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e) Criminal Sanctions

Contraventions of any requirements introduced by the Initiative as implemented by law shall be punishable by imprisonment for a term of up to three years and a fine of an amount up to the equivalent of six annual salaries. There is some controversy amongst legal scholars whether or not criminal sanctions may be introduced through the issuance of an ordinance by Government as opposed to a statute of law passed by the legislator.

d) Next Steps

The Initiative's language is vague in many respects and requires implementing legislation. Therefore, the short term consequences of the Initiative remain uncertain pending publication of the draft implementing ordinance by the Federal Government at the end of May 2013. The definitive (long-term) consequences will become clear only after a bill of law will be drafted and adopted in Parliament. The new law will then be subject to a possible referendum, which may lead to a nation-wide vote again if this is requested by 50,000 Swiss citizens.

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Revision of the Swiss Collective Investment Schemes Act— Consequences for managers of foreign investment funds

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On 13 February 2013 the Federal Council resolved to bring into force the revised Collective Investment Schemes Act (CISA) and its implementing Ordinance (CISO) as per 1 March 2013. The revised law has substantial impacts on the Swiss investment funds industry. Due to the altered regulatory concepts in terms of asset management regulation and distribution, particularly Swiss managers and advisors of foreign investment funds need to carefully analyze the revised CISA and potentially adapt their business models. This article highlights the new provisions relevant in this regards.

By Christian Koller

1) Asset Management

a) Supervision of Asset Managers

i. General

The revision of the CISA which was initiated by the Federal Council in summer 2011 aims at closing regulatory gaps and harmonizing Swiss law with international standards. In particular, Swiss regulation needed to be aligned with the European Directive 2011/61 on Alternative Investment Fund Managers (AIFM-D) in order to safeguard

European market access for Swiss investment fund managers and products to the extent permissible under such directive.

As a result, the revised CISA demands that all managers of collective investment schemes (CIS) are licensed by the Swiss Financial Market Supervisory Authority (FINMA) unless they qualify for a specific exemption (article 2 (1) (a) and (c) CISA). According to the previous law, only managers of Swiss collective investment schemes were required to become licensed by FINMA and managers of foreign investment funds could under certain restrictive preconditions voluntarily submit to FINMA supervision.

New article 18a (1) CISA states that a manager's core responsibilities comprise portfolio management and risk management of one or several CIS. In addition, a manager may carry out administrative tasks for Swiss and foreign CIS, investment fund distribution as well as representation activities and notably perform discretionary portfolio management and individual investment advisory services (article 18a (2) and (3) CISA); this allows independent wealth managers and advisors to continuously manage investment funds. Article 24a CISO further entitles investment fund managers to carry out securities brokerage.

A manager of CIS must be organized as a corporate body, general partnership *(Kollektivgesellschaft)* or limited partnership *(Kommanditgesellschat)* (article 18 (1) (a) and (b) CISA). It may also be organized as a branch of a foreign asset manager of investment funds (article 18 (1) (c) CISA). An asset manager of CIS domiciled abroad but effectively managed in Switzerland or predominantly performing its business in or out of Switzerland must be organized pursuant to Swiss law and will be supervised by FINMA as a Swiss asset manager (article 29a (2) CISO).

ii. Exemptions

It follows from the above that asset management for collective investment schemes will be subject to increased regulation. Under the revised law, all managers will need to obtain a FINMA license unless (i) their investment vehicles are only open for investors belonging to the same group of companies as the manager itself (article 2 (2) (h) (3) CISA) or (ii) if they are exclusively marketed to *qualified investors* and fall under a *de-minimis* exemption. The first *de-minimis* exemption applies if the assets of the managed CIS, including assets acquired through leveraged financing, amount to no more than CHF 100 million in total (articles 2 (2) (h) (1) CISA and 1b (1) (a) CISO). The second de-minimis exemption applies if the assets of the managed investment funds consist of non-leveraged collective investment vehicles which (underlying CIS) do not allow for redemptions within five years following first subscription and if such assets do not exceed CHF 500 million in total (article 2 (2) (h) (2) CISA). According to article 1b (3) CISO, a manager must notify FINMA within 10 days and file a license application

with FINMA within 90 days after having exceeded a *de-minimis* threshold. Considering the stringent prerequisites for obtaining a license and the amount of information to be provided to FINMA, the time limit for filing an application is ambitious and requires managers to get adequately organized well ahead before approaching the thresholds.

As mentioned above, the *de-minimis* exemptions only apply in case of distribution to qualified investors within the meaning of the revised law (QI). Pursuant to article 10 (3) CISA, regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of CIS, central banks (Regulated FI), regulated insurance companies as well as public and private institutions with professional treasury operations are deemed QI. Further, high-net-worth individuals are considered qualified if they make a respective written declaration (so-called *"opting-in"*) (article 10 (3^{bis}) CISA) and confirm in writing that they hold assets of at least CHF 5'000'000 (article 6 (1) (b) CISO); this relatively high financial limit is reduced to CHF 500'000 if an individual may ***prove*** that she due to her personal education and professional or comparable experience in the financial sector is sufficiently knowledgeable to understand the risks inherent to the investment (article 6 (1) (a) CISO).

Last but not least, individuals are deemed QI if they have entered into a written discretionary asset management agreement with a Regulated FI or with an independent asset manager (Eligible IAM) (i) which is subject to Swiss anti-money laundering laws and (ii) adheres to the code of conduct employed by an industry body (such code of conduct being recognized by FINMA as a minimum standard) and (iii) whose discretionary management agreements comply with such recognized standards. Such individuals may opt for being treated as non-qualified investors by respective declaration (so-called *"opting-out"*).

Please note that the new provisions governing QI did not enter into force on 1 March 2013 but will become applicable as of 1 June 2013 in order to allow the financial industry to adapt to the new regulation.

iii. Voluntary Submission to FINMA Supervision

A Swiss asset manager of CIS falling under one of the above exemptions may not become licensed by FINMA unless this is a requirement under the law of the jurisdiction where the CIS is registered or distributed or if this is required by Swiss law (article 2 (2^{bis}) CISA and article 1c (1) (b) CISO); for instance in delegation situations, Swiss law may require an asset manager which is *per se* not qualified for a FINMA license to become prudentially supervised (see paragraph 1b) below).

b) Delegation of Functions

The revised law contains partly new provisions regarding the delegation of tasks to third parties. As before, delegation must be in the interests of efficient management and may only be made to properly qualified persons (article 18b (1) and (2) CISA). Further, neither risk nor portfolio management functions may be delegated to persons whose interests may conflict with those of investors of the CIS (article 26 CISO). Article 18b (3) CISA newly states that portfolio management functions may be delegated to regulated entities only. Considering the wording of this provision, one may assume that risk management functions may be delegated also to unregulated entities which would not be compatible with the AIFM-D.

The delegating asset manager is liable for a careful selection, instruction and supervision of the commissioned entity (article 145 (3) CISA). In order to fulfill such duties of care, an asset manager commissioning the services of a third party must retain those core competences in-house which allow for a diligent oversight of the service providers. This should be considered while evaluating outsourcing solutions, particularly with regards to portfolio and risk management, compliance as well as IT functions.

c) License Requirements

i. Financial Requirements

As under the old law, asset managers of CIS shall have a minimum ***company capital of*** CHF 200'000 which needs to be paid-up in cash (article 19 (1) CISO); to the extent that they also carry out funds business activities (*Fondsgeschäft*) for foreign CIS, such minimum capital shall amount to CHF 500,000 (article 19 (2) CISO). Such enhanced capital requirement does therefore not generally apply if a Swiss entity manages a foreign CIS but only if an asset manager (in addition to asset and risk management functions) carries out administrative tasks for a foreign investment fund (such as bookkeeping, NAV reconciliations or share register administration). The components of the company capital are described in article 20 CISO. For stock corporations (*Aktiengesellschaft*) it comprises the share and participation capital and for limited liability companies (*GmbH*) the issued capital (*Stammkapital*).

Further, an asset managers' ***equity capital*** must amount to 0.02% of the assets of the managed CIS exceeding CHF 250 million but shall in any event not be less than 25% of the fixed costs as per the most recent financial statements; the maximum requirement shall be CHF 20 million (article 21 (1)) CISO). The definition of equity capital has not been altered and (for stock and limited liability companies) comprises the company capital, statutory and other reserves, retained earnings, the net profit for the current financial year (after deduction of the estimated distributions), hidden reserves assigned to a separate account and designated as own funds and certain subordi-

nated loans (which loans shall not exceed 50% of the equity capital in total) (article 22 CISO).

ii. Liability Coverage

To cover potential professional liability risks, new article 21 (3) CISO requires an asset manager to either conclude a professional malpractice insurance in line with FINMA standards or to hold additional equity capital corresponding to 0.01% of the assets of the managed CIS.

iii. Major Authorization Conditions

The conditions to be fulfilled by those persons responsible for governing and managing the asset manager of CIS as well as by the significant equity holders remain unchanged under the new law. In particular, the directors and officers must be of good repute, guarantee proper management and possess the requisite professional qualifications (article 14 (1) (a) CISA). This not only holds true for the management body but also for the board of directors: according to FINMA Newsletter 34 (2012) of 23 January 2012, the members of the board must have the relevant experience and knowledge as regards asset management and the accompanying risks. Further, the board as a body must have practical experience in risk management and compliance matters. As FINMA explicitly pointed out, the members of the board must continuously attend the company's business to fulfill the board's core tasks diligently and comprehensively. As is also promulgated in FINMA Newsletter 34 (2012), the board of directors shall consist of at least three members. The majority of the board must not carry out executive functions and at least one third should be independent from the significant shareholders (FINMA Newsletter 35 (2012) of 20 February 2012) and—according to current FINMA practice—the asset manager itself. Unchanged article 12 (1) CISO states that the management body of an asset manager of CIS must comprise at least two members.

In addition to such requirements for hierarchic (horizontal) segregations of functions between the board of directors and the management body, new article 12a (3) CISO imposes the duty to vertically separate the functions regarding risk management, internal control system and compliance from operational functions, in particular from the portfolio management. According to current FINMA practice, an asset manager must put in place an adequate deputy system with regards to its core tasks. Also in this respect, the principles regarding separations of functions must be adhered to which requirement would not be met if for instance a member of the compliance department deputizes the chief investment officer.

According to article 24 (1) CISO, asset managers of CIS must describe their scope of business in their articles of association, company or partnership agreements and or-

ganizational bylaws. In particular, such corporate documentation must reflect that the regulated entity has an appropriate risk management, internal control as well as compliance system in place (article 12a (1) CISO). A major task of every license preparation process therefore consists of analyzing the existing internal rules and regulations of an asset manager and bringing them in line with the regulatory requirements which also include the relevant guidelines and principles promulgated by the Swiss Funds Association as being the pertinent industry organization (article 14 (2) CISA).

2) Distribution

a) General

At the first glance, the revised law entails a new distribution concept. Whereas under the old law only public distribution of collective investment schemes was subject to regulation, the revised CISA regulates distribution as such, irrespective of it being public or not. Considering though the new definition of "*distribution*» there will be no fundamental changes in the distribution principles so far applied. Systematically, one must distinguish between (i) marketing which is not considered distribution at all and therefore not within the regulator's scope and (ii) marketing which is considered distribution within the regulator's scope. In case of distribution within the meaning of the law, one must further differentiate between (iii) marketing to non-qualified investors and (iv) marketing to QI. In addition, the revised CISA establishes different legal consequences for marketing local or foreign CIS.

b) Definition of Distribution

In principle, every offering of and advertisement for CIS in or out of Switzerland is considered distribution within the law (article 3 (1) CISA). However, this principle is broken by various exceptions. Pursuant to article 3 (1) and (2) CISA, no distribution is assumed if:

- units of CIS are sold or respective information is made available at the instance or initiative of the investor or in connection with advisory agreements as further defined in article 3 (3) CISO;
- marketing activities are addressed to Regulated FI or regulated insurance companies;
- units of CIS are sold or respective information is made available in connection with discretionary asset management agreements with either Regulated FI or Eligible IAM;
- Regulated FI publish prices, net asset values and tax data;
- employees are offered incentive compensation programs by way of CIS.

As mentioned above, to the extent that a marketing action is not considered distribution in the sense of article 3 (1) and (2) CISA, it is not subject to regulation at all.

c) Distribution to Non-QI

If a marketing action falls within in the legal definition of distribution, the law distinguishes between distribution to QI and non-QI. Distribution to *non-QI* entails the following consequences:

- The distributor needs a distribution license (13 (1) CISA).
- The distributor and the Swiss fund management company/Swiss CIS or the representative of a foreign CIS, respectively, must enter into a written distribution agreement (articles 30 (1) (c) and 30 (2) CISO).
- The distribution of foreign CIS needs prior FINMA approval. For that purpose, FINMA must be provided with the relevant documents relating to the CIS, such as the offering memorandum, the articles of association and the investment fund contract (article 120 (1) CISA).
- In case of distribution of foreign CIS, a Swiss paying agent and a Swiss representative need to be appointed (article 120 (2) (d) CISA).

d) Distribution to QI

As regards distribution to QI it should be noted that—given the exemptions pursuant to article 3 CISA—only distribution to institutional investors with professional treasury operations and to high-net-worth individuals (qualifying as QI) will be regulated. Distribution to other QI is not deemed "distribution» within the meaning of the law. Distribution to ***QI*** entails the following consequences:

- In principle, no distribution license is needed (article 13 (1) CISA, *e contrario*).
- If, however, foreign CIS are distributed in or out of Switzerland, the distributor must be licensed by FINMA or adequately supervised by its home country regulator (article 19 (1^{bis}) CISA); in this event there needs to be a written distribution agreement in place between the distributor and the representative of the foreign CIS (articles 30a and 131a (1) CISO).
- The distribution of foreign CIS does not need prior FINMA approval (article 120 (4) CISA).
- In case of distribution of foreign CIS, a Swiss paying agent and a Swiss representative need to be appointed (article 120 (4) CISA) which is a new requirement.

3) Ancillary New Obligations Concerning Management and Distribution

New article 24 (3) CISA and 34a CISO require that persons involved in the distribution of CIS (in the sense of article 3 CISA) take written records with regards to the economic needs of the investors and the reasons for having recommended the purchase of a specific CIS to them. Please note that this provision shall enter into force on January 1, 2014.

According to article 20 (1) (c) CISA, FINMA regulated persons must safeguard a transparent reporting on the CIS they market, hold in custody or manage, reveal all direct and indirect costs and fees charged to the investors, and inform the investors in a complete, accurate and comprehensible way on all remunerations in connection with the distribution of the collective investment schemes.

4) Time Lines

Subject to the exemptions mentioned above regarding the definition of QI and records keeping duties, the new law and its implementing ordinance have entered into force on 1 March 2013.

The revised law contains various provisions regarding transition periods. Most notably, managers, distributors and representatives of foreign CIS which need to become licensed due to the expansion of the regulatory scope will have to notify FINMA thereof by 1 September 2013. Further, they need to fulfill the relevant license requirements by 1 March 2015 and until then file the respective application(s) with the regulator. Foreign collective investment schemes which are permitted for distribution to non-qualified investors in Switzerland will however need to fulfill the new approval requirements of article 120 (2) CISA by 1 March 2014.

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New Swiss Rules on Insider Dealing and Market Manipulation entered into force on 1 May 2013

Reference: CapLaw-2013-12

On 1 May 2013, the new Swiss rules on insider dealing and market manipulation entered into force. They bring about a fundamental change in Swiss administrative and criminal law and will have a significant impact on Swiss practice. Accordingly, issuers, financial institutions, advisers and other affected persons (meaning any other market participant in Switzerland) should familiarize themselves with the new rules and review their internal guidelines, procedures and standard forms to ensure compliance with these new rules and to make appropriate use of the safe harbours available under the new law. Further regulation will follow shortly; in particular, a revised FINMA circular