



## New Fund Marketing Rules in Switzerland

January 2015

### Summary

Switzerland is not a European Union (EU) country and is not subject to the Alternative Investment Fund Managers Directive,<sup>1</sup> which regulates the management and marketing of alternative investment funds in EU countries. However, in parallel with the EU implementation of the AIFM Directive, Switzerland amended its own fund marketing rules, which were effective as of March 1, 2013. The new Swiss rules include a two-year transitional period for non-Swiss managers that had already been marketing in Switzerland before March 1, 2013.

Non-Swiss managers who wish to continue marketing their funds in Switzerland from March 1, 2015 must assess their target market in Switzerland, since different rules will apply to marketing to different classes of investors in Switzerland. The new Swiss rules require that new service providers must be appointed by funds that are to be marketed to the most usually targeted Swiss investors (including Swiss pension funds, family offices, family trusts and other high-net-worth individuals) and such appointments *must* be made before any marketing can take place on or after March 1, 2015.

### Marketing of Non-Swiss Funds in Switzerland

The marketing of non-Swiss funds to Swiss investors is not governed by the AIFM Directive as this only applies to EU countries. In Switzerland, the relevant legislation is the Swiss Collective Investment Schemes Act (CISA)<sup>2</sup> and the Swiss Collective Investment Schemes Ordinance (CISO)<sup>3</sup>. There are essentially two sets of rules—one for the “distribution” of funds to non-qualified investors, and the other for “distribution” to persons classified as qualified investors.

“Distribution” under the CISA/ CISO means any “offering” or “advertising” of funds, including “any type of activity whose object is the purchase” of shares or other interests in a fund. All forms of offering or advertising are in scope—whether in written format (offering memoranda, subscription documents, presentations, emails, websites, brochures, factsheets, etc.) or orally (in telephone calls, at conferences or presentations etc.). The new CISA/CISO requirements apply to any types of funds—whether an alternative investment fund (such as a hedge fund or private equity fund) or to a Undertakings for the Collective Investment of Transferable Securities (UCITS) fund.

Different rules apply in Switzerland depending on the classification of the investors to whom the fund interests are to be distributed or marketed:

“Non-qualified investors”: Non-qualified investors under CISA/CISO essentially means retail investors. Marketing to such persons requires that the relevant fund is registered with the Swiss

<sup>1</sup> Click [here](#) for or more information on how the EU’s Alternative Investment Fund Managers Directive (AIFM Directive) affects US private fund managers and their EU marketing activities.

<sup>2</sup> <http://www.admin.ch/opc/en/classified-compilation/20052154/index.html>

<sup>3</sup> <http://www.admin.ch/opc/en/classified-compilation/20062920/index.html>



regulator (Financial Market Supervisory Authority (FINMA)). This process is time-consuming (taking several months) and relatively costly as the documents required by FINMA must be translated before submission and there must be paid registration fees, as well as ensuring that the fund has appointed a Swiss-licensed representative and paying agent (who will supervise the marketing of the fund to Swiss retail investors). It should be noted that FINMA registration for distribution to retail investors is only open to UCITS funds and is not possible to register hedge or private equity funds.

“Qualified investors”: Distribution or marketing of fund interests to persons classified as qualified investors does not require any registration of the fund with FINMA. However, the definition of qualified investors breaks down into two sub-categories, each of which must be treated differently:

*“Regulated qualified investors”* include:

- a bank authorised and supervised by FINMA under the Swiss Federal Act on Banks and Savings Banks;
- the Swiss central bank;
- a securities dealer authorised and supervised by FINMA under the Swiss Federal Act on Stock Exchanges and Securities Trading;
- a fund manager or an asset manager of collective investment schemes authorised and supervised by FINMA under CISA; and
- an insurance company authorised and supervised by FINMA under the Swiss Federal Act on the Supervision of Insurance Companies.

*“Unregulated qualified investors”* include:

- a public institution (Canton, municipality, other state-owned institution) managing its treasury on a professional basis;
- a pension fund organised under the Swiss Federal Act on Professional Contingency managing its treasury on a professional basis;
- a commercial or industrial enterprise managing its treasury on a professional basis; and
- a high-net-worth individual<sup>4</sup> who meets certain conditions, requiring a written statement by the high-net-worth individual that he wishes to be treated as a qualified investor and that he or she has either:
  - at least CHF 5 million of assets; or
  - at least CHF 500,000 of assets and has sufficient knowledge of the risks of the investments from education and professional experience or based on comparable

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<sup>4</sup> The verification of a high-net-worth individual's status must be documented separately. Note that there are certain limits on the type and amount of assets that are eligible to be counted and that an individual who does not opt in will be treated as a non-qualified investor.



experience in the financial sector (comparable experience here means that the individual has executed an average of 10 transactions of significant size in each quarter in the relevant market over the previous four quarters).

There are no specific requirements when marketing to/distributing exclusively to regulated qualified investors. However, certain new CISA/CISO requirements apply where a fund is to be distributed to unregulated qualified investors. As is explained in the remainder of this alert, such new requirements include, *inter alia*, the appointment by the fund of (a) a Swiss-licensed representative and (b) a Swiss bank as paying agent, as well as specific disclosures that have to be given to Swiss investors and the entry into a Swiss-compliant distribution agreement.

Any managers who wish to stay outside of the new CISA/CISO requirements would have to restrict their promotional activity only to regulated qualified investors—meaning that no marketing/distribution to Swiss pension funds, family offices, family trusts and other high-net-worth individuals would be permitted—unless genuinely unsolicited (see below).

## Exemptions From “Distribution”

CISA/CISO contains a number of examples of conduct and behaviour which are deemed not to be distribution and so don't trigger the new requirements. The two principal exemptions that non-Swiss managers will find of most interest relate to reverse inquiry, and discretionary management clients.

*Reverse Inquiry:* If the provision of information and the subscription of a fund's shares is conducted “at the instigation of or at the own initiative of investors”, then the CISA/CISO would define that distribution of the fund shares as NOT having occurred. Such reverse inquiry exemption requires that the request or purchase has to be made in respect of a specific fund and “without prior action or contact” from the manager, distributor or other representative of the fund. This exemption is framed very narrowly and the Swiss investor must ask for marketing materials relating to one or more specified funds, referenced by name. Consequently, many managers may find it difficult to rely on this exemption.

*Discretionary Management Clients:* Providing information and the subscription of a fund's shares based on a written discretionary management agreement with a Swiss-regulated financial intermediary or an independent asset manager will also NOT be considered to be distribution. If a Swiss bank introduces a fund to its discretionary management clients who then invest in the fund, directly or indirectly, this would not be considered to be distribution by the fund's manager, provided that the manager has not been in contact with or sent any marketing materials, etc. to the investors. However, if a manager has direct contact with and/or sends fund marketing materials to Swiss investors, then this would likely be considered to be distribution—and must not occur unless the fund has appointed a Swiss representative and paying agent.

## Distribution to Unregulated Qualified Investors

If you intend to distribute/market to unregulated qualified investors (e.g., pension funds, corporates, high net worth individuals, family offices, etc.) in Switzerland, you must ensure that the requirements below are satisfied.



*Swiss Representative Appointment:* A FINMA-licensed Swiss representative must be appointed by the fund.<sup>5</sup> The Swiss representative's role is to represent the fund and act as a Switzerland-based contact for Swiss investors and for FINMA.<sup>6</sup> A distribution agreement will need to be entered into between the Swiss representative and, typically, the manager acting as distributor for the fund. In addition, the Swiss representative is required to monitor the Swiss distribution activities of the manager and to make sure that the fund is only being marketed to qualified investors. As a part of its role, the Swiss representative will have to review all relevant fund documents/marketing materials and ensure that they contain required disclosures. Swiss representatives will request on an annual basis that the relevant fund's manager provides a written confirmation regarding its compliance with the guidelines on distribution and the specific disclosure requirements.<sup>7</sup>

*Swiss Paying Agent Appointment:* Each fund being marketed to Swiss unregulated qualified investors must also appoint a Swiss bank as paying agent—so that the Swiss bank can receive subscription monies from Swiss investors and/or pay redemption proceeds to Swiss investors.<sup>8</sup> It should be noted that Swiss investors have the right under the CISA/CISO to pay their subscription monies via the Swiss paying agent or directly (via the fund's administrator etc.), so there will likely be instances where paying agents are appointed but who, in practice, are never used for the receipt or remittance of subscription monies or redemption proceeds.

*Disclosure Requirements:* The marketing materials for the fund, including any offering memorandum, must comply with Swiss requirements, including the incorporation of an updated Swiss selling legend.

## Timing

Managers who expect to be distributing funds to unregulated qualified investors in Switzerland on or after March 1, 2015, must satisfy the CISA/CISO requirements by that date. Such managers should therefore start considering which Swiss representative and paying agent should be appointed as a matter of urgency, if they have not already commenced this process. Marketing to Swiss unregulated qualified investors without putting the necessary service providers in place is a criminal offence under Swiss law and could result in FINMA penalising (fining) the applicable manager. More significantly though, as is the case under the AIFM Directive within the EU, Swiss investors could claim a right of rescission under Swiss law if they can show that they were improperly solicited and their investment in the fund has declined in value—i.e., if they invest in the fund as a result of improper marketing and the fund subsequently loses money, they could obtain a court order against the manager requiring that they be made whole again, which could be a very costly result of failing to appoint a Swiss representative and paying agent.

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<sup>5</sup> Typical Swiss representative fees currently appear to be between CHF 10,000 to 15,000 per annum per fund.

<sup>6</sup> A list of the licensed Swiss representatives is available on [FINMA's website](#). The (Swiss Funds and Asset Management Association has issued a standard-form representative agreement that Swiss representatives will likely wish to use. (This is drafted to be between the representative and the fund, though there is no issue if the manager is also a party to the agreement.)

<sup>7</sup> While managers will need to give an annual written compliance confirmation to the Swiss representative, the CISA/CISO do NOT impose any regulatory reporting or remuneration disclosure requirements on managers (unlike the AIFM Directive rules in the EU, which do require that a periodic risk report (Annex IV) be filed).

<sup>8</sup> Typical paying agent fees currently appear to be between CHF 2,000 to 4,000 per annum per fund.



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