Frequent or continuous issuers, in particular, that have grown to rely on these programs and the ability to issue a wide variety of (often novel) products with very little delay and a great degree of flexibility, are therefore well advised to familiarize themselves with the latest ESMA proposals and the draft Amending Regulation and to consult with their external legal advisers on the potential implications for their programs and the need to review and potentially (significantly) modify existing documentation and previously well-established offering procedures. Specifically, the new proposed regime may cause some market participants in the structured note space to create a larger number of "specialized base prospectuses" or to have recourse to more stand alone prospectuses for particular types of products.

In addition, financial intermediaries and their compliance personnel should start designing procedures as soon as possible to ensure compliance with the proposed consent requirements in the context of retail cascades.

Bernd Bohr (bbohr@mayerbrown.com)

Proposed CISA Revision to Bring Along Fundamental Change in Regulating Investment Funds Distribution

Reference: CapLaw-2012-13

Against the background of new regulatory developments in the European Union, Parliament will shortly debate a partial revision of the Collective Investment Schemes Act. The proposed legislative amendments focus on subjecting Swiss domiciled asset managers of foreign collective investment schemes to Swiss licensing and supervision requirements and introducing a new concept with respect to the regulation of distribution activities in relation to collective investment schemes. If adopted, the proposed changes would have a profound impact on the legal framework governing the distribution of such investment instruments in Switzerland.

By Sandro Abegglen

On 2 March 2012, the Federal Council issued the bill (Gesetzesentwurf) and explanatory report (Botschaft) for the partial revision of the Collective Investment Schemes Act (CISA) (see http://www.efd.admin.ch/dokumentation/gesetzgebung/00570/02453/index.html?lang=de). Parliament will deal with the bill in the summer session, with first pre-sessions in the Upper House already having taken place in March 2012. The revised law should enter into force in January 2013.

The partial revision of the CISA—a law merely five years old—and its urgency are motivated by the European Alternative Investment Funds Managers Directive (AIFMD) which inter alia sets forth that as of July 2013, European alternative investment funds

(EU-AIF), as well as non-EU-AIF to be distributed within the EU, may only delegate asset management functions to investment managers who are subject to prudential licensing and supervision under a standard equal to the one set forth by AIFMD and if regulatory cooperation by the foreign country is granted. Against this background, the revision of the CISA focuses on subjecting all Swiss domiciled asset managers of foreign collective investment schemes (CIS) to FINMA licensing and supervision (subject to certain de minimis exemptions identical to those under AIFMD) and on defining such licensing requirements (asset managers of Swiss CIS are subject to licensing with/supervision by FINMA already today).

On top of that the Federal Council used the revision to propose some further important changes to the current law. One of these amendments concerns the abolishment of the concept of "public promotion" *(öffentliche Werbung)* and the introduction of a new concept for the regulation of the distribution of CIS. This article aims to give an overview of this proposal.

1) Overview and Status Quo

Under current law, the criterion to determine whether a foreign CIS is subject to licensing and prudential regulation in Switzerland is whether public promotion is being made for the product or not.

- If so, the foreign CIS must be approved by FINMA (the fund prospectus and several other documents need approval of FINMA), appoint a FINMA approved Swiss representative, and may only be distributed by FINMA licensed distributors. Non-compliance with such requirements may amount to a criminal offence.

- If no public promotion is undertaken, no financial services regulatory restrictions or requirements whatsoever need to be observed.

This somewhat outdated "either-highly-regulated-or-complete-freedom" concept will be changed fundamentally if the bill will be made into applicable law by Parliament. Namely, any form of distribution of CIS will be regulated; however, according to article 120 (1) of the draft CISA (D-CISA), the regulatory requirements will vary depending on the category of targeted investors. Along with this concept goes the abolition of the notion of "public promotion" (see article 3 D-CISA), a term also used in laws other than the CISA to distinguish between regulated and non-regulated activities (in the area of banking and securities trading regulation) or, e.g., to define under what circumstances there exists a prospectus obligation (article 652a and article 1156 Code of Obligations).

2) Substitution of "Public Promotion" (öffentliche Werbung) by "Distribution" (Vertrieb) as Key Criterion for Regulating CIS Offerings

Pursuant to article 3 first sentence of the CISA, public promotion is deemed to be any advert addressed to the public. Advertising directed exclusively towards qualified investors is deemed to be non-public advertising (article 3 third sentence CISA); FINMA interpreted this third sentence to the effect that only advertising directed at qualified investors shall be considered non-public. As reported by the author in CapLaw 2010-30 and in CapLaw 2011-12, the Federal Administrative Court (BVGer B-7765/2008, 14.12.2009) and also the Federal Supreme Court (BGer 2C_106/2010) have held that such restrictive interpretation by FINMA is without legal basis in the CISA, as non-public promotion can also be pertinent under other circumstances than as defined in sentence three of article 3 CISA, namely whenever the circle of approached persons is qualitatively or quantitatively limited.

In view of the indisputable uncertainty of the above described open definition of public advertising which was a concern to FINMA, the Federal Council proposes in the bill, following the suggestions of FINMA, to abolish the term public promotion altogether and to substitute it by "distribution" as the new key regulatory criterion to govern fund offerings.

Accordingly, article 3 (1) D-CISA defines "distribution" as any offering of and promotion for CIS. According to article 3 (2) D-CISA the purchase of CIS (a) exclusively based on the investor's own initiative, or (b) under a discretionary investment management agreement (subject to this agreement and the asset manager fulfilling certain requirements), or (c) under employee participation plans structured in the form of CIS (as often seen with employee participation plans of French companies) is not deemed to be "distribution", subject to certain conditions.

While the application of exemption (c) above should not give rise to any major issues, it is clear that in view of the regime described in section 3) below, the assessment whether in a given case scenarios (a) or (b) are pertinent will become very important. As a consequence, the old discussions of when an interest of an investor is not "provoked", and subject to what legal and factual features a discretionary investment management agreement or its fulfilment would have to be deemed (indirect) CIS distribution, will likely see a revival.

3) Distribution to Qualified Investors Proposed Also to Be Regulated

In contrast to the current "black-and-white" regulatory concept mentioned above, if Parliament approves the draft CISA, ***any type of CIS distribution would in the future be prudentially regulated, whereby the degree of regulatory supervision would***

depend on the category of investors to whom CIS are distributed (into, within, or from Switzerland):

a) If a CIS is promoted or sold to non-qualified investors, the situation under the D-CISA will not substantially change compared to today's law. In particular, the CIS needs FINMA approval and must be represented by a FINMA licensed CIS representative, and it may only be distributed by a FINMA licensed distributor. In addition to these conditions, the new law requires—in adapting the similar requirement of AIFMD—that the CIS home regulator and FINMA have entered into a cooperation and information exchange agreement.

b) On the other hand, according to article 120 (4) D-CISA, if the promotion is limited to qualified investors as per CISA's definition of such term (see below), the CIS itself need not be approved by FINMA; however, the following new important conditions must be met:

- the CIS must appoint a Swiss FINMA licensed CIS representative; and
- the bill obliges the CIS representative to ensure that the requirements stated in article 120 (2) lit. *b–e* D-CISA are fulfilled. This means that the CIS representative has to periodically review:
  - whether the foreign fund management company and the custodian are subject to prudential regulation *(note: supervision not required)* equal to the D-CISA regulation in respect of organisation, investor rights and investment policy;
  - whether the designation "collective investment scheme" does provide grounds for confusion or deception; and
  - whether there is a cooperation and information exchange agreement in place between the CIS' home country supervisory authority and FINMA.

The question is if and how the CIS representative should be able to confirm the first-mentioned requirement (equivalence of the regulation of the foreign fund management company and the custodian) when at the same time article 120 (2) lit. *a* D-CISA is not fulfilled (according to which the foreign CIS, its fund management company, its asset manager and the custodian must be subject to sovereign prudential supervision serving the protection of investors).

In addition, according to article 19 (1) D-CISA, in the future also distributors of CIS that are only promoted to qualified investors will be required to obtain a FINMA license if the distribution is not limited to a particular category of qualified investors, namely regulated financial intermediaries and regulated insurance institutions.

It is evident that the above will dramatically impact on the—until now regulatory-wise completely non-restricted—distribution of foreign CIS to qualified investors, and there is reason to believe that a large number of CIS from traditional off-shore domiciles will not be in a position to fulfil the above requirements. Even certain types of non-UCITS (undertakings for collective investment in transferable securities) CIS from jurisdictions such as Luxembourg and Ireland may be confronted with the same problem. In other words, taking example from other countries, Switzerland erects entry barriers also against distribution to institutional and other qualified investors, much alike to those introduced by the EU under AIFMD. Whether this is good economic policy needs not be debated here.

4) More Restrictive Definition of "Qualified Investor"

Furthermore, the regulation relating to the distribution of foreign funds into, in or from Switzerland will become even more restricted due to the fact that the definition of "qualified investor" will be tightened, resulting in more distribution initiatives falling within the highly regulated category a) as described in section 3) above, as opposed to the somewhat less burdensome regime of category b).

In particular, under the D-CISA (as stated in article 10 (1) D-CISA) investors who have concluded a written discretionary management agreement with a regulated financial intermediary will no longer be deemed qualified investors. Moreover, today's qualified investor category of individuals with net financial assets of at least CHF 2 million (high net worth individuals, HNWI) would be substituted under the D-CISA by an opting-in concept. Whereas today, every HNWI automatically is deemed a qualified investor, under the revised law wealthy individuals would have to explicitly declare their readiness to be treated as qualified investors, subject, in addition, to those persons fulfilling certain conditions, in particular as far as investment expertise is concerned (MiFID-like knowledge and expertise criteria).

As a result the investor population to whom foreign CIS could be offered without the approval and licensing requirements as per lit. a of section 3) above will become smaller in the future.

5) Preliminary Assessment

The proposed abolition of the concept of "public advertising" as a key distinguishing factor for subjecting CIS offerings and the persons involved therewith to Swiss regulation may be welcome from a legal certainty point of view. However, it will further disintegrate the prospectus (and prospectus liability) rules of the Code of Obligations on share and bond issues from CISA's concept of dealing with offerings.

Whether it is appropriate to also subject distribution activities merely aimed at qualified investors to quite severe regulation is a political question, the answer to which should also depend on how wide or narrow the qualified investor-exemption will be defined. Under the current proposal, even CIS distribution to prudentially regulated institutions such as insurers and large corporations with own treasury departments would be highly regulated. In fact, if the bill is approved by Parliament with the current wording, it can be stated that non-regulated funds will disappear altogether from the distribution shelves for both individual and institutional investors in Switzerland. Considering that highly regulated investors such as life insurers are permitted under their own regulatory regime (subject to certain conditions) to invest a certain part of their assets in non-regulated alternative products such as private equity and hedge funds (see FINMA Circular 2008/18 note 324), it is questionable why an active advertising of such CIS to such types of investors should be prohibited in the future. One "political" argument is that a number of fraud cases in the area of alternative products such as Madoff likely would not have occurred if such non-regulated products had not been allowed to be actively promoted.

The MiFID-like amendments to the "high net worth individual exemption" also are a political question. However, as a matter of principle, it seems difficult to reject FINMA's and the Federal Council's reasoning that the mere fact that an individual owns CHF 2 million should not be decisive when it comes to assess the need for investor protection under the CISA.

Sandro Abegglen (sandro.abegglen@nkf.ch)

Proposed Abolishment of Control Premiums in Public Tender Offers

Reference: CapLaw-2012-14

In the context of a major change of the Swiss law on insider trading, market abuse and similar practices, the Federal Council has proposed an amendment of the minimum price rules in public tender offers. If adopted, the new rules will abolish the possibility to pay a control premium to controlling shareholders ahead of a public tender offer. This article summarises the proposed new rules and puts them into context.

By Hans-Jakob Diem

1) The current minimum price rules

The Swiss law on public tender offers as currently in force provides two minimum price rules which apply to mandatory offers as well as to voluntary bids that relate to more than one third of the voting rights of a Swiss listed company. According to the current rules, the price of an offer must at least equal the market price, being the volume-weighted average of the prices paid on a Swiss stock exchange during the 60 trading days preceding the announcement of the offer or, if higher, 75 percent of the highest price paid by the bidder and the persons acting in concert with it within the last twelve