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“Qualified Investors” under the new Federal Collective Investment Schemes Act



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The Federal Collective Investment Schemes Act of 23 June 2006 (the “CISA”) entered into force at the beginning of 2007. This law brought many changes to the landscape of investment fund regulation, including the introduction of a category of investors defined as “qualified investors” to whom interests in foreign collective capital investments which are not subject to regulation in Switzerland may be offered.

Significance of the Term “Qualified Investor”

The CISA uses the term qualified investor to include or exclude the application of provisions of the CISA to qualified investors. For example, the CISA states that an offer of interests in a collective capital investment which is directed exclusively to qualified investors does not fall within the CISA’s definition of a “public offer”. This means that foreign collective capital investments which are not subject to supervision in Switzerland, including those not subject to any regulation elsewhere, can be offered to qualified investors in Switzerland. The CISA defines qualified investors as (1) supervised financial intermediaries (such as banks, securities dealers and investment fund managers), (2) supervised insurance companies, (3) public law institutions and pension funds with professional investment operations (*professioneller Tresorerie*), (4) business enterprises with professional investment operations, (5) wealthy private persons (*vermögende Privatpersonen*) and (6) investors who have a written asset management agreement with a supervised bank, securities dealer or investment fund manager. The CISA also authorises the Swiss Federal Council (*Bundesrat*) (the “Council”) to add by regulation further categories of investors to the definition of qualified investor and to exclude, partially or completely, collective capital investments from the application of the CISA to the extent they are offered to qualified investors. The Council has used this authorisation in its Collective Investment Schemes Ordinance of 22 November 2006 (the “CISO”) to include as qualified investors those investors who have a written asset management agreement with an independent asset manager, if such manager is subject to the Swiss federal anti-money laundering law and to the code of conduct of an industry organisation which has been recognised by the Swiss Federal Banking Commission (the “FBC”) as meeting a minimum standard.

The “Wealthy Private Person” as “Qualified Investor”

The CISO also defines one of the categories of qualified investor, the “wealthy private person” (sometimes casually referred to as a “high net worth individual”), as a person who has confirmed to a supervised bank, securities dealer, investment fund manager or insurance company that such person owns, directly or indirectly, financial investments worth at least CHF 2 million. The introduction of this type of qualified investors is based on the establishment of a legal presumption that wealthy private persons have a reduced need for protection – and are therefore eligible as qualified investors – because they may afford professional advice in asset management. This definition relaxes the practice of the FBC under prior legislation, the Federal Law Concerning the Investment Funds of 18 March 1994, which held that an offer of interests in an unregulated investment fund to an investor was not a public offer if the investor had a written, general investment advisory agreement of unlimited duration with a bank or securities dealer and the investor could demonstrate direct or indirect ownership of financial investments worth at least CHF 5 million. The new threshold is, however, still higher than the EUR 500,000 investment assets requirement in European Union legislation used, in part, to define a qualified investor.

Draft Circular Letter Concerning the Public Offering of Collective Capital Investments

In addition to the CISA and the CISO, the FBC recently has published for public comment an update of its circular letter addressing the interpretation of the term “public offering” in the context of investment fund regulation (the “Draft Circular Letter”). The Draft Circular Letter, among other things, provides additional detail about what constitutes “financial investments” for purposes of meeting the CHF 2 mil-

lion threshold. These are bank deposits, assets held for the investor's benefit by a fiduciary, securities (including collective capital investments and structured products), derivatives as defined in the Federal Law Concerning Securities Exchanges and Securities Transactions of 24 March 1995, precious metals and insurance policies with cash surrender value. On the other hand, the Draft Circular Letter does not allow illiquid securities, direct investments in real estate and rights to receive payments under any form of social insurance to be counted towards the financial investments requirement. Although the CISO states that this requirement is to be met at the time when the collective capital investment is acquired, the Draft Circular Letter specifies that it must be satisfied not later than time of the offer or distribution of the collective capital investment. If assets are held by an investor through an investment vehicle, such assets can be used to meet the financial investments requirement and the Draft Circular Letter states that the investment vehicle will be treated as the "wealthy person".

Assessing the New Regulatory Regime

The CISA and the CISO give the managers and distributors of foreign collective capital investments which are not subject to regulation in Switzerland more, and more clearly defined, safe harbours for avoiding a public offering of such funds and therefore a violation of the CISA. The offer or distribution of collective capital investments to qualified investors – so-called "private placement" – can be considered as a safe harbour in this sense.

The Draft Circular Letter does not contain any reference to the so-called "20-person rule" used in the current *"Circular Letter of the FBC: the Public Offer in the Jurisprudence of the Investment Fund Law of 23 May 2003"*. Under this rule, a public offering was deemed to have occurred if the offer was made to more than 20 people during a business year.

Moreover, there remain opportunities for the FBC to provide clarifications and improvements in the collective capital investments regulatory regime concerning qualified investors and public offerings of interests in collective capital investments not regulated in Switzerland. For example:

- none of the CISA, the CISO or the Draft Circular Letter specifies any form requirements for the confirmation of ownership of sufficient financial investments to be given by an investor claiming to be a qualified investor on that basis. We assume, under basic legal principles, that any written con-

firmation bearing the investor's signature is sufficient;

- is a supervised foreign bank, securities dealer, investment fund manager or insurance company, if it is involved in the distribution of a foreign collective investment, a proper recipient of the confirmation that the investor is a qualified investor because the investor holds at least CHF 2 million in financial assets?
- the FBC should consider whether the spirit and intent of the CISA and CISO are served by denying qualified investor status to an investor with a substantial portfolio of real estate investments or any other "illiquid" investments, but less than CHF 2 million in eligible financial investments;
- does the FBC's statement in the Draft Circular Letter that an investment vehicle will be treated as the "wealthy person" mean that neither the investor nor its investment vehicle could meet the qualified investor standard if both the investor and the investment vehicle own financial investments which also are worth less than CHF 2 million but collectively more than that amount?

The ww&p 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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