Switzerland’s New Regime for the Distribution of Non-Swiss Funds to Swiss Investors

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A new regime governing the distribution of non-Swiss funds to Swiss investors will come into full force on March 1, 2015, when the current transitional period expires.

The new regime will segment Swiss investors into three categories:

1) unregulated qualified investors (pension plans, corporations, family offices, family trusts and high-net-worth individuals);

2) regulated qualified investors (a more restricted list of Swiss-regulated financial entities, such as banks, securities dealers, fund managers and insurance companies); and

3) non-qualified investors (effectively retail).

This Special Report focuses on investors in categories 1) and 2).

Investment managers who expect to be distributing their funds to unregulated qualified investors in Switzerland on or after March 1, 2015, must comply with the new requirements by that date. These include, amongst other things, the fund’s investment manager to enter into a distribution agreement with the appointed Swiss representative and a Swiss bank as a paying agent.

Complying with the new regime will not be a particularly onerous exercise.

How Does Swiss Law Regulate the Marketing of Non-Swiss Funds in Switzerland?

The marketing and sale of non-Swiss funds to Swiss investors is governed by the Swiss Collective Investment Schemes Act (CISA) and the Swiss Collective Investment Schemes Ordinance (CISO). Broadly speaking, there are two regimes— one governing the distribution of funds to non-qualified investors, and the other governing distributions to qualified investors.

Distribution to non-qualified investors (effectively retail) requires the fund to be registered with the Swiss Financial Market Supervisory Authority (FINMA), the Swiss regulator, and is an onerous process requiring translation and submission of various documents to FINMA for approval, the payment of initial and annual registration fees and the appointment of a Swiss licensed representative and paying agent who will be responsible for the fund’s marketing in Switzerland. FINMA also imposes strict eligibility criteria, including a requirement for regulatory supervision of the fund which is comparable to that of the fund’s home regulator in its home jurisdiction.
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Publication of Prices, Net Asset Values and Tax Data

The publication by Swiss (and appropriately supervised foreign) regulated financial intermediaries of prices, net asset values and tax data is deemed not to be distribution, provided that such publication does not contain contact information.

Who Are 'Regulated Qualified Investors'? Regulated qualified investors are Swiss regulated financial intermediaries and institutions. These are:

- banks authorised and supervised by FINMA under the Swiss Federal Act on Banks and Savings Banks;
- insurance companies authorised and supervised by FINMA under the Swiss Federal Act on the Supervision of Insurance Companies;
- investment managers who manage collective investment schemes authorised and supervised by FINMA under CISA, and
- any other financial intermediary or institution authorised and supervised by FINMA under the Swiss Federal Act on the Supervision of Financial Intermediaries.

Investment managers who intend to avoid the new requirements should consider whether they are comfortable contacting such prospective investors directly. The Swiss Financial Market Supervisory Authority (FINMA) has stated that direct contact with regulated qualified investors may be permissible, but only if it is made in accordance with Article 6 of CISO (positive opt-in). Note, for example, that this would mean that direct promotion to, and contact with, Swiss pension funds, family offices, family trusts and other high-net-worth individuals would not be possible, unless genuinely unsolicited in accordance with the strict tests noted under 'Reverse Inquiry' above.

Who Are 'Unregulated Qualified Investors'? Unregulated qualified investors are:

- public institutions (Canton, municipality, other state-owned institutions) managing their treasury on a professional basis;
- pension funds organised under the Swiss Federal Act on Professional Contingency managing their treasury on a professional basis;
- commercial or industrial enterprises managing their treasury on a professional basis; and
- high-net-worth individuals who meet the conditions set out in Article 6 of CISO, which are a written statement that he or she wishes to be deemed a qualified investor (opting in) and that he or she has either:
  1) at least 5 million Swiss francs (U.S.$5,030,890) of assets, or
  2) at least 500,000 Swiss francs (U.S.$503,089) of assets and has sufficient knowledge of the risks of the investments from education and professional experience or based on comparable 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).

The verification of a high-net-worth individual’s status must be documented unsolicited. Such documentation may be in the form of a letter from an individual who does not wish to be treated as a non-qualified investor, and who is prepared in accordance with an applicable reverse inquiry agreement to treat the contact as a reverse inquiry. If the individual rejects the inquiry, no further contact should be made. If the individual accepts the inquiry, a reverse inquiry agreement must be signed by the individual, which formally states that the individual is a qualified investor.

Breach of the new requirements is a criminal offence under Swiss law, but would not result in the contract between the fund and the investor being regarded as unenforceable.

If You Distribute Only to 'Regulated Qualified Investors', What Do You Need to Do? If your fund will be distributed only to 'regulated qualified investors' (e.g., regulated banks, insurers and wealth/asset managers — see 'Who Are 'Regulated Qualified Investors'?' above), it will not be required to appoint a Swiss representative and paying agent under the new law, and the investment manager will not be required to enter into a Swiss-compliant distribution agreement.

However, the action points here are likely to be:

Diligence in Advance In some cases (particularly where it is not clear who the ultimate investor is), you may need to do some diligence in advance to confirm that the relevant prospective investor is, in fact, a regulated qualified investor.

Representations as to an Investor's Swiss Status A prospective investor’s Swiss status could be included in the initial subscription document as a separate certification to confirm that he or she is a ‘regulated qualified investor’. If You Distribute Only to 'Regulated Qualified Investors', What Do You Need to Do? If your fund will be distributed only to 'regulated qualified investors' (e.g., regulated banks, insurers and wealth/asset managers — see 'Who Are 'Regulated Qualified Investors'?' above), it will not be required to appoint a Swiss representative and paying agent under the new law, and the investment manager will not be required to enter into a Swiss-compliant distribution agreement.

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Swiss Selling Legends

The wording of any fund selling legend currently used in the offering memorandum, marketing materials, and other offerings to Swiss investors should be checked and amended appropriately, given that your fund should be advertised only to “regulated qualified investors”.

If You Distribute to “Unregulated Qualified Investors”, What Do You Need to Do?

If your fund will be distributed to “unregulated qualified investors”, e.g., pension funds, mutual fund corporations, high-net-worth individuals, family offices, etc., you may need to provide the following to confirm your compliance with the Swiss regulator’s Circular 2013/9 on the Distribution of Collective Investment Schemes in Switzerland and for Swiss purposes and, if so, make any appropriate changes. The agreements required to be entered into by the fund consist of a Swiss representative agreement, a Swiss paying agent agreement, a Swiss selling legend, and a Swiss distribution agreement, each of which will impact the content of the offering memorandum, marketing materials.

Swiss Representative Agreement

A Swiss representative agreement will need to be entered into by the fund and a licensed Swiss representative. The fund’s representative will be the person responsible for ensuring that the fund is advertised only to “regulated qualified investors”. The Swiss representative will be obliged to comply with two sets of guidelines which will include ensuring that the relevant manager as well as the investment manager is complying with the guidelines on distribution and the specific disclosure requirements.

Swiss Paying Agent

The fund will also need to enter into a separate agreement with a Swiss bank under which it will agree to receive subscription proceeds from Swiss investors, to pay redemption proceeds to a Swiss investor, and to receive subscription monies from a Swiss investor or to pay redemption proceeds to a Swiss investor, in each case if required. The fund will also need to enter into a separate agreement with a Swiss bank under which it will agree to receive subscription proceeds, to pay redemption proceeds, and to receive subscription monies from a Swiss investor so requests. In practice, it is expected to get a Swiss representative and paying agent on board.

Swiss Selling Legend

The wording of the Swiss selling legend currently used in the offering memorandum, marketing materials, and other offerings to Swiss investors should be checked and amended in light of the new regime.

Swiss Distribution Agreement

A distribution agreement will need to be entered into between the fund and a licensed Swiss representative. The Swiss representative will be a point of contact both for Swiss investors and for Swiss purposes. The agreements required to be entered into by the fund with a licensed Swiss representative (SWMA) will represent an agreement which Swiss representatives will need to see or have regard to.

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Duty to Monitor and Annual Compliance

The Swiss regulator’s Circular 2013/9 on the Distribution of Collective Investment Schemes in Switzerland and for Swiss purposes requires the Swiss selling legend to be amended in light of the new regime. The Swiss selling legend currently used in the offering memorandum, marketing materials, and other offerings to Swiss investors should be checked and amended appropriately, given that your fund should be advertised only to “regulated qualified investors”.

How Onerous Is It to Comply?

Compliance with the new regime is not a particularly onerous exercise. The agreements required to be entered into by the fund will include a Swiss representative agreement, a Swiss paying agent agreement, a Swiss selling legend, and a Swiss distribution agreement, each of which will impact the content of the offering memorandum, marketing materials.

How to Proceed

It will take some time to get a Swiss representative and paying agent on board. The Swiss regulator’s Circular 2013/9 on the Distribution of Collective Investment Schemes in Switzerland and for Swiss purposes requires the Swiss selling legend to be amended in light of the new regime. The agreements required to be entered into by the fund will include a Swiss representative agreement, a Swiss paying agent agreement, a Swiss selling legend, and a Swiss distribution agreement, each of which will impact the content of the offering memorandum, marketing materials.

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Investment managers should not be rushed into agreeing to terms and conditions until they have a suitable licensed representative and paying agent. Investment managers should note that they will be required to give an annual written compliance confirmation to the Swiss representative, and will need to focus carefully on the duty of care and liability provisions in the agreements. There are, however, no specific regulatory requirements to be complied with. For example, there is no requirement of Annex IV reporting or remuneration disclosure under the EU Alternative Investment Fund Managers Directive (AIFMD) regime.

Expect typical Swiss representative fees in the range of 10,000 Swiss francs to 15,000 Swiss francs (US$10,062 to US$15,093) per annum, and typical paying agent fees of 2,000 Swiss francs to 4,000 Swiss francs (US$2,012 to US$4,025) per annum.

What Are the Penalties and Remedies for Non-Compliance?

Breach of the new requirements is a criminal offence under Swiss law, but would not result in the contract between the fund and the investor being regarded as unenforceable. A Swiss investor could, however, bring a damages claim under Swiss law if he or she is able to show that he or she has been improperly solicited and his or her fund investment has declined in value.

When Does the New Law Apply?

A transitional period applies to the distribution of funds until March 1, 2015. Investment managers who expect to be distributing funds to unregulated qualified investors on or after March 1, 2015, must satisfy the CISA/CISO requirements by that time.

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