

Gibraltar equipped to assist as Swiss fund laws are tightened

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report on behalf of the
Gibraltar Funds and
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(GFIA)

Gibraltar's business ties with Switzerland were celebrated last year when the Gibraltar Finance Centre invited guests to join members of Gibraltar's commercial and finance community at special "Gibraltar Day" conferences in Zurich and Geneva. The guest speaker at both events was the then Chief Minister of Gibraltar, the Hon. Peter Caruana QC, who, during his speeches, emphasised the benefits and solutions that Gibraltar can offer Swiss businesses. One Gibraltar industry which has seen substantial utilisation by the Swiss in recent years is Gibraltar's booming funds sector; Gibraltar's emergence as a funds domicile jurisdiction began in 2005 when it unveiled its Experienced Investor Fund (EIF) product. The EIF has since proved a popular vehicle amongst Swiss managers for its robustness and flexibility. This year, Gibraltar's EIF regime was updated to allow for foreign administration in certain circumstances and expansion of the definition of "experienced investors" to include investors who invest a minimum of EUR 50,000 provided they are professionally advised.

In February 2012, members of the Gibraltar Funds and Investments Association (GFIA) attended the Fonds 2012 exhibition at Kongresshaus, Zurich for the second year in succession. The main topic amongst attendees was the Swiss response to international pressure to amend its Collective Investment Schemes Act (CISA) in light of the evolving global legislative framework governing funds and fund management. The consultation period for the draft CISA (D-CISA) took



place between July 2011 and October 2011 and is currently with the Swiss Parliament for review. Implementation is planned for early 2013.

Regulation in Switzerland

Switzerland, under its CISA, currently operates a "light touch" regulatory system for Swiss managers managing non-Swiss domiciled funds. Only managers of Swiss collective investment schemes are currently subject to mandatory regulation by the Swiss Financial Market Supervisory Authority (FINMA). However, Swiss managers of foreign collective investment schemes may, under certain conditions, submit to voluntary supervision by self-regulatory organizations (SRO) which are in turn subject to regulation by FINMA. The main role of a SRO is to draft regulations governing the obligations under the Swiss anti-money laundering act and to ensure that institutions registered with them comply with these obligations.

However, changes in how fund managers are regulated globally are causing Switzerland to restructure its current regime and embrace new rules with regards the management, safekeeping and distribution of collective investment schemes. The aim of the D-CISA is to

bring the Swiss fund management arena in line with new international regulatory standards. At the forefront of changes to global regulation of fund management is the introduction the Alternative Investment Managers Directive (AIFMD) in Europe. AIFMD, which came into force on 21st July 2011 and is due to be implemented by EU member states by July 2013, provides that managers of alternative investment funds (AIFs) will be subject to mandatory regulation, subject to certain exceptions (such as those relating to the value of assets under management). After September 2015 under AIFMD, the management of AIFs may only be delegated to alternative investment fund managers (AIFMs) domiciled in third-party countries, such as Switzerland, if these AIFMs are subject to regulation equivalent to that under AIFMD. The regulatory authority of the third-party country responsible for the AIFM must also cooperate with the regulatory authority monitoring the AIF. Under the current provisions of the CISA, Swiss fund managers would most likely not meet these requirements. If the law in Switzerland is not amended, Swiss fund managers may not be able to manage certain collective investment schemes domiciled in Europe.

Proposed Changes under D-CISA

The D-CISA proposes that all Swiss fund managers, regardless of the domicile of the funds they manage, be subject to licencing and regulation by FINMA. The D-CISA did not initially offer any opt-out or exclusion provisions for smaller managers, even though AIFMD allows exemptions for fund managers managing less than EUR 500m (for closed ended funds with no leverage) or EUR 100m (for open ended funds or those which use leverage). However, due to some resistance on this point by the Swiss fund industry, the D-CISA was amended to allow for exemptions in certain circumstances, amongst them a partial exemption of smaller fund managers (the definition of

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which is drawn from AIFMD) of collective investment schemes at the discretion of the Federal Council.

Other changes under the D-CISA

Amongst other matters, the D-CISA also introduces new requirements relating to safekeeping for Swiss custodian banks and also relating to the distribution of funds within or from Switzerland. It is understood that all distributors of funds in Switzerland will need to be authorised, which includes distributors of funds to “qualified investors”.

How can Gibraltar help?

For financial services purposes, Gibraltar is fully within the European Union. We envisage two ways in which Gibraltar can assist Swiss fund managers:

Firstly, larger Swiss fund managers, who will have to comply with the D-CISA and be regulated by FINMA, will have significant regulatory constraints at least equivalent to those which are currently imposed by Markets in Financial

Instruments Directive (MiFID) or will be imposed under AIFMD. However, a MiFID license (or its mutually exclusive cousin, an AIFM license) will be passportable (on a regulator-to-regulator notification basis) across EU member states unlike the Swiss equivalent. A Gibraltar licensee will automatically be able to provide cross border services to AIFs (if an AIFM) or as currently under MiFID, by the simple checking of a box. There are a number of services providers already in Gibraltar, who are accustomed to providing both the technical services and personnel in Gibraltar for Swiss based managers to establish a MiFID licensed manager in Gibraltar. Gibraltar is particularly attractive because of the very low Gibraltar corporate tax rate (10% of accounting profit, subject to all the usual deductions) for business that are physically based in Gibraltar.

Secondly, Gibraltar will be interesting to Swiss fund managers with assets under management at the smaller end of the scale, that are exempt from the new licencing rules under D-CISA but who also cannot comply with AIFMD. The

exemption rules in AIFMD should allow them to manage European funds (whether as the AIFM or otherwise) provided the funds they manage have less than EUR 100M (or EUR 500M, as the case may be) under management. In the two largest alternative funds jurisdictions, Luxembourg and Ireland, even prior to the implementation of AIFMD, investment managers based outside those countries are coming under increasing scrutiny by the Luxembourg and Irish regulators where it is proposed they manage the Luxembourg or Irish EIF equivalent. The Gibraltar EIF regime simply requires the investment manager to be licensed in the place where it is based. In addition, at present there is no requirement to have a Gibraltar custodian bank, whereas the Luxembourg and Irish equivalents require a local custodian. We anticipate that these rules are unlikely to be altered in Gibraltar by the introduction of AIFMD, where the EIF or its manager are not required to comply with AIFMD, because the value of assets under management are low enough to fall within the exemption.

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