

Non-Swiss Fund Managers – new Swiss fund marketing regime applies from 1 March 2015

The two-year transitional period applicable to the amended Swiss fund marketing rules ends on 1 March 2015 and any fund marketing activity taking place after this date must be in compliance with the amended rules governing the distribution of funds under the Swiss Collective Investments Schemes Act ("**CISA**") and Collective Investment Schemes Ordinance ("**CISO**").

As Switzerland is not part of the EEA, it was not required to implement the AIFMD, and as a result, the AIFMD marketing passport or private placement route is not available to fund sponsors marketing to investors in Switzerland. However, Switzerland amended its own fund marketing regime in parallel with the AIFMD coming into force. The new regime came into force on 1 March 2013, but non-Swiss fund managers were subject to a two-year transitional period.

The regime governs the "distribution" of all types of fund (including alternative investment funds subject to AIFMD and UCITS). "Distribution" is defined quite broadly, and includes all activity the object of which is the purchase of interests/shares in a fund, whether written or oral. For private fund managers, this would cover marketing meetings and presentations related to a specific fund, distribution of the PPM and/or subscription documents, etc.

The specific rules applicable depend on the classification of investors the fund is marketed to. There are essentially two regimes:

Qualified investors – the broad position is that marketing a private fund to qualified investors in Switzerland will not require registration with the Swiss Financial Market Regulatory Authority ("**FINMA**"), but the precise rules applicable to an offering will depend on which of the sub-categories the potential investors fall into:

Where marketing is exclusively to "**regulated qualified investors**" (which includes banks, fund managers, securities dealers and insurers that are authorised and regulated by FINMA and the Swiss central bank), there are no specific marketing requirements under the CISA/CISO.

However, where potential investors are "**unregulated qualified investors**" (which includes private enterprises, public institutions and pension funds with professional treasury operations and high-net-worth individuals¹ that have confirmed

in writing to be treated as qualified investors), a fund manager/distributor must:

- be appropriately authorised in its home jurisdiction (managers authorised under AIFMD or by the SEC will be appropriately authorised for this purpose);
- appoint a Swiss bank as a paying agent;
- appoint a Swiss representative under a Swiss distribution agreement; and
- make certain specific disclosures to investors.

The purpose of the Swiss representative is to establish a permanent presence for the fund in Switzerland, ensure the paying agent is appointed and provide the manager/distributor with updates regarding applicable regulation, etc. The purpose of the paying agent is to give investors the option to pay down capital calls, and receive distributions, into a Swiss bank account.

Non-qualified investors – this category essentially covers retail investors. To market to this class of investor, the fund must be registered with the FINMA, which is time-consuming and costly. This option is only available to UCITS funds, so won't be relevant to private fund managers.

¹ The CISO defines high-net-worth individuals as investors that either (i) confirm in writing that they have assets of at least CHF 5 million; or (ii) provide evidence that they have assets of at least CHF 500,000 and have the knowledge required to comprehend the risks of the investments based on their individual education and professional experience or based on comparable experience in the financial sector.

Exemptions?

There are two exemptions from the regime's requirements that non-Swiss private fund managers may be able to rely on:

Reverse solicitation: the CISO confirms that the provision of information and the subscription for interests in a fund at the instigation of or at the own initiative of investors is not "distribution" for the purposes of the regime, and would not be caught by the rules. Any request from an investor must be made in connection with a specific fund and without any prior action from the manager or any agent of the manager (such as a placement agent). This exemption is therefore very narrow, and likely to be difficult to rely on.

Discretionary investment management arrangements: if the marketing information and any subsequent subscription is as a result of a written discretionary management agreement with a Swiss regulated intermediary, this is also excluded from the definition of "distribution" under the CISA. This exemption would not apply where the fund manager has direct contact with the investor, however.

Practical comments:

- To stay completely outside the remit of the new regime, private fund managers would need to restrict their fund marketing activity to regulated qualified investors. This is unlikely to be acceptable to most managers, as it would preclude marketing to Swiss pension funds, private companies and high-net worth individuals.
- The reverse solicitation exemption is unlikely to be

very helpful to non-Swiss managers as the exemption is drafted and, we understand, construed very tightly. Similarly, the exemption for funds distributed as a result of a discretionary investment management arrangement is not likely to be appropriate to private fund managers who tend not to market their funds under these types of arrangements.

- Where a non-Swiss manager intends to market to unregulated qualified investors and complies with the requirements under CISA, managers should be aware that the Swiss representative appointed under the distribution agreement will want to review the fund documents and will monitor the manager's marketing activity in Switzerland.

Key contacts



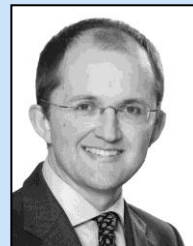
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