

# Revised Collective Investment Scheme Act / Draft Ordinance

The final version of the revised Swiss Collective Investment Scheme Act (“CISA”) was adopted by both chambers of parliament on September 28, 2012. The period to request a referendum lapsed on January 17, 2013. The Federal Council will now determine when the new CISA will enter into force, most likely on February or March 1, 2013. On December 11, 2012 the draft of the revised Swiss Collective Investment Scheme Ordinance (“R-CISO”) was published by the Federal Department of Finance (“FDF”) together with an explanatory report. The FDF invited interested parties to submit their comments on the draft by January 8, 2013. The final outcome of the R-CISO will have a substantial impact on how the new legislation will be applied. It is foreseen that the R-CISO will enter into force on March 1, 2013 (except for art. 34a R-CISO, which pertains to a new obligation to record advice given to clients).



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## Final version of the revised CISA and draft version of the revised CISO

### 1 Distribution

#### 1.1 Definition

The distinction between public offering and private placement has been abolished. Any form of offering or advertising pertaining to Swiss or foreign collective investment schemes (“CIS”) is, in principle, deemed to be “distribution”, unless it is addressed to regulated financial intermediaries (banks, securities dealers, fund management companies, asset managers of CIS and central banks) or regulated insurance companies. It is essential to bear in mind that the previously straightforward *private placement rules* generally

allowing offering or advertisement to all qualified investors (“QI”) or to a limited number of non-qualified investors (“NQI”) no longer apply. Furthermore, different regimes now govern various categories of QI.

#### 1.2 Exceptions

Certain activities have been specifically excluded from the scope of *distribution*. Such exceptions include providing information and acquiring CIS:

- based on *instructions* or upon the *initiative* of the investor, particularly within the scope of advisory agreements and execution-only transactions (the R-CISO currently limits the advisory exemption to remunerated advisory agreements with regulated financial intermediaries) and
- within the scope of a *written discretionary asset management agreement* with (i) a regulated financial intermediary or with (ii) an independent asset manager complying with minimal standards with respect to AML regulations, conduct rules as well as the form and content of the agreement.

Moreover, price publications by regulated financial intermediaries and the offering of employee-participation schemes in the form of CIS are not considered to be *distribution* either.

#### 2 Distribution of foreign collective investment schemes to NQI

Under the current law, an *approval of the foreign CIS* by Finma is required for distribution to NQI. According to the new law, however, further to the

existing conditions for approval, the *asset manager* and the *custodian* of a foreign CIS must be subject to supervision in their home state. The rules applicable to the custodian must also be deemed *equivalent* to those of CISA. Finally, a cooperation agreement providing for information exchange between Finma and the regulator of the home state of the CIS must be in place.

### 3 Distribution of foreign collective investment schemes to qualified investors

#### 3.1 Appointment and duties of representative and paying agent for QI-CIS

The new requirement to appoint a representative and a paying agent in Switzerland also for the distribution of foreign CIS to QI was maintained in the final version of the revised CISA. The originally foreseen very extensive requirements to be fulfilled and supervised by the Swiss representative, in this instance in the draft CISA, have been substantially reduced. Contrarily, the R-CISO currently suggests that (i) a Swiss distribution agreement subject to Swiss law will be required, (ii) that a “Swiss finish” be included in the fund documents used in Switzerland, and (iii) that there is an obligation of the representative to ascertain that the distributor holds sufficient authorisations to act as a distributor of CIS in its home country.

The Swiss representative must further hold the fund documentation at the disposal of the investors. The R-CISO clarifies that the publication and notification requirements applicable to CIS

distributed to NQI do not apply to foreign CIS distributed exclusively to QI.

#### 4 Distributors

Under the revised CISA, in order to distribute foreign CIS to QI, a financial intermediary must be subject to appropriate supervision either in Switzerland or in its home jurisdiction. In view of the suggested wording of the R-CISO, it is currently unclear if a financial intermediary who is not subject to supervision in its home jurisdiction has the possibility to apply for a Finma distributor license to approach both QI and NQI.

#### 5 Qualified investors

##### 5.1 Definition

Under the new CISA, *high net worth individuals* are no longer automatically considered to be QI. However, they have the option to request in writing to be treated as such. According to the R-CISO, an individual person is deemed to be a *high net worth individual* if such person (i) holds assets of at least CHF 500,000 and has professional market knowledge comparable to the institutional QI listed in the CISA or (ii) holds assets of at least CHF 5 million.

Clients who have entered into a *discretionary asset management agreement* with a regulated (or, under certain conditions, unregulated) asset manager continue to be considered as QI. However, under the revised CISA they can “opt out” to be treated as NQI by means of a written declaration and thus enjoy a higher level of protection. According to the R-CISO, such clients must be informed of the option to waive their QI status. Otherwise, the definition of QI has not been changed.

##### 5.2 Differentiated regimes for qualified investors

As mentioned above, foreign CIS must, under the new rules, appoint a representative and paying agent in Switzerland even if their shares are only *distributed* to QI.

Accordingly, if no *distribution* as defined by the new legislation is at hand, it should not be necessary to appoint a representative and a paying agent.

Since the offering of CIS to regulated financial intermediaries and regu-

lated insurance companies is not deemed to constitute *distribution*, it should not be necessary to appoint a representative or paying agent in such a case. The same should apply for the acquisition of CIS on the basis of a discretionary mandate.

Contrarily, it would not be admissible to offer such shares to, e.g., high net worth individuals who have “opted in” as QI, to pension funds or undertakings with professional treasury, unless a representative and paying agent has been appointed.

#### 6 Asset management

##### 6.1 New license requirement

All asset managers of Swiss and foreign CIS in Switzerland must obtain a Finma license. *De minimis* rules allow for a license exemption if the investors are QI and

- the assets under management do not exceed CHF 100 million (including assets purchased with leverage) or
- the assets under management of the CIS consist of non-leveraged CIS which are not redeemable for five years and do not exceed CHF 500 million or
- the investors are part of the same group as the asset manager.

Exceptions have been made in the R-CISO with respect to asset managers who are already subject to equivalent supervision (i.e. fund management companies, banks, securities dealers and insurance companies).

##### 6.2 Swiss branch of foreign asset managers

Under the revised CISA, a Swiss branch of a foreign asset manager will be eligible for a Finma license if (i) appropriate supervision takes place in the home jurisdiction, (ii) the foreign asset manager is sufficiently organized and has sufficient financial resources and qualified personnel to run a Swiss branch and (iii) a cooperation agreement with the home regulator is in place. The relevant provisions of the R-CISO include more details on the conditions to be eligible for a Finma license (e.g. that the home regulator (i) does not raise any objections and (ii) undertakes to inform Finma immedi-

ately if circumstances occur which could jeopardize the interests of the clients, their assets or the managed CIS).

#### 7 Transitory provisions

Numerous transitory periods to adapt to the new legislation are foreseen in the revised CISA and in the R-CISO. In particular, asset managers of foreign CIS must notify Finma of their activity within six months of the entering into force of the new law. Within two years, they must have adapted their structure to comply with the new requirements and have filed an application for authorisation. Also, distributors of CIS who now fall within the scope of CISA must notify Finma of their activities within six months of the entering into force of the revised law. They too must adapt their structure and apply for an authorisation within two years.

The newly foreseen obligation for licensees to record the needs and recommendations to their clients will first enter into force on January 1, 2014.

#### 8 Outlook

It can be expected that a certain consolidation will take place in the field of *asset management of CIS* in Switzerland. Small enterprises which do not fall within the *de minimis* exemptions may not have sufficient means or sufficiently substantial structures in Switzerland to qualify for a Finma license. Also, some family offices which manage CIS may fall within the scope of these new rules and will need to adapt their organization accordingly.

Further regulation of managers of other assets (non-CIS) as well as, potentially, investment advisors, is currently in preparation in a new Swiss Financial Services Law (also referred to as Swiss Mifid).

One positive effect of these new regulations of asset managers may be seen in a higher level of confidence in the market participants which are licensed and Finma-supervised.

Regulating *distribution of CIS also to QI* and potentially refusing to grant foreign entities a distributor's license are likely to result in a reduction of the number of CIS offered in Switzerland.

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