only transactions, information and/or purchasing under a written asset management agreement with a regulated financial intermediary (and IAM under certain additional conditions) are not considered as distribution (for a comprehensive list of all exceptions, see art. 3 al. 2 CISA).

However, the offering of foreign CIS unit(s)/share(s) to public entities, Swiss pension funds and companies with professional treasury departments as well as to HNWI who have opted in is considered as "distribution" subject to the CISA, despite the fact that these entities are considered as QI. In such situation, the foreign financial intermediary must be adequately supervised in Switzerland or in its home jurisdiction and a representative and paying agent must be appointed.

In conclusion, the new provisions, especially in relation to foreign CIS, have clearly created a more stringent environment for managers and investment funds with additional administrative and legal layers. Consequently, an increase of costs in the industry should not be surprising for investors.

Please find hereafter the link to CISA and CISO:
Loi sur les placements collectifs, LPCC
Ordonnance sur les placements collectifs, OPCC

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