Private Placement and Distribution Rules in Switzerland

Questions and Answers

1. Do foreign collective investment schemes have to be authorized by the Swiss Financial Market Supervisory Authority ("FINMA") for distribution in Switzerland?

No authorization of the foreign collective investment scheme by FINMA is necessary if distribution occurs to certain qualified investors only such as:

(i) prudentially supervised banks, securities dealers, fund management companies and asset managers of collective investment schemes;

(ii) prudentially supervised insurance companies (together with the entities according to the preceding paragraph (i) hereinafter the "**Supervised Financial Intermediaries**");

(iii) central banks;

(iv) public entities and retirement benefits institutions (pension funds), each with professional treasury operations;

(v) private companies with professional treasury operations;

(vi) certain high net worth individuals who declared in writing that they want to be treated as qualified investors (opting-in);

(vii) independent asset managers which are subject to the Swiss Anti-Money Laundering Act, which are committed to the code of conduct of an self-regulatory organization that are recognized by FINMA as minimum standards, which employ asset management agreements complying with such code of conduct and which confirm in writing that they place the shares in the foreign collective investment schemes with qualified investors only, *i.e.* with their discretionary asset management clients not having declared that they do not want to be treated as qualified investors (opting-out).

2. Does the revised Swiss Collective Investment Schemes Act ("CISA") prohibit private placements of foreign collective investment schemes in Switzerland?

Foreign collective investment schemes may be marketed to Supervised Financial Intermediaries and central banks without any regulatory restrictions whatsoever (Art. 3 para. 1 CISA). Supervised Financial Intermediaries may further freely place the non-Swiss fund units with their discretionary asset management clients or (to the extent certain additional legal requirements are met) investment advisory clients (Art. 3 para. 2 let. a und let. b CISA).

3. Which are the major requirements in case of distribution of foreign collective investment schemes to qualified investors not being Supervised Financial Intermediaries or central banks?

(i) The foreign collective investment scheme must appoint a Swiss paying agent and a Swiss representative (Art. 120 para. 4 CISA).

(ii) Distribution must occur via a financial intermediary which is subject to appropriate supervision in Switzerland or in its home jurisdiction abroad (Art. 19 para. 1bis CISA).

(iii) The distributor and the Swiss representative must enter into a distribution agreement which meets certain minimum standards defined by the Swiss Funds & Asset Management Association SFAMA (Art. 131a para. 1 and 30a of the Swiss Collective Investment Scheme Ordinance ("**CISO**")).

For distributing foreign collective investment scheme to non-qualified (*i.e.* retail) investors, a comprehensive prior approval process by FINMA is necessary.

4. Already placed foreign Private Equity Funds (closed-end collective investment vehicles for private market investments), which are no longer distributed, do not have to appoint ex-post a representative and paying agent?

The ex-post appointment of a representative and paying agent in Switzerland is in our view not necessary, if the distribution was discontinued at the latest on 28.02.2015. This because, for distribution occurred before 28.02.2013 a situation subject to transitional rules is given, to which Art. 158d para. 4 CISA is to be applied. According to this provision, in the case of distribution exclusively to qualified investors (which is regularly the case for PE Funds) a representative and paying agent must be appointed within two years of the changes to the law coming into force (that was 28.02.2015). If therefore the distribution is discontinued by 28.02.2015, neither a representative nor a paying agent must be appointed.

For the sake of completeness it is placed on record that the CISA does not foresee a seamless appointment of representatives and paying agents, because even after 28.02.2015 the „placing" of foreign collective investments with qualified investors is permissible without such an appointment; namely in all those cases, which pursuant to Art. 3 para. 2 CISA do not constitute „distribution". This in our view also applies if the relevant discretionary asset management or advisory relationship in place at the time of the placement of the fund ceases at a later date. The foreign fund manager did not have to expect such cessation.

5. Does, as a matter of mandatory Swiss law, a place of jurisdiction in Switzerland exist for distribution of foreign funds to qualified investors in Switzerland?

In our view there is no legal basis for a mandatory submission of a fund to the courts at the place of business of the representative. Art. 125 CISA only provides only that the place of performance for units of a foreign fund distributed in Switzerland lies at the place of busi-

ness of the representative. Also, Art. 30a CISO only requires that the distribution agreement obliges the distributor to use only fund documents, which cite the representative, the paying agent and the place of jurisdiction. Thus, in the absence of a legal basis to the contrary, the fund should be able to choose freely the place of jurisdiction, subject to the compulsory rules of international private law. Pursuant to Art. 30a para. 2 CISO, the place of jurisdiction has to be indicated in the fund documents.

6. Can a foreign fund terminate representative and paying agent, if despite distribution efforts in Switzerland, there has been no subscription by qualified investors and no further distribution is to take place in Switzerland?

The legal rule about the appointment of a representative and a paying agent for the distribution of foreign funds to qualified investors in Switzerland is based on the basic idea that in the context of distribution within the meaning of the CISA units are effectively placed in Switzerland or, in the case of open-ended funds, distribution activities take place continually in Switzerland.

If, despite distribution efforts in Switzerland, there are no subscriptions and as a result the fund is no longer distributed in Switzerland, after completion or discontinuance of distribution the functions of a representative and a paying agent in Switzerland become obsolete. After completion of distribution, the representative no longer has to monitor the distributors, because distribution has ceased and in future no further distribution takes place, and it can also not (no longer) act in the function of contact person towards potential investors.

Equally unnecessary is a paying agent, because, given the lack of subscriptions, there have been no payments in Switzerland. In the absence of investors in Switzerland, in such a case investor protection considerations can also not play a role, which might have supported the maintenance of the representative and paying agent agreements. Accordingly, in our view, the representative and paying agent agreements as well as the agreements with the distributors can in such a case be terminated immediately after discontinuation of distribution.

7. What duties does the distributor have after discontinuation of the distribution of foreign funds to qualified investors in Switzerland?

After discontinuation of distribution of closed-end funds to qualified investors in Switzerland and termination of the distribution agreements with the distributors, in our view the duties of the representative are limited to the acceptance and answering of questions and complaints, which are raised by FINMA, external auditors or courts in connection with the distribution of the funds, informing the fund about complaints or claims of the investors and their answering and the provision of fund documents (to the extent drawn up by the fund concerned) upon request by investors.

All other duties of the representative cease because of the discontinuation of distribution, in particular also the duty of the representative to monitor the distributors in accordance with the relevant regulations. It therefore appears appropriate, if after discontinuation of

distribution in Switzerland the existing representative agreement is limited and reduced to the duties listed above and the representative agreement is revised accordingly. In addition it is to be pointed out that in respect of foreign funds, which are distributed exclusively to qualified investors in Switzerland, the (continuous) publication and reporting requirements of Art. 133 CISO do not apply (Art. 133 para. 5 CISO).

8. Does the discussion with potential investors of fund projects or of drafts of fund documents constitute distribution?

In advance of the distribution of PE products frequently pre-marketing efforts are undertaken by the fund manager. Possible projects and investment strategies and with them their market potential and feasibility are evaluated with potential investors. The pre-marketing also makes possible an open exchange of views, which the fund manager can benefit from when structuring the new product.

In our view the pre-marketing phase ends, when the main terms of the fund product are established. These include, e.g. the investment strategy, the Asset Manager and the structure of the investment vehicle. Therefore, as soon as a product is given, the basic parameters are known and it can therefore be marketed and promoted in a way, which can effect a purchase decision by the investor, distribution is given.

In order that an activity constitute distribution it is not necessary that the vehicle has already been formed, the offering memorandum is already available or binding subscription commitments can be given, so that the boundaries between pre-marketing and distribution are fluid. If doubts exist whether an activity constitute unregulated pre-marketing or already regulated distribution, distribution is to be assumed for reasons of prudence. This approach is to be recommended at least until a different practice of the competent supervisory authority or the courts has been established.