

Update

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Proposal for an unregulated fund category for qualified investors

On June 26, 2019, the Federal Council launched a consultation on certain amendments to the Collective Investment Schemes Act (CISA), which would introduce a new unregulated fund category for qualified investors, the so-called Limited Qualified Investor Fund (L-QIF). The consultation lasts until October 17, 2019.

1. Background

The proposal aims at introducing a new category of funds for qualified investors, which is not subject to authorization, approval or supervision by the Swiss Financial Market Supervisory Authority (FINMA).

The L-QIF is intended to meet the needs of the Swiss institutional market participants, which commonly use collective investment schemes to pool their assets. The L-QIF may also suit the needs of high-net-worth individuals. It is inspired by the success and experiences of foreign investment funds, such as the Luxembourg Reserved Alternative Investment Funds (RAIFs).

2. Definitions

The proposed L-QIF is a collective investment fund which is (i) exclusively reserved for qualified investors, (ii) not subject to FINMA authorization, approval or supervision (iii) and managed directly or indirectly by a supervised fund management company.

The definition of qualified investors under CISA, whilst being broader, will essentially be aligned with the client segmentation under the new Swiss

Financial Services Act (FinSA). This means that all professional clients under FinSA will be qualified investors eligible to invest in L-QIFs. This includes financial intermediaries, insurance companies, pension funds, companies with a professional treasury, large companies, as well as high-net-worth individuals requesting to be treated as professional clients.

The L-QIF is not a new legal form as such. Rather, any of the existing open-ended (contractual fund or SICAV) and closed-ended (LPCI or SICAF) investment schemes within the meaning of CISA can be used as a basis of a L-QIF. The absence of FINMA approval and authorization will be balanced by the fact that:

- › L-QIFs in the form of contractual investment funds will need to be managed by a FINMA regulated fund management company (which may itself delegate its investment decisions to regulated asset managers of collective investment schemes).
- › L-QIFs having a corporate form (SICAVs, LPCIs, SICAFs) will have to delegate the management to a FINMA regulated fund management company (which, again, may delegate its investment decisions to regulated

asset managers of collective investment schemes). Self-managed SICAV L-QIFs will not be permitted. Further, L-QIFs organized as LPCIs, the general partner of which is a bank or an insurance company, will not be subject to the mandatory delegation to a fund management company, as the general partner is already supervised by FINMA.

The compulsory delegation of the management to a FINMA regulated fund management company as well as the obligation to appoint exclusively supervised entities for any sub-delegation of the asset management is currently being challenged by a large number of market participants as being inadequate for LPCIs or SICAFs, in particular considering the increased costs triggered by such supervised structures. Ultimately, this might prevent LPCIs or SICAFs from taking the L-QIF form.

An existing Swiss collective investment scheme currently supervised by FINMA, which qualifies as a L-QIF, will be able to request the withdrawal of its authorization provided it meets the L-QIF requirements.

3. Other features and challenges

As a rule, CISA provisions will remain applicable to L-QIFs, with the exception of the provisions governing FINMA's authorization and supervision. That said, L-QIFs will not be subject to the investment regulations provided for by CISA. The legislative proposal does not set out any requirements regarding permitted investments or risk allocation. New investment provisions will be introduced by the Federal Council and FINMA in their implementing ordinances (CISO and CISO-FINMA), which should be consistent with the goal of not imposing limitations in relation to investments, risk allocation or leveraging. In this context, L-QIFs will for example, be able to invest in any financial instruments, as well as in digital assets (such as cryptocurrencies), wine, artwork or vintage cars.

L-QIFs could further be set up as single investor funds, provided that a delegation of the investment decisions to the single investor is only permissible if the single investor is subject to FINMA supervision. In our view, a delegation of the asset management function to that single investor should, based on the particular qualification

required for such single investors, be allowed without requirement that such institutional investor be supervised by FINMA, or at least the possibility of an exemption from such supervision as currently permitted for Swiss collective investment schemes, should be maintained.

It is worth noting that L-QIFs organized as a SICAV, LPCI or SICAF will be exempt from the Anti-Money Laundering Act (AMLA) and from the related registration with a self-regulatory organization, provided that the institution responsible for the management of the L-QIF ensures compliance with AMLA obligations.

L-QIF raises several challenges, some of which are discussed in the context of the consultation process. These include (i) the possible reporting obligations to which L-QIF will be subject, (ii) the responsibility for a future L-QIF register, (iii) the requirement / involvement of the custodian bank, (iv) the confirmation of the tax status as a tax transparent collective investment scheme on the basis of the "same business, same rules" principle, as for collective investment schemes generally, (v) the treatment of real estate L-QIF under the Swiss regulation governing the acquisition of real estate by foreigners, as well as (vi) the possible specific substance requirements that FINMA may impose on fund management companies managing L-QIFs investing in innovative asset classes (e.g. crypto funds).

L-QIFs will be subject to Swiss withholding tax on the income they realize and either distribute or reinvest as any other Swiss collective investment schemes. This withholding tax does not apply for the amount of capital gains realized by the L-QIFs as well as for the income from directly held real estate.

4. Next steps

With the introduction of L-QIFs, innovative Swiss funds could be launched much faster and in a cost-effective way. This would represent an important step towards responding to the needs of the Swiss institutional market whilst improving the attractiveness of Switzerland as leading asset management center.

The L-QIF draft legislation is moving forward quickly and seems to be supported in Parliament.

Please do not hesitate to contact us in case of any questions.

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