

Institutional Fund Distribution in Switzerland – Sweeping Changes Right Ahead

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Introduction

Switzerland has always been an attractive and relatively easily accessible market for the distribution of foreign funds. As at end-November 2014, the total volume of funds registered for sale to retail investors (including institutional share classes) amounted to more than CHF 850 billion. This is not the total market picture, however, as according to the Swiss National Bank, at the end of 2014 another approximately CHF 800 billion have been privately placed into securities accounts of Swiss and foreign private HNWI's and institutional clients held with banks in Switzerland. This is not only due to Switzerland's importance as a global Centre for Wealth Management, but also due to its well-developed system of insurance companies and pension funds, amounting to total assets of approximately CHF 1.2 trillion. Especially when targeting Swiss pension funds and other so-called 'Qualified Investors', foreign asset managers will very soon have to comply with new rules.

On March 1 2013, the amended Collective Investment Scheme Act (CISA) came into force in Switzerland. This is the Swiss federal law that governs the entire value chain of the fund industry and their managers in Switzerland. It is accompanied by delegated legislation and by self-regulation adopted by the Swiss Funds & Asset Management Association (SFAMA). Moreover, FINMA has issued an amended version of its Circular on the Distribution of CIS.

The amended CISA was triggered by the implementation of the AIFMD in the EU, its main objectives being to achieve 'equivalence' of Swiss legislation with the new AIFMD-Third-Country-Rules (Switzerland is, as you may know, a 'Third Country' for the purposes of the AIFMD). CISA is the sole Swiss legislation equivalent to the UCITS Directive, AIFMD and (where applicable) MiFID.

With the end of the grandfathering period on February 28 2015, the amended rules on distribution by foreign-based asset managers will become fully effective. There are three changes I would like to emphasise here:

1. The statutory definition of what is deemed "distribution of foreign collective investment schemes" has been enlarged

- Considered as distribution is now "every offering and advertising for collective investment schemes with the intent of shares being subscribed by the targeted investor(s)"
- All different forms of marketing/distribution in their broadest sense (including fact sheets, recommendation lists, road shows, the internet etc.) are deemed "distribution" by the new regulation.

2. The Private Placement Regime exemption remains, but has been narrowed to 'super-qualified investors'

The following financial institutions are deemed to be 'super-qualified investors':

- banks
- securities dealers
- fund management companies
- asset managers of collective investment schemes
- central banks
- insurance companies

- including financial institutions marketing funds to their clients, having concluded a written asset management or long-term advisory agreement

Any offering and marketing of funds to these institutions including specific categories of their clients shall be considered a 'private placement' and is not regulated by CISA.

Please note that the so-called 'Independent Asset Managers' (IAM), i.e. over 2,000 small and medium firms that are not FINMA-authorized and not subject to prudential supervision by FINMA, although under an obligation to entrust the custody of their client's assets to a Swiss bank, are NOT deemed to be qualified investors in their own right. However, subject to certain provisos, selling funds in favour of their discretionary managed and long-term advisory clients also will benefit from the 'private placement exemption' (see under 4 below).

There are some further exemptions, especially for 'reverse solicitation'.

Caveat: in spite of this 'private placement safe harbour', some Swiss banks holding the assets of investors may require that the funds which they hold in custody for their clients name a Swiss representative and a Swiss paying agent as described below 'on a voluntary basis'.

3. Distribution to a newly-defined category of 'qualified Investors'

In the aftermath of the financial crisis, it has become widely accepted that even Institutional Investors need a (reduced) degree of investor protection.

Therefore, CISA has introduced a new category of 'qualified investors' consisting of:

- public entities, pension funds and companies with a professional treasury
- high net worth individuals who have opted-in in writing to be considered as qualified investors and who are either
 - financial sector professionals with a net worth of at least CHF 500,000, or
 - affluent persons with a net worth of at least CHF 5 million.

Any offering and marketing of foreign funds to them will from now on be deemed 'distribution' and triggers the appointment of both a representative and a paying agent.

Moreover, the persons active in distribution will have to comply with the newly-introduced duty to keep minutes when recommending the subscription of funds 'to a specific person' and to inform the (qualified and retail) investor about the different fees and cost incurred, including inducements of all kinds (if any).

4. Conclusion

Distribution of foreign funds to Swiss qualified investors now requires the nomination of a Swiss representative and paying agent on behalf of the foreign-domiciled fund, unless

- (i) the funds are offered and marketed exclusively to FINMA-regulated financial intermediaries and insurance companies, or
- (ii) the offering and marketing is made exclusively at the investor's initiative (reverse solicitation), or
- (iii) the funds are offered and marketed in the context of a written advisory agreement with a FINMA-regulated financial intermediary or an IAM, or
- (iv) the funds are acquired on behalf of a client on the basis of a written discretionary asset management agreement with a FINMA-regulated financial intermediary or an IAM.

Contrary to Swiss retail fund business, however, there is no product approval by FINMA involved and there are no restrictions as to the fund domiciles and the regulation (if any) of the foreign funds involved.

Therefore, the representative - which itself must be a FINMA-authorized and regulated financial institution, has no legal reporting and/or publication obligations toward the regulator and the qualified investors involved. Nonetheless, the foreign asset manager will have to inform the Swiss representative about these amendments and the latter will keep up to date versions available to qualified investors upon request.

Generally speaking, the Swiss representative will act as a Swiss compliance function for foreign asset managers and will advise them on all aspects of distribution on the Swiss institutional fund market, without, however, taking part in the specific distribution and marketing activities of their clients.

Dr. Matthäus Den Otter, Non-Executive/Independent Director, Carnegie Fund Services S.A, has almost 30 years of experience in the Swiss Fund & Asset Management Industry as a Regulator, Fund Company Executive and –until his early retirement 2013 – CEO of the Swiss Funds Association. He now holds several mandates as a Consultant and an Independent Director.

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