clearly states the regulations and/or standards that have been used as the basis for preparation.

4) Conclusion

With the new reporting obligations on non-financial matters, Swiss listed and/or FINMA regulated companies will in the future be required to comprehensively report on environmental, social and other non-financial matters. The new reporting requirements, which apply for the first time with respect to the 2023 financial year, supplement the already existing, governance-focused reporting obligations (compensation report, corporate governance report) applicable to Swiss listed companies.

In terms of content of the report, there is a clear trend towards more quantitative data and clear KPIs; investors (and regulators) no longer accept purely qualitative statements and declarations of intent on ESG-related topics. Accordingly, recent amendments to or developments on ESG-related disclosure regimes focus in particular on measurable KPIs and targets.

Finally, the ESG reporting obligations are expected to continue evolving in light of developments in other major jurisdictions as well as recommendations and soft law issued by international standard-setting organizations. In particular, the recent developments in the European Union broadening the scope of non-financial reporting obligations are expected to influence future legislative developments in Switzerland.

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Draft Implementing Provisions on the Limited Qualified Investor Fund (L-QIF): A Missed Opportunity for Improving the Competitiveness of the Swiss Fund Market

Reference: CapLaw-2023-14

On 23 September 2022, the Swiss Federal Council opened the consultation procedure on the draft for an amendment to the Collective Investment Schemes Ordinance (CISO) and a number of fund-related provisions in other ordinances. The core content of the consultation draft (Consultation Draft) is the implementing provisions regarding the Limited Qualified Investor Fund (L-QIF), a new category of Swiss collective investment schemes (CIS) which, unlike all existing categories of Swiss CIS, do not require FINMA approval or authorization.

The basis for the introduction of the L-QIF was created through a partial revision of the Collective Investment Schemes Act (CISA) passed by the Swiss Parliament on 17 December 2021. As the legal provisions contained in CISA – deliberately – regulate the

L-QIF only in broad terms, and important aspects such as the investment regulations applicable to the L-QIF are delegated to the Federal Council for regulation at ordinance level, the content of the CISO rules is of decisive importance for the attractiveness and, as a consequence, the future success of this new fund category.

This article summarizes and discusses the key points of the proposed regulation of the L-QIF at ordinance level pursuant to the Consultation Draft. Proposed changes to ordinance provisions that are not directly related to the L-QIF will not elaborated on here.

By Sandro Abegglen / Yannick Wettstein

1) Background

a) Competitive disadvantage of Switzerland as a fund domicile

In the fund sector, Switzerland is primarily an asset management location and distribution market. ***As a fund domicile***, however, Switzerland is traditionally less important compared to other jurisdictions such as Luxembourg. This is especially true with respect to alternative investments: For example, there are currently (as of 23 May 2023) only 26 closed ended Swiss CIS (in the legal form of a limited partnership for collective capital investments (*Kommanditgesellschaft für kollektive Kapitalanlagen;* KmGK), which was introduced in 2007 as a Swiss alternative to Anglo-Saxon limited partnerships in the area of venture capital investments).

The main reasons for this situation are the lack of EU market access for Swiss CIS and unfavorable aspects of the Swiss withholding tax. In addition, the regulatory framework abroad, in particular for setting up alternative and innovative fund products, is often more attractive than in Switzerland. In recent years, various EU member states have introduced fund types that do not require approval by the local supervisory authority. An important example is the Luxembourg *Reserved Alternative Investment Fund* (RAIF), which is also popular with Swiss asset managers and investors. By eliminating the need for obtaining regulatory approval, such funds can be brought to market quickly and cost-effectively. In addition, they usually offer more flexibility in terms of investment strategies.

Until now, Swiss law did not provide for a comparable fund category. All Swiss CIS require approval (*Genehmigung*; article 15 CISA) and – in the case of SICAV, KmGK and SICAF – authorization (*Bewilligung*; article 13 CISA) from FINMA and are subject to supervision by FINMA. As a consequence, even for Swiss fund providers and investors, Swiss CIS are often not the "go to" vehicle, especially not for alternative investments by professional investors.

b) The L-QIF as a new category of Swiss CIS

Against this background, the Swiss Parliament intended to strengthen the attractiveness of Switzerland as a fund domicile by creating a new internationally competitive category of Swiss CIS for qualified investors.

As already mentioned, the main feature of the L-QIF, which can be structured either as an open ended CIS (either in the legal form of a contractual investment fund or a SICAV) or as a closed ended CIS (in the legal form of a KmGK), is that it requires neither approval nor authorization from, and is not supervised by, FINMA (article 118*a*(1)(d) CISA). The reduced level of investor protection resulting from the lack of (direct) FINMA supervision is taken into account by the fact that the L-QIF is only open to qualified investors within the meaning of CISA (article 118*a*(1)(a) and (b) CISA). Moreover, the law requires that L-QIF must be managed by certain FINMA supervised financial institutions (article 118*a*(1)(c) CISA in conjunction with articles 118*g* and 118*h* CISA), specifically:

- L-QIF in the legal form of a contractual investment fund must be managed by a Swiss fund management company (article 118*g*(1) CISA);
- L-QIF in the legal form of a SICAV must delegate the administration and the investment decisions to one and the same Swiss fund management company (article 118*h*(1) CISA);
- L-QIF in the legal form of a KmGK must delegate the management to a Swiss manager of collective assets, unless the general partners (*Komplementäre*) of the KmGK are banks, insurance companies, securities firms, fund management companies or managers of collective assets (article 118*h*(2) and (4) CISA).

Investment decisions may be delegated (or sub-delegated) to a Swiss manager of collective assets or to a foreign manager of collective assets that is subject to appropriate regulation and supervision in its country of domicile (article 118*g*(2) and (3) and article 118*h*(3) CISA).

2) Proposed Concretization of the CISA provisions on the L-QIF

a) Investment regulations: too restrictive and not in line with Parliament's objectives

i. Overview

To enable flexible adaptation to market developments, the regulation of investment techniques and investment restrictions for L-QIF is delegated to the Federal Council (article 118*n*(3) CISA). The investment regulations provided for in CISA with respect to FINMA-supervised CIS (articles 53–71 and 103 CISA) are not applicable to L-QIF (article 118*d*(a) CISA).

With a view to the circle of investors, which is limited to qualified investors, and the objective of promoting innovation, the CISA provisions on the L-QIF were deliberately designed in a liberal manner. CISA does not to impose requirements regarding permitted investments or the diversification of risk. This means that, in principle, any type of investments is permitted for an L-QIF. In particular, investments that are only marketable to a limited extent, are subject to high price fluctuations, have a limited risk diversification and/or are difficult to value are also permissible for L-QIF, which makes it possible for an L-QIF to i.a. invest in assets such as cryptocurrencies, wine, artworks or vintage cars.

The investment regulations proposed for the L-QIF are contained in articles 126*o*–126*z*ter D-CISO, whereby different rules apply to L-QIF in the legal form of a contractual investment fund or SICAV on the one hand (articles 126*o*–126*y* D-CISO; see(ii) below) and to L-QIF in the legal form of a KmGK on the other hand (articles 126*z*–126*z*ter D-CISO; see (iii) below). The investment regulations provided for in CISO with respect to supervised Swiss CIS (articles 32*a*, 67–102, 117(2) and (3), 120 and 121 CISO) expressly do not apply to L-QIF (article 126*f*(b) D-CISO).

ii. L-QIF in the legal form of the contractual investment fund or SICAV

Article 126*p*(1) D-CISO provides that L-QIF in the legal form of contractual investment fund or SICAV may:

- raise loans for an amount not exceeding 50% of the fund's NAV;
- pledge or cede as collateral no more than 100% of the fund's NAV; and
- commit to an overall exposure of up to 600% of the fund's NAV.

In other words, the Federal Council proposes to apply to L-QIF the same rules that apply to FINMA supervised "other funds for alternative investments" within the meaning of article 71 CISA (see article 100(2) CISO). Especially since the latter, in contrast to the L-QIF, are also open to non-qualified investors, it would, in our view, have been justified (and more in line with the legislator's intentions) to set the investment rules for the L-QIF in a less restrictive manner – or, as is the case with the Luxembourg RAIF, to refrain entirely from setting specific investment restrictions and specifications regarding investment techniques – and instead to focus on transparent disclosure of the associated risks in the fund documentation.

With respect to securities lending, repurchase agreements, derivative financial instruments and collateral management, the provisions contained in articles 1–55 CISO-FINMA (in the version of 1 January 2015) are to be applied to L-QIF *mutatis mutandis*, with certain exceptions (article 126*p*(4) D-CISO).

The L-QIF must meet the investment restrictions within two years of the launch of the fund; if this deadline cannot be met, the fund management company may extend it once by six months, if this is provided for in the fund contract or the investment regulations (article 126*q*(3) D-CISO).

If an L-QIF in the legal form of contractual investment fund or SICAV makes direct real estate investments, the specific provisions of articles 126*t*–126*y* D-CISO also apply. The regulations contained therein are less stringent than those for the FINMA-supervised real estate fund (*Immobilienfonds*; article 58 et seq. CISA): In particular,

– an L-QIF may hold real estate in co-ownership even if the fund management company or the SICAV cannot exercise a controlling influence (article 126*u* D-CISO); and

– in the case of pledging land (*Verpfändung von Grundstücken*) and ceding the rights of lien as collateral (*Sicherungsübereignung der Pfandrechte*), an average encumbrance of up to 50% of the market value of the L-QIF's real estate assets is permissible (article 126*v* D-CISO), compared to one-third in the case of supervised real estate funds.

Article 126*w* D-CISO sets out the minimum information that the fund contract or the investment regulations must contain on risk diversification. When entering into transactions with related parties, the restrictions provided for in article 126*x* D-CISO must be observed.

The Consultation Draft provides that master-feeder structures (where a feeder fund structured as an L-QIF invests at least 85% of the fund assets in units of a master fund) are only permissible if this is provided for in the fund contract or the investment regulations and if *both* the master fund and the feeder fund are L-QIF (article 126*s* D-CISO). However, we do not see any reason why an L-QIF should not be allowed to invest in a (more regulated) supervised fund. A feeder fund structured as an L-QIF should therefore also be allowed to invest in a supervised master fund.

iii. L-QIF in the legal form of KmGK

Just as for supervised KmGKs, there are in principle no statutory investment restrictions, or regulations on investment techniques, for L-QIF in the legal form of a KmGK. It is therefore up to the L-QIF to determine the investment restrictions and investment techniques applicable to it, and to describe them in detail in the company agreement (article 126*z*(2) D-CISO).

Importantly, L-QIF in the legal form of KmGK must have a minimum duration of five years (article 126*z*(1) D-CISO). This provision is intended to prevent a blurring of the distinction between open-ended and closed-ended CIS and an undermining of the investment restrictions and investment techniques for open-ended CIS (see(ii) above) – particularly against the background that in the case of L-QIF in the legal form of a

contractual investment fund or a SICAV, the right of investors to redeem their units at any time may be suspended under certain circumstances for a period of up to five years (see article 126*m* D-CISO; Explanatory Report, 29). The fact that the Federal Council would like to generally prohibit the establishment of L-QIF in the legal form of a KmGK with a term of less than 5 years with the argument of the conceptual separation between open-ended and closed-ended collective investment schemes seems, however, regrettable, especially since also for funds with a term of less than 5 years it is conceivable that the KmGK represents the more suitable legal form (compared to the contractual fund or SICAV) in certain cases.

b) Applicability of federal ordinances and of the self-regulation recognized by FINMA as a regulatory minimum standard

Pursuant to article 118*a*(2) CISA, the L-QIF is subject to the provisions of CISA unless the latter provides otherwise. Also applicable to the L-QIF are all other federal acts (such as tax laws, the Anti-Money-Laundering Act, or, with regard to L-QIF making real estate investments, the Federal Act on the Acquisition of Real Estate by Persons Abroad ("Lex Koller")) that contain provisions for CIS and do not stipulate special provisions for the L-QIF (Explanatory Report, 18).

The question arises as to what extent the provisions of ordinances issued by the Federal Council (in particular: CISO) or FINMA (in particular: CISO-FINMA), as well as the self-regulation recognized by FINMA under article 7(3) of the Financial Market Supervision Act, apply to the L-QIF. In this regard, D-CISO provides for the following:

The provisions of CISO apply to the L-QIF, unless CISO provides otherwise (article 126*b*(1) D-CISO). CISO provisions ***not*** applicable to the L-QIF are set out in article 126*f* D-CISO. Other ordinances issued by the Federal Council containing provisions on CIS are also applicable to the L-QIF, unless special provisions are made.

In contrast, the FINMA Collective Investment Schemes Ordinance (CISO-FINMA) is ***not*** directly applicable to the L-QIF. It only applies to the L-QIF if the Federal Council expressly stipulates this in CISO (article 126*b*(2) D-CISO), which results from the fact that the L-QIF is not subject to the supervision of FINMA (as a consequence of which FINMA has no (direct) regulatory powers whatsoever with respect to the L-QIF itself). Against this background, the Federal Council has declared certain provisions of the CISO-FINMA applicable to the L-QIF by analogy, namely (each with certain exceptions): articles 1–55 CISO-FINMA on securities lending, repurchase agreements, derivative financial instruments and collateral management (see article 126*p*(4) D-CISO), articles 56–64 CISO-FINMA on master-feeder structures (see article 126*s*(4) D-CISO) and articles 79–105 CISO-FINMA on bookkeeping, valuation and accountability (see article 126*z*^{quater}(1) D-CISO). It should be noted that the references to the CISO-FINMA contained in D-CISO are ***static***, i.e. they each refer to a specific version of CISO-FINMA. This means that future amendments to CISO-FINMA do not

automatically apply to the L-QIF, but only if the reference in CISO is also amended accordingly (Explanatory Report, 18).

The ***self-regulation recognized by FINMA as a minimum standard*** is also ***not*** directly applicable to the L-QIF. However, the following six self-regulations issued by the Asset Management Association Switzerland (AMAS) shall apply to L-QIF by analogy (article 126*b*(3) D-CISO):

i. AMAS Code of Conduct (in its version of 5 August and 23 September 2021);

ii. Guidelines for real estate funds (in its version of 5 August 2021);

iii. Guidelines for money market funds (in its version of 5 August 2021);

iv. Guidelines on the valuation of the assets of collective investment schemes and the handling of valuation errors in the case of open-end collective investment schemes (in its version of 5 August 2021); and

v. Guidelines on the calculation and publication of performance data of collective investment schemes (in its version of 5 August 2021);

vi. Guidelines on the calculation and disclosure of the Total Expense Ratio (TER) of collective investment schemes (in its version of 5 August 2021).

Future amendments to self-regulation will not automatically apply to the L-QIF, but will first require a corresponding amendment to article 126*b*(3) D-CISO.

The institution responsible for managing the L-QIF is also responsible for compliance with the legal provisions applicable to the L-QIF (article 126*h*(1) D-CISO). It must inform FINMA, the custodian bank and the audit firm without delay if a CIS no longer meets the characteristics of an L-QIF pursuant to article 118*a*(1)(a)-(c) CISA (see 1(b) above; article 126*h*(2) D-CISO). If any legal, contractual, statutory or regulatory provisions applicable to the L-QIF are otherwise not complied with, the responsible institution must inform the investors and the audit firm of this and ensure that compliance is restored within a reasonable period of time. If this is not possible, it must dissolve the L-QIF (article 126*h*(3) D-CISO).

c) Report to the Federal Department of Finance (FDF) as a constitutive requirement for the establishment of an L-QIF

Article 126*a* D-CISO specifies that a CIS which fulfils the characteristics of an L-QIF pursuant to article 118*a*(1)(a)-(c) CISA, i.e., a CIS which

i. is open exclusively to qualified investors within the meaning of CISA (respectively, in the case that it invests directly in real estate, exclusively to qualified investors that are professional clients pursuant to article 4(3)(a)-(h) FinSA); and

ii. managed in accordance with the provisions of Arts 118*g* and 118*h CISA* (see 1(b) above),

is not automatically deemed to be an L-QIF, but only if the institution responsible for the management expressly waives the obtaining of FINMA approval (and, in the case of CIS in the legal form of a SICAV or KmGK, authorization) for the L-QIF by submitting to the Federal Department of Finance (FDF) the notification provided for in article 118*f*(1) CISA and article 126*g*(1) D-CISO within 14 days of the signing or adoption of the fund contract, the articles of association and the investment regulations or the company agreement.

A period of 14 days also applies for reporting the launch date of the L-QIF, any changes to the reported facts and the discontinuation of the management of the L-QIF (article 126*g*(2)D-CISO). The FDF may make this data publicly accessible in a directory (article 126*g*(3) D-CISO).

d) Change of status and restructuring

Supervised CIS may "downgrade" from supervised to L-QIF status by returning their FINMA approval and, if any, authorization (article 118*b* CISA). The requirements for such a change of status are further specified in articles 126*c* D-CISO. Article 126*d* D-CISO contains provisions on the information obligations vis-à-vis FINMA and the investors in the event of a change of status.

Specifically, the change of status requires prior approval (and, in the case of a SICAV or KmGK, authorization) from FINMA (article 126*c*(1) D-CISO), which is granted if the CIS meets the characteristics of an L-QIF pursuant to article 118*a*(1)(a)-(c) CISA (see 1(b) above) and if (article 126*c*(2) D-CISO):

i. the fund contract, the investment regulations or the company agreement provide for the possibility of a change of status;

ii. neither the CIS nor the investors incur any costs from the change of status;

iii. depending on the legal form of the CIS, the following additional requirements are met:

– in the case of a contractual investment fund, only investors who have expressly consented to the change of status remain in the CIS;

- in the case of a SICAV, company shareholders (*Unternehmeraktionäre*) holding at least two thirds of the issued company shares (*Unternehmeraktien*) have consented to the change of status and only investors who have expressly consented to the change of status remain in the CIS;
- in the case of a KmGK, all investors have consented to the change of status.

In view of the these requirements, the change of status is likely to be relevant in practice only for supervised CIS for qualified investors, since an exclusion of non-qualified investors will be practically impossible. The requirement that all investors remaining in the fund must have expressly consented to the change of status also appears difficult to implement. It would be preferable to have a regulation that allows investors to object to the change of status within a certain period of time instead.

e) Audit, accounting, valuation, accountability and publication requirements

The audit of the L-QIF is divided into an audit of accounts (*Rechnungsprüfung*; article 126*z*^septies D-CISO), which is carried out in accordance with the same provisions as for supervised CIS, and a supplementary audit (*ergänzende Prüfung*; article 126*z*^octies D-CISO), the purpose of which is to assess compliance with the material product-specific provisions of the L-QIF that are not already the subject of the audit of accounts, e.g., whether the fund in question meets the characteristics of an L-QIF pursuant to article 118*a*(1) CISA (article 126*z*^octies(1)(a) D-CISO). If the audit firm identifies material deficiencies based on the audit of accounts or the supplementary audit, it records these as objections in the audit report on the supervisory audit of the institution responsible for managing the L-QIF (article 126*z*^tredecies(1) D-CISO), so that that the latter can be held accountable under supervisory law if it fails to comply with the regulations applicable to the L-QIF to a material extent.

As regards accounting, valuation and reporting, pursuant to article 118*a*(2) CISA, the same CISA provisions apply to L-QIF as to supervised funds (articles 87–90 and 108 CISA), save that the issuance of specifying regulations does not fall within the competence of FINMA (see article 91 CISA) but of the Federal Council (see article 118*i*(6) CISA). The Federal Council has made use of this competence in article 126*z*^quater D-CISO to the effect that the specifying provisions for supervised funds, namely articles 79–105 CISO-FINMA (in the version of 1 January 2021), also apply by analogy to the L-QIF (without, however, the possibility for FINMA to grant exceptions).

Article 126*z*^quinquies D-CISO, which governs the publication duties for the L-QIF, provides that the issue and redemption prices or the NAV must be published in the media of publication for each issue and redemption of units (para. 1) and that the prices for L-QIF must be published at least twice a month (or at least four times a year for L-QIF

for which the right to redeem at any time has been restricted) in the media of publication (paras 2 and 3).

f) Investment regulations for Swiss investment foundations

In addition to the amendments to CISO described above, the Consultation Draft also provides, among other things, for adjustments to the investment regulations for Swiss investment foundations (*Anlagestiftungen*) contained in the Investment Foundations Ordinance (ASV).

In particular, it is proposed that investment foundations may now also make investments (both traditional and alternative) via L-QIF (revised article 30(2) and article 29(3)(b) ASV).

Liberalization is also envisaged regarding indirect investments via foreign collective investments: Under current law, the share of a single foreign collective investment may only exceed 20% of the assets of an investment group if the collective investment has been approved by FINMA pursuant to article 120(1) CISA for offering to non-qualified investors or is subject to supervision by a foreign supervisory authority with which FINMA has concluded a cooperation agreement pursuant to Article 120(2)(e) CISA (Cooperation Agreement). According to the Consultation Draft, the 20% threshold may also be exceeded if the fund management company or the fund company as well as the asset manager and the custodian are subject to supervision by FINMA or a foreign supervisory authority with which FINMA has concluded a Cooperation Agreement (Article 30(3bis)(c) D-ASV). This is intended to cover foreign collective investments that are comparable to the L-QIF, such as the Luxembourg RAIF (Explanatory Report, 34).

3) Assessment / Conclusion

CISA gives the Federal Council considerable leeway in specifying the provisions on the L-QIF. This applies, in particular, with respect to the investment regulations applicable to the L-QIF. The Federal Council faces the challenge of, on the one hand, taking into account the objectives associated with the introduction of the L-QIF (which are to enhance the competitiveness and innovative strength of Switzerland as a fund domicile), and, on the other hand, ensuring adequate investor protection.

In our view, the rules provided for in the Consultation Draft are too restrictive overall. Although the Federal Council largely refrained from enacting prohibitions and investment restrictions and, for example, expressly permitted the holding of real estate in co-ownership (article 126*u* D-CISO), the Consultation Draft now nevertheless contains restrictions that are likely to have a negative impact on the attractiveness of the L-QIF compared to foreign vehicles such as the Luxembourg RAIF, in particular the investment restrictions for L-QIF in the legal form of a contractual fund or SICAV provided for in article 126*p* D-CISO (restrictions on borrowing, pledging / ceding as collateral

as well as limitation of total exposure) and article 126*v* D-CISO (encumbrance of all properties may not exceed 50% of the market value on average). In order to protect investors (who, in the case of the L-QIF, by definition consist only of qualified investors), we believe it would be sufficient to require the institution responsible for managing the L-QIF (which is supervised by FINMA) to transparently disclose the material risks associated with the investment policy in the fund documentation.

As the general disadvantages of Swiss CIS (keywords: lack of market access to the EU, Swiss withholding tax) also affect the L-QIF and these disadvantages do not seem to compensated by any significant advantages – in fact, the investment rules for L-QIF (as set out in the Consultation Draft) are more restrictive than those for Luxembourg RAIF – the legal framework for the L-QIF will have to be developed further to make the L-QIF a real alternative to foreign vehicles, especially when it comes to attracting foreign investors. And even when it comes to regulated Swiss investors, the L-QIF will be in direct competition with its foreign peers: For example, as mentioned, article 30(3bis) (c) D-ASV provides that investment groups of Swiss investment foundations may in principle invest up to 100% of their assets via a foreign vehicle comparable to the L-QIF (such as a RAIF). Against this background, we do not expect Swiss L-QIF to be set up on a significant scale in the near future instead of the well-established foreign structures.

We hope that such liberalizations will be made in the final draft. If so, the L-QIF could compete on par with comparable foreign vehicles and thus become a certain success, which would also be beneficial for the investors who could choose from a broader range of funds, investment strategies and styles.

It remains to be seen whether or to what extent the Federal Council will take into account the considerations the criticism expressed by some of the participants in the consultation (namely that of AMAS) when drafting the final version of the revised regulations. Currently, it is assumed that the launch of L-QIF will not be possible before Q1 2024.

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