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# Distribution of foreign collective investment schemes to qualified investors in Switzerland

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## Q&A

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On 1 March 2015, the transitional period for distributors and foreign funds distributed in Switzerland to become compliant with new regulation expired. Participants are now working out how best to navigate and adapt to the new distribution regulatory framework. We thought we would help by putting together a Q&A covering the most-asked questions.

## 1. Regulatory framework and bodies

### Q1. Does the AIFM Directive apply to Switzerland?

No, Switzerland is not part of the European Union and has enacted its own legislation.

The aim of the Swiss legislation is to ensure compatibility with the European directive 2011/61/EU on Alternative Investment Fund Managers (AIFM Directive).

### Q2. What are the key regulations, rules, circulars and guidelines that govern distribution in Switzerland?

1. The Collective Investment Schemes Act (CISA):  
*CISA regulates both open-ended and closed-ended funds, regardless of whether they are aimed at retail or non-retail investors or of local or foreign origin.*
2. The Collective Investment Schemes Ordinance (CISO) and the Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) on Collective Investment Schemes (CISO-FINMA):  
*CISO and CISO-FINMA state the fundamental principles that regulate the investment in collective investment schemes set out in CISA.*
3. FINMA Circular 2013/9:  
*Circular 2013/9 describes the distribution of fund units under the Collective Investment Scheme legislation, focusing on the circumscription of distribution and clarifying which activities constitute an act of distribution.*
4. SFAMA's Guidelines on the Distribution of Collective Investment Schemes – May 2014:  
*The Guidelines form part of the self-regulation regime of the Swiss fund industry and apply to collective investment schemes distributed in Switzerland.*

<http://open-funds.ch/index.php/representative-services/links-to-documents>

### Q3. Which funds fall under the revised/new regulations, rules, circulars and guidelines?

The revised Swiss Collective Investment Schemes Regulations as well as the FINMA Circular 2013/9 and SFAMA's Guidelines on the Distribution of Collective Investment Schemes establish a new concept for distribution.

The old law only regulated the distribution of collective investment schemes to the wider public, i.e. retail investors, but the revised CISA regulates all forms of distribution, whether public or non-retail.

The previous concept of "public advertising" has been replaced by the more encompassing term "distribution". This has brought hedge funds, private equity funds and other alternative investment funds within the scope of the revised rules, obliging them to comply with the rules in order to continue doing "business as usual" with Swiss-based investors.

#### Q4. Are all Swiss-based investors considered to be the same when it comes to distribution?

No. The CISA recognizes three levels of distribution, each of them with different legal implications.

- **Level 1: Distribution to regulated qualified investors, i.e. private placement**

Placement activities do not qualify as distribution in terms of the CISA and are therefore not subject to the CISA regulations. In other words, for regulated qualified investors the private placement regime still applies.

Regulated qualified investors are financial institutions such as banks, securities dealers, fund management companies, asset managers of collective investment schemes, the central bank and regulated insurance institutions ((Article 10 para. 3 lit. a and b CISA).

- **Level 2: Distribution to non-regulated qualified investors**

Non-regulated qualified investors are:

- a. public entities and retirement benefit institutions with professional treasury operations (Article 10 para. 3 lit. c CISA);
- b. companies with professional treasury operations (Article 10 para. 3 lit. d CISA);
- c. HNWI (with more than CHF 5 million or CHF 500k and experience within the financial sector) who decide to opt-in independently and because of their status (Article 10 para. 3bis CISA);
- d. non-FINMA regulated independent asset managers/family offices that are subject to the Money Laundering Act and are either governed by a code of conduct for a specific industry body or that have a discretionary management agreement in place that complies with the recognized standards of a specific industry body.

**Be careful:**

**Independent asset managers/family offices that are not regulated by FINMA are not regarded as qualified investors under the revised CISA.**

**Distribution activities targeting independent asset managers count as distribution to qualified investors only if the asset managers confirm in writing that they fall within Article 3 para. 2 lit. c CISA and that they will only use information they obtain for clients who are themselves qualified investors.**

**Confirmations needs to be requested by the distributor before the distributor initiates a discussion and introduces any investment product to an independent asset manager/ family office.**

- **Level 3: Distribution to non-qualified investors, i.e. retail investors**

**Q5. Do funds distributed exclusively to qualified investors have to be authorised or licensed by FINMA?**

Foreign funds do not have to be registered or approved by FINMA provided they are distributed exclusively to qualified investors.

In order to comply with the Swiss rules, foreign funds distributed exclusively to qualified investors foreign funds must:

- Appoint a Swiss representative and a Swiss paying agent
- Have fund documentation with notes on distribution in Switzerland
- Conclude a distribution agreement between the representative and the respective distributor in accordance with Swiss law.

**Q6. What are the roles of the Swiss representative and Swiss paying agent?*****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. The representative is also responsible for ensuring distributors comply with Swiss law.

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.

***Swiss paying agent:***

The paying agent's main role is to receive investors' subscriptions and distribute any payments due to investors if requested by the Swiss investor.

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 payments are properly performed.

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.

## 2. Distribution

### Q7. Who can distribute funds targeting qualified investors only?

Distribution of collective investment schemes fund units to qualified investors in or from Switzerland is subject to authorisation requirements.

Safe harbour rules apply only in the case of private placement of foreign fund units (please refer to Q4 for more details). Under the private placement rules, no licence or authorisation is required if:

- (i) the solicitation targets FINMA regulated qualified investors only; *and*
- (ii) only marketing materials or activities that are typical for qualified investors are used.

Any other type of distribution of foreign funds in or from Switzerland requires authorisation.

- (i) In cases where the distributor is a Swiss entity, it must either have a distribution license issued by FINMA or be exempted on the grounds that it is already authorized to act as a bank, a securities dealer, an insurance or an asset manager.
- (ii) In cases where the distributor is a foreign financial intermediary it may only distribute if it is subject to appropriate supervision in Switzerland or in its country of domicile and is authorized to distribute collective investment schemes.

Further, units of a foreign fund may only be distributed in Switzerland if the fund manager is located in a jurisdiction that has a cooperation agreement with FINMA.

### Q8. What activities are considered to be distribution?

Distribution means any type of activity that aims to encourage the acquisition of units of collective investment schemes by an investor (FINMA Circular 2013/9 mn 6), including:

- Issuance of print and electronic media of any kind, such as newspapers and magazines, direct mail, brochures, fact sheets, recommendation lists and information letters sent to the clients of a bank or of another financial intermediary
- Offers to financial intermediaries that do not have the status of regulated qualified investors for forwarding to their clients
- Information on opportunities to subscribe to collective investment schemes (e.g. securities number, subscription agent)
- Press conferences, telemarketing, unsolicited phone calls (cold calling), presentations (road shows), trade shows, sponsored reports on collective investment schemes, home visits by financial intermediaries of any kind
- Websites and other forms of e-commerce, subscription slips and online subscription opportunities and emails.

Distribution also includes indirect distribution. This is why offering or advertising “managed fund accounts”, in particular, constitutes the distribution of collective investment schemes. “Managed fund accounts” are effectively regarded concept-oriented collective investments, and their economic effect is considered comparable to a fund of funds or an asset allocation fund (FINMA Circular 2013/9, mn 7).

The use of a website is subject to different rules, depending on the level of distribution:

- Providers of websites aimed exclusively at qualified investors in Switzerland must have distribution authorization and a disclaimer and access limitation to ensure that only qualified investors gain access to the content of the website (FINMA Circular 2013/09, mn 81 ff).
- If a website makes any direct or indirect reference to Switzerland – be it a contact address, or an NAV expressed in CHF – and is not restricted to qualified investors, the website provider must have distribution authorization. A disclaimer stating that the website is not meant to be accessed by Swiss domiciled visitors is inadequate in legal terms. The website disclaimer must explicitly exclude and bar investors in Switzerland from accessing the website.

### **Q9. Is there a grace period/grandfathering for funds marketed before the implementation of the revised CISA?**

Article 158d para 4. CISA introduced a grandfathering rule which allowed existing foreign collective investment schemes intended for distribution exclusively to qualified investors in Switzerland until 28 February 2015 to meet the conditions stipulated in Article 120 para. 4 and Article 123. After this date however, foreign funds need to appoint a Swiss representative and a Swiss paying agent.

Should a fund have one or more Swiss-based investors, even if it is no longer distributed in Switzerland (e.g. a closed private equity structure), the fund has to appoint a Swiss representative and a Swiss paying agent.

### **Q10. Where on the FINMA webpage can I find a list of counterparties regulated by FINMA?**

You will find a list at <https://www.finma.ch/en/finma-public/authorised-institutions-individuals-and-products/>.

The FINMA list of all authorised institutions and investment funds is updated regularly, but there might be time lags between authorisation and list updates. Equally, it is possible that a supervised institution may still feature on the list even though it has lost its authorisation.

### **Q11. Under the link <https://www.finma.ch/en/authorisation/self-regulatory-organisations-sros/sro-member-search/> I found the name of the counterparty I would like to contact. Does this mean it is a qualified investor?**

No. The FINMA member search webpage [www.finma.ch/en/authorisation/self-regulatory-organisations-sros/sro-member-search/](https://www.finma.ch/en/authorisation/self-regulatory-organisations-sros/sro-member-search/) lists the entities in Switzerland that are part of a Self-Regulatory Organisation ('SRO'). The fact that a company is listed there does not mean that it can be considered a qualified investor.

Authorised institutions can be found at <https://www.finma.ch/en/finma-public/authorised-institutions-individuals-and-products/>

**Q12. A bank in Switzerland has subscribed to a fund I distribute. Since banks are regulated qualified investors, am I correct in assuming that my activities fall under the private placement regime and therefore the fund I market does not have to appoint a Swiss representative and a Swiss paying agent?**

It depends. If the distributor has marketed the fund directly to the bank (or in a similar way to a regulated qualified investor) and the bank decides to subscribe, this marketing activity would fall under the private placement regime.

If the bank acts as a nominee for the account of a client to whom the distributor has marketed the fund, then the private placement regime would apply only if the counterparty is a regulated qualified investor (such as FINMA licensed asset manager, an insurance company or the Central Bank). And in any other case it would also be incorrect to assume that marketing activities fall under the private placement scheme.

**Q13. Apparently as a distributor I need to produce a consultation report. What is this, and why do I need to produce it? Do I need to do it every time I have a meeting with the same client?**

The new measures are intended to strengthen investor protection by ensuring high standards in the provision of information and advice on collective investment schemes. The measures came into force on 1 January 2014.

The partially revised CISA makes it mandatory for distributors to maintain consultation transcripts. This means that when distributors offer their clients investment funds for purchase they must justify their recommendations in writing, provide their clients with a transcript of the consultation, and retain a copy for their own records. The transcript must demonstrate that the distributor has based the recommendation to purchase a certain fund on a clear assessment and understanding of the needs of the investor.

In our opinion the distributor needs to complete a consultation transcript every time there is a discussion about the fund with the (potential) investor, and we advise distributors to do this. Information on this matter is available at: <https://www.finma.ch/en/news/2015/06/20150605-guidelines-on-protocol-requirements>

**Q14. Is it correct that promotional materials, including legal documents such as the Offering Memorandums, must contain disclaimers for Swiss-based investors? And what are the disclaimers required to disclose?**

This is correct. All marketing material and all legal documents such as the Offering Memorandum, the Subscription Agreement, the audited financial statements, the Articles of Incorporation of the fund, etc., must contain a separate disclaimer addressed to Swiss-based investors.

Next to the name and address of the Swiss representative and paying agent, the disclaimer informs Swiss-based investors where the relevant legal documents may be obtained, where publications concerning the fund(s) are made, the place of performance and jurisdiction and finally the policy of the fund management company or the fund in relation to retrocessions and rebate (please refer to Question 15).

### 3. Transparency guidelines

#### **Q15. What are the Transparency Guidelines issued by SFAMA and to whom do they apply? What impact do they have to which fund documents?**

SFAMA's revised transparency guidelines ("Transparency Guidelines") apply to all FINMA licensees and their agents, and to Swiss as well as foreign collective investment schemes, irrespective of whether funds are being distributed to qualified or non-qualified investors.

The Transparency Guidelines state that fund documents must disclose all fees and costs, as well as the anticipated value of all costs that are charged to a fund. The fees and costs actually charged must be disclosed in the (semi-) annual report. Fund documents must indicate if fees are to be paid to third parties and for what services, although it is not a requirement that service providers be named. The Transparency Guidelines grant existing and former investors the right to enquire about fees and costs, subject to relevant terms and conditions.

Costs and fees that are not charged to the fund need not be disclosed except in the following circumstances:

- Retrocessions need to be made transparent. The Transparency Guidelines define retrocessions as "payments and other soft commissions paid by fund management companies, SICAVs and SIVAFs and their agents for distribution activities in respect of fund units". Retrocessions are effectively distribution fees in the broadest sense, regardless of whether they are charged to investors or paid out of management or distribution fees.
- Rebates need to be disclosed. Rebates are defined as "payments by fund management companies, SICAVs and SIVAFs and their agents directly to investors from a fee or cost charged to the fund with the purpose of reducing the said fee or cost to a contractually agreed amount". Asset managers usually pay rebates to investors to reduce management fees.

Fund documents need to be revised to meet the new disclosure requirements. The deadline for revisions is 1 March 2015 in the case of Swiss collective investment schemes, and 31 August 2015 for foreign collective investment schemes.

### 4. Links to related articles

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

<http://open-funds.ch/images/OF-JAN-2015.pdf>

Closed-end funds - How are they affected by the new distribution rules in Switzerland?

<http://open-funds.ch/images/news/OF-q4-2014-DEF.pdf>

Distribution of foreign collective investment schemes to qualified investors in Switzerland – The basics.

<http://open-funds.ch/images/news/OF-q4-2014-DEF.pdf>

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