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Revision of the Collective Investment Schemes Act – Amendments to Management

In the 2012 fall session, the Swiss parliament passed amendments to the Collective Investment Schemes Act (CISA). If a referendum is not launched, which it can be assumed will be the case, the revised act will enter into force at the beginning of 2013. By then, the ordinances to the revised CISA (revCISA) will also be available.

The reason for the revision was in particular the so-called Alternative Investment Fund Managers Directive (AIFMD) issued by the European Union (EU), which also applies to the European Economic Area (EEA), which namely includes Liechtenstein. Without an alignment of the Swiss act to the AIFMD, the distribution of units in funds, which are managed from Switzerland, would be massively more difficult if not entirely impossible within the EU and EEA. Furthermore, legislators would like to strengthen the competitiveness of the Swiss financial centre and expand investor protection with this revision.

The amendments overwhelmingly concern the portfolio management of collective investment schemes, their distribution and their custody. We are discussing these amendments in three publications. This publication deals with the amendments in the area of management.

1. Who must mandatorily have an asset manager licence?

Under current law, a mandatory licence rule only exists for the asset managers of Swiss collective investment schemes (art. 13 para. 2 let. f CISA). The asset managers of foreign collective investment schemes may make application for one when the foreign law, under which the collective investment scheme was drawn up, requires this (art. 13 para. 4 CISA). However, a voluntary licence does not exist.

Now, art. 13 para. 2 let. f revCISA will provide for mandatory licensing for all asset managers of collective investment schemes as a principle. An asset manager is considered to be someone, who guarantees the portfolio management and risk management of one or more collective investment schemes (art. 18a para. 1 revCISA). This definition does not conform to that in art. 4 para. 1 let. w AIFMD, which requires that the asset manager exercises either portfolio management or risk management.

2. Who does not need an asset manager licence?

Under art. 2 para. 2 let. h revCISA, a licence is not needed by those who manage a collective investment scheme, where the circle of investors is restricted to qualified investors as stipulated in art. 10 para. 3 – 3ter revCISA and one of the following requirements is satisfied:

– The value of the assets under management, including assets acquired through leveraged financing, amounts to no more than CHF 100 million in total (art. 2 para. 2 let. h1 revCISA).

  According to the text of the law, the CHF 100 million limit refers to the entire amount of the assets managed by the asset manager and not only to the managed fund's assets. This was confirmed in Parliament by the Federal President (as non-member of the legislative body). The Parliament, however, has also mentioned several times that with this provision they wanted to incorporate art. 3 para. 2 let. a AIFMD, which explicitly refers only to managed fund's assets. It remains to be hoped that the interpretation of this provision will be oriented to the regulation of the AIFMD within the concept of uniform international handling.

  Specifically, under a literal interpretation, an asset manager who exclusively manages a collective investment scheme with assets of, for example, CHF 30 million does not need a licence. If he were to manage assets of at least CHF 70 million beyond this, this would trigger a licence requirement for his activity as an asset manager of a collective investment scheme.

– The managed assets of the collective investment scheme are not made up of leverage-financed collective investment schemes, which may not exercise any redemption rights for five years in each of these collective investments and amount to not more than CHF 500 million (art. 2 para. 2 let. h2 revCISA). This condition is difficult to understand and remarkable in various respects:

  - In fact, an exception should be created through this for asset managers of small, closed funds such as private equity funds. What was created, however, is an exception for fund of funds («the […] assets of the collective investment scheme are not made up of [. . .] collective investment schemes […]»). The European Parliament committed the same error (art. 3 para. 2 let. b AIFMD), although both the draft of the AIFMD enacting German as well as the Luxembourg laws removed this lapse in their implementation.

  - Parliament's intention was that this provision referred to closed funds, whose shares could not be redeemed for five years. According to the wording of the law, the «lock-up» does not refer to the collective investment scheme managed by the asset manager but rather to its target funds. Since this provision was not intended to cover fund of funds but rather private equity funds etc., this provision should – in light of its legislative history – be understood to apply to the collective investment scheme managed by the asset manager.

  - Deviating from the CHF 100 million limit in let. A, this CHF 500 million limit explicitly refers to the assets of the managed collective investment schemes without considering the other mandates in the care of the asset manager.

– The investors are exclusively group companies of the corporate group to which the asset manager belongs (art. 2 para. 2 let. h3 revCISA).

These *de minimis* rules apply to both the asset managers of Swiss as well as foreign

funds. This appears to be a relaxation compared to the current law, which foresees a licensing requirement for all asset managers of Swiss collective investment schemes (see section 1, above).

3. Who can voluntarily apply for an asset manager licence?

Asset managers, who fall under art. 2 para. 2 let. h revCISA, can submit themselves to subordination by the FINMA voluntarily, when this is required in the country, where the collective investment scheme is established or distributed. A voluntary subordination without the presence of these conditions remains impossible (art. 2 para. 2bis revCISA).

4. Who can be exempted from the licensing requirement?

Even asset managers of collective investment schemes, which do not fall under the *de minimis* rules stipulated in art. 2 para. 2 let. h revCISA, can be exempted from the licensing requirement (art. 18 para. 3 revCISA). FINMA is responsible for the exemption. The following conditions must be fulfilled:

- the protective purpose of the law is not compromised;
- asset management is delegated by one of the following entities to the asset manager: by fund management companies, SICAV, KGK [*i.e.* the Swiss version of a LLP], SICAF, asset manager of collective investment schemes, foreign fund management companies or by companies, which are subject to equivalent supervision to that of Switzerland.

In accordance with the message of the Swiss Federal Council, asset managers of Swiss funds should profit from this exemption, since they are delegated asset managers from another licensee, who remains responsible for the asset management provided that they manage a fund, which is smaller than CHF 100 million but which nevertheless don't fall under the *de minimis* rule on the basis of additional private mandates (see section 2 above).

5. The delegation of asset management and liability

The delegation of asset management will be permitted as under current law (art. 18b revCISA) as long as

- the delegation is in the interest of correct and proper management;
- the delegation assignee is qualified for irreproachable execution of the task;
- the asset manager guarantees the instruction and control of the performance of the mandate;
- the delegation assignee is subject to recognised supervision;
- the foreign law provides for an agreement on cooperation and information exchange with the supervising authority of the delegation assignee and such an agreement was reached.

According to N. 19 of the «FINMA Circular 2008/37 Delegation by Fund Management Companies/SICAV,» the asset management may only be delegated by the asset manager to another party once, at least in the case of Swiss funds. It cannot be assumed that this practice of the FINMA will be changed on the basis of the revCISA.

The issue of liability for the delegation of the asset management is oriented, similar to now, according to the general liability provisions stipulated in art. 145 para. 3 CISA. The delegating asset manager is liable for any damage caused unless he cannot prove that he applied the due care required by the circumstances during selection, instruction and monitoring.

6. Which legal form must a asset manager take?

Whoever applies for a licence under art. 13 para. 2 let. h revCISA must be in one of the following legal forms (art. 18 para. 1 revCISA):

- legal entities (joint-stock company [AG], partnership limited by shares [Kommanditaktiengesellschaft], limited liability company [GmbH]) or general partnership (Kollektivgesellschaft) or the limited partnership (Kommanditgesellschaft];
- branch of a foreign asset manager, if
  - this asset manager, including the branch, is subject to appropriate supervision in its home country. The draft legislation from the Swiss Federal Council determined that the foreign supervision must be equivalent to the terms and conditions of the CISA. This was not passed by Parliament;
  - the asset manager is sufficiently organised and has sufficient funds and qualified personnel; and
  - an agreement on cooperation and information exchange between FINMA and the foreign supervisory authority exists.

Natural persons, on the other hand, may no longer apply for an asset manager licence.

The amendments, which the revision of the CISA entails in the area of administration and distribution, are treated in a separate publication. You may also find this on our website at www.kellerhals.ch

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