Kellerhals Carrard

Newsletter

New fund category L-QIF

Entry into force on 1 March 2024

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On 31 January 2024, the Swiss Federal Council adopted the amended Collective Investment Schemes Ordinance (CISO), bringing the legal basis for the Limited Qualified Investor Fund (L-QIF) into force as of 1 March 2024. The L-QIF is a new fund category introduced as part of the Collective Investment Schemes Act (CISA) revision of 17 December 2021 exclusively for qualified investors, which is exempt from the authorization and approval requirement. With the implementation of L-QIF, Switzerland aims to promote the innovative capacity of Switzerland as a fund location and strengthen its competitiveness.

1. Introduction

The possible legal forms for an L-QIF are the contractual investment fund, the investment company with variable capital (SICAV), and the limited partnership for collective investment (LP). The L-QIF is based on the Luxembourg legislation on the Reserved Alternative Investment Fund (RAIF). While certain risk diversification principles apply to the RAIF in certain circumstances, they do not apply to the L-QIF. However, the L-QIF must disclose its risk diversification to investors in the fund documents. Certain investment regulations do apply to the L-QIF. However, these are designed to be liberal in light of the lower investor protection requirements of the qualified investor and the deliberate promotion of innovation by the legislator. However, the L-QIF regulations require comprehensive transparency through the disclosure of information in the fund documents. In addition to comprehensive transparency, the CISA requires specific requirements for the management of L-QIFs as a central corrective to the lack of supervision by FINMA. The management must also be performed by institutions supervised by FINMA.

2. Admissible group of investors

In principle, all qualified investors pursuant to Art. 10 para. 3 and para. 3ter CISA may invest in L-QIFs. This notably also includes wealthy private clients pursuant to Art. 5 para. 1 FinSA who declare that they wish to be considered professional clients (opting out) as well as investors with a written investment advisory or asset management agreement pursuant to Art. 10 para. 3ter CISA, provided they have not declared that they do not wish to be considered qualified investors. However, if the L-QIF invests its assets directly in real estate, wealthy private clients are not permitted to invest in the L-QIF (Art. 118a para. 1 lit. b CISA). In addition, it should be noted that the provisions on the acquisition of real estate by persons abroad (so-called „Lex Koller“) must of course also be complied with in the case of an L-QIF.

3. Management by an institution super-vised by FINMA

The L-QIF must be managed by certain institutions supervised by FINMA. In the case of the contractual investment fund and the SICAV, the entity responsible for management must be a fund management company, while in the case of an LP it must be a fund management company or a manager of collective assets. Furthermore, an L-QIF in the legal form of an LP does not have to delegate its management if the general partner is a bank, an insurance company, a securities firm, a fund management company, or a manager of collective assets (Art. 118h CISA).

4. Reporting obligations

The launch and management of an L-QIF must be reported to the Federal Department of Finance (FDF) within 14 days by the institution responsible for its management (Art. 118f CISA). The reported L-QIFs are maintained in a publicly accessible register.

5. Conversion into an L-QIF

A change of status, i.e., a conversion from a supervised fund to an L-QIF, is possible, provided that the following strict requirements are met (Art. 126c CISO):

- The requirements for an L-QIF pursuant to Art. 118a CISA must be met;
- The fund documents must provide for the possibility of a change of status;

- Investors must not incur any costs as a result of the conversion;
- Only those investors who have expressly consented to the change of status remain in the collective investment scheme. In the case of an LP, all investors must approve the change of status in order for a conversion to be possible.

In the case of the contractual investment fund and the SICAV, the decision to change status must be published in the publication organ, with the publication containing at least the following information:

- Reference to the consequences of the change of status, in particular the release of the collective investment scheme from FINMA supervision;
- Reference to the investor's options,

» either to remain in the collective investment scheme and thus become an investor in the L-QIF, or

» to redeem the units in compliance with the redemption periods and deadlines;

- Indication that investors who do not exercise their option are treated in the same way as investors who redeem their units.

A reverse change of status, i.e., a conversion of an L-QIF into a supervised fund, is prohibited (Art. 126e CISO).

6. Duties of the institution responsible for the management of the L-QIF

The entity responsible for the management of the L-QIF, i.e., the fund management company or the manager of collective assets, is responsible for ensuring the compliance with the legal provisions applicable to the L-QIF (Art. 126h CISO). The responsibility of the competent institution also includes the ongoing compliance with the definitional characteristics of an L-QIF (Art. 5 para. 6 CISO). If an L-QIF no longer meets the defining characteristics of an L-QIF, FINMA, the custodian bank, and the audit firm must be notified immediately. If the applicable regulations for the L-QIF are otherwise not complied with, the institution responsible for the management must inform the investors and the audit firm and restore the appropriate condition within a reasonable timeframe.

Although it is not explicitly stated in the statutory provisions, the responsible institution for the SICAV and the LP is also responsible for the institution-specific requirements of the L-QIF according to the explanatory report on the amendment to the CISO (page 32). This concerns, for instance, compliance with the requirements of the appropriate business organization or the guarantee of proper business conduct of the L-QIF. The institution responsible for managing the L-QIF is required to exercise appropriate due diligence in this regard, and carefully monitor the partners selected to set-up an L-QIF and adapt its organization where necessary. In particular, the responsible institution must take the necessary measures regarding the control functions (internal control system, risk management, compliance) and define its risk appetite. This applies in particular to the willingness and requirements to launch private label funds together with promoters of third-party funds.

If the institution responsible for managing the L-QIF seriously breaches its duties in relation to the management of an L-QIF, it may be subject to supervisory measures, usually due to organizational irregularities.

The CISO also states that certain self-regulations of the Asset Management Association Switzerland (AMAS) also apply mutatis mutandis to L-QIFs, such as the AMAS Code of Conduct, the Directive for Real Estate Funds, the Valuation Directive, the Performance Directive and the Total Expense Ratio (TER) Directive.

In this context, it should also be mentioned that the duties of the custodian bank pursuant to Art. 72 CISA remain unchanged for an L-QIF compared to a FINMA-supervised fund, in particular with regard to the safekeeping of assets and its control function.

7. The final version of the CISO

Of the points that were strongly criticized in the consultation on the draft of the CISO, only a few corrections were made in the final version. The main improvements compared to the consultation draft include the following in particular:

- Removal of the inappropriate requirement of a lack of family ties in the term „collective investment scheme" in Art. 5 CISO;
- Abandonment of inappropriate regulation of the distinction between collective investment schemes and structured products;
- Liberalization of the regulation of active investment violations (publication only if investors are not compensated);
- Approval of the model approach (value-at-risk) as a risk measurement method for L-QIF;
- In the final version, the maximum redemption period for L-QIF is every five years, instead of initially 5 years from launch and thereafter every two years;
- In the case of the LP, a minimum period of five years was not specified.

Other improvements requested by the fund industry, such as a more liberal regulation of status changes or the abandonment of an exhaustive list of ancillary costs in Art. 37 CISO (at least the list was subsequently supplemented) which can be charged to the fund assets, were not taken into consideration. Regarding the non-exhaustive list of specific expenses in Art. 37 para. 2bis lit. a CISO in connection with the purchase and sale of real estate investments and thus the possibility of transferring the transfer tax (Handänderungssteuern) to the fund assets in the event of a change of the fund management company, see the new decision of the Federal Supreme Court of 7 December 2023 (9C_312/2023).

8. Conclusion

After the draft bill was adopted by the Swiss Parliament in December 2021 to amend the CISA, implementation in the CISO took more than two years due to some very critical consultations. It is gratifying that the bill can now finally enter into effect in March 2024. Although it is regrettable that the CISO has undergone only a few modifications in comparison to the consultation draft, it does not change the overall very positive assessment of the introduction of the L-QIF.

With the implementation of the L-QIF, a new fund category has been created that offers new opportunities for flexible and innovative fund products due to the liberal regulations and the elimination of the sometimes lengthy FINMA approval process. Due to the restriction of the group of investors to qualified investors and the corresponding lower need for investor protection, the L-QIF enhances the differentiated investor protection in Swiss collective investment scheme law. This represents a further advancement of tailored investor protection without compromising the protection of private clients in need of protection.

Following the introduction of the L-QIF, practice over the next few years will show in which areas fund providers will make use of the new product opportunities and the short time to market and where the risk management of the responsible institutions and the supervisory practice of FINMA will set limits to the newly created opportunities. However, numerous changes of status from supervised funds to L-QIF are not to be expected due to the strict requirements.

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