

MARKETING FOREIGN COLLECTIVE INVESTMENT SCHEMES TO SWISS INVESTORS

CHANGES BROUGHT BY THE NEW FINANCIAL SERVICES ACT

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In this article, which is part of a series of briefings on the new Financial Services Act (FinSA, FIDLEG (German) and LSFIn (French)) and the Financial Institutions Act (FinIA, FINIG (German) and LEFin (French)) that will come into force in 2020, we will look at certain changes which the new regulatory regime will bring to the cross-border offering of collective investment schemes into Switzerland.

1. Investor classification

Under the current regime, the Collective Investment Schemes Act (CISA) defines and categorises investors as either qualified investors or non-qualified investors, with a subset of qualified investors often referred to as regulated qualified investors. The FinSA creates new categories (i.e. retail clients, professional clients and institutional clients) meant to apply across all products and financial services.

To align the definitions of qualified investors and non-qualified investors, the CISA will be amended so that professional clients under the FinSA shall be deemed qualified investors and retail clients shall be deemed non-qualified investors. In addition, certain retail clients to whom Swiss regulated financial intermediaries or foreign regulated financial intermediaries subject to an equivalent standard of supervision in providing asset management or investment advisory services on the long term will also be considered qualified investors under the CISA.

From 2020, the following investors/clients will be considered professional clients under the FinSA and therefore qualified investors under the CISA:

- (i) Swiss regulated financial intermediaries;
- (ii) Swiss regulated insurance institutions;

- (iii) foreign financial intermediaries and insurance institutions subject to a prudential supervision;
- (iv) central banks;
- (v) public entities with professional treasury operations;
- (vi) pension funds with professional treasury operations;
- (vii) companies with professional treasury operations;
- (viii) companies that reach at least two of the following thresholds (balance sheet of CHF 20 million or more, turnover of CHF 40 million or more and equity of CHF 2 million or more);
- (ix) private investment structures with professional treasury operations set up for high net worth individuals; and
- (x) certain high net worth individuals and their private investment structures who/which request to be treated as professional clients (opting out).

Large companies (item viii) and private investment structures (item ix), although they may meet the requirements of another category of qualified investors, are currently not considered qualified investors under the CISA: Their addition to the list of professional clients means that they will be considered qualified investors under the new regime.

Institutional clients are a subset of professional clients and include the categories (i) to (iv) listed above.

Retail clients comprise all the clients that do not qualify as professional clients.

Institutional clients may request to be treated as professional clients only (opting down). Professional clients who are not institutional clients may request to be treated as retail clients.

Financial institutions and other persons offering or marketing collective investment schemes in Switzerland will need to categorise investors according to the new classification.

2. Concept of Offer

Currently, the application of the CISA is triggered if there is a distribution. Distribution is a broad concept defined as any offer or advertisement for collective investment schemes in view of obtaining subscriptions, which is not exclusively directed at regulated qualified investors. If an activity is deemed a distribution in or from Switzerland it is subject to the CISA unless an exemption applies.

With the new FinSA, the concept of distribution will be replaced by the concept of "offer". An offer is defined by the FinSA as any proposition to acquire a financial instrument which contains sufficient information on the conditions of the offering and the relevant financial instrument for an investor (i) to accept or (ii) if not capable of being accepted, for the investor to make an offer to

acquire the relevant financial instrument, which offer may be approved or declined by the recipient.

Hence, under the new FinSA the concept of offer should be narrower than the previous concept of distribution under the CISA and certain generic advertising may not contain the elements to constitute an offer. Determining whether a communication amounts to an offer will require a case-by-case analysis.

3. Appointment of a Representative and a Paying Agent

Under the new regime, the need to appoint a representative and a paying agent for qualified investors is largely lifted. Currently, it is necessary to appoint a representative and a paying agent for funds distributed to qualified investors prior to any distribution activity. Thanks to the changes brought by the FinSA, it will no longer be necessary to appoint a representative and a paying agent to offer foreign collective investment schemes to qualified investors (i.e. to professional clients), except to high net worth individuals and their investment structures who have opted to be treated as professional clients. Note that this exclusion does not apply to private investment structures with professional treasury operations.

The distribution of collective investment schemes to non-qualified investors will not change significantly. Foreign collective investment schemes to be offered to retail clients will still need to appoint a representative and a paying agent, and be approved by the Swiss Financial Market Supervisory Authority (FINMA).

4. Offering of Collective Investment Schemes

Under the current regime, Swiss distributors of collective investment schemes need a license from the FINMA and foreign financial intermediaries distributing foreign collective investment schemes on a cross-border basis must be subject to a standard of supervision in their jurisdiction.

Under the new regime, Swiss distributors will no longer need a license from the FINMA and foreign distributors will no longer be required to be subject to equivalent supervision; however, their activities are likely to be considered financial services subject to the FinSA.

Indeed, the sale and purchase of units of collective investment schemes, including the intermediation or distribution without advice or recommendation according to the dispatch of the draft ordinance, the acceptance and transmission of orders, the management on behalf of clients and the provision of recommendations (investment advice) regarding units of collective investment schemes, carried out on a professional basis will be considered financial services subject to the FinSA and those providing such services will be subject to the requirements of the FinSA, in par-

ticular the obligation to comply with the code of conduct (read our article [FinSA / LSFin – FID-LEG – Requirements for financial services providers](#)).

In addition, Swiss and foreign financial advisors will need to be registered in a newly created financial advisor register to carry out their activities in Switzerland, unless they are employed by a Swiss financial institution supervised by the FINMA or a foreign regulated financial institution which belongs to a group subject to the consolidated supervision of the FINMA. This requirement is wide reaching in particular for the international fund industry where most firms would likely have to face considerable administrative work to register their advisors before distributing funds in Switzerland. It remains to be seen whether the registration requirement will be softened in the draft Ordinance on Financial Services for foreign financial advisors once the Federal Council has reviewed the consultation papers.

To summarise, whilst the FinSA will introduce a welcome change of regime with regard to the cross-border distribution of collective investment schemes (in particular relief from the requirement of the appointment of a Swiss representative and paying agent), it will introduce new obligations for foreign financial advisors.

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