

The Swiss representative and Swiss paying agent

The requirement for and role of Swiss representatives and Swiss paying agents for foreign funds distributed to qualified investors

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The regulations on the distribution of funds in Switzerland have changed. Fund providers need to assess their existing or planned distribution activities in Switzerland, and decide if they need to appoint a Swiss representative and a Swiss paying agent. In this article we briefly summarize the requirement for a Swiss representative and a paying agent and terms that apply to the requirement. We then explain the respective roles of the representative and paying agent.

1. Requirement for a Swiss representative and paying agent

In all cases where shares of foreign collective investment schemes are distributed in Switzerland, it is necessary to appoint both a Swiss representative and a Swiss paying agent (Article 120 para. 4 in connection with para. 2 lit. d CISA).

The requirement applies both to shares of foreign collective investment schemes and to limited partnerships distributed before and after the new regulations come into force on 1 March 2013. A Swiss representative and a Swiss paying agent will also be needed for shares of foreign collective investment schemes that start being distributed after new regulations take effect on 1 March 2013.

The regulator has also indicated that a Swiss Fund & Asset Management Association ('SFAMA') Circular, no. 25/2013, was correct when it stated that pre-marketing of any to-be-launched fund automatically falls under the new distribution rules and therefore obliges the fund promoter to appoint a Swiss representative in such cases where marketing documents outline the main features of the to-be-incorporated fund so that the potential investors can make an informed purchase decision. According to SFAMA the main features include:

- A description of the investment policy
- An outline of the fees charged
- Details of the main service providers, e.g. the investment manager, the administrator, etc.

If the pre-marketing is successful and a Swiss based investor chooses to invest in the fund, the requirement for a Swiss representative and a Swiss paying agent applies for as long as that Swiss based investor remains invested. In the case of a closed-end vehicle, this will be for the life of the fund; in case of an open-ended fund, as long as the fund continues to be distributed in Switzerland.

It is worth taking stock of the most important basic requirements for foreign funds catering to qualified investors only:

- 1. Foreign funds do not require FINMA approval.** Funds catering to qualified investors do not need to be registered, nor do they need to be approved by FINMA, but they require a Swiss representative and a Swiss paying agent.
- 2. Foreign funds require a representative and a paying agent in Switzerland.** The rules governing the distribution of a foreign collective investment scheme to qualified investors have become more stringent (Article 120 para. 4 and 123 CISA). A foreign fund already marketed in Switzerland (on a private placement basis and to qualified investors only) will be required, as of 1 March 2015, to appoint a Swiss representative and a paying agent. The paying agent needs to be a Swiss Bank. The representative needs to be duly authorized by FINMA.
- 3. Foreign fund documentation must include notes on distribution in Switzerland.** Article 30a para. 2 and 133 para. 2 CISO state that publications and marketing materials must provide details of a) the country of domicile of the collective investment scheme; b) the name of the representative; c) the name of the paying agent; and d) the location for obtaining fund documents.
- 4. Distribution must be based on a distribution agreement between the representative and the respective authorized distributor (Article 131a CISO).**
- 5. Distribution within Switzerland by foreign financial intermediaries requires Swiss distribution authorization unless distribution activities are deemed to be appropriately supervised in the intermediary's country of domicile (Article 19 para. 1bis CISA).**

2. Role of the Swiss representative

The Swiss representative is responsible for ensuring distribution activities comply with Swiss law. The representative is a regulated, FINMA licensed entity, and must ensure a smooth flow of information between the fund and Swiss investors and FINMA. Most importantly the representative is on the other hand responsible for the compliance of the distributors with Swiss law. The Swiss representative is responsible for ensuring distribution activities comply with Swiss law.

Fund / Fund Management Companies

Swiss representatives for a fund / fund management companies are responsible for duties arising from:

- CISA and CISO
- Applicable practices of FINMA
- Minimum applicable standards of self-regulation for industry organizations as declared by FINMA

Article 123 et seq. CISA and Article 131 et seq. CISO state that, prior to distributing foreign collective investment schemes in or from Switzerland, the fund management company must appoint a Swiss representative to undertake the duties specified in Article 124:

1. The representative must represent the foreign collective investment scheme with regard to investors and FINMA without any restrictions to its powers of representation.
2. The representative must observe statutory obligations to report, publish and inform, as well as the codes of conduct for industry bodies that have been declared to be the minimum standard by FINMA. The representative's identity must be disclosed in every publication.

As well as representing the fund / fund management company on all matters vis-à-vis qualified investors and FINMA, the Swiss representative must inform the fund / fund management company about all communications and notifications from the Swiss authorities and courts. It must do the same in relation to communications and notifications from shareholders in the fund it represents. In addition the Swiss representative must periodically review whether:

1. the foreign fund management company and the custodian are subject to prudential regulation (note: supervision not required) equivalent to the Swiss regulation pertaining to organisational matters, investor rights and investment policy;
2. there is a cooperation and information exchange agreement in place between the home country supervisory authority of the fund / fund management company concerned and FINMA.

The Swiss representative needs to work with the fund / fund management company to tailor fund documents to meet the minimum requirements of the regulation. It must also ensure that the website of the fund management company complies with the current regulation and, in particular, apply what FINMA has described in Circular 2013/9 "Distribution of Collective Investment Schemes" as the requirements of the disclaimer and/or access restrictions. Finally, the Swiss representative must make available to investors, free of charge, the relevant documents on foreign collective investment schemes as described in Article 13a CISO. It must ensure the documents contain all the relevant disclaimers and information as per Article 133 para. 2 CISO.

Supervision of distribution

Foreign collective investment schemes can only be distributed to qualified investors within Switzerland by financial intermediaries who are adequately supervised in Switzerland or abroad (Article 19 para. 1bis CISA). Adequately supervised means the financial intermediary must either have a distribution license issued by FINMA (for Swiss distributors), or be subject to appropriate supervision in its country of domicile (for foreign distributors), or be exempted from the requirement for such a license as per art. 8 CISO (Article 30a CISO in analogy).

The Swiss representative must supervise the distribution activities of any appointed distributor and ensure these are in line with the SFAMA Guidelines on the Distribution of Collective Investment Schemes. The Distribution Guidelines are aimed at “ensuring high quality standards on the Swiss market for collective investment schemes” distributed in Switzerland “with regard to the information and advice provided to investors”. They are

applicable to so called ‘fund providers’, i.e. Swiss fund management companies, SICAVs, SICAFs and representatives of foreign collective investment schemes.

The guidelines require fund providers to contractually oblige their distributors to live up to certain standards when selling fund units either directly or via electronic communication means. The standards are designed to ensure that fund distributors protect the interests of the (potential) investors and that fund providers enter into SFAMA model distribution agreements with distributors.

Fund providers are obliged to carefully select and control distribution agents. The Distribution Guidelines, together with the Transparency Guidelines and the Swiss Bankers Association’s guidelines on the duty to keep documentary records pursuant to Article 24 para. 3 CISA, constitute the set of self-regulatory standards intended to increase investor protection at the point of sale of fund units.

3. Role of the paying agent

The paying agent’s main role is to receive investors’ subscriptions and distribute any payments due to investors.

Article 120 para. 2 CISA, in conjunction with Article 128 para. 2 CISO, requires foreign collective investment schemes distributed in Switzerland to qualified or to non-qualified investors to have an appointed a Swiss paying agent at all times.

Pursuant to Article 121 CISA, the Swiss paying agent must be a Swiss bank. The agreement between a Swiss paying agent and a fund / fund management company is only legally binding within the territory of Switzerland. Therefore all fund documents can only refer to the Swiss paying agent as being the paying agent in Switzerland.

Usually the fund custodian handles payments between a fund and its investors. The Swiss paying agent is intended to provide a certain level of assurance to investors, since the Swiss bank can be seen as a “local” counterparty which is obliged – if requested by the Swiss investor – to ensure that the payments related to the subscription, conversion and redemption of shares, dividend distribution, liquidation and any other fund related payment are properly performed. There is some debate at present, when it comes to non UCITS funds, as to whether fund service providers that take responsibility for payments, subscriptions and redemptions, and in doing so play a role similar to a custodian in the UCITS world, need to be part of the paying agent agreement. This is

the case for UCITS funds (Article 128 para 2 CISO), which have standard fund structures. But we think it makes little sense for non-UCITS funds, whose subscriptions, redemptions and distribution pay-

ments can vary considerably because they are organised and timed in ways that are specific to the heterogeneous underlying asset classes they invest in.

4. Conclusion

A Swiss representative acts as the Swiss compliance arm of a fund / fund management company for all matters relating to the distribution of foreign funds into or from Switzerland. The Swiss representative also performs a supervisory function in relation to Swiss or foreign distributors operating within or from Switzerland. These two functions require Swiss representatives to have a strong background in fund distribution, in particular from a practical perspective.

While it is a regulatory requirement that funds offer the services of a Swiss paying agent should

a Swiss investor require these, experience of the world of registered and authorized funds, e.g. UCITS funds – for which a Swiss paying agent is also a requirement – has shown that investors tend to rely on the fund custodian and administrator to subscribe and redeem shares and make corresponding payments. We are of the opinion that the current definition of the Swiss paying agent is outdated and should be thoroughly reviewed, and possibly abolished completely, in the next revision of the Law.

The views expressed in this paper are those of the authors and should not be used without appropriate advice.

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