Investment Funds Practice fund circular #35 2 October 2017

EVOLVING NEW SWISS FINANCIAL MARKETS REGULATION – Selected areas of expected impact on foreign fund providers and foreign asset managers

STATUS OF THE DRAFT LEGISLATION AND NEXT STEPS:

- The Swiss National Council ("SNC") has concluded the debate of the drafts of the **Financial Services Act** (FinSA or FIDLEG) and **Financial Institutions Act** (FinIA or FINIG) (together the "Acts") on September 13, 2017. The version of the Acts finally adopted by the SNC contains surprisingly few differences – in particular also from the view of foreign financial services providers - compared to the version adopted by the Swiss State Council ("SSC") in December 2016.
- The parliamentary procedure for adjusting these differences will follow in a next session of the SSC and – if needed - the SNC. It is theoretically possible that the SSC and SNC remain in disagreement which would mean that the Acts would be cancelled. This however seems to be an unlikely scenario from what we know.
- The final version of the Acts is expected to be adopted by parliament in spring 2018. The implementing ordinances - which will in many areas define practically relevant requirements - are in the course of being drafted already and are expected to be sent out for consultation as well in spring 2018. Entry into force of the Acts is currently still expected to be in the course of 2019. The possibility of a staggered entry into force and/or additional transition periods might be considered.

THE ESSENTIALS IN 12 POINTS:

1. New general client segmentation concept with the investor categories private, professional and institutional clients;
2. Introduction of new comprehensive client segmentation, suitability and appropriateness checking, information and documentation duties varying depending on client category concerned;
3. Replacement of the concept of „distribution" of collective investment schemes by introduction of a general concept of "**offering"** of financial instruments. The term "offering" is likely to be defined more precisely in the implementing ordinance and possibly also in the practice of the regulator. However, the definition of "offering" seems to be of a narrower scope than the current definition of "distribution";
4. New qualified investor definition includes professional investors, discretionary clients and permanent advisory clients of certain prudentially supervised Swiss and foreign financial intermediaries;
5. Necessity of FINMA-approval for the "offering" of foreign funds to non-qualified investors with same requirements as current FINMA-approval for "distribution" of foreign funds to non-qualified investors;
6. New requirement of basic information sheet for "offering" of financial instruments to private clients (replacing KIID-requirement in the area of collective investment schemes). Documents according to foreign law which are equivalent to the basic information sheet can be used instead of the basic information sheet;

7. Abolition of fund distributor licensing requirement; partial replacement by a new client adviser registration requirement (registration body yet to be created). The implementing ordinance may exempt prudentially supervised foreign financial services providers from client adviser registration requirement whereby reciprocity may be required;
8. Abolition of requirement to appoint a Swiss representative and paying agent for offers of collective investment schemes to client categories that are categorised as qualified investors under the current legislation, except high net worth individuals (for whom no private investment structure with professional treasury operations has been established) that have opted to be treated as professional clients;
9. Removal of requirement that Swiss representatives are mandatory parties to distribution agreements and obliged to supervise distribution in Switzerland, and, consequently, abolition of any mandatory self-regulation in the area of offering of collective investment schemes, this would mean in particular that the self-regulatory “SFAMA provisions for distributors” and model distribution agreements become obsolete;
10. Introduction of comprehensive new rules regarding prospectuses of financial instruments to be offered to private clients and for a general prior prospectus approval requirement (by yet to be created/licenced bodies); however, prospectuses for collective investment schemes are exempt from such new approval requirement;
11. New FINMA-licensing requirement for foreign asset managers of collective investment schemes as well as foreign asset managers in general for operation of a permanent representation in Switzerland (e.g. with marketing activities relating to services of such foreign asset managers);
12. Prohibition of operation of a permanent representation in Switzerland for foreign fund management companies.

OUR VIEW:

The Acts have a long history and are the result of many compromises over time. However, should the Acts be finally adopted by parliament substantially as they are drafted now, this would considerably lighten the regulatory burden for foreign fund providers accessing the Swiss market. Due to the anticipated narrowed scope of activities covered by the definition of offering, the removal of the requirement of self-regulation in the area of offering/distribution of collective investment schemes and the abolition of the requirement to appoint a Swiss representative in the majority of cases of offering/distribution to qualified investors (e.g. in the case of offering/distribution to Swiss pension funds), Switzerland would become much more accessible for market testing and in many areas time to market would improve as well. Due to the anticipated limitation of the scope of duties of Swiss representatives the respective costs could decrease and also Swiss registrations for offering of UCITS to non-qualified investors could become even more advantageous. Summarising we think that the anticipated changes described above would make Switzerland all the more an attractive destination for fund distribution in times when markets in many other jurisdictions become more difficult to access.

For more information feel free to contact any of our investment fund specialists (www.nastra.ch).
Note: None of the information contained herein is to be regarded as legal advice.