

FEBRUARY 2019

Newsletter

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BANKING & FINANCE

The distribution of collective investment schemes vs. the offer according to the FinSA

The Federal Act on Financial Services (**FinSA**), adopted on 15 June 2018, and the related amendment to the Collective Investment Schemes Act (CISA) will lead to a complete paradigm shift in the distribution of collective investment schemes in Switzerland. Indeed, the notion of “distribution” introduced as part of the 2013 revision of the CISA will be abolished and replaced by the notion of “offer” provided for in the FinSA. The related ordinances will be published later this year.

1 THE NOTION OF DISTRIBUTION

The **notion of distribution** of collective investment schemes was introduced with the revision of the Collective Investment Schemes Act (**CISA**) which came into force in 2013. The notion of distribution had been introduced to replace the **notion of public promotion** (*öffentliche Werbung/appel au public*), the scope and interpretation of which had been criticised by the Federal Court in a decision in 2011. The 2013 revision of the CISA had also introduced certain additional requirements for the distribution of foreign collective investment schemes to qualified investors, such as the appointment of a representative and a paying agent in Switzerland. Generally speaking, Switzerland had in 2013 **abandoned its liberal approach** in terms of its access to qualified investors for foreign collective investment schemes. The 2013 revision also introduced the requirement for distributors of foreign collective investment schemes to

qualified investors to be licensed as distributors in Switzerland or abroad and the obligation to have a distribution agreement with the representative governed by Swiss law.

In regards to the notion of distribution, the current provides for a **negative definition**, namely that any offering or advertising for collective investment schemes that is not **exclusively directed to prudentially supervised investors**, such as banks, fund management companies, securities dealers, asset managers or insurance companies, constitutes distribution within the meaning of the law. The CISA also provides for **additional exceptions**, such as reverse solicitation, the placement of collective investment schemes within management mandates or advisory agreements if certain regulatory conditions are met. The current distribution regime was described in detail in our December 2014 Newsletter.

With regard to the distribution of foreign collective investment schemes to **non-qualified** investors, regardless of the notion of distribution, the 2013 revision had maintained a strict regime for FINMA's approval of such collective investment schemes and added some additional conditions, such as the existence of cooperation agreements between the respective supervisory authorities.

2 THE NOTION OF OFFER

With the introduction of new regulations in the financial sector, namely the FinSA and the Financial Institutions Act (**FinIA**), it is planned in particular that the **various financial service providers be subject to the same rules** when providing financial services with a view to obtaining a level playing field.

In this context, the notion of distribution (currently applicable to collective investment schemes and structured products), including its entire exception catalogue, will be **replaced** by the **notion of offer** (applicable to all financial instruments, unless otherwise provided by the law).

FinSA defines an offer as any **proposal** to acquire a financial instrument that includes **sufficient information** on the terms of the offer and the respective financial instrument. The draft Ordinance on Financial Services (**D-FinSO**) further specifies that communication should usually be aimed at **drawing attention** to a particular financial instrument and **selling** it. The question of whether there is an offer will therefore have to be analyzed on a case-by-case basis, in the light of the specific circumstances and the structure and content of the communication concerned. A general communication that does not contain sufficient concrete indications does generally not qualify as an offer within the meaning of the FinSA. However, the new provisions applicable to advertisement could apply (see para. 3 below).

It should be noted that the notion of offer as introduced by the FinSA, similarly to other financial regulations, is **technology-neutral** and can be carried out by various ways, including internet **platforms**. The explanatory report for the opening of the D-FinSO consultation procedure (**Explanatory Report**) states in this respect that in order to determine whether or not the provision of information on a platform constitutes an offer, it must be based on the circumstances, and in particular on the concrete structure of the information and of the platform. If the platform contains all the information and documents relating to a collective investment that enable an investor to make an investment decision or if it is possible to subscribe for units of a collective investment directly on the platform, it will then always qualify as an offer with respect to the relevant collective investment.

In addition, the D-FinSO contains a **number of exceptions**. For instance, references to NAVs, prices, information on risks, price movements or tax data, the mere provision of factual information or the transmission of information and documents required by law to existing clients or to financial intermediaries do not constitute an offer. Especially for collective investment schemes, the publications required by the CISA, among others in the event of a change in cost structure, investment policy or universe or in the event of restructuring, will not constitute an offer. However, the D-FinSO does not contain any reverse solicitation exceptions at this stage.

It should be noted that the notion of **public offering** has only limited implications in the context of collective investment schemes, therefore this newsletter will not analyze it in more detail.

3 IMPLICATIONS IN THE EVENT OF AN OFFER

For **collective investment schemes under Swiss law**, the current regime remains essentially the same. Swiss funds must be approved or authorized by FINMA prior to any offer to non-qualified or qualified investors, unless otherwise provided by CISA.

"In the event of an offer to qualified investors, it will no longer be necessary to have a representative and a paying agent, except for high net worth individuals."

For **collective investment schemes under foreign law**, prior approval of the funds by FINMA will still be required in the event of an offer to **non-qualified investors** (in regards to the notion of qualified investors, see para. 4.2 below), which will require the appointment of a representative and a paying agent, as it is the case currently. In the event of an offer to **qualified investors**, unlike the current situation, it will in principle no longer be necessary to have a representative and a paying agent, with the exception of offers to high net worth individuals or their private investment structures.

At the level of **financial service providers**, the offer of collective investment schemes as such will no longer trigger **any licensing requirements** for the institution, as is the case to date in the event of any distribution activities (see para. 4.3 below). On the other hand, the offer of collective investment schemes qualifies as financial service within the meaning of Art. 3 let. c cipher 1 FinSA, as specified in particular in the Explanatory Report, or within the meaning of art. 3 let. c cipher 3 FinSA if a personalized recommendation is given. Therefore, in the event of an offer of collective investment schemes under Swiss or foreign law, the **rules of conduct** must be complied with and, if necessary, the service provider must be registered in the **register of advisors** (see section 4.3).

4 OTHER CHANGES

4.1 ADVERTISEMENT

The new regulations also introduce the **notion of advertisement** and related regulatory requirements. In accordance with FinSA and as specified in the D-FinSO, the notion of advertisement includes **any communication** relating to financial instruments intended for investors and the content of which is intended to draw their attention to those financial instruments.

Any advertisement for a financial instrument, and thus notably for a collective investment scheme, must be **clearly identifiable** as such and must mention the prospectus and the key information document relating to the respective financial instrument, as well as the place where these documents can be obtained.

The D-FinSO contains a number of **exceptions**. Thus, the publication of prices, net asset values or tax data, announcements concerning issuers or transactions in particular if they are required by the regulations or articles in the specialized press do not constitute advertisement within the meaning of the FinSA.

In practice, the **delimitation between offer and advertisement** may not be easy. The Explanatory Report indicates that generally the more an advertisement refers specifically to a particular financial instrument, the more likely it will qualify as an offer. As far as internet platforms are concerned, if a platform contains indications relating to a collective investment that go beyond the above-mentioned indications, but which are nevertheless not sufficient to enable the investor to make an investment decision, then it will be an advertisement and the new regulatory requirements relating to it mentioned above must be complied with.

"The status of distributor licensed by FINMA will now be abolished."

4.2 EXTENSION OF THE NOTION OF QUALIFIED INVESTOR IN THE CONTEXT OF CISA

While client segmentation in the context of financial services in general is defined in the FinSA, the **notion of qualified investors remains central** in the field of collective investment schemes and thus continues to be applicable. However, this notion has been adapted due to the new categorisation of clients according to FinSA, but has also been extended.

Therefore, professional clients within the meaning of FinSA will notably be considered as qualified investors within the meaning of the CISA, i.e.:

- > **financial intermediaries** within the meaning of the Banking Act, the FinIA and the CISA and insurance companies covered by the Insurance Supervision Act;
- > **pension funds** and **public law institutions** with professional treasury operations;
- > **companies** with professional treasury operations and large companies;
- > **high net worth individuals**, provided that they have declared that they wish to be treated as professional clients (*opting-out*) and that they meet certain requirements in terms of wealth and/or experience and private investment vehicles for high net worth clients with professional treasury operations.

In addition, CISA provides that qualified investors will also include investors who have entered into a **management or advisory mandate** with financial intermediaries within the meaning of the FinSA. Also, the great novelty is that asset managers and clients under advisory agreements will now be considered as qualified investors.

4.3 ABOLITION OF THE DISTRIBUTOR STATUS

CISA currently provides for a **distributor licence** for the distribution of Swiss collective investment schemes to non-qualified investors or foreign collective investment

schemes to qualified and non-qualified investors. Distributors who distribute collective investment schemes to non-qualified investors must be in Switzerland and authorised by FINMA. Distributors of foreign collective investment schemes to qualified investors do not necessarily have to be in Switzerland, but must be subject to a supervision equivalent to that of Switzerland.

With the entry into force of the FinSA and the abolition of the notion of distribution, the status of distributor licenced by FINMA will now be **abolished**. Instead, the FinSA introduces the obligation for **client advisors** of Swiss financial services providers not subject to FINMA supervision and client advisors of foreign financial services providers to register in a **client advisor register** and **comply with the rules of conduct** provided by FinSA.

Distributors of collective investment schemes must therefore take steps to analyse whether they will be subject to the obligation to register in the client advisor register and prepare for compliance with the rules of conduct.

5 OVERVIEW AND TRANSITIONAL PROVISIONS

The introduction of the notion of offer under FinSA from **1st January 2020** will remove the concept of distribution under CISA. Even if the consequences in the event of an offer under FinSA are and must remain in part the same as currently under the distribution regime, the **notion of offer** is more limited than that of distribution and thus **more liberal**. However, the legislator did not wish to effect a deregulation and in particular provided for the register of client advisors and cross-sector rules of conduct in order to ensure adequate investor protection. Moreover, even if the concept of offer is more liberal and the access to qualified investors is once again more open, the access to non-qualified investors in Switzerland must remain subject to the required approvals by FINMA, in order to protect retail investors.

The **final text of the ordinances** will be published later this year and will be accompanied by a new explanatory report in view of the many changes required by the market as part of the consultation. Many clarifications are expected, in particular as regards the **notion of offer**.

As regards the **transitional provisions**, the FinSA contains only a limited number of them, so they had to be introduced at the D-FinSO level. However, the new transitional provisions introduced raise important questions related to the regime applicable during this period, since some provisions of the current CISA will be repealed as soon as the FinSA comes into force and will not remain applicable during the transitional period.

Contacts

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:



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