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Funds Distribution under FinSA/FinIA: A change of paradigm

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The introduction of the concept of an "offer" according to Art. 3 let. g FinSA as a replacement of the current notion of a "distribution" pursuant to Art. 3 CISA will lead to a number of consequences for the Swiss financial industry as well as for foreign financial services providers acting on a cross-border basis into Switzerland. The new concept is more flexible as the current notion of a "distribution", but also raises a number of delicate questions which need to be clarified. The object of this article is to provide a first analysis of the salient features and challenges of the current and future regimes and their practical consequences with a specific focus on the placement of collective investment schemes in Switzerland.

By Diana Imbach / François Rayroux

1) Introduction

a) The new financial market law architecture

With the new Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), the existing financial market law architecture will be subject to sweeping reforms. Today, financial market regulation has a primarily sectoral structure. Thus, the provisions governing the management and distribution of collective investment schemes are primarily governed by the Collective Investment Schemes Act (CISA) and its implementing ordinances, FINMA Circulars and SFAMA self-regulation. With the FinSA and the FinIA, the current regulatory framework will be transformed into a horizontal structure. This means, in particular, that the FinSA will introduce, among other things, uniform cross-sector regulations for the provision of financial services and the offering of financial instruments.

b) Impact of the legal framework on collective investment schemes

Today, the CISA governs three different areas: (1) the authorization and supervision of financial institutions, (2) the licensing of collective investment schemes (product licensing), and (3) the distribution of collective investment schemes.

With the new financial market law's architecture, the authorization and supervision of fund management companies and asset managers of collective investment schemes will be regulated exclusively in the FinIA. Most of the corresponding provisions are to be "transferred" unchanged in its substance from the CISA. The product licensing requirements are solely applicable to collective investment schemes and will therefore remain in the CISA. However, the requirement to obtain a product license for foreign collective investment schemes is closely related to the question whether the specific fund will be offered to non-qualified investors in Switzerland. As the distribution – respectively the offering of collective investment schemes – and the corresponding rules of conduct will be regulated comprehensively in the FinSA, there is a close link between the two areas of regulation. Consequently, the current distribution concept in CISA will be abandoned in favor of the concept of an "offer". Furthermore, the current authorization requirement for distribution activities (fund distributor license) will be abolished in the CISA. As the FinSA governs the rules of conduct applicable at the point of sale in general, the corresponding provisions in the CISA (Art. 10, Art. 20 et seqq. CISA) will be limited to product-specific aspects. The same applies in principle to the product documentation, *i.e.*, the obligation to publish a prospectus and the requirement to provide for a Key Information Document (KID) for private clients. However, all product-specific regulations, such as the regulations for SICAVs, SICAFs, limited partnerships for collective investments or the obligation to appoint Swiss representatives and paying agents, will remain to be governed by CISA in the future.

c) Challenges

As the offering of collective investment schemes to non-qualified investors is intrinsically tied to the provisions in the FinSA, it was the intent of the legislator that the provisions of the FinSA and of the CISA, as well as the respective ordinances (*i.e.,* the Financial Services Ordinance (currently in draft form, Draft-FinSO) and the Collective Investment Scheme Ordinance (CISO)), be carefully coordinated. In this context, the particular challenge is to transfer and embed the product-specific obligations for the offering of collective investment schemes into the new concepts introduced by the FinSA and thereby to ensure an equivalent, but different, concept for the purposes of the protection of the investors. The legislator's intent was not to reshape the entire legislative framework based on a one-sided reduction of the investors' protection on the side of the CISA, but to implement a new balanced and consistent concept in the FinSA and Draft-FinSO. An illustration of this approach is the abolition of the authorization regime for fund distributors which, in the opinion of the legislator, is to be compensated by the new prudential supervision over all asset managers in the FinIA, on the one hand, and by the registration requirement for client advisors provided for in the FinSA, on the other hand (see Dispatch FinSa/FinIA, BBl 2015 8901 et seqq, page 9010 (German version), page 9050). A one-sided levelling down of customer protection in the fund area would in our view contradict the legislator's intent and moreover contradict international developments.

2) From "Distribution" to "Offer" of Collective Investment Schemes

a) Current Legal Framework

i. Notion of "distribution"

With the revised Collective Investment Scheme Act of September 28, 2012, which entered into force in 2013, the historical concept of a "public solicitation" (*"öffentliche Werbung"/"appel au public"*) has been replaced by the notion of "distribution" (*"Vertrieb"/"distribution"*) (see Dispatch CISA, BBl 2012 3639 et seqq., page 3647 (German version). The concept of a "public solicitation" was not only fundamental for the Investment Funds Acts of 1966 and 1995 as well as for the Collective Investment Schemes Act before its revised version of 2012, but it is also a basic principle for the offer of securities under the Swiss Code of Obligations (CO). The origin of this change of paradigm was a Swiss Supreme Court Ruling, dated February 10, 2011, resolving that FINMA's interpretation, pursuant to which there was no "public solicitation" as long as the offer was exclusively directed towards qualified investors, was not supported by the text and historical interpretation of the former Art. 3 CISA (BGE 137 II 284, 291 consideration 5.1 et seqq.). In the view of FINMA and of the authors of the Federal Council's supporting dispatch, this ruling triggered a legal uncertainty. For this reason, the legislator replaced the principle-based test of a "public solicitation", whose combination of numerical and qualitative criteria by taking into consideration the

circumstances of each case had allowed a flexible regulation, by the more narrow principle of the "distribution".

The new, more restrictive test of a "distribution" pursuant to Art. 3 CISA is based on one single criterion, covering any offer or marketing of collective investment schemes which is not exclusively directed to prudentially supervised financial intermediaries, such as banks, securities dealers, fund management companies and asset managers of collective investment schemes, central banks as well as supervised insurance companies, without any numerical or qualitative factor, which would allow taking into consideration the circumstances of each case. Moreover, all exemptions to the notion of a "distribution" are enumerated in an exhaustive manner in the CISA. As a result, a simple reference to a collective investment scheme, such as in a press article, even without intent to distribute, such as in the context of a conference or of an article, would constitute a distribution, if not otherwise covered by exemption provided for within the meaning of Art. 3 CISA.

More specifically, the concept of a "distribution" has also been extended to include the offer or marketing of funds to so-called non supervised qualified investors, *i.e.*, all qualified investors according to Art. 10 CISA who are not prudentially supervised, such as pension funds or corporates with a professional treasury management. By contrast, this category of investors was under the "public solicitation test" characterized as "institutional investors" and considered not to form part of the "public" in application of the qualitative criteria under the CISA's previous "public solicitation test". The notion of a "distribution" has been further defined by FINMA Circular 2013/9. As a result, so-called "independent asset managers", which are not expressly included by the CISA as qualified investors, may, subject to certain conditions, be treated as non-supervised qualified investors pursuant to Art. 10 CISA if their clients are qualified investors.

ii. Consequences of a "distribution"

The notion of distribution according to Art. 3 CISA triggers the following consequences: (1) Distributors of Swiss or foreign collective investment schemes require FINMA authorization, provided none of the specific exemption applies; (2) on the level of the product, a distribution of foreign funds to non-qualified investors requires additionally a prior FINMA approval for each fund according to Art. 120 para. 1 CISA; (3) moreover, the distribution of foreign funds triggers the obligation to appoint a Swiss representative and a paying agent, the former being the gatekeeper for compliance with Swiss regulatory provisions. With the revision of the CISA in 2012, this obligation has been extended to the distribution of foreign funds to all investors, qualified investors as well; and (4) finally, the specific conduct rules under Art. 20 et seqq. CISA apply. This includes, in particular, an enhanced information duty within the meaning of Art. 20 para. 1 let. c CISA as well as Art. 34 CISO. Compliance with these conduct

rules, also by foreign distributors, is ensured by distribution agreements and respective requirements to monitor and audit distributors.

Furthermore, the concept of a "distribution" is of essence in the context of the placement of structured products in Switzerland and serves also as an element to distinguish a Swiss collective investment scheme, subject to the supervision of FINMA, from internal collective pools of assets, which was already the case before the revision of CISA in 2012.

iii. Exemptions to the concept of a "distribution"

As an exception to the broad concept of a "distribution", the CISA describes exhaustively in Art. 3 para. 1 and 2 CISA those actions and circumstances, which do not constitute an "offer" or "marketing" within the meaning of Art. 3 para. 1 CISA in relation to Art. 3 para. 1 and 5 CISO. This applies most importantly to offers and marketing to supervised financial intermediaries and insurance companies within the meaning of Art. 10 para. 3 let. a and b CISA as well as Art. 3 para. 4 CISO. With this exemption, the legislator intended to continue allowing Swiss banks and insurance companies to offer without restrictions funds offered by foreign promoters.

With a similar intent to safeguard the traditional private banking activity based on the rules provided for under the 1996 Investment Funds Act and under CISA before its revision of 2012, the legislator has also carved out from the notion of a "distribution" the provision of information as well as the placement of collective investment schemes in the context of discretionary asset management agreements (Art. 3 para. 2 let. b-c CISA). This exception was extended to independent asset managers, provided that those independent asset managers have adhered to rules of conduct within the meaning of Art. 3 para. 2 let. c CISA and meet other additional requirements.

As provided for in many foreign jurisdictions, information in relation to collective investment schemes as well as to the placement of collective investment schemes in the context of so-called "execution only transactions" are carved out from the concept of a distribution (Art. 3 para. 2 let. a CISA und Art. 3 para. 2 let. b CISO). It has to be noted that this includes not only circumstances where there is an execution only transaction, but also circumstances of so-called "reverse solicitation" (or "reverse inquiry"), which were not considered to constitute a distribution activity. Similarly, in light of the restrictive nature of the "distribution" test, during its debates the Swiss Parliament has also introduced an exemption to a "distribution" within the meaning of Art. 3 CISA, allowing the offer of information as well as the placement of collective investment schemes within the context of written and remunerated advisory agreements.

Finally, the publication of prices, NAVs and tax information by supervised financial intermediaries are also expressly carved out as not constituting a distribution (Art.

3 para. 2 let. d CISA). There is also a carve-out for the offer of employee benefit schemes to employees within the restrictive conditions of Art. 3 para. 2 let. e CISA and Art. 3 para. 6 CISO in a consistent manner to the long-standing FINMA practice.

iv. Assessment of the concept of a "distribution"

The test of a "distribution", which is based on the sole trigger of the existence of an offer or marketing of a fund, can only be applied in practice as a result of a series of exemptions expressly provided for in the CISA. A number of those exemptions had to be introduced by the Swiss Parliament in the context of the parliamentary debates and, therefore, given the "last minute nature" of certain of these amendments, lack thorough and conceptual systematics. While the new system is now widely implemented in the Swiss market practice, this change of paradigm has raised a multitude of questions. Indeed, the test has shown to be very restrictive and not taking into account many circumstances on which distribution activities were traditionally based. It still results in a rather inflexible and restrictive system that lacks comparable concepts in other foreign jurisdictions, including in the European Union. As a final note, it is to be mentioned that it was not an element required to be implemented under the so-called "third country rules" imposed by AIFMD in view of a potential recognition of CISA as an equivalent jurisdiction and which ultimately was the trigger for the 2012 revision of the CISA.

b) The new concept of an offer of collective investment schemes

i. Legal Framework

The legislator has resolved to implement, among all categories of financial services providers and, furthermore, across all types of financial products, to the extent possible, the principle of a "level playing field". As a consequence, the specific test of a "distribution" introduced in the context of the 2012 revision of the CISA will be replaced by what the Dispatch of the Federal Council refers to the more general rule of an *offer*. The reference to a "distribution" in today's context of Art. 3 CISA will be replaced by a reference to the "offer" as defined in Art. 3 let. g and h FinSA. As a further consequence, the obligation to obtain an authorization from FINMA as a distributor of investment funds will be abolished . Furthermore, the entire system of express legal exemptions to the concept of a "distribution" under Art. 3 para. 2 CISA, as well as the detailed and exhaustive catalogue of exemptions, is replaced in its entirety by the new concept of an "offer" of collective investment schemes. An important aspect in this regard is further the definition of *financial services* according to Art. 3 let. c FinSA. Similarly, various references in the CISA and the CISO to a "distribution" shall be replaced by the one of an "offer", most importantly in Art. 120 CISA relating to the obligation for foreign funds to be approved by FINMA before an offer is made to non-qualified investors. The Federal Department of Finance (FDF) has further specified the concept of an offer in Art. 3 para. 3 Draft-FinSO.

ii. Notion of an "offer"

During the parliamentary debates, the notion of an offer has been expressly specified as one which has to be specific, meaning formulated in such a manner that it can be accepted or refused immediately by the investors. Within this line of argument, an offer has necessarily to contain all essential aspects of the future agreement between the investor and the financial services provider. By contrast, a more general communication, which still has to be specified and cannot be accepted as such, is not a relevant "offer" within the meaning of the FinSA (Votum Guillaume Barazzone AB 2017 N 1310/BO 2017 N 1310). Since the notion of a "public offer" according to Art. 3 let. h FinIA only triggers limited legal consequences in the field of the offer of collective investment schemes, it will not be further addressed below.

The concept of an offer pursuant to Art. 3 let. g FinSA is not the one of the historical principle of a "public solicitation", which was fundamental for the Investment Funds Acts of 1966 and 1995 as well as for the Collective Investment Schemes Act before its revised version of 2012. In the first instance it has to be interpreted based on the general principles of Art. 3 CO. However, the notion of an "offer" pursuant to Art. 3 let. g FinSA goes beyond the one of Art. 3 CO, as the FDF in its explanatory report expressly states that such an offer also includes a so-called invitation to formulate an offer (*Einladung zur Offertstellung/invitation à presenter une offre*), which in turn has to be accepted or refused by the financial services provider.

Whether an offer within the meaning of Art. 3 let. g and h FinSA as well as Art. 3 para. 3 and 4 Draft-FinSO exists in a specific case has to be determined based on the circumstances at hand and in particular on the structure and content of the relevant communication. The assessment as to the existence of an offer is always to be made based on whether or not a general member of the public can in good faith understand that the communication is a proposal to enter into an agreement in respect of a specific financial instrument.

The explanatory report of the FDF specifies in this context on page 20 that, if potential customers are made aware of financial instruments at advertising events and if said financial instruments can be purchased at the event itself or subsequently from any financial services provider with a simple acceptance or offer, it can be concluded that a prior offer to provide a financial service has been provided. In our view, this presupposes a causal link between the communication at the event and the conclusion of the financial contract and, moreover, that during the event, all details which are necessary are conveyed. The situation would in our view be different if, at such events, only a strategy or some of the characteristics, but not all key elements, are presented. This may however presuppose that no remuneration is paid to the organizers of the events which would be performance driven and, for example, depend on the commercial success of the event, as this may suggest that there is still a causal link between the sales

event and the conclusion of the financial contract. In such a case, however, the new rules on advertisement for financial instruments according to Art. 68 FinSA and Art. 95 Draft-FinSO are likely to apply.

Furthermore, as an offer is always based on the direct or indirect intent of the financial services provider to trigger with the investor an investment decision (*i.e.*, the reason why its content has to be so specific to contain all essential elements of the future contractual relationship with the investor), we are of the opinion that analytical presentations, or research reports, or scientific contributions, should not be in scope of the concept of an offer if they are not published with the intent to specifically sell a financial product. In this context, clear communications, for example in the form of disclaimers, as to the absence of any intent to sell a specific financial instrument, may have to be published in order to exclude that a communication can be understood as an offer.

The notion of an "offer" is neutral in terms of technology and these principles should apply *mutatis mutandis* to platforms. If those platforms contain all key elements for an investor to take an investment decision, or if their content is a so-called invitation to formulate an offer, their content may constitute an offer within the meaning of Art. 3 let. g FinSA. We assume that this condition should always be met if investors have the possibility to subscribe on-line, as this presupposes that they receive all the relevant information for their investment decisions. In this context, it should, based on the report of the FDF, not be relevant whether this subscription is made directly with the platform or with another financial intermediary, but caused as a result of the consultation of the platform (see Explanatory Report, page 20). The situation is different if the platform contains information, which is as such not sufficient for the investor to take an investment decision, in which case the new rules on advertisement for financial instruments will apply. As such, the new concept of an "offer" seems to clearly be more flexible than the one of a "distribution", therefore, the reference made by the FDF to the current more restrictive FINMA Circular 2013/9 on the distribution of collective investment schemes seems not to be in line with the intent of the legislator (see Explanatory Report, page 21).

Neither the FinIA nor the FinIO provide, by contrast to what applies in the context of a distribution pursuant to Art. 3, para. 2 CISA, for an express exemption, confirming that there is never an offer on the part of a financial intermediary in case of a specific reverse solicitation by an investor, based on the latter's own initiative, including when the specific conditions of an execution only transaction are not met. The *reverse solicitation* rules provided for in Art. 2 para. 2 Draft-FinSO only relate to a reverse solicitation in relation to financial services and, moreover, only in a cross-border context. We assume that the reverse solicitation-exemption implicitly also applies under FinSA (see also M. Andreas Josuran/Vanessa Isler, Änderungen beim Vertrieb kollektiver Kapitalanlagen unter dem FIDLEG/FINIG, GesKR 2016, page 205, 209 (hereafter Josuran/

Isler)). However we consider that such a clarification in the context of the offering of financial instruments within Switzerland, in line with the current Art. 3 para. 2 CISA, would be helpful in Art. 3 Draft-FinSO, in particular to clarify the application or not of the new offer rules.

This being said, the legislator has expressly provided for a negative catalogue which may serve as guidance and specify a number of non-exhaustive circumstances which exclude the existence of an offer within the meaning of Art. 3 let. h FinSA. These circumstances include a simple reference to financial instruments, such as a reference to their ISIN codes, or the NAVs of collective investment schemes, the provision of factual information as well as any publication linked to legally imposed communication, including corporate communications (Art. 3 para. 5 Draft-FinSO). Within this line of idea, the publication of information on collective investment schemes as required pursuant to Swiss or foreign legal obligations, including the changes of investment policies, risk profiles, cost structures, etc., should not be deemed to be an offer.

In summary, the narrow definition of an "offer", which has to be formulated in such a manner that it can be accepted or refused immediately by the investors, provides in many instances for much more flexibility than the one of a "distribution" pursuant to Art. 3 CISA. The concept of an "offer" pursuant to Art. 3 let. g FinSA can however not be analyzed without considering certain delimitations and a reference to the two new other concepts introduced by the FinSA, the concept of "advertisement" (*Werbung/publicité*) for financial instruments and, in particular, the concept of "financial services" within the meaning of Art. 3 let. c FinSA.

iii. Delimitations

(1) Offer vs. advertisement

The FinSA introduces in Art. 68 specific regulations regarding the advertisement for financial instruments. So far, the only regulations under the Swiss law on financial instruments governing marketing and advertisement are laid down in the definition of a "distribution" pursuant to the current Art. 3 CISA, *i.e.*, its definition as any marketing or offer of funds. Art. 95 Draft-FinSO further defines the concept of "advertisement" as any communication relating to financial instruments whose content aims at drawing the attention of investors to such financial instruments. Advertisement has to be specifically declared.

At this stage, there seems to be a lack of clarity as to the precise meaning of "advertisement" and, in particular, its delimitation to an "offer" and also to circumstances where there is also a "financial service". Interestingly, while nothing in the parliamentary debates or the provisions of the FinSA would confirm this, the FDF seems to define the concept of "advertisement" by reference to the current FINMA Circular 2013/9

"Distribution of collective investment schemes", which is expected to be abolished with the entry into effect of FinSA (see Explanatory Report, page 62). As a consequence, it would appear that the notion of "advertisement" will in the view of the FDF in substance be in line with the one of the current notion of a distribution pursuant to Art. 3 CISA. To the extent that the legislator wanted to abolish the current concept of a "distribution" pursuant to Art. 3 CISA, it would in our view be necessary to provide for a new and autonomous interpretation of the concept of "advertisement", but not only by reference to the narrow and rigid principle of a "distribution" pursuant to Art. 3 CISA.

Art. 95 para. 3 Draft-FinSO expressly specifies that advertisement may not be addressed to investors who are not eligible for an investment in the specific financial instrument, as this would be contrary to the provision of Art. 3 para. 2 let. b of the Swiss Federal Law on Unfair Competition. This implies in our view, based on the principle *e maiore minus*, that no advertisement can be made for a collective investment scheme to any investor who would not be eligible for an offer of such an investment, *i.e.*, mainly in case of an offer to non-qualified investors of a fund which has not been previously registered with FINMA or appointed a representative and a paying agent pursuant to Art. 120 CISA. The text of Art. 95 para. 3 Draft-FinSO should be further clarified to this effect. This restriction seems to be in line with the intent of the legislator, but is in practice only relevant with respect to advertisement made for foreign collective investment schemes. Thus it would make sense to specify this reservation in the CISO, rather than in Art. 95 para. 3 Draft-FinSO which has a more general application. This clarification is particularly important with regard to funds bought in the context of an asset management agreement.

(2) Offer vs. Financial Services

Shares or units in collective investment schemes are financial instruments pursuant to Art. 3 let. a cipher 3 FinSA. An "offer" of financial instruments and, hence, of collective investment schemes pursuant to Art. 3 let. g FinSA is, however, not *per se* a financial service within the meaning of Art. 3 let. c cipher 1 to 5 FinSA. An offer can, depending on the circumstances, be made outside the context of any financial service or alternatively be formulated in conjunction with such financial service pursuant to Art. 3 let. C cipher 1 to 5 FinSA. Unfortunately, an explicit link was not established between the two terms in the FinSA (see also Sandro Abegglen/Yannick Wettstein, Zum Anbieten kollektiver Kapitalanlagen unter dem FIDLEG – und ausgewählte Aspekte der dabei einzuhaltenden Verhaltenspflichten, SZW 2018 page 131, 133). However, the question is how extensive the new Art. 3 para. 1 Draft-FinSO ("any activity which, such as "intermediation", is specifically aimed at the acquisition or disposal of a financial instrument") should be interpreted. This being said, with the now specified Art. 3 para. 1 Draft-FinSO, the question arises, if there will be any cases in practice where an offer does not constitute also a financial service.

Further, it should be analyzed under which circumstances the marketing of collective investment schemes, whether there is an "offer" within the meaning of Art. 3 let. g FinSA or not, may be characterized as a financial service pursuant to Art. 3 let. c FinSA.

Within the context of a discretionary asset management agreement, there is in our view no offer for the transactions thereunder as each investment decision is made by the asset manager based on the discretionary powers conferred to him. There is eventually an offer by the financial services provider towards the asset manager, but the latter will, as a matter of principle, be an institutional investor, hence triggering no further rules of conduct under the FinSA. A general exemption applies with respect to the obligation to provide investors with a KID, while a specific general exemption regarding the prospectus is expected to be granted by FINMA (see Explanatory Report, page 45). Such an exemptions should in any event, by contrast to what is currently referred to by the FDF, be extended to all qualified investors, and not only professional investors.

In the context of an advisory agreement, there may be an offer for each transaction thereunder, but only where a sufficiently detailed recommendation under such advisory agreement is provided, but not where the investor has requested himself a financial instrument. Similarly, there will be a separate financial service in the context only if a specific advice is given, but not when there is a general recommendation or even a reverse solicitation by the investor. However, the consequences of a potential offer are mitigated by a series of exemptions, such as the categorization of the clients as "qualified investors", which aim at not introducing any additional burden or limitation within the context of such advisory agreements as compared to the current legal framework of Art. 3 CISA, in particular as to the obligation to register collective investment schemes with FINMA or to mandate a Swiss representative or paying agent and as to the obligation to establish and hand over a prospectus and a KID.

An offer may in practice be in many cases linked to a transfer of an order or a purchase or sale of a financial instrument, both circumstances characterized by Art. 3 lit c FinSA as a "financial service". In this case, the crucial question is the meaning which shall be given to the concept of a purchase or sale of a financial instrument pursuant to Art. 3 lit. c cipher 1 FinSA. In this respect, the report of the FDF expressly clarifies, in line with what seems to be the intent of the legislator expressed in the Dispatch of the Federal Council, that the term of a "purchase" or "sale" of financial instruments pursuant to Art. 3 let. c cipher 1 FinSA goes beyond circumstances where there is an effective purchase or sale of a financial instrument and that this concept also includes any activity in relation thereto, such as any other action which specifically aims at the purchase or sale of a financial instrument; the FDF refers in this context to any "intermediation", which also covers circumstances where no advice is given to the client, whether transaction-based or in a general form (see Art. 3 para 1 Draft-FinSO and Explanatory Report, page 18).

iv. Consequences of the new concept

The abolition of the concept of a "distribution", with its complicated system of legal exemptions, lacking any systematic or logic character, is rendered obsolete with the introduction of the new concept of an "offer" pursuant to Art. 3 let. g FinSA. The FinSA has yet to introduce another system with a series of exemptions, aiming at ensuring the implementation of the express intent of the legislator which was that no further restrictions should, as a matter of practice, be imposed in the specific context of an offer of financial instruments, and in particular of collective investment schemes, into the Swiss financial services framework.

An offer of collective investment schemes will trigger the obligation to register the funds with FINMA pursuant to Art. 120 CISA, but only where such offer is made to non-qualified investors, and as a consequence the obligation to appoint a Swiss representative and paying agent. In this respect, the current registration obligation which was historically provided for in the CISA will remain substantially unchanged, except that due to the more flexible nature of an "offer" as opposed to a "distribution" pursuant to the current Art. 3 CISA, the circumstances where registration of a foreign fund with FINMA is required may in practice be more limited. Similarly, the obligation to appoint a representative will be limited under the new system to an offer to non-qualified investors as well as to so-called opt-in qualified investors (Art. 120 CISA in conj. with Art. 5 para. 1 FinSA). An offer to *per se* qualified investors will, by contrast to the current system introduced by the 2012 revision, no longer require the appointment of a Swiss representative and paying agent, as this does not constitute a distribution anymore.

Wherever the CISA provides in its current version for express legal exemptions, pursuant to which there is no "distribution", mainly within the context of discretionary asset management agreements or long-term advisory agreements, the FinSA will define the relevant investors as "qualified investors" in order to obviate the requirement to register the fund with FINMA pursuant to Art. 120 CISA More specifically, if there is an offer within the context of an advisory agreement, there is a general exemption to appoint a Swiss representative and paying agent, even though an advisory agreement can also be entered into by private clients (see Art. 129a CISO in its revised version).

The obligation currently provided for by CISA to obtain authorization as distributor of collective investment schemes will be replaced by the obligation to register with the Client Advisors Register according to Art. 28 FinSA, but only where an offer is linked to the provision of financial services pursuant to Art. 3 let. c FinSA and, furthermore, if no exemption to the registration obligation according to Art. 31 Draft-FinSO applies.

The foregoing shows the intent of the legislator to compensate the narrower concept of an "offer" as compared to a distribution with the new concept of "financial services", triggering specific rules of conduct under the FinSA and the duty to register with the

Client Advisors Register, thereby namely replacing the authorization regime for distributors pursuant to Art. 19 and the specific rules of conduct provided for in Art. 20 of the current version of the CISA (see also Josuran/Isler, page 207). Against this background, it seems consistent that there is no room for a restrictive interpretation of the new concept of "purchase" or "sale" of financial instruments pursuant to Art. 3 let. c cipher 1 FinSA, in particular if one intends to limit its scope of application to an effective transfer of the financial instrument.

There is however in our view room for a further specification of the notion of an "intermediation" which, according to the FDF, should be covered by the term of a "purchase or sale" of financial instruments pursuant to Art. 3 let. c cipher 1 FinSA (see Explanatory Report, page 18). Such an intermediation has to specifically aim at the purchase or sale of a financial instrument by an investor. This seems in our view namely to imply that an "intermediation" as a rule directly aims at an end investor. As a result, this excludes many circumstances arising in the context of a classical third party fund distribution activity towards other supervised financial intermediaries. Should such supervised financial intermediaries be contacted to act as end investors, such as in the context of a fund-of-funds structures, there would be an intermediation, but the FinIA rules of conduct would not apply based on the exemption according to Art. 20 para. 1 FinSA. An "intermediation" in our view further presupposes that its author has directly or indirectly an economical interest therein, either because he intermediates his own funds or is directly or indirectly remunerated to this effect. The existence of a "delegation arrangement" between the author of the intermediation and a Swiss or foreign financial services provider may also be relevant, but always provided that either the "intermediary" or the Swiss or foreign financial services provider, which has appointed the intermediary, has contact with the end investors. In such cases the provisions of Art. 23 FinSA, regulating the involvement of third parties, may also be relevant. Finally, as already indicated, we are of the view that, if an intermediary organizes an advertising event regarding a financial instrument, which can be purchased subsequently from another financial service provider, a direct causal link between an offer and a subsequent purchase or sale of a fund must exist before one can conclude that there is an offer for a financial service by the intermediary within the meaning of Art. 3 let. c, cipher a FinIA, as the Explanatory report of the FDF specifies on page 20.

The definition of an "intermediation" covered by Art. 3 let. c cipher 1 FinSA may need further reflection and debate which cannot be covered in this article. That being said, we are of the view that potential issues in practice will arise as a result of a few rules of conduct or organizational requirements, mainly the transparency obligations in relation to retrocessions pursuant to Art. 26 FinIA. In particular the obligation to transfer retrocessions to a client pursuant to Art. 26 para. 1 let. b FinIA can only exist in our view where a contractual link exists between the financial services provider and an end investor providing also for a claim as a matter of civil law for the benefit of the investor,

including in case of an execution only transaction, but not if there is no contractual relationship between the author of an "intermediation" and the end investor. There is in other words, if at all, rather a need to clarify or limit some organization requirements in this context, rather than to narrow the concept of a purchase or sale under Art. 3 let. c cipher 1 FinSA, thereby creating potential loopholes in the investors' protection. Indeed, one would in this case have to conclude that there is no "financial service" which will in turn lead to the disapplication of the investors' protection under the FinSA in a number of cases where the legislator wanted to compensate the current protection under the CISA which is to be abolished. Such disapplication would also be inconsistent with international developments, in particular with regard to retail clients. In this regard an outcome based approach is important. Particularly with regard to the regulation in the EU, where besides the regulations in MiFID also product-specific provisions in AIFMD and UCITS have to be taken into account.

3) Comparison and Assessment

The FinSA and the relating amendments of the CISA introduce a new concept of investor's protection based on the notion of an "offer" which is based on different levels of legislative intervention, both in the FinSA and the CISA, by contrast to the current system based on Art. 3 CISA. The latter triggers as a consequence of one single test (1) the rules of conduct under the CISA, (2) the obligation to register a fund with FINMA pursuant to Art. 120 CISA, where the distribution is made to non-qualified investors, (3) the obligation to appoint a Swiss representative and paying agent as well as (4) the obligation to obtain authorization as distributor, provided no exemption applies.

By contrast, the FinSA introduces different levels of legislative intervention, *i.e.*, three tests, meaning consequences linked to (1) an "offer" pursuant to Art. 3 let. g FinSA, other consequences linked to (2) the existence of a financial service pursuant to Art. 3 let. a cipher 3 FinSA (mainly the rules of conduct, where applicable) and (3) obligations triggered by the existence of advertisement within the meaning of Art. 68 FinSA and Art. 95 Draft-FinSO. With the draft of the Draft-FinSO, the link between these three tests has been clarified further.

The concept of financial services is central to the question of the applicability of the FinSA, in particular, with regard to the duties of conduct and organization as well as the obligation to register as a client advisor. Art. 3 let. c FinSA defines which activities will be regarded as financial services in the future. It has already been pointed out in the Dispatch of the Federal Council that "classical" fund distribution - outside of an advisory or asset management agreement - must also qualify as a financial service (see Dispatch FinSa/FinIA, page 8922, 9010, 9050). Unfortunately, the Federal Counsel has not further specified under which of the activities mentioned in Art. 3 let. c FinSA it should qualify. This has led to discussions whether the distribution of funds will no

longer be regulated, *i.e.*, not be covered at all by the conduct rules and the obligation to register as a client advisor according to FinSA. This has now been clarified in Art. 3 para. 1 Draft-FinSO, making it clear that the acquisition or sale of a financial instrument according to Art. 3 let. c cipher 1 is to be understood in such a way that it also covers the classical fund distribution.

It is debatable whether the wording chosen in the Draft-FinSO is perfect or could be further specified. However, the outcome is, as a matter of principle, in accordance with the intention of the legislator. Also from the perspective of the fund industry, it is crucial to close potential loopholes in the new regulation, without reintroducing the obsolete concept of a "distribution" pursuant to Art. 3 CISA, mainly for the following reason: with the introduction of the new conduct rules for financial services providers at the point of sale and the corresponding registration obligation in the FinSA, the "point of sale"-specific conduct rules in Art. 20 and the distributor license in the CISA were deliberately abolished. This also only makes sense if "classical" fund distribution, which typically does not yet have the quality of transaction-based advice, qualifies as a financial service according to FinSA. This corresponds to the intention of the legislator and must also be seen in the light of the large number of rules where more flexibility has been introduced in the course of the legislative process, such as the abolition of the obligation to appoint a representative, being the gatekeeper for compliance with Swiss regulatory provisions today, for "per se" qualified investors or to contractually structure any fund distribution based on formal distribution agreements, thereby reinforcing the supervision of the distribution networks in the interest of the investors protection.

To conclude, the interaction of three different tests in our view adequately ensures the investors' protection, depending on the need of such a protection, depending on whether the investor is a private investor, a professional investor or an institutional investor. As a result, the new regulatory framework introduced by FinSA, and in particular as a result of the introduction of the new concept of an offer, favorably compares to the current regime which is based, for the purpose of the regulation of the offer and marketing of collective investment schemes, on the narrow and rigid concept of a "distribution", with its intricate set of legal rules and exemption provided for in the CISA.

The content of this article is the personal opinion of the authors. This opinion is not necessarily identical with the position of SFAMA or Lenz & Staehelin.

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