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Alternative Funds 2021

Switzerland: Law and Practice
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Law and Practice

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1. GENERAL

1.1 General Overview of Jurisdiction Managers of Alternative Funds

Switzerland is home to several of the world's significant alternative investment managers. Furthermore, most of the top-class managers domiciled in other jurisdictions have a presence in Switzerland as a major European financial centre. The country attracts this business thanks to its political stability, highly developed and reliable infrastructure, as well as its large pool of talented professionals.

There are currently 251 licensed managers of collective assets in Switzerland, according to the list published by FINMA as of 3 September 2021. This does not, however, accurately reflect the number of managers of alternative products. This is because no distinction is made between the managers active in the alternative business and those devoted only to traditional investing. Also, market participants holding a more encompassing licence, such as a bank or a securities firm licence, are also allowed to manage investment funds.

Alternative Fund Domicile

Switzerland currently has 121 funds that fall into the categories of “real estate funds” and “other funds for alternative investments”.

Compared to its competition in on and offshore jurisdictions, Switzerland is often considered a less attractive place to establish the fund itself. This is mainly due to taxation considerations which are not optimal for foreign investors. The alternative funds set up in Switzerland are therefore mainly targeted at Swiss investors. See **2.11 Tax Regime**.

Investors

Switzerland is home to many large institutional investors from the banking and insurance sec-

tors, pension funds and large corporations. Furthermore, this small country is notorious for attracting wealthy individuals along with their fortunes and family offices. In short, the country is highly ranked as a fundraising destination.

2. FUNDS

2.1 Types of Alternative Funds

The most common form of alternative fund established in Switzerland is the real estate fund. This type of product is actually treated as a separate fund category. Other types of Swiss alternative funds are less common, although there are some private equity, venture capital and various types of hedge funds set up within the jurisdiction. Current trends, such as lending and crypto-asset funds, are not as popular in Switzerland as in other jurisdictions, not only due to the tax environment but also because all Swiss funds need to obtain the approval of the Swiss regulator, FINMA. Nevertheless, Switzerland is an active centre for the portfolio managers of diverse alternative strategies.

2.2 Fund Structures

Open-End Alternative Funds

There are two forms of regulated Swiss open-end collective investment schemes (regardless of whether they invest in traditional or alternative assets).

The first is a contractual fund with no legal personality (FCP), and the second is a corporate fund in the form of an Investment Company with Variable Capital (SICAV). Both FCPs and SICAVs are subject to the same investment rules. They are both divided into “fund categories”, based on their investment strategy.

Categories

The most common and flexible categories for open-end Swiss alternative investment funds are

the so-called “other funds for alternative investments” and “real estate funds”.

Depending on the overall strategy and asset allocation, it is also possible to structure a vehicle investing in alternatives as a fund for “traditional investments”.

“Securities funds” (the Swiss equivalent of the European Undertakings for Collective Investment in Transferable Securities – UCITS) have even been used to pursue an alternative strategy. However, in such a case, it is very challenging to meet the strict investment restrictions imposed by the legislation on these vehicles.

Closed-End Vehicles

Regulated alternative funds can also be set up as closed-end structures. The Collective Investment Schemes Act of 23 June 2006, as amended (CISA) provides for a Limited Partnership for Collective Investment Schemes and a Company with Fixed Capital. There is a further (unregulated) investment vehicle that can be used for alternative investments – the Investment Company.

Limited Partnership for Collective Investment (LPCI)

The LPCI is basically structured as a typical limited partnership as used in all common fund jurisdictions. Its sole purpose is collective investment, primarily in venture capital. Investments in companies or projects can take the form of equity capital, lending or mezzanine financing. Permitted investments generally include real estate development and infrastructure projects.

Investments in LPCIs are open to qualified investors only (as described in **4.3 Rules Concerning Marketing of Alternative Funds**). LPCIs do not have legal personality, but can enter into obligations and exercise their rights, as a company with legal personality can.

At least one partner’s liability is unlimited (the general partner). Only a Swiss corporation can act as the general partner. The other investors’ (limited partners’) liability is limited to the amount of their contribution to the partnership. There are currently 22 registered LPCIs in Switzerland.

Company with Fixed Capital (SICAF)

Not a single SICAF has been established in Switzerland at this time. For this reason, this structure will not be addressed in detail.

(Unregulated) Investment Company (IC)

Finally, ICs can be established for investments in alternative assets. Such companies are subject only to the applicable company rules in the Swiss Code of Obligations (CO) as well as the Swiss AML regulations. To remain outside the scope of CISA, the following conditions need to be met:

- the shares must be listed on a Swiss stock exchange; or
- only registered shares are issued; and
- investment is restricted to qualified investors.

If these conditions are not fulfilled, the company falls within the scope of the (regulated) SICAF.

Based on the information available regarding listed ICs, they are most often used for investment in private equity, hedge funds, venture capital and real estate vehicles. No information is publicly available for unlisted ICs.

2.3 Regulatory Regime

Regulation of Funds (Product Regulation) and Supervision

All regulated alternative Swiss funds, as described in **2.2 Fund Structures**, are subject to:

- the Swiss Collective Investment Schemes Act (CISA);

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- the Swiss Collective Investment Schemes Ordinance (CISO); and
- the FINMA Swiss Collective Investment Schemes Ordinance (FINMA-CISO).

They need to be approved by FINMA and remain supervised by the regulator for their entire life cycle. This entails, in particular, ongoing documentation and reporting obligations.

Only the unregulated Investment Company is not subject to these rules, but exclusively to the CO and Swiss AML regulations.

Permitted Investments and Investment Techniques

Open-end alternative funds

As mentioned, the two common categories for “truly” alternative investments for FCPs and SICAVs are “other investment funds for traditional investments” and “other investment funds for alternative investments”.

Both of these categories can invest in equity, funds, money market instruments, call and time deposits of up to 12 months, precious metals, derivatives and structured products with varied underlyings.

The investment techniques permitted for other funds for traditional investments include:

- loans of up to 25% of the net assets;
- pledging or transfer as collateral of up to 60% of the net assets; and
- commitment to an exposure of up to 225% of the net assets.

They can engage in short selling.

Other investment funds for alternative investments provide the most flexibility and minimal diversification requirements. Further to the above, they may also invest in all kinds of com-

modities, raw materials and their respective certificates.

Permitted investment techniques include:

- loans of up to 50% of the net assets;
- pledging or transfer as collateral for 100% of the net assets; and
- commitment to an exposure of up to 600% of the net assets.

They can also engage in short selling.

FCPs and SICAVs also take the form of real estate funds. They may invest, in particular, in real estate, real estate companies, interests in real estate funds and real estate assets abroad. The use of derivatives is permissible, subject to limitations. As security for loans, real estate funds may not encumber their real assets on average for an amount exceeding one third of their market value.

Closed-end alternative funds

LPCIs are closed structures intended for investment in venture capital, private equity, real estate and infrastructure projects, and “other alternative investments”. The applicable legislation does not provide restrictions on the investment techniques, so they are set out in the fund documents, subject only to approval by FINMA. These vehicles are not very common and have been used mainly for real estate and real estate development.

As mentioned in **2.2 Fund Structures**, there are no SICAFs in Switzerland, even though this form of closed-end fund is a theoretical alternative to setting up an alternative investment vehicle.

The permissible investments for “other funds” described above apply also to SICAFs. However, CISA does not include particular investment restrictions or techniques regarding SICAFs.

Accordingly, as for LPCIs, such rules need to be included in the fund documents, subject only to approval by FINMA.

2.4 Loan Origination

Alternative funds can, in principle, originate loans. However, there are currently only a few approved Swiss lending funds.

There are various reasons for this. Firstly, all Swiss funds must go through the FINMA approval process regardless of their nature. Approval processes can be avoided in other jurisdictions. Furthermore, as the case may be, such funds may be deemed to trigger AML regulations or even the need for a banking licence if they accept public deposits in excess of CHF100 million, engage in advertising to this effect or substantially refinance themselves through third-party banks.

Finally, due to limitations foreseen in dedicated legislation on consumer credit, they cannot lend directly to consumers.

2.5 Non-traditional Assets

No Swiss fund investing in cryptocurrencies has yet been approved in Switzerland, although the wording of the applicable legislation on investments in alternative assets would, in theory, permit it. Until now, the projects submitted to FINMA have not been deemed to meet the high investor protection standards (particularly with respect to custody) expected by the regulator. Foreign funds investing in crypto-assets can nevertheless be offered in Switzerland if the marketing rules generally pertaining to foreign funds are complied with. Finally, it is noteworthy that the first Swiss asset manager of foreign cryptocurrency funds was granted a licence by FINMA three years ago.

2.6 Regulatory Approval Process Regulation

At the present time, all Swiss funds that can invest in alternative assets are regulated by FINMA, with the notable exception of investment companies as described in **2.2 Fund Structures**.

Going forward, a new form of unregulated Swiss fund, the Swiss “Limited Qualified Investor Fund” will be available. However, the relevant draft legislation is currently still in parliamentary deliberations. The Council of State – one of two chambers of the Swiss Parliament – has completed its first deliberations and the draft was received well. Refer to **2.18 Anticipated Changes** for more information on this new development.

Timing of Licensing Process

The time it takes to obtain approval for any of these funds can vary greatly depending on the workload of FINMA, the complexity of the project and the sophistication of the parties involved. It is common for an approval process to take between three and six months.

However, with respect to special standardised applications (so-called “fast-track” processes), funds open only to qualified investors are to be automatically approved upon submission – except for funds in the category “other funds for alternative investments”, for which approval takes four weeks. Nevertheless, since these deadlines only begin to run once FINMA is satisfied with the documentation provided, the approval process usually takes longer than the foreseen deadlines.

2.7 Requirement for Local Investment Managers

Only a Swiss fund management company or a Swiss self-managed corporate fund vehicle may be entrusted with the (overall) management of the relevant collective investment scheme. Nev-

ertheless, portfolio/investment management can then be delegated by the manager to an appropriately regulated entity in Switzerland or abroad. The terms of the delegation are subject to FINMA approval. In particular, the Swiss auditor of the Swiss alternative fund must not be hindered in its tasks by the delegation of the portfolio management abroad. Furthermore, if required by the delegated foreign country's laws, an agreement on the automatic transmission of information must be entered into between FINMA and the relevant regulator.

2.8 Other Local Requirements

The effective management of Swiss funds must in all cases remain in Switzerland. This means that the most important decisions regarding the funds must be made in Switzerland.

The fund management company must be in the form of a Swiss corporation. In order to ensure that management functions can be exercised at all times, the equivalent of at least three full-time employees (each with joint signatory powers with another employee) must be appointed. They must live somewhere that will allow them to carry out their duties as representatives of the fund management company on an ongoing basis. Practically, this means that they need to reside in Switzerland or very close to Switzerland, eg, in a neighbouring country, close to the Swiss border.

As regards the LPCI, the general partner may only be a Swiss corporation.

As mentioned previously, irrespective of these requirements, certain tasks can be delegated abroad, eg, portfolio management (see **2.7 Requirement for Local Investment Managers**).

2.9 Rules Concerning Other Service Providers

Contractual funds and SICAVs must in all instances enter into an agreement with a custodian for the fund's assets. Only a Swiss bank licensed under the Swiss Banking Act can be appointed in such capacity. Self-managed funds, the fund management company and the custodian may all, subject to FINMA's approval of the set-up, make use of the services of other providers (eg, IT) both in Switzerland and abroad under their own responsibility and, generally, in compliance with Swiss law (in particular, regarding data protection).

2.10 Requirements for Non-local Service Providers

The main requirement for a foreign service provider concerns foreign natural persons marketing funds in Switzerland either in their own name or on behalf of a foreign non-regulated entity. Such people need to be registered in a Swiss client adviser register according to the new Swiss Financial Services Act. Furthermore, in some instances, an affiliation with an ombudsman in Switzerland is required. More information is provided in **4.3 Rules Concerning Marketing of Alternative Funds**.

2.11 Tax Regime

Swiss Income and Capital Taxes

FCPs, SICAVs and LPCIs that are subject to CISA are not treated as taxpayers for Swiss income and capital tax purposes. In this regard, these collective investment schemes are transparent. Income from units of these collective investment schemes is fiscally attributed on a pro rata basis to the unit-holders irrespective of whether the income is distributed or accumulated.

As an exemption, FCPs, SICAVs and LPCIs are treated as taxpayers for Swiss income and capital tax purposes to the extent they own Swiss or foreign real estate, irrespective of whether the

income is distributed or accumulated. These collective investment schemes are subject to a particular (lower) Swiss corporate income tax rate. Income from Swiss and foreign real estate is exempted at the level of the Swiss resident unit-holder, as this income is subject to Swiss corporate income tax at the level of the FCP, SICAV and LPCI.

In contrast, SICAFs are treated as taxpayers for Swiss income and capital tax purposes, irrespective of whether they own Swiss or foreign real estate. A SICAF is entitled to participation relief on dividend and capital gains derived from qualifying participations. Due to the economic double taxation of corporate profits, SICAFs were not previously attractive as collective investment schemes. However, due to the lowering of the corporate income tax rates in the past, the disadvantage of non-transparency has been significantly reduced. Furthermore, as capital gains upon the sale of units in a SICAF are income tax-free in the hands of a Swiss-resident individual unit-holder if they hold the unit as private assets, a cumulating SICAF may provide tax advantages.

Swiss Withholding Tax

FCPs, SICAVs and LPCIs that are subject to CISA are treated as taxpayers for Swiss WHT purposes. In this regard, these collective investment schemes are opaque. Income from units of these collective investment schemes is subject to Swiss WHT at a rate of 35% irrespective of whether the income is distributed or accumulated, ie, at the moment of debiting in the account of reinvestment. Swiss WHT levied on income of Swiss collective investment schemes is a significant obstacle for non-Swiss-resident investors.

If the collective investment scheme demonstrates that income will be sourced continuously from foreign sources to a minimum of 80%, it may ask the Federal Tax Administration to be

exempted from Swiss WHT to the extent that income is paid or credited to a foreign-resident unit-holder (affidavit procedure).

The following are exempted from Swiss WHT – capital gains and income from Swiss and foreign real estate that is directly owned by a collective investment scheme and repayment of paid-in capital if the income is distributed by the FCP, the SICAV or the LPCI to the unit-holder by means of a separate coupon.

Swiss WHT may be refunded fully or partially according to Swiss domestic tax law or an applicable double-tax treaty. In accordance with Swiss domestic tax law, a Swiss-resident unit-holder is entitled to a full refund of the Swiss WHT. Foreign-resident unit-holders are entitled to a full refund of Swiss WHT if a minimum of 80% of the income is sourced from foreign sources (affidavit procedure). If a double-tax treaty between the resident state of the foreign-resident unit-holder and Switzerland is applicable, the foreign unit-holder is entitled to a full or partial refund of the Swiss WHT.

2.12 Double-Tax Treaties

FCPs, SICAVs and LPCIs are not treated as Swiss-resident persons for treaty purposes. Therefore, these collective investment funds are not entitled to relief from foreign withholding taxes under an applicable double-tax treaty between Switzerland and a source state.

The Federal Tax Administration has agreed a number of Mutual Agreements with foreign treaty states that entitles FCPs, SICAVs and LPCIs to ask for relief from foreign withholding taxes on behalf of their Swiss-resident unit-holders (Austria, Canada, Denmark, France, Germany, the Netherlands, Norway, Spain, Sweden, and the UK and Ireland). Australia, Japan and Canada also grant withholding tax relief at source in relation to SICAVs on the grounds of a Swiss

address. If no Mutual Agreement is applicable, the Swiss-resident unit-holder has to ask for treaty relief from foreign withholding taxes in accordance with the applicable treaty provisions.

2.13 Use of Subsidiaries for Investment Purposes

Swiss alternative funds in corporate form may use subsidiaries to hold different investments. This may, in some cases, serve tax optimisation purposes.

2.14 Origin of Promoters/Sponsors of Alternative Funds

The promoters and sponsors of Swiss alternative funds are mainly Swiss (with a few exceptions) The large Swiss banks and pension funds play a leading role. This is because large foreign players seek to reach an international investor base, for which the Swiss tax regime applicable to foreign investors in Swiss funds is not advantageous (stamp duty and withholding tax).

2.15 Origin of Investors in Alternative Funds

The investor base is mainly Swiss, for the same reasons as described in **2.14 Origin of Promoters/Sponsors of Alternative Funds**. Further to those mentioned there, large Swiss corporations, Swiss HNWIs and family offices do invest in such products.

2.16 Key Trends

A major trend in Switzerland, and worldwide, is currently environmental, social and governance (ESG) considerations in all aspects of projects. This is, in particular, driven by the adaptation of ESG standards in the EU and the high demand by investors for ESG products. Alternative credit in different forms is also picking up speed, but not at the rate seen in other jurisdictions. AI and digitalisation technology projects are even more

visible, particularly as a result of the COVID-19 pandemic.

2.17 Disclosure/Reporting Requirements

Open-End Funds

FCPs and SICAVs must issue a prospectus, of which, investment regulations are usually an integral part. The minimum content of the prospectus is now provided in an appendix to the Swiss Financial Services Ordinance (FINSO), whereas the information to be included in the fund regulations is provided in CISA.

FINMA must approve the fund regulations of the FCP and SICAV, as well as the articles of incorporation of the SICAV. FINMA may waive all or some of the disclosure requirements when the fund is open only to qualified investors.

Furthermore, any alternative fund that may be offered to retail investors (which, in any case, excludes LPCIs and ICs) requires a “key investor document” (KID) as now foreseen in the Swiss Financial Services Act (FINSA). For open-end funds established prior to the change of legislation, there is a transitional period until 31 December 2021 during which they can continue to use their existing “simplified prospectus” or “key investor information document” (KIID). In view of the ongoing discussion in the EU about an extension of the respective transitional period for another six months until 1 July 2022, the Swiss Federal Council will also discuss a similar extension of this transitional period. This extension of the transition period requires an amendment to Articles 110 and 111 of the Financial Services Ordinance and Article 144 paragraphs 1 and 5 of the Collective Investment Schemes Ordinance. The Federal Council’s decision on these amendments is expected in November 2021.

Closed-End Funds

LPCIs must submit the partnership agreement/prospectus to FINMA for approval. Its content requirements are to be found in CISA. A SICAF is also required to issue a prospectus with its articles of incorporation and fund regulations. Both LPCIs and SICAFs are subject to FINMA approval. As mentioned, there are currently no SICAFs registered by FINMA and, accordingly, they are factually of no practical relevance in the Swiss alternative fund landscape.

Since LPCIs are not open for investment to retail investors, no KID is required. However, if a SICAF were ever established, the rules above pertaining to the issuance of a KID would apply.

Foreign Funds

Alternative foreign funds can only be marketed to qualified investors as defined in the revised CISA.

Under the old CISA, appointing a Swiss representative and a paying agent was required, except to market to regulated institutional investors.

Furthermore, the offering and marketing documents needed to include specific disclosures regarding, in particular, the Swiss representative and the paying agent, the country of origin of the fund, the place of performance and jurisdiction, and information on the payments of retrocessions and rebates.

Although FINSA has done away with these appointment and disclosure rules (except when marketing to HNWIs), last-minute transitional provisions have been included in FINSO. As a result, until the fund marketer is fully compliant with the new FINSA conduct and organisational rules, these (old) obligations continue to apply. The transitional period ends upon compliance with the relevant new FINSA rules, which must

be implemented by 31 December 2021 at the latest.

Retrocessions

Based on FINSA, all financial services providers, including fund distributors and advisers, must disclose in advance to the client any payments they receive from third parties (such as the manager of the fund) in connection with this activity. Unless the client provides a waiver, it is entitled to claim the amount of the retrocessions paid to the financial services provider.

Reporting

Swiss funds must generally issue and provide FINMA with (unaudited) semi-annual reports within two months of the end of the first half of the business year. Audited annual reports are to be prepared and filed with FINMA within four months of the end of the business year. Furthermore, open-end funds must publish the net asset value of their shares at regular intervals. There are numerous additional reporting obligations to FINMA concerning changes to the approved organisation of the fund, changes pertaining to the persons in management, and to the fund documents. Many of these changes require approval from FINMA before they can be implemented. Finally, publications on the platform chosen by each fund are required as a means to inform investors.

2.18 Anticipated Changes

L-QIF

An initiative for a new Swiss unregulated fund to be included in CISA was launched in June 2019. The dispatch with the Bill was issued on 19 August 2020, and the Council of State has already deliberated the Bill and received it well. The draft legislation would allow the establishment of a new category of Swiss fund, the “Limited Qualified Investor Fund” (L-QIF), which would not require FINMA approval and would be the first Swiss unregulated vehicle of its kind to

qualify as a fund. The draft provides for a wide range of investment categories. This is a welcome potential addition to the Swiss fund products on offer. Time to market would decrease substantially, which would allow Switzerland to become more competitive as a fund domicile. Nevertheless, the Bill currently foresees that only a Swiss-registered fund management company can manage the vehicle. Also, withholding tax issues affecting foreign investment have not been addressed. It is anticipated that the new legislation could come into force in mid-2022 at the earliest.

3. MANAGERS

3.1 Legal Structures Used by Fund Managers

Swiss fund management companies are required to be established as a Swiss law corporation. The same applies to general partners of LPCIs.

A self-managed SICAV (fund and fund management company in one entity) is a special form of combined Swiss law corporation, according to the CO, with special provisions (particularly pertaining to variable capital) in CISA. SICAFs (although none has yet been established) have a similar legal structure: a corporation according to the CO with special provisions foreseen in CISA. Unregulated ICs are usually established as Swiss law corporations.

3.2 Regulatory Regime

Swiss fund management companies are subject to an extensive licensing process by FINMA. It is one of the most comprehensive licensing processes there is and is comparable to those of securities firms. The company must demonstrate that it fulfils all the legal requirements set out in the Swiss Financial Institutions Act (FINIA). The scope of the process includes satisfying legal requirements and FINMA expectations

pertaining to internal organisation, irreproachable business conduct, governance, capital, capital adequacy, segregation of assets, etc. The fund management company is subject to ongoing extensive prudential supervision by FINMA based on regular reporting and audits.

3.3 Tax Regime

The Swiss income taxation of the management fees depends on the legal form of the Swiss-resident fund manager. Income from fund management qualifies as income from self-employment activity in the hands of a Swiss-resident individual and as taxable profit in the hands of a Swiss-resident company. The income from self-employment activity is also subject to Swiss social security contributions.

3.4 Rules Concerning “Permanent Establishments”

Swiss taxation does not provide for an exemption or other rules to ensure that alternative funds with a manager in Switzerland do not have a permanent establishment or other taxable presence in Switzerland. Switzerland follows Article 5 of the OECD Model. Therefore, a Swiss tax-resident fund manager that provides fund management services to a foreign alternative fund does not generally create a Swiss permanent establishment.

3.5 Taxation of Carried Interest

In the field of private equity investments, it is common that the fund manager participates in the profit of the collective investment scheme. The Swiss income taxation of carried interest depends on the legal form of the Swiss-resident fund manager. If Swiss-resident fund managers who are employed with the fund management company hold own units in the collective investment scheme, such units generally qualify as private assets. In that case, capital gains from the sale of the units are income tax-free. Furthermore, participation in the profit of the collective

investment scheme (so-called Carried Interest II) is tax-free to the extent that the participation is in proportion to the holding of own units. The extended participation is treated as employment income.

3.6 Outsourcing of Investment Functions/Business Operations

Managers may outsource some of their investment functions and business operations. See **2.7 Requirement for Local Investment Managers** to **2.10 Requirements for Non-local Service Providers**.

3.7 Local Substance Requirements

See **2.7 Requirement for Local Investment Managers** to **2.10 Requirements for Non-local Service Providers**.

3.8 Local Regulatory Requirements for Non-local Managers

No Swiss fund can be managed from outside Switzerland. However, certain functions, including asset/portfolio management, can be delegated to foreign managers under certain conditions. See **2.7 Requirement for Local Investment Managers** to **2.10 Requirements for Non-local Service Providers**.

4. INVESTORS

4.1 Types of Investor in Alternative Funds

There is substantial appetite for alternative funds among investors in Switzerland. Investor interest in such funds continues to increase, especially in light of the poor returns in several forms of traditional investments. The negative interest rate environment, in particular, is adding to the search for higher yields, even if this results in taking higher risks.

Banks and other asset managers looking for better returns for their clients will consider allocations to alternative funds within the limits of their client mandate. Swiss pension funds are currently allocating to more alternatives, hoping to compensate for insufficient yields within the scope of the legal restrictions applicable to them. Large Swiss companies as well as HNWIs also invest in this asset class themselves or through family offices. It is important to point out that this substantial interest does not particularly focus on Swiss products. Much of Swiss investors' allocation to alternative products flows into funds established outside of Switzerland.

4.2 Marketing of Alternative Funds

This depends on the chosen fund structure. Open-end Swiss alternative funds (contractual funds and SICAVs) may, based on their approval by FINMA, be made available to all (including retail) investors. However, FINMA may grant exemptions to the manager, particularly pertaining to risk diversification requirements, if the circle of investors is voluntarily limited to qualified investors.

LPCIs, SICAFs and ICs are only open to qualified investors.

Foreign alternative funds can only be marketed to qualified investors and the limitations mentioned in **2.17 Disclosure/Reporting Requirements** apply.

4.3 Rules Concerning Marketing of Alternative Funds

Client Segmentation

The marketing rules differ according to the qualification of the client.

Under the new rules, the following are deemed qualified investors:

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- institutional investors –
 - (a) financial intermediaries pursuant to the Banking Act, the Financial Institutions Act or the Collective Investment Schemes Act;
 - (b) insurance companies as defined in the Insurance Supervision Act;
 - (c) foreign clients subject to prudential supervision, such as the persons listed above;
 - (d) central banks; and
 - (e) a national or supranational public entity with professional treasury; and
- other professional investors –
 - (a) public entities with a professional treasury;
 - (b) pension funds or other institutions that serve the purpose of an occupational benefits scheme with a professional treasury;
 - (c) companies with a professional treasury;
 - (d) large companies;
 - (e) private investment structures with a professional treasury established for HNW retail clients that have requested in writing to be treated as a professional investor (opt-out);
 - (f) HNWIs who have requested in writing to be treated as a professional investor (opt-out); and
 - (g) a retail client for whom discretionary asset management or investment advisory services are being provided based on a long-term written asset management or investment advisory agreement with a regulated financial intermediary as listed above, or with a foreign asset manager subject to equivalent prudential supervision, which has not declared that it does not want to be treated as a qualified investor.

Clients that are not listed as institutional or professional investors are considered to be retail investors.

Swiss Alternative Funds

New conduct and organisational rules generally apply to the provision of financial services to end clients. Fund intermediation falls within the scope of financial services, according to FINSO.

The relevant conduct rules include, in particular:

- providing information on the financial services provider to the client;
- performing suitability and appropriateness tests;
- documentation and reporting obligations; and
- (as the case may be) best execution obligations.

These conduct rules do not apply to marketing to institutional investors. Furthermore, professional investors can waive some of these obligations. This is not, however, the case for marketing to retail investors.

Some of the relevant organisational rules include (to the extent applicable):

- appropriate internal organisation of the service provider;
- having sufficiently well-trained staff;
- appropriate handling and disclosure of conflicts of interest; and
- compliance with applicable disclosure and waiver rules related to compensation from third parties (retrocessions).

Transitional Rules

A transitional period has been foreseen for financial service providers to implement these conduct and organisational rules until 31 December 2021.

Until these new provisions have been implemented, the prior regime under the old CISA, including the conduct rules (in particular, the loyalty obligation, duty of care, and informa-

tion obligations), the obligation to keep records of the needs of the clients and the reason for recommending a particular fund, as well as the implementation of self-regulation of the Asset Management Association Switzerland (AMA) on distribution of funds, continue to apply.

The transition to the new rules, above, can take place any time prior to 31 December 2021. For Swiss financial service providers, the auditors need to be notified of the date of the regime switch.

Foreign Alternative Funds

Persons and entities marketing foreign alternative funds in Switzerland must comply with the same FINSA conduct and organisational rules described above, within the same time-frame and with the same option to implement the changes earlier (transitory rules). However, until the new conduct and organisational rules are implemented, the old regime rules continue to apply, and the obligation to appoint a Swiss representative and paying agent when marketing only to qualified investors, as defined above, remains in place temporarily. Once the new system is implemented, this obligation will no longer exist, except if marketing to HNWIs. In the latter case, the old regime is maintained. The AMA has adapted its self-regulation to these changes coming into effect on 1 January 2022.

Client Adviser Register

Under FINSA, any natural person providing financial services (eg, fund mediation to end clients) in Switzerland qualifies as a client adviser (regardless of whether any advice is provided). This applies both for independent marketers and for those employed by a company offering such services.

All client advisers who do not act on behalf of a prudentially supervised financial institution in Switzerland, must register with a new adviser

register in Switzerland in order to market funds. Client advisers acting on behalf of a prudentially supervised financial institution abroad are exempt from registration if they limit their marketing efforts in Switzerland to professional investors.

Based on the applicable transitional rules, such a registration, when required, must have taken place by 19 January 2021. However, the transition period for proof of sufficient training by such already-registered client advisers will end on 31 December 2021.

Affiliation with an Ombudsman Office

All financial service providers active in Switzerland (even from abroad) and not providing services exclusively to professional clients (excluding HNWIs with opt-in) must become affiliated with a Swiss ombudsman office to ensure clients are able to make use of mediation proceedings in the event of a disagreement or conflict.

4.4 Local Investors

Local investors may invest in alternative funds in Switzerland. Retail investors may, however, only invest in those alternative funds which are open to them.

4.5 Regulatory Regime

Refer to **4.3 Rules Concerning Marketing of Alternative Funds** with respect to registration as a client adviser and affiliation with an ombudsman office.

4.6 Disclosure Requirements

Refer to **2.17 Disclosure/Reporting Requirements** with respect to required disclosures to investors.

4.7 Tax Regime

A Swiss-resident unit-holder is subject to Swiss income tax on dividends, interest, etc, realised by FCPs, SICAVs and LPCIs. Capital gains on

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the sale or redemption of units in FCPs, SICAVs and LPCIs are income tax-free if the Swiss-resident individual unit-holder holds the unit as a private asset. The redemption of units is taxable in so far as the liquidation proceeds include income that has not yet been taxed in the hands of a Swiss-resident individual unit-holder.

A Swiss-resident individual unit-holder is entitled to shareholder relief on dividends from qualifying participation in SICAFs. Capital gains on the sale of units in a SICAF are income tax-free in the hands of the Swiss-resident individual unit-holder if they hold the unit as a private asset. The unit-holder realises dividend income upon distribution that is subject to Swiss income taxes. In the hands of a Swiss-resident individual unit-holder, the redemption of units is taxable in so far as the liquidation proceeds exceed the nominal value and the paid-in capital of the participation.

A Swiss-resident corporate unit-holder is entitled to participation relief on capital gains and dividends from qualifying participations in SICAFs.

4.8 FATCA/CRS Compliance Regime

FATCA Agreement

The agreement between Switzerland and the United States came into force on 2 June 2014. The corresponding implementing act has been in force since 30 June 2014. FATCA implementation in Switzerland is based on Model 2, which means Swiss financial institutions disclose account details directly to the US tax authority with the consent of the US clients concerned. Where US clients do not give their consent, the United States has to request this data through normal administrative assistance channels.

CRS

Switzerland usually implements the Automatic Exchange of Information (AEOI) according to the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA). Bilateral treaties on the AEOI have been concluded with the EU, Hong Kong and Singapore. The legal basis for the AEOI came into force on 1 January 2017.

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MLL Meyerlustenberger Lachenal Froriep Ltd is one of the most reputable international business law firms in Switzerland. Over 100 experienced and dynamic lawyers form a strong team of specialists who stand for innovative and solution-focused services. With offices in Zurich, Geneva, Zug, Lausanne and Brussels, the firm is present in the key Swiss economic centres and the heart of Europe. Its Chinese and Latin American desks are a gateway to and from these regions. The key areas of practice in relation to the investment funds sector are

fund structuring; drafting/adapting legal product documentation for Swiss purposes; compliance; drafting/negotiating investment management agreements; applications to the Swiss Financial Market Supervisory Authority (FINMA) for licences; applications to FINMA for approval of domestic and foreign funds; advice regarding Swiss distribution rules, including training for new market participants; listing of exchange-traded funds; listing of structured products; enforcement procedures; and updates on legal developments.

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