

Newsletter No.

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**New Rules on Distribution of Foreign Investment Funds** and Regulation of Asset Managers of such Funds. On 28 September 2012, the Swiss parliament approved a reform bill to the Swiss Federal Act on Collective Investment Schemes, which will most likely enter into force in early 2013. The aim of the bill is to comply with the requirements of the European Alternative Investment Fund Managers Directive. The reform bill focuses on the rules of distribution of foreign investment funds and the regulation of Swiss asset managers of such funds.

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# New Rules on Distribution of Foreign Investment Funds and Regulation of Asset Managers of such Funds



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## Background

In March 2012, the Swiss Federal Council published a proposal on a reform bill to the Swiss Federal Act on Collective Investment Schemes («CISA»). The main goal of the partial revision was to align the rules regarding the management, safekeeping, and distribution of collective investment schemes to international standards, in particular the European Alternative Investment Fund Managers Directive («AIFMD»). The proposal also aimed to strengthen investor protection and the competitiveness of the Swiss fund industry, and to ensure access of Swiss financial services providers to the European market.

The Federal Council's proposal was heavily criticised by the fund industry for exceeding its intended purpose. Market participants argued that the proposed new provisions of the CISA were too strict compared to the requirements under the AIFMD and would negatively affect Switzerland as an asset management centre.

The Swiss parliament subsequently revised the original proposal. Both chambers of the Swiss parliament voted in favour of a lean reform bill to the CISA, which nonetheless has notable implications for the distribution rules of foreign funds in Switzerland, and the regulation of Swiss asset managers of such funds. The new rules are expected to be implemented in early 2013 after the mandatory three month referendum term has expired. The federal ordinance which will specify the new provisions has not yet been drafted.

## Distribution of Investment Fund Units

According to current laws and regulations, public distribution or advertisement of Swiss or non-Swiss investment funds in or from Switzerland triggers authorisation and licencing requirements for both the funds and the Swiss distributor. Safe harbour rules are provided for private placements of foreign fund units. Under the private placement rules, no licence or authorisation is required if: (i) the solicitation targets «qualified investors» as defined in the CISA; and (ii) only marketing materials or activities that are typical for qualified investors are used. Under the current law, companies with professional treasury operations and high net worth individuals (i.e. individuals with financial assets of at least CHF 2M) are considered qualified investors. The distribution of foreign fund units to such companies or individuals currently falls under the private placement regime.

Under the revised CISA, distribution of fund units will generally be subject to regulation but the Swiss parliament has now decided that, in contrast to the original proposal of the Swiss Federal Council, a safe harbour rule for private placements shall remain in force. Further, the definition of «qualified investors» has been revised.

Distribution of fund units to licenced financial institutions (banks, securities dealers, fund managers, asset managers of investment funds, insurance companies and the central bank) will continue to be covered by the private placement re-

gime and will not be regulated. In addition, a sale of fund units to individuals having entered into a written asset management agreement with a regulated financial institution will qualify as private placement.

Any distribution of a foreign investment fund in or from Switzerland, which falls outside of the revised limited private placement regime, requires (i) in any case the appointment of both a Swiss representative and a Swiss paying agent and (ii) generally a prior authorisation by the Swiss Financial Market Supervisory Authority («Finma») of such investment fund. The Swiss representative shall serve as a point of contact for the investors in Switzerland and must obtain a licence from Finma. The distributor of the fund units must also be licenced by Finma (provided it is not already licenced in its home country). Further, units of a foreign fund may only be distributed in Switzerland if the fund manager is located in a jurisdiction that has a cooperation agreement with Finma in place.

An additional prior authorisation of the foreign investment fund by Finma will not be required provided that its units will be distributed to qualified investors only. The term «qualified investors» contains (besides the above mentioned regulated financial institutions) companies and pension funds with professional treasury operations. High net worth individuals will no longer be deemed qualified investors but will have the opportunity to «opt-in», i.e. explicitly waive the enhanced protection provided for retail investors by a written declaration. In the event of an «opt-in», fund units may be distributed to such high net worth individuals without the foreign investment fund being authorised by Finma and without the funds' offering documents being filed or reviewed (while the appointment of a Swiss representative and paying agent will still be required).

### Regulation of Asset Managers

Currently, asset managers for funds administrated outside of Switzerland do not require a licence from Finma. However, such asset managers may apply for a licence if the home country of the fund requires the asset manager to be licenced. This provision enables Swiss financial services providers to manage UCITS under the European Directives 2001/107/EC and 2001/108/EC.

The CISA reform bill changes this licencing and supervision scheme from voluntary to mandatory. In general, asset managers of foreign collective investment schemes will have to obtain a licence from Finma. In order to obtain the licence, the asset manager must, inter alia, demonstrate equity capital of at least CHF 200,000.

The revised CISA includes some exceptions regarding the duty to obtain a licence. For instance, asset managers of funds limited to qualified investors are excluded from the licencing requirement provided that (i) the assets under management (including assets acquired through the use of leverage) do not exceed CHF 100M; or (ii) the assets are below CHF 500M (provided that the managed portfolio is not leveraged and that investors do not have redemption rights exercisable for a period of five years following the date of the initial investment); or (iii) all investors belong to the same financial group as the asset managers. These provisions should be in line with the de-minimis rule introduced by the AIFMD, under which a voluntary licencing by the asset manager remains possible. In addition, Finma may partially or completely exempt asset managers of foreign funds from provisions of the revised CISA upon request in certain justified cases.

The Swiss asset manager may delegate its services to a foreign entity provided that a cooperation agreement between Finma and the foreign entity's regulator is in place (if such cooperation agreement is required by the foreign jurisdiction, e.g. the AIFMD).

Finally, it is noteworthy that foreign asset managers may open a branch office in Switzerland, without obtaining a licence by Finma, subject to adequate supervision of that branch by the home regulator. This possibility aims to strengthen Switzerland as a centre for asset management.

### Trends and Outlook

The new provisions of the CISA will most likely enter into force in early 2013 with the goal of preserving the quality and competitiveness of Swiss asset management services. We certainly welcome the Swiss parliament's passage of a reform bill that should not overly burden the Swiss asset management industry. However, it is hard to understand why the stricter rules on private placement will now be implemented in Switzerland while national private placement rules of the EU member states will potentially only phase out in 2018 under the AIFMD.

Recent revisions of the Swiss regulation of collective investment funds have not brought the hoped-for positive results, but instead rather have had a negative impact on the Swiss investment fund market. It is difficult to say whether the reform bill will meet expectations this time. First, the new rules lack provisions concerning the remuneration of asset managers, which is required under the AIFMD. Whether Swiss alternative investment fund managers will be able to benefit from a pan-European passport with regard to their marketing and management activities from 2015 on thus remains open, and also depends, inter alia, on cooperation agreements between regulators, sharing of tax information, and the progress of the «level 2» implementing measures under the AIFMD yet to be finalised.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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