

## FOCUS ON

## SWITZERLAND

By enacting an amended legal framework governing the managers of alternative investment funds and the distribution of their products, as well as by signing a memorandum of understanding (MoU) with the European Securities and Markets Authority (Esma), Switzerland has made every possible effort to position itself as a compliant jurisdiction. As the final technical details take shape over the next few weeks, Dr Guenther Dobrauz-Saldapenna and Dieter Wirth of PwC Zurich provide an update.



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**B**y not being a part of the EU, Switzerland is under no obligation to transpose the EU Alternative Investment Fund Managers Directive (AIFMD) into its national law. But to ensure continued and equal access of Swiss AIFMs and service providers to the hugely important EU market, the country has amended its legal framework to comply with the Directive.

After an intensive legislative process and industry involvement to ensure practicality and the avoidance of unnecessary gold-plating, the partial revision of the Swiss Collective Investment Schemes Act (CISA) was approved by the Swiss parliament on 28 September 2012 – way before many of the EU member states even issued drafts of their respective new laws. Under the revised Act, Swiss-based managers of foreign alternative investment funds (AIFs) will be required to obtain a licence from the Swiss Financial Market Supervisory Authority (Finma). Mirroring the AIFMD de minimis rules, mere registration will also be available for smaller managers.

It is important to note that in future, Swiss branches of foreign asset managers will be eligible for licensing, provided they are adequately staffed and capitalised and there is adequate supervision in the asset manager's home jurisdiction. Moreover, a co-operation agreement between Finma and the respective authority must be in force. In order to ensure access to the new AIFMD passporting regime at the earliest possible time, Switzerland will also have to enter into tax information exchange agreements (TIEAs) as well as co-operation agreements between Finma and the relevant EU supervisory authorities. Switzerland has also made progress on this front. On 3 December 2012, Esma approved the MoU for a co-operation arrangement between Finma and the EU securities regulators regarding the supervision of alternative investment funds. The agreement was negotiated on behalf of all 27 EU national

securities market authorities and in keeping with IOSCO's 'Principles on Cross-Border Supervisory Co-operation'.

The amended law will extend licensing obligations to cover all Swiss-based managers, including those of foreign AIFs. Swiss managers who have historically set up products and investment management entities in offshore domiciles and included Swiss advisory entities in their structures will have to consider initiating licensing procedures if the effective place of management is deemed to be Switzerland due to a lack of substance offshore, and if they do not wish to be in breach of the amended law.

With its revision of CISA, Switzerland has not only aligned its licensing regime with AIFMD requirements, but also brought its distribution rules closer to Markets in Financial Instruments Directive (MiFID) standards. Until now, the country offered one of the most lenient private placement regimes in Europe. This is about to change. The concept of 'public promotion' will be substituted with 'distribution' as a key criteria for regulating the offering of AIFs, and the rather broad definition of 'qualified investor' will be narrowed. High-net-worth individuals (HNWIs) who are currently defined solely by their net worth but have little or no specific investment experience will no longer automatically qualify. This essentially means that the qualified investor category will only comprise supervised financial intermediaries (such as banks, securities dealers, fund management companies, regulated asset managers and central banks) as well as supervised insurance companies. The good news is that HNWIs can opt to be treated as qualified investors.

Also, the purchase of alternative investment funds by regulated or independent asset managers for inclusion in the portfolios of clients with whom they have entered into a written discretionary asset management agreement is not considered distribution; and such clients are considered qualified investors unless they have explicitly opted out of this status. Registration will be required for

all distributors, and their products will need to have a representative and a paying agent in Switzerland.

The technical details of the law will be detailed in the related ordinance (CISO). The draft was published on 11 December 2012 and the solicitation of comment from the industry was concluded on 8 January 2013. The draft ordinance included some surprising new elements of gold-plating, such as a CHF500,000

minimum capital requirement for Swiss AIFMs of foreign AIFs. It also required that investors who qualify as HNWIs confirm in writing that either they have market knowledge and assets of at least CHF500,000, or they have a total net worth of at least CHF5m, of which real estate may account for a maximum CHF2m. Due diligence obligations in connection with AIFs have been broadened. The Swiss AIFM industry is rather optimistic that, as was the case with the draft CISA, any gold-plating that extends beyond AIFMD requirements will not become applicable. Both the revised CISA as well as the related CISO are expected to enter into force by the beginning of March 2013. Watch this space – we will keep you posted! ■

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