there also be a market? If the recent issuance of USD denominated CoCo-Bonds by Credit Suisse is indicative, there is a good reason to assume that this will be the case.

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Swiss Federal Supreme Court Judges on FINMA Circular 08/8 Definition of Public Advertisement

Reference: CapLaw-2011-12

The Federal Administrative Court on 14 December 2009 held that FINMA Circular 08/8 on Public Advertisement of Collective Investment Schemes violates federal law in so far as in note 9 the term "public advertisement" is defined as any type of promotion not exclusively directed to qualified investors pursuant to article 10 (3) and (4) Collective Investment Schemes Act (CISA) and article 6 (2) of its implementing ordinance (CISO). On appeal by FINMA on this point, the Federal Supreme Court on 10 February 2011 upheld the decision of the Federal Administrative Court and also followed the reasoning of the lower court.

The case concerns a number of other financial services regulatory questions many but not all of which were decided in favour of FINMA; most notably, the Federal Supreme Court–in line with the Federal Administrative Court–protected FINMA's practice to apply a group perspective when assessing whether activities engaged in by related persons and companies are subject to financial services regulation. Hereinafter will only be addressed the CISA issue of what constitutes a public offering and the following elaborations remain short due to the Federal Supreme Court not bringing up substantially new arguments when compared with the decision by the Federal Administrative Court; the latter is discussed by the author in detail in CapLaw 3/2010 pages 19 et seqq.

By Sandro Abegglen

1) Issue at Hand, Statutory Background and Overview

In the case at hand, 14 persons and an investment volume of approx. CHF 6 million in the aggregate were invested in a foreign collective investment scheme. FINMA had considered the underlying sales activity as public promotion of foreign collective investment schemes (without proper licenses) whereas the complainant argued successfully in the Federal Administrative Court that the promotion had not been made on a public basis.

The question on whether foreign collective investment schemes are publicly promoted (as opposed to non-public offerings) is decisive as in such case both the foreign fund and distributing persons require licenses under CISA (in the absence of which the activity may even constitute a criminal offence).

As reported in CapLaw 3/2010 page 20 et seqq., the Federal Administrative Court, based on quite extensive elaborations, came to the—correct—conclusion that the promotion in the case at hand had not been public; FINMA unsuccessfully appealed to the Federal Supreme Court on this point.

2) Federal Supreme Court's Considerations

The Federal Supreme Court—not very surprisingly—upheld the view of the Federal Administrative Court.

After having recapitulated once again that the FINMA Circular 08/8 is not binding for the courts but constitutes a mere interpretation by FINMA of the applicable law, the Federal Supreme Court states that Note 9 FINMA Circular 08/8 with the very broad definition of the term public advertisement (see introductory paragraph above) has no statutory basis in article 3 CISA. Namely, so the court, if one were to follow the interpretation of FINMA, article 3 para. 1 CISA providing for a general definition of public promotion ("Als öffentliche Werbung im Sinne dieses Gesetzes gilt jede Werbung, die sich nicht an das Publikum richtet.") would not make any sense: The Federal Supreme Court correctly states that the first sentence of article 3 CISA provides for the basic definition of a public offering whereas the two following sentences constitute statutory exemptions to the basic definition; sentence 2 in respect of the term promotion, sentence 3—relevant in the case at hand—in respect of the term public (grammatical and systematical interpretation).

Accordingly, the Federal Supreme Court holds that besides promotion which is addressed to qualified investors, only, and due to the just mentioned statutory exemption automatically deemed non-public, from a purely logical point of view there need be left some room for other types of non-public offerings. Such non-public promotion, so the court, may be pertinent if the circle of approached persons is limited either (i) qualitatively on the basis of the relationship to the approached potential investors or (ii) quantitatively on the basis that a limited number of persons per se cannot be deemed a public. The court stresses that each case has to be considered according to its specific circumstances and that in the case at hand there was no need to analyse as up to what number the quantitative element would be fulfilled. Namely, in the case at hand besides relatives/family members of the fund promotors/distributors there had been investment discussions with as little as two persons, only, and such even on a coincidental basis. To the other investors there existed a family relationship for which reason the Court considered the promotion to be qualitatively limited.

3) Assessment

The Federal Supreme Court follows both the decision as well as the reasoning of the Federal Administrative Court and therefore for details in such respect it may be referred to the article (which includes an assessment of the decision) in CapLaw 3/2010 pages 19 et seqq. Further to the views uttered in such article remains to be said that when read literally, the decision of the Federal Supreme Court could be interpreted to the effect that even an offering to a very large number of persons (hundreds, thousands) to whom a pre-existing specific relationship exists could be non-public. However, as elaborated in CapLaw 3/2010 page 22 such would not be an appropriate interpretation of the law. Namely, it is neither correct to state that a private offering always requires cumulatively a quantitative and qualitative element, nor is it correct to hold that in case the qualitative element is pertinent the number of persons approached is completely irrelevant. Rather, the correct answer should be based on a flexible interplay of the quantitative and qualitative elements meaning that a small(er) number of persons approached may compensate for the non-fulfilment (or minimal fulfilment) of the qualitative element, and—at least as a rule of thumb—vice-versa.

The decision of the Federal Supreme Court is welcome also from a rule of law point of view as it reminds FINMA to stick narrowly to the generally accepted, traditional methods of interpretation of statutory law when drafting guidance notes and circulars. This is even more important in a case as the one at hand where the violation of the statutory provision may even lead to criminal sanctions.

4) Outlook and Implication for Distribution Practice

In reaction to the decision FINMA announced that it will take into account the judgment when being confronted in the future with similar cases; the FINMA statement further seems to imply that a formal amendment of the FINMA Circular 08/8 were not (already) planned and were not welcome. FINMA further stated that it considers a revision of article 3 CISA necessary in order to ensure investor protection and avoid uncertainty of law (see FINMA Mitteilung 23 (2011)–29 April 2011).

As was stated in the previous article in this matter in CapLaw 3/2010 page 20 et seqq., in practice for strategic offerings into the Swiss market of non-licensed funds, only the qualified investor exemption remains a safe harbor. However, opportunistic placements within the above described—unfortunately vague—quantitative and qualitative limits to non-qualified investors will now be possible.

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