Hedge Funds

A Practical Global Handbook
to the Law and Regulation
Second Edition

Consulting Editors **Florentino Carreño,**
Lynn McGrade and **Alfred LJ Page**

Table of contents

Switzerland

Markus Pfenninger
Pascal Zysset
Walder Wyss Ltd

1. Introduction and regulatory framework

1.1 Swiss hedge fund industry

While the Swiss hedge fund industry is not comparable to the likes of those in the United States and the United Kingdom, it still ranks among the top European nations in terms of size. Numerous hedge funds are domiciled outside of Switzerland, but carry out their fund management, fund marketing and sales functions in Switzerland. The Swiss hedge fund industry is concentrated in three centres:

- Zurich, Pfäffikon and Zug in the German-speaking region of Switzerland, which is the most important centre;
- Geneva, Nyon and Lausanne in the French-speaking region; and
- Lugano in the Italian-speaking region.

1.2 Federal Act on Collective Investment Schemes

The Federal Act on Collective Investment Schemes is a framework law regulating the fundamental principles of collective investment schemes. The Collective Investment Schemes Act is supplemented by the Federal Council's Ordinance on Collective Investment Schemes and the Financial Market Supervisory Authority's (FINMA) Ordinance on Collective Investment Schemes. Based on the main principle 'same business, same risks, same rules', the Collective Investment Schemes Act governs all types of collective investment schemes, including those that carry out hedge fund strategies. It does not include a legal definition of 'hedge funds'. However, the term 'hedge fund' is presumed in some regulatory ordinances and also in FINMA circulars aimed at publicising FINMA's practices in the interpretation of the legal framework.

1.3 Market supervision

Collective investment schemes are supervised by FINMA. FINMA is responsible for the authorisation and supervision of all collective investment schemes in Switzerland governed by the Collective Investment Schemes Act.

Under the Collective Investment Schemes Act, domestic collective

investment schemes and all parties responsible for managing such schemes (ie, fund management companies, asset managers and distributors) or for keeping safe the assets of such scheme (ie, custodian banks) require a licence and are supervised by FINMA. The investment products distributed by each domestic collective investment scheme, including its related documents, require prior approval from FINMA. The different types of collective investment schemes governed by the Collective Investment Schemes Act (see below) are subject to investment and borrowing restrictions.

The legal regime provides for four types of domestic collective investment schemes. Swiss funds can be established as open-ended collective investment schemes (ie, investors have either a direct or an indirect legal entitlement, at the expense of the collective assets, to redeem their units at the net asset value) in the form of a contractual investment fund or an investment company with variable capital (SICAV). Swiss hedge funds can also be established in the form of a closed-ended limited partnership for collective investments (LP) or an investment company with fixed capital (SICAF). 'Closed-ended' means that investors have neither a direct nor an indirect legal entitlement at the expense of the collective assets to the redemption of their units at the net asset value.

Irrespective of their legal status, foreign collective investment schemes that are distributed in or from Switzerland are also subject to the Collective Investment Schemes Act and, unless such distribution is limited to qualified investors (see below), will require authorisation from FINMA.

2. Structures of Swiss collective investment schemes

2.1 Contractual investment funds

(a) Overview

Contractual investment funds are open-ended collective investment schemes based on a collective investment agreement (fund contract) between an investor, a fund management company and a custodian bank. Under the fund contract, the fund management company commits itself to involving investors in accordance with the number and type of units which they have acquired in the fund and to managing the fund's assets in accordance with the provisions of the fund contract. The fund management company is required to be a joint stock corporation under the Code of Obligations with its registered office and its main administrative office in Switzerland. The fund management company must have a share capital of at least CHF 1 million that is fully paid up in cash. The custodian bank is responsible for the safe-keeping of the fund's assets, the issuance and redemption of units, and the payment transfer on behalf of the investment fund. Under the Collective Investment Schemes Act, the custodian bank must be a bank under the Federal Act on Banks and Savings Institutions.

Contractual investment funds can be set up as securities funds, real estate funds or other funds for traditional or alternative investments. The Collective Investment Schemes Act, the Federal Council ordinance and the FINMA ordinance specify which investments and investment techniques are allowed for each type of contractual investment fund. Real estate funds are of low relevance for the Swiss hedge fund market, so the following explanations are limited to securities funds and other funds for traditional and alternative investments.

(b) Securities funds

Securities funds may invest in transferable securities issued on a large scale and in non-securitised rights having the same function (uncertified securities) which are traded on a stock exchange or other regulated market open to the public, and in other liquid financial assets. With certain restrictions, securities funds are also entitled to conduct transactions in derivatives. However, a securities fund's overall exposure associated with derivative financial instruments may not exceed 100% of the net assets. (Direct) short selling of investments and investments in precious metals, or precious metals certificates and commodities, or commodities certificates, is not permitted. However, securities funds may carry out indirect short-selling investments by entering into total return swaps or contracts for difference.

Under the Federal Council ordinance, securities funds are also entitled to invest 10% of the fund's total assets in 'other assets' than those listed above. In the absence of a consistent code of practice, it is not clear whether this so-called 'trash quota' leads to greater flexibility for investments of securities funds. Some scholars believe that the provision allows for a broader range of investments – for example, short-selling investments and investments in precious metals and commodities – as long as such investments do not exceed 10% of the fund's total assets. Other scholars, holding a more restrictive opinion, state that all investments of securities funds must be in line with the defined investment policy of the relevant securities fund.

Overall, even though they are actually the basis for model funds for traditional investments, securities funds allow investment strategies that are also typical for hedge funds (eg, long/short strategies – short indirectly by the use of derivatives – managed futures strategies and (global) macro-strategies).

(c) Other funds for traditional and alternative investments

Other funds for traditional and alternative investments are defined as open-ended collective investment schemes that are neither securities funds nor real estate funds. They are permitted to invest in securities, precious metals, real estate, commodities, derivatives, units of other collective investment schemes, and other assets and rights. In particular, other funds for traditional and alternative investments may carry out investments that:

- have only limited marketability;
- are subject to strong price fluctuations;
- exhibit limited risk diversification; and
- are difficult to value.

These funds are permitted to engage in short selling and benefit from extensive investment techniques and relatively low restrictions. For example, other funds for alternative investments may commit an overall exposure of up to 600% of the fund's net assets. Most hedge funds in Switzerland are set up as other funds for alternative investments.

With regard to risk disclosure and transparency, other funds for alternative investment are subject to additional regulations. They are obliged to disclose the special risks involved in alternative investments in the fund name, as well as in the prospectus and advertising material. The prospectus must be offered actively and free of charge to interested persons prior to an agreement being concluded or prior to subscription. The warning clause requires prior approval from FINMA.

2.2 SICAV

A SICAV has the form of an open-ended collective investment scheme similar to the SICAV under Luxembourg law. A SICAV represents an own legal structure of a legal entity based on the Collective Investment Schemes Act. Other than a SICAF (see below), a SICAV does not constitute a corporation under the Code of Obligations. A SICAV may either be self-managed by its executive body or be externally managed by a licensed fund management company. Self-managed SICAVs require a minimum investment of CHF 500,000 on formation. Under the Collective Investment Schemes Act, externally managed SICAVs require a minimum investment of CHF 250,000. Like contractual investment funds, SICAVs must appoint a custodian bank.

As a SICAV is an open-ended collective investment scheme, its share capital is variable and the investors are entitled (by direct or indirect legal entitlement) to redeem their units at the net asset value. A SICAV has two types of shareholders: company shareholders and investor shareholders. The company shareholders act as promoters or sponsors of the SICAV and are required to pay in the minimum investment amount at the time of formation. The minimum investment amount must be maintained at all times.

With regard to investment policy and investment strategy, the Federal Council ordinance refers to the provisions set out for contractual investment funds. Therefore, a SICAV generally also qualifies to pursue a hedge fund strategy.

2.3 SICAF

Under the Collective Investment Schemes Act, a SICAF has the form of a joint stock corporation pursuant to the Code of Obligations. A SICAF qualifies as a closed-ended collective investment scheme, so investors are not entitled to redeem their units at the net asset value. As it is an investment company, a SICAF is not subject to the Collective Investment Schemes Act if:

- it is listed on a Swiss stock exchange;
- its shareholders are only qualified investors (as defined below);
- it meets the requirements of an investment club under the Collective Investment Schemes Act; or
- it acts as a holding company of its operating subsidiary.

In general, the Code of Obligations is applicable to a SICAF if the Collective Investment Schemes Act does not regulate differently. Since the last revision of the Collective Investment Schemes Act, a SICAF must appoint a custodian bank supervised by FINMA.

With regard to the risk profile of the permitted investments of a SICAF, the Collective Investment Schemes Act refers to the respective provisions that apply to other funds for traditional and alternative investments and therefore the same regulations are applicable (see above).

2.4 LP

An LP is a closed-ended collective investment scheme in the form of a limited partnership. At least one partner bears unlimited liability (general partner), while the other partners (limited partners) are liable only up to a specific capital contribution. The general partner is considered to be the manager of the LP and the limited partners have the role of investors. The general partners must be joint stock corporations pursuant to the Code of Obligations with their registered office in Switzerland and are entitled to be active as general partner only in one LP. In contrast to the other forms of collective investment schemes, LPs are obliged to appoint only a custodian and a payment agent, and neither need be authorised or supervised by FINMA.

An LP is considered by the legislature to be a vehicle for risk capital, such as direct or indirect financing for start-ups, venture capital, private equity, hedge funds and real estate, with the expectation of generating above-average capital gain and added value. The Collective Investment Schemes Act does not contain provisions on investment restrictions and thus offers a significant degree of flexibility to the management. Since an LP is created to invest in risk capital and is a closed-ended investment scheme (ie, investors have no entitlement to the redemption of their participation), limited partners may only be qualified investors (as defined below).

The concept of an LP as a form of a collective investment scheme was

introduced into Swiss law in 2006. Its uptake can be described as limited at best. At the time of writing, only 18 LPs are registered in Switzerland.

2.5 Authorisation and licensing requirements for domestic collective investment schemes

A collective investment scheme that is incorporated or *de facto* managed in Switzerland can be incorporated, managed and distributed in or from Switzerland only if it has been approved by FINMA. In general, all types of domestic collective investment schemes, and all parties responsible for managing, distributing or keeping safe the assets of a domestic collective investment scheme, require authorisation from FINMA.

Parties applying for authorisation must file the following with FINMA:

- for fund management companies, SICAVs and SICAFs, the articles of association and the bylaws;
- for LPs, the partnership agreement; and
- for asset managers and distributors of collective investment schemes, the relevant organisational documents.

However, under the Collective Investment Schemes Act, authorised banks are exempt from the duty to obtain authorisation for asset management and asset distribution. Authorised fund management companies are also relieved of the obligation to be authorised as a representative of foreign collective investment schemes. Authorised asset managers require an additional licence as a representative of a foreign collective investment scheme, but not as a distributor.

In principle, authorisation is granted if specified conditions are met, including the following:

- The persons responsible for the management and business operations are of good reputation, can guarantee good management and business conduct, and have the necessary professional background;
- Significant investors (ie, investors that hold, directly or indirectly, 10% or more of the equity or voting rights respectively, and investors with the possibility to materially influence the business activity of the licensee) are of good reputation and do not exert their influence to the detriment of prudent and sound business practice;
- The internal regulations and organisational structure comply with the applicable legal requirements; and
- Sufficient financial guarantees are available (under the Collective Investment Schemes Act, the licensee is deemed to have sufficient financial guarantees if it meets the relevant provisions regarding the minimum capital or minimum investment amount).

If the relevant requirements for a simplified authorisation procedure under the Federal Council ordinance are met (the fund regulations must comply with a format that FINMA has recognised as binding in relation to the relevant standards), domestic collective investment schemes for qualified investors (as defined below) can be approved within four weeks of receipt of the application and within eight weeks for non-qualified investors. If the simplified approval procedure does not apply, the process can take between three and six months.

3. Marketing of foreign collective investment schemes in Switzerland

3.1 Definition of 'foreign collective investment schemes'

The Collective Investment Schemes Act defines 'foreign collective investment schemes' as:

- assets that were accumulated on the basis of a fund contract or another agreement with similar effect for the purpose of collective capital investment and that are managed by a fund management company with its registered office and main administrative office abroad; and
- companies and schemes with their registered office and main administrative office abroad whose purpose is collective capital investment.

3.2 Distribution as regulated activity

The distribution of collective investment schemes in or from Switzerland is subject to regulatory requirements set forth in the Collective Investment Schemes Act and the relevant regulations of FINMA – in particular, the guidelines relating to the distribution of collective investment schemes in its Circular 2013/9.

The term 'distribution' includes any marketing activity involving print and electronic media of every kind, such as newspapers and magazines, direct mail, brochures, fact sheets, recommendation lists and information letters sent to potential investors, press conferences, telemarketing, unsolicited phone calls (cold calling), presentations (road shows), trade shows, sponsored reports on funds, home visits, websites and other forms of e-commerce, subscription slips and online subscription opportunities, as well as emails. In short, any type of activity that aims to encourage the acquisition of fund interest by an investor is regarded as 'distribution', unless it is directed at exempt investors or on a reverse solicitation basis. 'Exempt investors' are:

- licensed financial intermediaries such as banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks;
- licensed insurance institutions;
- any investor which has concluded either a written discretionary asset

management agreement or a written long-term remunerated investment advisory agreement with a FINMA-licensed financial intermediary (eg, banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks), if information is provided by such financial intermediary in connection with the performance of the relevant agreement; and

- any investor which has concluded either a written discretionary asset management agreement or a written long-term remunerated investment advisory agreement with an independent (external) asset manager, if the information is provided by such independent asset manager in connection with the performance of the relevant agreement and such independent asset manager:
  - is subject to anti-money laundering regulations (ie, the Federal Act on Combating Money Laundering and Terrorist Financing (the Anti-Money Laundering Act) and connected ordinances);
  - is subject to the code of conduct issued by a specific industry body recognised as minimum standard by FINMA; and
  - has concluded a written discretionary asset management agreement or written long-term remunerated investment advisory agreement that is compliant with the standards of the industry body recognised as minimum standard by FINMA.

Furthermore, the provision of information to any investor on an unsolicited basis – which, according to the relevant ordinance, is the case if an investor on its own initiative requests information (reverse solicitation), such as where the investor actively requests information or purchases or subscribes to collective investment schemes units, in each case without having been contacted or solicited prior to its request – will not trigger regulatory requirements either.

If a foreign hedge fund is not distributed (ie, if it markets only to exempt investors or on a reverse solicitation basis), the provision of information and sale of units in such collective investment scheme is not regulated and may be performed without any authorisation, approval or licence of FINMA, either for the distributor or for the foreign hedge fund. If, however, the interests in a foreign hedge fund are marketed to prospects other than exempt investors and on an unsolicited basis, all marketing activities will be subject to the Swiss regulatory requirements as set forth below.

The Collective Investment Schemes Act differentiates between distribution to qualified investors (as defined below) only and distribution to non-qualified investors (ie, any investor that is not a qualified investor).

3.3 Distribution to qualified investors

The following persons represent 'qualified investors':

- exempt investors;
- public entities with professional treasury operations;
- retirement benefits institutions with professional treasury operations;
- companies with professional treasury operations;
- high-net-worth individuals (natural persons) who declare in writing that they wish to be deemed qualified investors (opting-in), if they:
  - confirm that they hold assets of at least CHF 5 million (at least CHF 3 million in non-real estate assets); or
  - provide evidence that they hold assets of at least CHF 500,000 and have sufficient knowledge to comprehend the risks of the investment based on personal education and professional experience or based on comparable experience in the financial sector; and
- independent asset managers who:
  - are subject to anti-money laundering regulations;
  - are subject to the code of conduct issued by a specific industry body recognised as minimum standard by FINMA;
  - have concluded a written discretionary asset management agreement or written long-term remunerated investment advisory agreement that is compliant with the standards of the industry body recognised as minimum standard by FINMA; and
  - confirm in writing that they will use the information provided on the collective investment scheme only for clients which are qualified investors.

Under the current regime, the distribution of a foreign collective investment scheme in or from Switzerland to qualified investors will not require a licence from FINMA, but the following requirements must be met:

- The fund's name must not provide reasons for confusion or deception;
- A Swiss representative and Swiss paying agent must be appointed for the distribution of units in Switzerland;
- The fund interests may be distributed only by a financial intermediary which is authorised to distribute collective investment schemes and is adequately supervised in its home jurisdiction (should the financial intermediary be located in Switzerland, it will require a distributor licence);
- The distributor must enter into a distribution agreement with the Swiss representative; and
- The relevant documents must contain a reference to the Swiss representative and Swiss paying agent and the place of jurisdiction.

Pursuant to current market standards, the Swiss representative may further require the manager of the foreign fund to insert a statement to the effect that

certain fund documents may be obtained from the Swiss representative free of charge and disclose certain information on distribution fees and rebates in the prospectus.

3.4 Distribution to non-qualified investors

Foreign collective investment schemes require authorisation from FINMA if they are distributed in or from Switzerland to non-qualified investors. Relevant documents, such as the sales prospectus, the key investor information documents (KIIDs), the articles of association and the fund contract, must be approved by FINMA.

FINMA will grant approval for the distribution of foreign collective investment schemes to non-qualified investors if:

- the scheme is subject to adequate prudential supervision in its home country;
- the organisation, investor rights and investment policy of the scheme are equivalent to the provisions of the Collective Investment Schemes Act;
- the name of the scheme does not provide grounds for confusion or deception;
- a licensed representative and Swiss bank as paying agent are appointed; and
- a cooperation and information agreement is in place between FINMA and the relevant foreign regulator.

Within the authorisation procedure, FINMA distinguishes between:

- funds complying with Directive 2009/65/EC (UCITS funds);
- funds complying with the Code on Unit Trusts and Mutual Funds of the Hong Kong Securities and Futures Commission (Hong Kong funds); and
- theoretically, other funds.

FINMA considers that foreign collective investment schemes complying with either the UCITS directive or – under certain conditions – the Hong Kong Code on Unit Trusts and Mutual Funds comply with the first two requirements set out above. With regard to foreign collective investment schemes that are not subject to the abovementioned regulations, applicants must provide evidence that the investor protection is equivalent to Swiss collective investment schemes. However, while FINMA has accepted investment funds regulation in the United States, the European Economic Area, Guernsey and Jersey as being equivalent to the Swiss standards set out in the Collective Investment Schemes Act prior to its revision in 2013, we are not aware that it has, to date, accepted any other investment funds regulation (other than the aforementioned) as being equivalent under the revised regime.

The time taken for foreign collective investment schemes to be granted approval depends on the complexity of the case. The authorisation process may take longer compared with domestic collective investment schemes, but has become quite straightforward for UCITS and Hong Kong funds, with FINMA having published standard application templates to be used.

4. Current regulation of asset managers

Most hedge funds registered in Switzerland are contractual investment funds set up in the form of other investment funds for alternative investments, with some of these hedge funds limited to qualified investors. Therefore, the respective investment decisions for a hedge fund's assets are sometimes delegated by the fund management company to the sponsor – that is, the custodian bank. To some extent, the investment decisions are also delegated either to specialised Swiss asset managers that are subject to FINMA supervision or to specialised asset managers whose registered office is abroad and that are subject to supervision in their home country. Some hedge funds have their own well-trained staff and carry out in-house asset management.

Asset managers of Swiss collective investment schemes require authorisation from FINMA. Under the current regulation, Swiss asset managers of foreign collective investment schemes will require a licence as an asset manager of collective investment schemes only if they manage portfolios of funds which are distributed to non-qualified investors or if the managed assets exceed CHF 100 million (leveraged) or CHF 500 million (unleveraged). An additional exemption is granted to asset managers of collective investment schemes whose investors are exclusively other companies of the asset manager's group. An asset manager that falls under one of these exemptions may (voluntarily) apply for a licence from FINMA if the law of the jurisdiction of the collective investment scheme or distribution requires that the asset manager be subject to supervision and the collective investment scheme managed by it be subject to foreign supervision that is equivalent to Swiss supervision. Asset managers that are already subject to FINMA supervision (eg, banks, securities dealers and insurance institutions) do not require an additional licence.

A foreign asset manager that is subject to the licensing requirement will need to establish a branch or subsidiary in Switzerland, which will need to apply for the licence. In principle, authorisation will be granted if specific conditions are met, including the following:

- The persons responsible for the management and business operations are of good reputation, can guarantee good management and business conduct, and have the necessary professional background (in this regard, asset managers for hedge funds are required to have a good education and at least five years' experience);
- Significant investors (ie, investors holding, directly or indirectly, 10% or

more of the equity or voting rights respectively, and investors with the possibility to materially influence the business activity in another way than holding 10% of the equity or voting rights) must be of good reputation and are obliged to not exert their influence to the detriment of prudent and sound business practice; and

- The internal regulations and organisational structure comply with the relevant legal requirements and sufficient financial guarantees are available (ie, the asset manager holds a minimum capital of CHF 200,000 contributed in cash). For natural persons or partnerships, asset managers may provide collateral in the form of a bank guarantee or cash deposit of at least CHF 200,000. Asset managers must hold a minimum equity of at least 25% of their fixed costs incurred during the last fiscal year (capped at CHF 20 million) at any time. Fixed costs include personnel and operating expenses, depreciation of investment assets and expenses for allowances, provisions and losses.

If the asset manager meets all of these requirements, the licensing procedure should take about six months.

5. Compliance

5.1 Swiss codes of conduct and industry body guidelines

Authorised collective investment schemes must comply with the codes of conduct issued by specific self-regulatory organisations. Currently, these codes are issued by the Swiss Funds and Asset Management Association (SFAMA). They address, for example, duties of loyalty to investors, duties in respect of due diligence, duties of disclosure and the valuation of assets of collective investment schemes.

With respect to the distribution of collective investment schemes to Swiss investors, the SFAMA has issued distribution guidelines which are relevant for all persons distributing collective investment schemes in or from Switzerland, even if exclusively to qualified investors.

The Collective Investment Schemes Act further requires that distributors record in writing the client's investment needs as established by the distributor and the reasons for each investment recommendation in a specific collective investment scheme, and that such written record be handed over to the client. The Swiss Bankers' Association has issued guidelines on the duty to keep documentary records, which provide for minimum standards as to how a distributor (or any other licensee or person subject to the relevant provision) shall comply with this recording requirement. These guidelines apply only to the extent that units in a collective investment scheme in or from Switzerland are distributed and a personal recommendation to buy these units is made.

Consequently, if the units are marketed only to exempt investors or on a reverse solicitation basis, or if the personal recommendation refers to a holding or selling of units or shares in a collective investment scheme, the guidelines will not apply.

5.2 Reporting requirements

Under the Collective Investment Schemes Act, authorised collective investment schemes must fulfil certain reporting duties to their investors by way of publication. The medium of publication may be either a print medium (eg, the *Swiss Official Gazette of Commerce*) or a publicly accessible electronic platform recognised by FINMA (eg, www.swissfunddata.ch or www.fundinfo.com). The information that must be made available free of charge to investors on a regular basis includes:

- the prospectus;
- KIIDs;
- the articles of association and the fund contract (as well as any amendments);
- the annual and semi-annual reports; and
- the net asset value.

No such reporting requirements exist in relation to foreign collective investment schemes which are distributed exclusively to qualified investors.

Licensees (with the exception of the custodian bank) must report important issues to FINMA, such as:

- a change in responsible persons or significant equity holders;
- facts that might question the good reputation of the persons responsible or of significant equity holders; and
- changes to any relevant documents, such as the prospectus, KIIDs, the articles of association or the fund contract.

6. Current regulation activities

6.1 New financial market regulation architecture

The Swiss legislature has passed two new financial market regulations: the Federal Act on Financial Services and the Federal Act on Financial Institutions. Both aim to create a level playing field for financial intermediaries and are designed to enhance investor protection. These new acts as well as the corresponding ordinances will enter into force on 1 January 2020.

The Financial Services Act will introduce new rules for providing financial services and offering financial instruments that apply across all sectors. The new rules will apply regardless of whether the provider of financial services is a bank, an independent (external) asset manager or another financial intermediary. The

Financial Institutions Act sets out the authorisation conditions and organisational requirements for financial institutions such as fund management companies, asset managers of collective investment schemes and independent (external) asset managers. Product-specific determinations – such as rules regarding contractual investment funds, SICAVs, SICAFs and LPs – remain in the Collective Investment Schemes Act.

Relating to hedge fund activities, the key changes include a new test for marketing collective investment schemes as well as revised approval requirements for independent (external) asset managers.

6.2 Future distribution activities

Under the new regulation, the term 'distribution of investment funds' will be replaced with 'the offering of financial products' (this term includes investment funds). A fund distribution licence will no longer be available. Under the new rules, a fund distributor will qualify either as a salesperson being a financial service provider or as an investment adviser. Investment advisers are not subject to licensing requirements, but will be obliged to conduct a suitability test with regard to their clients, as well as an appropriateness test. No such tests will be required if the entity or person does not provide advisory services, but is acting as a mere salesperson. According to a broad interpretation of the Financial Services Act by the draft Financial Services Ordinance, both investment advisers and salespersons are subject to registration requirements, although the register is yet to be established. The registration body will review the conditions, such as sufficient financial service knowledge of the applicant, at the time of the application, but there will be no ongoing supervision of the registration conditions. However, if the registration body becomes aware that a registered person no longer meets a condition for registration, it will deregister that person.

This registration requirement will apply irrespective of whether a foreign financial services firm has a permanent presence in Switzerland, but will be triggered by the mere provision of financial services in Switzerland. The registration requirement does not extend to the financial services firm as such, but to the individual respective persons of the firm. The Financial Services Act does not provide for grandfathering mechanisms, so anyone providing the relevant services must apply for registration within a transitional period of six months following the entry into force of the act. The draft Financial Services Ordinance provides for an exemption from the registration requirement for foreign financial services providers that are subject to prudential supervision abroad and are part of a financial group which is subject to FINMA supervision if their services in Switzerland are exclusively provided to professional or institutional clients. At the level of product regulation, foreign collective investment schemes offered to non-qualified investors continue to require

FINMA's prior approval. Offering to qualified investors will still not require prior regulatory approval. There will no longer be a requirement to appoint a Swiss representative or a paying agent, unless non-qualified investors or high-net-worth retail clients that have exercised their opting-out right are also targeted.

As the law-making process is not yet complete (the Federal Council ordinances are still in draft form, while the FINMA ordinances have not yet been published), several questions with regard to offering activities (eg, whether mere advertising also qualifies as a financial service under the Financial Services Act) remain open, but are expected to be answered by autumn 2019.

6.3 Future approval requirement for independent asset managers

Independent (external) asset managers will no longer be exempt from prudential financial market supervision. Independent asset managers will require authorisation from FINMA as portfolio managers, which will involve more stringent fit and proper requirements compared to today's anti-money laundering supervision. Asset managers of collective investment schemes that currently target qualified investors only and avail of the *de minimis* exemption due to the failure to reach the thresholds of CHF 100 million of leveraged assets under management, or CHF 500 million of non-leveraged assets under management, will henceforth qualify as portfolio managers subject to supervision. The *de minimis* rules therefore will no longer lead to an exemption from the authorisation requirement.

Independent asset managers will have a transitional period of six months following the entry into force of the new act to contact and notify FINMA accordingly. They must satisfy the requirements of the Financial Services Act and submit an authorisation application within three years of the act coming into force. Independent asset managers may continue to conduct their professional activities during the application period, provided they are affiliated with a self-regulatory organisation in accordance with the Anti-money Laundering Act.

The publisher and authors acknowledge David Borer as co-author of this chapter in the previous edition, and Martina Nueesch for her contribution to this chapter.

This chapter 'Switzerland' by Markus Pfenninger and Pascal Zysset is from the title Hedge Funds: A Practical Global Handbook to the Law and Regulation, Second Edition, *published by Globe Law and Business.*