3/2013

Revision of the Collective Investment Schemes Act (CISA) – The legal framework of Distribution after the issue of the Circular 2013/9 "Distribution under the Collective Investment Schemes legislation" (RS 2013/9)

1. Introduction

As a consequence of the partial revision of the Collective Investment Schemes Act (CISA) and the Collective Investment Schemes Ordinance (CISO) the Swiss Financial Market Supervisory Authority (FINMA) issued the RS 2013/9. It enters into force on 1 October 2013. Core of the new Circular is the definition of the term "Distribution of Collective Investment Schemes". The final German version can be found under the following link: *Link*

The RS 2013/9 replaces the Circular 2008/8 "Public Advertising of Collective Investment Schemes" as well as the Directive "Duties of the Representative of foreign collective investment schemes".

The most important changes in the Act and the Ordinance, especially in the field of distribution, have already been discussed in short&simple of September 2012 (Kellerhals s&s 2012/7). By the present short&simple we provide you with a complete paper of the provisions about distribution.

2. The distribution as identification criteria

Identification criterion for the distribution activities is no longer "public advertising" but "distribution". Considered as distribution is every offering and advertising for Collective Investment Schemes (Art. 3 para. 1 CISA) and thus every action that intends the purchase of units of Collective Investment Schemes by the investor (Art. 3 para. 1 CISO).

Type and form of the distributing activity are of no significance. Covered are print and electronic media, prospectuses, fact sheets, recommendation lists, information letters, subscription information, road shows etc. (RS 2013/9 N 6). The term "Distribution" is to be understood broadly. It is characterized by the intention to bring the potential investor to the subscription of fund shares.

3. Division of the distribution activities into three sections

The new CISA distinguishes three kinds of distribution activities:

- Private placement („non-distribution") without legal regulation
- Distribution to qualified investors with limited investor protection
- Distribution to non-qualified investors with wide-ranging investor protection.

4. Private placement (non-distribution)

The scope of the private placement is determined by Art. 3 para. 1 and 2 CISA. Pursuant to Art. 3 para. 1 CISA, e contrario, every distribution activity, within the meaning of point 2 above, that is *directed only at investors in accordance to Art. 10 para. 3 (a) and (b),* shall be deemed to be a private placement, ergo at banks, securities dealers, fund management companies, asset managers of collective investment schemes, central banks and regulated insurance institutions but not representatives of foreign collective investment schemes (hearing report to the RS 2013/9 page 8). This applies regardless of whether the collective investment schemes are redistributed or not.

Pursuant to Art. 3 para. 2 CISA also the following actions fall under private placement:

a) the making available of information and the purchase of collective investment schemes that follow on request or on the investors' own initiative, in particular in the context of advisory agreements and execution only transactions. Advisory agreements need to be longterm, in return for payment and in writing (Art. 3 para. 3 CISA);
b) the making available of information as well as the purchase of collective investment schemes in the context of a written asset management agreement with financial intermediaries pursuant to Art. 10 para. 3 (a) CISA;
c) the making available of information as well as the purchase of collective investment schemes in the context of a written asset management agreement with particular, qualified independent asset managers;
d) the publication of prices etc. by regulated financial intermediaries;
e) the offering of employee participation plans in the form of collective investment schemes.

(b) and (c) are only applicable if the distribution is based on the asset management agreement and carried out by the asset managing party (RS 2013/9 N 20).

The CISA is not applicable on distribution activities in the field of private placement. Neither approval for the product, representative of foreign collective investment schemes, paying agent nor distributor license are required.

5. Distribution to qualified investors

If a distribution activity meets the requirements of the distribution pursuant to point 2 above and is addressed at qualified investors according to Art. 10 CISA it is deemed to be distribution to qualified investors. Although this only applies to qualified investors that are not excluded from the scope of application of the CISA by Art. 3 CISA. A distribution to qualified investors thus only is given if the distribution is addressed to:

- public entities, pension institutions and companies with professional treasury department
- high net worth individuals who state in writing that they want to be considered as qualified investors and who (i) are aware of the risks of their investments either due to their education and professional experience or due to comparable experience in the financial sector and dispose of a fortune of at least CHF 500'000, (ii) or alternatively who dispose of a fortune of at least CHF 5 million. A "comparable experience" exists if the investor has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters (RS 2013/9 N 16).

The distribution to regulated financial intermediaries pursuant to Art. 10 para. 3 (a) and

(b) CISA and to investors with a written asset management agreement according to Art. 10 para. 3ter CISA, however, qualify as private placement because they are covered by Art. 3 para. 1 and 2 (b) and (c) CISA; the latter only if the distribution is carried out by the asset managing party of the asset management agreement (RS 2013/9 N 20).

Important is, that independent asset managers do not qualify as qualified investors, even if their distribution to their clients is considered to be distribution to qualified investors or even as private placement. However, FINMA recognizes that the distribution to independent asset managers is deemed to be distribution to qualified investors if they undertake in writing to use the information only for clients that are qualified investors within the meaning of Art. 10 CISA (RS 2013/9 N 19). There should be no need of such a declaration of banks since they are considered as qualified investors pursuant to Art. 10 para. 3 (a) CISA and the distribution to them shall be deemed to be a private placement (Art. 3 para. 1 CISA *e contrario*).

The distribution of Swiss collective investment schemes to qualified investors is not subject to regulation. The distribution of foreign collective investment schemes to qualified investors in Switzerland may only be carried out by financial intermediaries who are regulated in Switzerland or who are properly supervised abroad (Art. 19 para. 1bis CISA). In Switzerland this requires a distributor license (subject to Art. 8 CISO).

The distribution of foreign collective investment schemes to qualified investors requires the appointment of a representative of foreign collective investment schemes and a paying agent. There is no need for a product approval (Art. 120 para. 4 CISA). The representative of foreign collective investment schemes has no legal reporting and publication obligations (Art. 133 para. 5 CISO).

The distributing persons especially have the obligation to comply with the mandatory records pursuant to Art. 24 para. 3 CISA and Art. 34a CISO (beginning in 2014) as well as the information duty about fees, costs and distribution remunerations according to Art. 20 para. 1 (c) CISA.

6. Distribution to non-qualified investors

Distribution to non-qualified investors shall always exist if an activity meets the requirements of the distribution pursuant to point 2 above but neither falls under private placement nor under the distribution to qualified investors. Hence the distribution to non-qualified investors represents a repository.

The distribution to non-qualified investors requires permission pursuant to Art. 13 para. 1 CISA (subject to Art. 8 CISO), the distribution of foreign collective investment schemes requires a prior approval of the relevant documents.

The listing of a foreign collective investment scheme on a Swiss stock exchange shall be deemed to be distribution to non-qualified investors. The mandatory records and the information obligation about fees, costs and distribution remunerations exist here as well as in the case of distribution to qualified investors.

7. Obligations of the representative of foreign collective investment schemes

The obligations of the representative of foreign collective investment schemes are outlined in RS 2013/9 and depend on whether it is a distribution to qualified investors or a distribution to non-qualified investors. The Directive "Duties of the Representative of foreign collective investment schemes" has been repealed without material changes in the duties.

8. Distribution via internet

Basically the content of a website that intends the purchase of shares of a collective investment scheme by an investor in Switzerland shall be deemed to be distribution, subject to the website refers to investors in Switzerland. Concerning the requirements to the website it distinguishes between whether if the offer only refers to qualified investors or also to non-qualified investors. The Circular contains appropriate specifications. If the offer of a website explicitly does not refer to investors in Switzerland (disclaimer, access restriction) then it is no distribution (RS 2013/9 N 76).

9. Focus „opting-out" declaration

After the entering into force of the partially revised CISA there was a lack of clarity about in which products investors pursuant to Art. 10 para. 3ter CISA that have entered into a written asset management agreement but subjected to the protection rules of the CISA by an "opting-out" may be invested. The distribution to clients of asset management actually do not fall under Art. 3 para. 2 (b) and (c) CISA.

The hearing report of the FINMA to RS 2013/9 states hereto that one has to distinguish between the regulative and the civil law level. From a regulatory view the distribution to clients of asset management does not fall under the CISA (Art. 3 para. 2 (b) and (c) CISA) und the scope of allowed products is not limited. From a civil law point of view the scope of allowed products can be limited in an asset management agreement. An investment in collective investment schemes, which has been excluded in the asset management agreement, may be unproblematic from a regulatory point of view, but may result in a liability for damages due to a breach of contract. Therefore, the adherence to the conditions agreed upon in the asset management agreement is vitally important.

Just as an aside, it should be mentioned that the FINMA talks mistakenly of opting-in instead of opting-out in her explanations to Art. 10 para. 3ter CISA. The parliament deemed the ex-planation of the client of asset management as opting-out and the opposite explanation of private persons as opting-in (AB 2012 page 548).

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