



Cross-border distribution of collective investment schemes

www.practicallaw.com/8-525-9194

Christophe Rapin, Alexander Vogel, Christophe Pétermann and Reto Luthiger
Meyerlustenberger Lachenal

In February 2012 there were 1,388 Swiss collective investment schemes and 385 Swiss collective investment scheme distributors. In February 2012 there were 6,120 foreign collective investment schemes distributed in Switzerland, more than four times the number of authorised Swiss collective investment schemes. Therefore, cross-border issues regarding collective investment schemes are very important to the Swiss collective investment scheme industry.

The EU member states are required to transpose Directive 2011/61/EU on alternative investment fund managers (AIFM Directive) into national law by mid-2013. Among other things, this will require EU asset managers to only market collective investment schemes in non-EU jurisdictions which are adequately supervised. Therefore, adapting Swiss laws to the AIFM Directive (and Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive)) became of urgent importance for Switzerland, to enable its regulation to be qualified as equivalent to EU regulatory rules, and to remove potential impediments to Swiss financial players who are active in the EU. This will allow:

- Swiss investment funds to have third-country access to the pan-European passport when this becomes available in 2015.
- Swiss asset managers of EU investment funds the ability to continue their activities in the EU.

The changes to the Swiss regulatory regime came into effect on 1 March 2013. This article considers the following:

- The main Swiss regulatory provisions concerning collective investment schemes.
- Differences between the AIFM Directive and the pre-March 2013 Swiss regulatory regime.
- General rules relating to distributions, including the revised definition of distributions, requirements for authorisation, and definitions of qualified and non-qualified investors.
- Distribution requirements for foreign investment schemes.
- General obligations of conduct for authorised institutions and third parties subject to the regime.
- Rules relating to the key investors information document.

SWISS REGULATORY PROVISIONS CONCERNING COLLECTIVE INVESTMENT SCHEMES

Swiss regulation of collective investment schemes is governed by:

- Swiss Federal Act of 23 June 2006 on Collective Investment Schemes (Collective Investment Schemes Act (CISA)).

- Swiss Federal Ordinance of 22 November 2006 on Collective Investment Schemes (Collective Investment Schemes Ordinance (CISO)). For the purposes of this article, all amendments to the CISA are also applicable to the relevant sections of the CISO.

The provisions of the CISA distinguish between:

- **Swiss collective investment schemes.** These are schemes that are established and authorised in Switzerland. All Swiss schemes must be authorised by the Swiss Financial Market Supervisory Authority (FINMA).
- **Foreign collective investment schemes.** These are schemes established in a foreign jurisdiction but distributed to investors in Switzerland and/or to foreign investors from Switzerland.

DIFFERENCES BETWEEN THE AIFM DIRECTIVE AND THE PRE-MARCH 2013 SWISS REGULATORY REGIME

The AIFM Directive requires all member states to transpose its provisions into national law by mid-2013. Before 1 March 2013 there were notable differences between the Directive and the Swiss regulatory regime, including:

- The CISA did not regulate Swiss asset managers managing collective investment schemes in other jurisdictions (unlike EU law).
- Under the CISA, the duties on depository banks were rather limited compared to other jurisdictions.
- Qualified investors were not protected in distributions of foreign collective investment schemes in or from Switzerland on a private placement basis.

However, the most important difference is that foreign schemes were only required to have their documents approved by the FINMA if their interests were to be distributed to non-qualified investors (that is, retail investors).

DISTRIBUTIONS: GENERAL RULES

Definition of distribution

The term “distribution” generally refers to the placement of interests in a collective investment scheme on the primary market. In very limited circumstances, a distribution may also refer to re-placements of redeemed interests of collective investment schemes. In addition, the trading of a collective investment scheme on the secondary market may require the trader to be authorised as a securities dealer in certain circumstances. A distribution includes any activity intended to achieve the acquisition of interests by an investor in relation to a collective investment scheme, such as offering, promoting or advertising.



The revised definition of distribution to the CISA now means that the offering of a collective investment scheme will now be considered a “regulated distribution” if offered to certain categories of qualified investors (for details of the categories of qualified investors see below, *Categories of investors* and table, *List of qualified and non-qualified investors*). This will significantly affect the distribution of foreign collective investment schemes in Switzerland, as offers/promotions of collective investment schemes to certain types of qualified investors, such as high net-worth individuals or companies with professional treasury operations (to which foreign collective investment schemes were distributed and which were previously unregulated), will now be considered “regulated distributions”.

In practice, this now means that for foreign collective investment schemes distributed to certain categories of qualified investors in Switzerland:

- A Swiss representative and a Swiss paying agent must be appointed.
- The distributor must be an appropriately supervised financial intermediary.
- The distributor must comply with the general obligations of conduct.
- The distributed product's designation must not provide grounds for confusion or deception.

Exemptions from regulation

The following transactions are exempt from regulation (CISA):

- Execution-only transactions (that is, transactions executed by a bank or a securities dealer at the investor's request and without any prior advice from the bank or the securities dealer).
- The offering or promotion of a collective investment scheme on the basis of a strict reverse solicitation. This is the case where the investor requests information or an offer for collective investment schemes on his own initiative.
- Transactions made as part of a written discretionary management agreement with a regulated financial intermediary or an independent asset manager.

From 1 March 2013, the CISA does not include exemptions based on limited quantity. Under the pre-March CISA and the related case-law of the Supreme Court, the offering of collective investment schemes to a narrowly defined circle of investors was not considered as public advertising and therefore did not trigger a duty to authorise. An offering to less than 20 investors was generally considered a private placement.

Authorisation of distributors

Any entity carrying out a distribution under the CISA must be authorised to be a distributor by the FINMA. Active distributors that were active (but not required to be authorised) before 1 March 2013 and now require authorisation are subject to a grandfathering provision. Under this provision, they must:

- Report to the FINMA within six months.
- Comply with the new provisions.
- File a request for authorisation within two years of coming into effect.

The following entities are exempt from the authorisation requirement:

- Banks.
- Securities dealers.
- Insurance institutions.
- Fund management companies.
- Asset managers of collective investment schemes.
- Representatives of foreign collective investment schemes.

Categories of investors

There are four categories of investor under the CISA:

- **Qualified investor: category A.** This category includes regulated financial intermediaries such as banks, securities dealers and fund management companies and regulated insurance institutions (from 1 June 2013 it will also include asset managers of collective investment schemes and central banks).
- **Qualified investor: category B.** This category includes:
 - public entities and retirement benefits institutions with professional treasury operations;
 - companies with professional treasury operations;
 - high net-worth individuals (from 1 June 2013, these will only be considered qualified if they opt in (see below));
 - investors who have concluded a written discretionary management agreement (from 1 June 2013, these will only be considered qualified if they do not opt out (see below)).
- **Qualified investors according to foreign law: category C.** This category includes:
 - institutional investors with professional treasury operations (such as regulated financial intermediaries and insurance institutions);
 - public entities;
 - retirement benefits institutions and companies with professional treasury operations;
 - high net-worth individuals complying with the requirements of Article 6 of the CISO at the moment of acquisition, such as the holding of financial assets of at least CHF5 million, or holding of financial assets of at least CHF500,000 if the investor has the necessary knowledge and experience;
 - individuals that have concluded a written discretionary management agreement with a regulated financial intermediary who acquires interests of collective investment schemes for their account.
- **Non-qualified investor.** This category includes all other types of investors that do not fall within categories A to C.

See also table, *List of qualified and non-qualified investors*.

Investors who have concluded a written discretionary management agreement are only considered to be qualified investors if

LIST OF QUALIFIED AND NON-QUALIFIED INVESTORS			
Qualified investors: category A	Qualified investors: category B	Qualified investors according to foreign law: category C	Non-qualified investors
This category includes: - Regulated financial intermediaries such as banks, securities dealers and fund management companies. - Regulated insurance institutions. From 1 June 2013 category A will also include asset managers of collective investment schemes and central banks.	This category includes: - Public entities and retirement benefits institutions with professional treasury operations. - Companies with professional treasury operations. - High net-worth individuals (from 1 June 2013, these will only apply in the case of opting-in). - Investors who have concluded a written discretionary management agreement (from 1 June 2013, these will only apply in the case of no opting-out).	This category includes: - Institutional investors with professional treasury operations (such as regulated financial intermediaries and insurance institutions). - Public entities, retirement benefits institutions and companies with professional treasury operations. - High net-worth individuals complying with the requirements of Article 6 of CISO at the moment of acquisition. - Individuals that have concluded a written discretionary management agreement with a regulated financial intermediary who acquires interests of collective investment schemes for their account.	This category includes all other types of investors that do not fall within categories A to C.

their contracting party is a regulated financial intermediary (such as a bank, securities dealer, fund management company, asset manager of a CIS, or a central bank). The contracting party can also be an independent asset manager, provided that:

- The asset manager, in its capacity as a financial intermediary, is governed by the Money Laundering Act.
- The asset manager adheres to the code of conduct issued by a recognised industry body, where the code of conduct must be recognised by FINMA as a minimum standard.
- The discretionary management agreement complies with the recognised standards of such recognised industry body.

An offering/promotion will qualify as a distribution if made to a:

- Category B investor.
- Category C investor.
- Non-qualified investor.

The three types of distribution above are subject to different levels of regulation (with category B investors subject to the least regulation and non-qualified investors subject to the most). An offering/promotion of a collective investment scheme to a category A investor is subject to the private placement regime and is therefore not subject to regulation. Within the framework of a written discretionary management agreement, financial intermediaries and independent asset managers must inform their clients of:

- Their status as qualified investor.

- The risks of being qualified as a qualified investor.
- The possibility to opt-out.

The CISA and the CISO introduce changes regarding high net-worth individuals and investors who have concluded a written discretionary management agreement, which are due to come into force on 1 June 2013. Under these new changes, investors who have concluded a written discretionary management agreement can opt-out of their status as qualified investor by written notice.

High net-worth individuals will be considered to be a qualified investor if they fulfil one of the following at acquisition:

- The investor confirms in written form that he holds financial assets of at least CHF5 million.
- The investor confirms in written form that he holds financial assets of at least CHF500,000 and that he has the necessary knowledge to understand the investment risks due to his education and professional experience or comparable experience in the financial sector.

However, under the CISA, high net-worth individuals are not automatically considered qualified investors, but can opt-in by written notice.

There is also a grandfathering provision regarding high net-worth individuals. Under this provision, high net-worth individuals that do not comply with the requirements of the new CISA regarding the written opting-in notification after 1 March 2015 will not be allowed to invest in investments reserved for qualified investors.



DISTRIBUTION OF FOREIGN COLLECTIVE INVESTMENT SCHEMES

Distribution made	To investor category	Requirements for distributor	Requirements for distributed product	Further requirements
In Switzerland	Qualified investor: category A.	None.	None.	None.
	Qualified investor: category B.	Distributor with Swiss domicile. Authorisation as distributor (Article 13(2)(g) CISA or other authorisation under Article 8 of CISO).	Designation of scheme must not have grounds for confusion or deception.	■ Appointment of Swiss representative and Swiss paying agent. ■ Written distribution agreement governed by Swiss law between the distributor and representative.
		Distributor with non-Swiss domicile. Permission to distribute in jurisdiction of domicile or equivalent authorisation under Article 8 CISO.		
	Non-qualified investor.	Authorisation as distributor (Article 13(2)(g) CISA or other authorisation under Article 8 of CISO).	■ Approval of relevant documents (sales prospectus, articles of association, fund contract and so on). ■ Distributed product subject to public supervision intended to protect investors. ■ Distributed product subject to regulation equivalent to CISA regarding organisation, investor right, and investment policy. ■ Designation of scheme must not provide grounds for confusion or deception.	■ Asset manager of scheme depositary subject to a public supervision intended to protect investors. ■ Depositary subject to regulation equivalent to CISA regarding: ■ organisation; ■ investor rights; and ■ investment policy. ■ Appointment of Swiss representative and Swiss paying agent. ■ Agreement regarding collaboration and information exchange between FINMA and relevant foreign supervisory authorities.

DISTRIBUTION REQUIREMENTS FOR FOREIGN COLLECTIVE INVESTMENT SCHEMES

Schemes distributed to investors in Switzerland

The revised requirements applicable to foreign collective investment schemes distributed to investors in Switzerland are set out below. For a detailed breakdown of distributions to Switzerland, see table, *Distribution of foreign collective investment schemes*.

Non-qualified investors. Distribution activities provided to non-qualified investors are subject to the highest level of regulation.

A distributor offering or advertising a foreign collective investment scheme to non-qualified investors in Switzerland must:

- Be authorised to be a distributor by the FINMA.
- Comply with the general obligations of conduct (*see below, General obligations of conduct*).

The distributed product (that is, the scheme) does not require authorisation from the FINMA. However, the product's relevant

documents (for example, sales prospectus, articles of association, fund contract and so on) must be approved by the FINMA and its designation must not have any grounds for confusion or deception.

The distributed product, the depositary and the asset manager must be subject to a public supervision from their home regulator intended to protect investors. However, in relation to the organisation, investor rights and investment policy, only the distributed product and depositary must be subject to regulation equivalent to the CISA.

In addition, a Swiss representative and a Swiss paying agent must be appointed. Furthermore, an agreement regarding collaboration and information exchange between the FINMA and the foreign supervisory authorities relevant for the distribution must be in place.

Qualified investors: category A. Category A investors qualify for private placement. Therefore, a collective investment scheme offered/promoted to category A investors is not subject to regulation.

DISTRIBUTION OF FOREIGN COLLECTIVE INVESTMENT SCHEMES <i>continued</i>				
Distribution made	To investor category	Requirements for distributor	Requirements for distributed product	Further requirements
From Switzerland	Qualified investor: category A.	None.	Swiss investment product.	Swiss investment product.
			Product authorisation.	Appointment of custodian bank.
			Foreign investment product.	Foreign investment product.
	Qualified investor: categories B and C.	None.	None.	None.
			Swiss investment product.	Swiss investment product.
			Product authorisation.	Appointment of a custodian bank.
From Switzerland	Qualified investor: categories B and C.	None.	Foreign investment product.	Foreign investment product.
			The designation of scheme must not have grounds for confusion or deception.	Appointment of a Swiss representative and Swiss paying agent.
	Non-qualified investor.	Authorisation as distributor (Article 13(2)(g) CISA or other authorisation under Article 8 of CISO).	Swiss investment product.	Swiss investment product.
			Product authorisation.	Appointment of custodian bank.
			Foreign investment product:	Foreign investment product:
From Switzerland	Non-qualified investor.	Authorisation as distributor (Article 13(2)(g) CISA or other authorisation under Article 8 of CISO).	Approval of the relevant documents (sales prospectus, articles of association, fund contract and so on).	Asset manager of scheme and depositary subject to a public supervision intended to protect investors.
			Distributed product subject to a public supervision intended to protect investors.	Depositary subject to regulation equivalent to CISA regarding organisation, investor rights and investment policy.
			Distributed product subject to regulation equivalent to CISA regarding organisation, investor rights and investment policy.	Appointment of Swiss representative and Swiss paying agent.
	Non-qualified investor.	Authorisation as distributor (Article 13(2)(g) CISA or other authorisation under Article 8 of CISO).	Designation of scheme must not have grounds for confusion or deception.	Agreement regarding collaboration and information exchange between FINMA and foreign supervisory authorities which is relevant for distribution.

Qualified investors: category B. Distributors offering/promoting a foreign collective investment scheme to category B investors must be appropriately supervised financial intermediaries.

If the distributor is domiciled in Switzerland, he must have the appropriate authorisation from the FINMA. If the distributor is not domiciled in Switzerland, he must be authorised to distribute collective investment schemes in his jurisdiction of domicile. In either case, the distributor must comply with the general obligations of conduct (*see below, General obligations of conduct*).

The distributed product's only requirement is that its designation must not provide grounds for confusion or deception. It does not require authorisation or need to have its documents approved by the FINMA.

A Swiss representative and a Swiss paying agent must be appointed. Furthermore, a written distribution agreement governed by Swiss law between the distributor and the representative is required.

Schemes distributed from Switzerland to investors in foreign jurisdictions

The requirements applicable to foreign collective investment schemes distributed from Switzerland to investors in foreign jurisdictions are set out below. For a detailed breakdown of distributions from Switzerland, see table, *Distribution of foreign collective investment schemes*.

Non-qualified investors. Distribution activities provided from Switzerland to non-qualified investors are subject to the highest level of regulation.

A distributor domiciled in Switzerland that offers/promotes a collective investment scheme to foreign non-qualified investors must:

- Be authorised to be a distributor by the FINMA.
- Comply with the general obligations of conduct (*see below, General obligations of conduct*).



TIMETABLE FOR APPLYING THE KIID

	Type of fund	Existing funds/sub-funds		New funds/sub-funds	
		Until 14 July 2014	From 15 July 2014	Until 14 July 2012	From 15 July 2012
Swiss collective investment scheme.	Securities fund (non-Qualified Investment Fund (Non-QIF)).	Simplified prospectus.	KIID.	Simplified prospectus.	KIID.
	Real estate fund (Non-QIF).	Simplified prospectus.	Simplified prospectus.	Simplified prospectus.	Simplified prospectus.
	Other funds for traditional investments (non-QIF).	Simplified prospectus.	KIID.	Simplified prospectus.	KIID.
	Other funds for alternative investments (non-QIF).	-	-	-	-
Foreign collective investment scheme.	UCITS funds.	Simplified prospectus / KIID if a KIID is available in EU.	KIID.	Simplified prospectus / KIID if a KIID is available in EU.	KIID.
	Non-UCITS funds.	Simplified prospectus.*	KIID** or simplified prospectus.***	Simplified prospectus.*	KIID** or simplified prospectus.***

Source: Swiss Funds Association, Circular 12/2013, p. 2 and seq.

*A simplified prospectus is required for foreign collective investment schemes comparable to a Swiss real estate fund or a fund in the category "other funds for traditional investments".

**A KIID will be required for foreign collective investment schemes comparable to a fund in the category "other funds for traditional investments".

***For foreign collective investment schemes comparable to a Swiss real estate fund.

A foreign product distributed from Switzerland does not require authorisation by FINMA. However, the product's relevant documents (for example, sales prospectus, articles of association, fund contract and so on) must be approved by the FINMA and its designation or label must not have any grounds for confusion or deception.

Any foreign product distributed from Switzerland (and the depository or asset manager of that product) must be subject to a public supervision from their home regulator intended to protect the investors in the foreign product's country of origin. A regulation equivalent to the CISA in relation to the organisation, investor rights and investment policy is mandatory for only the distributed foreign product and the depository.

For any foreign product to be distributed from Switzerland, a Swiss representative and a Swiss paying agent must be appointed. Furthermore, an agreement regarding collaboration and information exchange between FINMA and the foreign supervisory authorities must be in place.

Swiss collective investment schemes must be authorised by the FINMA and a custodian bank must be appointed for the product.

Qualified investors: category A. Category A investors qualify for private placement. Therefore, a collective investment scheme offered/promoted to category A investors is not subject to

regulation. However, in case of a Swiss product, an authorisation as a collective investment scheme by FINMA is required and a custodian bank must be appointed for the product.

Qualified investors: categories B and C. A distributor domiciled in Switzerland that offers/promotes foreign collective investment schemes to foreign qualified investors of categories B and C is not subject to Swiss regulations.

A foreign product distributed from Switzerland does not require authorisation or an approval of its relevant documents. However, the product must not have any grounds for confusion or deception in its designation or label.

A Swiss product requires an authorisation as a collective investment scheme by FINMA and a custodian bank must be appointed for the product.

In case of a foreign product distributed from Switzerland, a Swiss representative and a Swiss paying agent must be appointed.

GENERAL OBLIGATIONS OF CONDUCT

The amendments have rephrased the general obligations of conduct for authorised institutions and third parties subject to the CISA. They are generally wider than before.

Duty to provide adequate information

All authorised institutions subject to the CISA (and their agents which fall within the collective investment scheme) must comply with their duty to provide adequate information. In particular, they must inform the investors appropriately concerning:

- All schemes managed, deposited and distributed.
- All directly or indirectly debited fees and costs and their specific purpose.

Duty to provide information in the fund's protocol

The CISA and the CISO introduced a new duty regarding protocols, which is due to come into force on 1 January 2014. Under this new duty, all activities involving a distribution by authorised institutions and third parties subject to the CISA must provide in written form:

- The client's needs.
- All reasons for the acquisition of a specific collective investment regime.
- A copy of the written protocol, to be given to the client.

KEY INVESTORS INFORMATION DOCUMENT (KIID)

One small revision to the CISO, which was required by the UCITS IV Directive and came into effect on 15 July 2011, was the

introduction of the key investor information document (KIID). This revision will also be integrated into the CISA (due to come into effect on 1 June 2013). The key provision is that a KIID, instead of a simplified prospectus, must be approved for foreign collective investment schemes and, at a later date, for most Swiss securities funds and other funds in traditional investments (however, for Swiss real estate funds the publication of a simplified prospectus is to be continued for the time being).

The grandfathering provisions of the CISO from 15 July 2011 will remain unchanged in connection with the new CISA. Under these provisions, Swiss securities funds and other Swiss funds for traditional investments, as well as UCITS IV funds authorised in Switzerland, must adapt their prospectuses by mid-July 2014.

For the different situations that apply to different types of funds, see table *Timetable for applying the KIID*.

CONCLUSION

The amendments to the Swiss regime for collective investment schemes are fundamental. Many more offers/promotions of foreign collective investment schemes will now fall under regulation. However, they have been seen as essential in maintaining the importance of Switzerland as a destination for foreign collective investment schemes.

CONTRIBUTOR PROFILES



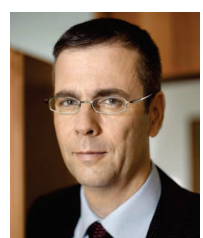
CHRISTOPHE RAPIN

*Partner, Head of Capital Markets & Finance, Geneva and Brussels
Meyerlustenberger Lachenal*
T +41 22 737 10 00
F +41 22 737 10 01
E christophe.rapin@mll-legal.com
W www.mll-legal.com



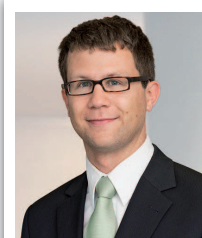
CHRISTOPHE PÉTERMANN

*Associate, Brussels and Geneva
Meyerlustenberger Lachenal*
T +41 22 737 10 00
F +41 22 737 10 01
E christophe.petermann@mll-legal.com
W www.mll-legal.com



DR ALEXANDER VOGEL

*Partner, Head of Corporate & Finance
Department, Zurich and Zug
Meyerlustenberger Lachenal*
T +41 44 396 91 91
F +41 44 396 91 92
E alexander.vogel@mll-legal.com
W www.mll-legal.com



RETO LUTHIGER

*Junior Associate, Zurich
Meyerlustenberger Lachenal*
T +41 44 396 91 91
F +41 44 396 91 92
E reto.luthiger@mll-legal.com
W www.mll-legal.com