

Memorandum

Marketing a Private Fund in Switzerland: Compliance with CISA Required from 1 March 2015

February 24, 2015

The revised Swiss Collective Investment Schemes Act (“**CISA**”) entered into force on 1 March 2013. Switzerland has not joined the European Economic Area and is therefore not required to implement the Alternative Investment Fund Managers Directive (“**AIFMD**”). Fund managers marketing private funds to investors in Switzerland are subject to compliance with CISA, not AIFMD, in respect of such activities.

Until now, fund managers marketing fund interests into Switzerland have generally benefited from a transitional period during which compliance with certain provisions of CISA was not required.

This transitional period ends this week. Fund managers marketing to investors in Switzerland on or after 1 March 2015 will now need to consider whether they are subject to CISA and, if so, take appropriate steps to ensure compliance.

Who is subject to CISA?

CISA and its associated regulations distinguish between:

- “*regulated qualified investors*” – broadly, regulated financial intermediaries such as banks, securities dealers and fund management companies, as well as central banks and regulated insurance companies. Marketing exclusively to “regulated qualified investors” currently falls outside the scope of CISA, and this will continue to be the case after 1 March 2015;
- “*unregulated qualified investors*” – broadly, public entities, pension funds and corporates with professional treasury management, as well as high net worth individuals who have elected to be treated as qualified investors. The implications of marketing to “unregulated qualified investors” are summarised below; and

- “*non-qualified investors*” – in effect, retail investors. Fund managers seeking to market to non-qualified investors will need to seek specific advice.

CISA regulates marketing or distribution activities in Switzerland, which in broad terms include any offer, presentation or advertisement which aims to encourage the acquisition of interests in a specific fund or collective investment scheme. We understand from Swiss counsel that the presentation of general information regarding a fund manager’s experience, strategy and track record – without any specific information about a prospective fund – should not be considered marketing or distribution for the purposes of CISA; in this regard, specific information would be likely to include any document setting out the principal terms of the fund, including a near-final draft of the fund’s private placement memorandum.

Additionally, marketing at an investor’s own initiative (“reverse solicitation” or “reverse enquiry”) falls outside the scope of CISA.

What are the implications of marketing to Swiss “unregulated qualified investors”?

A fund manager marketing any fund to Swiss “unregulated qualified investors” on or after 1 March 2015 will be required to:

- be authorised to distribute funds in, and subject to “appropriate supervision” in, its home jurisdiction. This would include, for example, a manager registered as an investment adviser with the SEC, or authorised as an AIFM under AIFMD by the UK’s Financial Conduct Authority (or other relevant EEA financial services regulator);
- appoint a Swiss representative (licensed by the Swiss Financial Market Supervisory Authority (“FINMA”)) and a Swiss paying agent (regulated under the Swiss Federal Banking Act) for the fund or, as applicable, for the parallel or feeder vehicle(s) in which such investors participate, and include details of such appointees in the fund documentation provided to “unregulated qualified investors”; and
- enter into a Swiss law distribution agreement with the Swiss representative. This will need to incorporate certain distribution and transparency guidelines applicable to fund offerings in Switzerland.

The role of the Swiss representative is, inter alia, to provide a permanent presence for the fund in Switzerland; to keep the fund manager informed of applicable Swiss legislation and standards; to enter into the distribution agreement with the fund manager and ensure compliance with the distribution and transparency guidelines; and to act as a point of contact in Switzerland for both qualified investors and FINMA, in the event of any claims, regulatory issues, information or documentary requirements regarding the fund.

The role of the Swiss paying agent is to give Swiss investors the option to make capital call payments to, and receive distributions from, the fund through a Swiss bank. In practice a number of entities are able to provide the functions of both Swiss representative and paying agent.

We have been advised by Swiss counsel that a manager that has been marketing to "unregulated qualified investors" during the transitional period but has ceased marketing in Switzerland prior to 1 March 2015 may not be required to appoint a Swiss representative or paying agent, but the position is not yet entirely clear and may depend upon the particular facts of the marketing (e.g., whether the marketing resulted in an investment by an "unregulated qualified investor"), so we recommend that specific advice is sought.

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