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# THE LAWYER



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the lawyers behind  
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**Pieter de Waal,  
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# BRIEFING SWITZERLAND



As Switzerland moves to enhance and improve its financial services laws to increase transparency and flexibility, this week's briefings look at some of the key developments in the jurisdiction. Among the topics on the table are tax information exchange agreements, changes to the laws governing banks, and an overview of the laws for financial planning.

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## FUNDS

# New landscape

Switzerland is betting on the appeal of a duly policed funds playing field



Dunja Koch (top), Mark Montanari (middle) and Benjamin Duerig are partners at Froriep Renggli

In 2005 the Swiss Revenue opened the door for fund managers to set up in Switzerland by exempting capital gains taxes on non-Swiss funds. On 2 March this year the Federal Council published a draft amendment to the Swiss Collective Investment Schemes Act (CISA) which triggered fierce reactions as the new rules, instituted to match the EU's directive on alternative investment fund managers will reshape the Swiss funds landscape.

## Asset managers

Today, save for anti-money laundering regulations, neither independent asset managers nor managers of foreign funds are regulated and hence do not need an authorisation by the Swiss Financial Market Supervisory Authority (FINMA). Under the new CISA, such asset managers will be regulated. They will need to notify FINMA within six months and apply for an authorisation within two years from the day the new CISA becomes effective. Small asset managers may benefit from certain exemptions.

Further, the new CISA provides that foreign asset managers may set up a Swiss branch although, given their capacity as managers of foreign funds, such branches will require FINMA authorisation.

## Distribution

Currently, the distribution of foreign funds by way of private placements and distribution to qualified investors does not require authorisation by FINMA.

Under the new CISA the criterion of "public advertisement" is dropped. Any distribution, whether public or private, to non-qualified investors and certain qualified investors will be caught. Some activities remain exempt, such as the purchase of funds (i) upon solicitation by the investor or (ii) in the framework of a written asset management agreement with regulated financial intermediaries or with an independent asset manager subject to Swiss anti-money laundering regulations and the code of conduct of a professional organisation, provided the agreement complies with it.

As regards qualified investors, under the new CISA high-net-worth individuals benefit from qualified investor status only if they declare in writing that they want to be deemed as such. Unlike now, a written advisory asset management agreement with a regulated intermediary will not suffice for the investor to be considered a qualified investor.

In addition, the distribution of foreign funds to qualified investors will only benefit from the FINMA authorisation exemption if:

- the fund or the managers and custodian are subject to equivalent supervision with regard to organisation,

investor rights and investment policy;

- the label "collective investment scheme" does not provide reason for confusion or deception;
- the fund employs a representative and a paying agent in Switzerland; and
- FINMA has an information-sharing agreement with the foreign supervisory authority.

Hence, the proposed amendment would lead to a significant change in the CISA's concept of distribution to qualified investors. In particular, the foreign fund would need to appoint a FINMA-authorized representative who would have to adhere to certain duties, such as checking that the fund, its manager and the custodian are (i) supervised by a recognised foreign authority, (ii) subject to regulations equivalent to the provisions of CISA and (iii) a cooperation and information-sharing agreement is in place. Swiss representatives would be liable for damages to investors, the fund and creditors.

## Consequences

Whereas the changes in the definition of "distribution activities" and the slightly amended list of qualified investors would not seriously jeopardise the distribution of foreign funds in or from Switzerland, the new regulation on distribution to qualified investors and two new additional conditions for distribution of foreign funds will do, as (i) it is not foreseeable with which (offshore) jurisdictions FINMA would enter into information sharing agreements and (ii) it is not clear who would be able and willing to provide services as a representative to foreign funds, considering the increased burden of responsibilities.

Without a Swiss representative and a cooperation and information sharing agreement, any distribution of foreign funds in or from Switzerland would be prohibited and foreign funds would have to amend the language of disclaimers in their prospectus.

## Outlook

Funds sector lobbying has triggered much discussion in the competent commission of Parliament. The commission has made proposals to tone down the new regulations, in particular by (i) replacing the requirement of "equivalent supervision" with "adequate supervision", (ii) waiving (at least partially) the requirement of information sharing agreements between FINMA and the foreign supervisory authority and (iii) refraining from increasing the duties of Swiss representatives. Finally, it is proposed that investors having a written asset management agreement with a regulated financial intermediary shall be considered as qualified investors.

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The Lawyer Briefing series will continue with the following forthcoming topics:

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Litigation - June 18th

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The Bar - June 25th

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China/Hong Kong - July 9th

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Compliance - July 30th

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Latin America - August 6th

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Insurance - September 3rd

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Baltics - September 10th

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Private Client - September 24th

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Eastern Europe - October 15th

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Insolvency - October 29th

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Benelux - November 5th

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India - November 19th

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IP - November 26th

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Ireland - December 5th

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Client Retention - December 12th

\* Please note these dates are subject to change.

To book your entry into the next relevant Briefing, please contact Ed Tillotson on 0207 970 4658 or email [ed.tillotson@centaur.co.uk](mailto:ed.tillotson@centaur.co.uk).