

Fund Management 2019

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Published by

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First published 2015

Fifth edition

ISBN 978-1-83862-124-7

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Fund Management 2019

Contributing editor**Michelle Moran****K&L Gates LLP**

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Fund Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new Global Overview and new chapters on France and Thailand.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Michelle Moran of K&L Gates LLP, the contributing editor, for her assistance in devising and editing this volume.



London

June 2019

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This article was first published in July 2019

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Investment fund business in Switzerland is governed by the Collective Investment Schemes Act (CISA) and its implementing ordinances:

- the Collective Investment Schemes Ordinance (CISO);
- the Ordinance of the Swiss Financial Market Supervisory Authority on Collective Investment Schemes (CISO-FINMA); and
- the Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Collective Investment Schemes (CISBO-FINMA).

The CISA is a framework law leaving many matters to be regulated in detail to the implementing ordinances.

In addition, the Swiss Financial Market Supervisory Authority (FINMA), as the competent regulatory body and supervisory authority, has published several circulars addressing specific areas of collective investment schemes law (eg, distribution of collective investment schemes).

Market participants must also comply with self-regulation of industry organisations recognised by FINMA as a minimum standard, namely the code of conduct and various guidelines of the Swiss Funds & Asset Management Association (SFAMA) and the guidelines of the Swiss Bankers Association, which have great significance.

FINMA approves funds as products and is also responsible for the authorisation and supervision of the following institutions responsible for the management, safekeeping of assets or distribution of funds in Switzerland:

- fund management companies;
- investment companies with variable capital (SICAV);
- partnerships for collective investment (LP);
- investment companies with fixed capital (SICAF);
- custodian banks of Swiss collective investment schemes;
- asset managers of Swiss and foreign collective investment schemes;
- distributors; and
- representatives of foreign collective investment schemes.

SICAVs, LPs and SICAFs require a twofold FINMA authorisation of a fund product (in the form of a company) as well as an institution (in the form of a licence holder).

Further, it is worth noting that a 'dual supervisory regime' applies, which requires regulated entities to appoint a FINMA-recognised auditor to verify whether they comply with all applicable legal requirements.

2 Is fund administration regulated in your jurisdiction?

Fund administration forms part of the main duties of a fund management company of a contractual fund (FCP) or an externally managed SICAV, of a self-managed SICAV, of an LP or of a SICAF and is generally regulated and supervised as part of these licences.

The delegation of fund administration tasks to unregulated third-party providers is also permitted, provided that the delegation is in the interest of efficient management and that those persons appointed are properly qualified to execute the tasks. Furthermore, instruction, monitoring and control of the agent must be ensured.

The delegation of fund administration is subject to the prior authorisation of FINMA. For a delegation abroad, specific requirements apply.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Switzerland is a niche production market but ranks among the top distribution markets in Europe. As at March 2018, 9,415 funds were registered in Switzerland, of which only 1,644 are domiciled in Switzerland.

Timing and process for approval and authorisation depend on whether a fund is organised under Swiss or foreign law.

Domestic funds

CISA distinguishes between open-ended and closed-ended funds.

Open-ended funds may be structured in the form of an FCP or a SICAV. Investors have a direct or an indirect legal entitlement to redeem their units at the net asset value.

In the case of an FCP, the fund management company and the custodian must be authorised by FINMA and the fund contract, with the consent of the custodian, must be submitted to FINMA for approval. The FCP is the predominant legal form of collective investment scheme organised under Swiss law.

FINMA must authorise all SICAVs and approve their articles of association and investment regulations.

The timing and process of FINMA authorisation and approval largely depend on the complexity of the fund (investment policy, investment techniques, etc).

In closed-ended funds (LP or SICAF), investors have neither a direct nor an indirect legal entitlement to redeem their units at the net asset value.

Both the LP and the SICAF require authorisation by FINMA and their limited partnership agreement (for LPs) and the articles of association and investment regulations (for SICAFs) require FINMA's approval.

Foreign funds

The majority of foreign funds approved for distribution in Switzerland are undertakings for collective investment in transferable securities (UCITS). FINMA has standardised the approval process for UCITS over the last few years. The application is to be filed by the Swiss representative together with the relevant fund documents for Switzerland.

As one of the very few non-UCITS funds, the first Hong Kong-based fund was approved for distribution to non-qualified investors in Switzerland in 2017.

Managers and operators

Anyone applying for FINMA authorisation to operate as an institution must meet the following minimum authorisation requirements:

- persons responsible for the management and business operations must have a good reputation, guarantee proper management and possess the requisite specialist qualifications;
- significant equity holders must have a good reputation and not exert their influence to the detriment of prudent and sound business practice;

- compliance with the duties stemming from CISA must be assured by internal regulations and an appropriate organisation;
- sufficient financial guarantees must be available; and
- any additional authorisation conditions set forth in CISA are met.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

CISA has an extraterritorial scope and governs the following fund business activities:

- domestic funds and persons responsible for the management and distribution of funds, and the safekeeping of assets;
- foreign funds distributed in Switzerland;
- persons managing foreign funds in or from Switzerland;
- persons distributing foreign funds in Switzerland; and
- persons representing foreign funds in Switzerland.

All legal or natural persons carrying on a regulated activity in Switzerland require authorisation from FINMA.

A foreign fund management company cannot act as a fund management company for domestic funds. However, a Swiss fund management company may delegate specific tasks to a foreign fund management company if this is in the interest of efficient management.

The asset management of a domestic fund may be delegated to overseas managers who are subject to a recognised supervision. Where foreign law requires an agreement on cooperation and the exchange of information with foreign regulators, a delegation to an overseas manager may only take place where such agreement exists between FINMA and the competent foreign regulator.

If the overseas manager is managed in Switzerland or conducts its business largely or exclusively in or from Switzerland, it must be organised in accordance with Swiss law. FINMA authorisation is required when an overseas manager employs persons in Switzerland who conduct asset management on its behalf on a permanent commercial basis in or from Switzerland.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The direct or indirect holding and acquisition of significant equity holdings in a fund management company or in any other licensees or any change thereof requires the prior authorisation of FINMA.

All significant equity holders must provide proof that they have a good reputation and do not exert their influence to the detriment of prudent and sound business practice.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

The only fees and incidental costs chargeable to the fund are those set out in the relevant fund regulations in accordance with the statutory provisions of CISA and CISO. These include the management fee as well as any performance fee. The intended use of the management fee must be disclosed, as detailed in the SFAMA Transparency Guidelines recognised by FINMA as the minimum standard.

FINMA Circular 2010/1 sets out minimum standards for salary and remuneration policies of financial institutions that generally apply to licensees under CISA only on a voluntary basis.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Any marketing of funds falling under the definition of 'distribution' (see question 8) may trigger authorisation requirements for the distributor and for the fund itself. In the case of distribution, the degree of regulatory requirements depends on the category of investors to whom the funds are marketed.

Domestic funds

Except for the approval requirement for the fund itself (see question 3), distribution of domestic funds is regulated only if directed to non-qualified investors. Distribution to non-qualified investors

requires an authorisation as distributor by FINMA or another FINMA authorisation that already covers such activity. Only individuals, legal entities and partnerships domiciled in Switzerland can obtain a distributor licence. Branch offices of foreign financial intermediaries are not granted such licence under FINMA's current practice.

Foreign funds

Distribution of foreign funds is regulated if non-qualified investors and certain qualified investors are targeted (see question 27).

Distribution to non-qualified investors requires the foreign fund to be approved by FINMA. Various registration requirements apply (eg, the appointment of a Swiss representative and paying agent). Only FINMA-authorized distributors or Swiss-domiciled regulated entities exempt from such authorisation may distribute foreign funds to non-qualified investors.

Distribution to qualified investors does not require FINMA approval for foreign funds concerned but requires, inter alia, the appointment of a Swiss representative and a Swiss paying agent. For distribution to qualified investors, distributors must be adequately supervised in Switzerland or in their country of domicile. Each distributor must enter into a written distribution agreement governed by Swiss law with the Swiss representative.

All distributors are subject to particular statutory and self-regulatory conduct rules (eg, mandatory record-keeping).

8 What marketing activities require authorisation?

Generally, any form of distribution of domestic and foreign funds in, into and from Switzerland, is regulated (see question 7).

Distribution is defined as any offering or marketing of funds with certain specific statutory exceptions. 'Offering' and 'marketing' include any type of activity that aims to encourage the acquisition of fund units. Translated into practice, this means that the circulation of any information about funds to potential investors might qualify as regulated activity if no statutory exception applies. There is no concept in Swiss law of 'pre-marketing'. The SFAMA have outlined the likely scope of permitted pre-marketing activities in interpretative circulars issued to its members only.

The following marketing activities are not deemed distribution:

- offering or marketing to regulated financial intermediaries such as banks, securities dealers, fund management companies and asset managers of collective investment schemes, central banks and supervised insurance companies;
- provision of information and acquisition of fund units at the instigation of ('reverse solicitation') or at the own initiative of investors, especially in the context of certain defined types of investment advisory agreements or execution-only transactions;
- provision of information and acquisition of fund units under a written discretionary asset management agreement with a regulated financial intermediary;
- provision of information and the acquisition of fund units under a written discretionary asset management agreement with an independent asset manager (IAM) that is subject to Swiss anti-money laundering regulations and the code of conduct of a recognised industry organisation, provided that the agreement itself complies with such code;
- publication of prices, rates, net asset values and tax data by regulated financial intermediaries, as long as no contact information is provided; and
- offering of stock option schemes in the form of a collective investment scheme to employees.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

See questions 4 and 7.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

The distribution of foreign funds in Switzerland requires the prior appointment of a Swiss representative and a Swiss paying agent. All distributors must enter into a written distribution agreement with the Swiss representative.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Swiss law generally does not prohibit intermediaries from accepting and keeping commission payments in relation to their marketing activities, provided that certain transparency and consent requirements are met.

Licensees under CISA and their agents are under a regulatory duty of disclosure regarding compensation for distribution. This encompasses the nature and scale of all fees and other pecuniary benefits through which the activities of the distributor are to be compensated. According to the SFAMA Transparency Guidelines, licensees that pay such compensation have to comply with their duty to inform by disclosing in the fund documents that 'retrocessions' may be paid and the services for which they are payable. The recipients of the retrocessions must inform investors, unsolicited and free of charge, of the amount of the compensation they may receive for distribution and, upon request, of the amounts actually received. The SFAMA Transparency Guidelines extend the applicability of the respective duties to foreign intermediaries and foreign funds and their managers. In practice, the distribution agreements to be entered into with the appointed Swiss representative usually include a respective contractual undertaking.

Moreover, intermediaries must comply with any obligations in relation to their clients under applicable Swiss civil law. In a series of leading decisions beginning in 2006, the Swiss Supreme Court held that distribution fees paid to an intermediary acting as agent in connection with clients' assets were subject to a statutory restitution duty and therefore must be passed on to the client unless otherwise foreseen by (written) agreement in which the client waives the right to receive the distribution fee and other benefits on the basis of sufficient disclosure of conflicts of interest and information about the amounts actually paid to the intermediary or, at least, the range of fees and their calculation.

Swiss pension fund legislation provides for a mandatory duty of restitution of all pecuniary benefits that cannot be waived by a Swiss pension institution.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Open-ended retail funds may be set-up as FCPs or as SICAVs.

FCPs are based on a tripartite fund contract between investors, the fund management company and custodian bank. Under the fund contract, the fund management company commits itself to involving investors in accordance with the number and type of units they have acquired in the fund and to managing the fund's assets in accordance with the provisions of the fund contract at its own discretion and for its own account. The custodian bank is a party to the contract in accordance with the tasks conferred on it by CISA and by the fund contract. The fund management company draws up the fund contract and, with the consent of the custodian bank, submits it to FINMA for approval. Any amendment to the fund contract requires the consent of the custodian bank and prior FINMA approval.

SICAVs must be authorised by FINMA as institutions and their articles of association and investment regulations require FINMA approval. A SICAV is a company whose capital and number of shares are not specified in advance, whose capital is divided into company and investor shares, for whose liabilities only the company's assets are liable and whose sole object is collective capital investment. It is important to distinguish between self-managed SICAVs, which perform their own administration, and externally managed SICAVs, which delegate the administration (including distribution) to an authorised fund management company. The formation of a SICAV is largely based on the provisions of the Swiss Code of Obligations regarding the formation of companies limited by shares.

If closed-ended share companies are listed on a Swiss stock exchange, they do not fall under CISA. However, if they are not listed on a Swiss stock exchange, they qualify as SICAF and are subject to authorisation and supervision by FINMA. Since the introduction of SICAFs in 2007, none have been authorised in Switzerland, mainly owing to the unfavourable tax treatment that leads to taxation at both the company and the investor level.

13 What are the key laws and other sets of rules that govern retail funds?

See question 1.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

All domestic funds require FINMA authorisation or approval.

Furthermore, all foreign funds distributed to non-qualified investors in Switzerland require FINMA approval.

15 Who can market retail funds? To whom can they be marketed?

See question 7. Retail funds may be marketed to non-qualified and qualified investors.

16 Are there any special requirements that apply to managers or operators of retail funds?

There are no special requirements for managers or operators of retail funds. The requirements set out in question 3 apply.

17 What are the investment and borrowing restrictions on retail funds?

CISA distinguishes four types of open-ended funds based on the type of investment: securities funds, real estate funds, other funds for traditional investments and other funds for alternative investments. Each type of fund follows a different set of rules regarding permitted investments, investment restrictions and investment techniques.

Additional restrictions may be determined in the fund regulations.

Securities funds

Securities funds may invest in transferable securities issued on a large scale and in non-securities rights having the same function (uncertified securities), and that are traded on a stock exchange or another regulated market that is open to the public, in addition to other liquid financial assets.

The following investments are permitted:

- securities;
- derivatives;
- units in funds;
- money market instruments; and
- short-term deposits.

The following are not permitted: investments in precious metals or precious metal certificates, commodities or commodity certificates, as well as short-selling of investments.

The following investment techniques may be employed:

- securities lending;
- repurchase agreements;
- borrowing of funds of up to 10 per cent of the fund's net assets; and
- pledging or transferring as collateral up to 25 per cent of the fund's net assets.

Real estate funds

Real estate funds may invest their assets in:

- property;
- real estate companies;
- units in other real estate funds and listed real estate investment companies; and
- foreign real estate securities.

The use of derivatives is permitted for hedging purposes.

Other funds for traditional and other funds for alternative investments

Other funds for traditional and alternative investments are open-ended funds that neither qualify as securities funds nor as real estate funds. Permitted investments for both types of funds include, in particular:

- securities;
- precious metals;
- real estate;
- commodities;
- derivatives;

- units of other funds; and
- other assets and rights.

Investments may be of limited marketability, subject to strong price fluctuations, and may be difficult to value. Often these types of funds exhibit limited risk diversification.

The risk profile of these types of funds differs in terms of their investments, investment techniques and investment restrictions, in particular with regard to the following:

	Other funds for traditional investments	Other funds for alternative investments
Borrowing	Up to 25% of the fund's net assets	Up to 50% of the fund's net assets
Pledge or transfer as collateral	Up to 60% of the fund's net assets	Up to 100% of the fund's net assets
Overall exposure	Up to 225% of the fund's net assets	Up to 600% of the fund's net assets
Engagement in short-selling	Permitted	Permitted

Specific investment restrictions and techniques must be laid down in the fund regulations.

FINMA may grant derogations from the statutory provisions in the individual case.

For SICAFs, the provisions concerning permitted investments for other funds for traditional and alternative investments apply accordingly.

18 What is the tax treatment of retail funds? Are exemptions available?

Swiss tax law does not generally differentiate between domestic retail funds and non-retail funds. Taxation depends on the type of legal structure of the fund. The various types of domestic fund can be classified into two groups: FCPs, SICAVs and LPs; and SICAFs.

The first group is viewed in a transparent manner from a Swiss corporate income tax perspective. These types of funds are not subject to Swiss corporate income taxes on their income or gains. The fund's income is taxed in the hands of the investors. An exception applies to income derived from directly owned real estate that is subject to corporate income tax at the fund level. A domestic fund holding real estate situated in Switzerland may nevertheless be tax exempt for the purpose of corporate income tax if its investors consist exclusively of tax-exempt pension schemes or social security institutions and compensation funds.

Profit distribution or accumulated profits from non-distributing (annual deemed distribution) FCPs, SICAVs and LPs are subject to a withholding tax at a 35 per cent rate. If such distributions or accumulated profits derive from real estate or capital gains, no withholding tax is due, provided that they are reported separately. The withholding tax on the distribution or accumulated profits can be reclaimed by Swiss investors if they declare the income in their tax return or account for it in their financial statements.

Non-resident investors may qualify for an exemption from Swiss withholding tax under the affidavit procedure or may reclaim the withholding tax in full, if at least 80 per cent of the fund's earnings are foreign-sourced. If foreign-sourced earnings amount to less than 80 per cent, a non-resident investor can reclaim Swiss withholding tax based on an applicable double taxation treaty between Switzerland and its country of residence.

The second group is treated identically to any other corporation in Switzerland and therefore is not tax transparent for any type of tax. SICAFs are subject to corporate income tax and tax on net equity and their distributions (but not accumulated profits) to shareholders are subject to withholding tax at a 35 per cent rate.

In principle, regarding capital and income taxes, Swiss legislation does not distinguish between investments in a domestic or a foreign fund. In both cases, investments are subject to capital tax, distributed or accumulated income is subject to income tax, while capital gains are tax-free for investors holding their assets for private investment purposes.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Fund management companies of FCPs, SICAVs and SICAFs must entrust the safekeeping of assets to a custodian bank. Custodian banks must be authorised banks according to the Swiss Banking Act (BA) and have an appropriate organisational structure to act as custodian bank for funds. Unlike depositories and paying agents, custodian banks must, in addition to their banking licence, be authorised as such by FINMA.

The role of a custodian bank includes holding fund assets on deposit, issuing and redeeming units, and handling payments processing and ensuring that the fund management company or SICAV comply with the regulations.

A custodian bank may delegate the safekeeping of fund assets to regulated third-party custodians and collective securities depositories in Switzerland or abroad, provided this is in the interest of efficient safekeeping and is appropriate. Any change of custodian bank requires prior FINMA authorisation.

If a custodian bank becomes bankrupt, the assets held by it in custody are not included in the bank's bankruptcy estate. Instead, the assets (except cash) are segregated from the bank's bankruptcy estate in favour of the fund management company of an FCP or of a SICAV, subject to any claims by the custodian bank against the respective depositor.

In the case of bankruptcy of a fund management company of an FCP, assets and rights belonging to the fund will be segregated in favour of the investors. Debts of the fund management company that do not arise under the fund contract may not be set off against claims of the investment fund.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Any party responsible for the management of funds, the safekeeping of assets held in it or the distribution of it to non-qualified investors, must obtain authorisation from FINMA. Authorisation is granted if, in particular, the requirements set out in question 3 are fulfilled.

If there is a change in the circumstances underlying the authorisation, FINMA's authorisation must be sought prior to the continuation of activity. The following must be reported to FINMA without delay:

- changes in the persons responsible for the management and business operations and of significant equity holders;
- facts that might call into question the good reputation or the guaranteeing of proper management by the persons responsible for the management and business operations (eg, criminal proceedings);
- facts that might call into question the good reputation of significant equity holders or the prudent and sound business practice of the licensee owing to the influence of significant equity holders;
- change of executive persons entrusted with the performance of the custodian bank's duties; and
- any change regarding financial guarantees.

Authorised institutions and their agents must fulfil the following statutory conduct rules:

- duty of loyalty: they must act independently and exclusively in the interest of the investors;
- due diligence: they must implement organisational measures that are necessary for proper management; and
- duty to provide information:
 - they must ensure the provision of transparent financial statements and provide appropriate information about the funds that they manage and distribute and the assets that they hold in safekeeping;
 - they must disclose all charges and fees incurred directly or indirectly by the investors and their appropriation; and
 - they must notify investors of compensation for the distribution of funds in the form of commission, brokerage fees and other soft commissions in a full, truthful and comprehensive manner.

The statutory conduct rules are complemented by self-regulation of industry organisations that FINMA has recognised as minimum standards, particularly the Code of Conduct of SFAMA, as well as several guidelines.

21 What are the periodic reporting requirements for retail funds?

Domestic funds

Open-ended funds must keep separate accounts and publish an audited annual report within four months of the end of the fund's financial year and an unaudited semi-annual report within two months after the end of the first half of the fund's financial year.

The fund management company of an FCP or a SICAV must publish the prices at regular intervals in the designated publication instrument as indicated in the prospectus.

Changes to the fund regulations of FCPs, SICAVs or SICAFs must be communicated to investors by way of publication and require prior approval or authorisation by FINMA. In case of material changes, investors have a right to lodge objections. Changes to the prospectus, simplified prospectus and key investor information documents must only be notified to FINMA.

Foreign funds

Foreign retail funds approved for distribution must also publish an annual report within four months of the end of the fund's financial year and a semi-annual report within two months of the fund's first half of the financial year.

In addition, they must publish prices at regular intervals in the designated Swiss publication instrument as indicated in the prospectus.

Moreover, investors must be notified by way of publication about amendments to the fund documents, change of legal form, mergers, liquidations, changes of Swiss representative or paying agent and about measures taken by foreign regulators. The amended fund documents require (post-effective) FINMA approval.

Proposed changes of the Swiss representative or paying agent, as well as the termination of representative agreements, require prior FINMA approval.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

The fund management company of an FCP or the SICAV may temporarily or fully suspend the issue of units at any time and may reject individual applications to subscribe for, or switch, units without assigning any reason therefor.

There are no statutory restrictions on the transfer of units in open-ended retail funds.

The fund regulations of open-ended retail funds, however, may further restrict the issue and transfer of units.

Investors of open-ended retail funds are, in principle, entitled to request the redemption of their units and payment of redemption amount in cash. The fund regulations of open-ended retail funds whose value is difficult to ascertain, or which have limited marketability, however, may provide for notice to be served only on specific dates, subject to a minimum of four times per year.

FINMA may, in the event of a justified request, restrict the right to redeem at any time depending on the investments and investment policy. This can apply specifically in the case of investments that are not listed and not traded on another regulated market open to the public, mortgages and private equity investments. The right to redeem at any time may be suspended for a maximum of five years and this restriction on redemption must explicitly be disclosed in the fund regulations.

The fund regulations may provide for repayment to be deferred temporarily in certain circumstances (eg, market closures, trading restrictions or suspensions, emergencies, restrictions on asset transfers or large-scale withdrawals of units).

The auditor and FINMA must be informed immediately of any decision to defer redemptions and such decision must be communicated to the investors in a suitable manner.

The transferability of shares in SICAFs is regulated by the Swiss Code of Obligations. The SICAF's articles of association can set out certain transfer restrictions. If there are no restrictions, the shares are freely transferable.

In the case of closed-ended retail funds, investors have neither a direct nor an indirect legal entitlement to request redemptions.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Open-ended non-retail funds may be set up as FCPs or as SICAVs. See question 12. Closed-ended non-retail funds may be set up as SICAFs (see question 12) or as LPs.

An LP is a partnership whose sole objective is collective investment. At least one member bears unlimited liability (general partner), while other members (limited partners) are liable only up to a specified amount (limited partner's contribution). General partners must be companies limited by shares with their registered office in Switzerland. Limited partners must be qualified investors according to CISA (see question 27). An LP may only manage its own investments. An LP conducts investments in risk capital. The investments in companies or projects can take the form of equity capital, lending or mezzanine financing. Other permitted investments generally include construction, real estate and infrastructure projects as well as alternative investments.

24 What are the key laws and other sets of rules that govern non-retail funds?

See question 1.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

All domestic non-retail funds must be approved or authorised by FINMA. Foreign non-retail funds may not be approved for distribution.

26 Who can market non-retail funds? To whom can they be marketed?

See questions 7. Non-retail funds may exclusively be marketed to qualified investors.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

The circle of investors of non-retail funds is limited to the following qualified investors according to CISA and CISO:

- regulated financial intermediaries (banks, securities dealers, fund management companies, asset managers of collective investment schemes and central banks);
- regulated insurance companies;
- public entities and pension funds with professional treasury operations;
- companies with professional treasury operations;
- high net worth individuals meeting certain criteria (ie, thresholds of liquid assets, minimum level of knowledge) and having elected in writing to be deemed qualified investors; and
- investors who have concluded a written management agreement with a qualifying IAM or a regulated financial intermediary, provided that they have not declared in writing that they want to be treated as non-qualified investors.

IAMs themselves are deemed qualified investors if they fulfil certain requirements (see question 8) and confirm in writing to only use the information obtained for clients who are qualified investors.

The specific fund regulations may provide for additional restrictions in individual cases (eg, for tax exemption reasons).

28 Are there any special requirements that apply to managers or operators of non-retail funds?

The requirements that apply to managers or operators of non-retail funds are essentially the same as for retail funds. See questions 3 and 16. In the case of single investor funds (for regulated insurance institutions, public entities or pension schemes with professional treasury operations), the fund management company of an FCP or SICAV may delegate the investment decisions to the single investor. FINMA may exempt them from the duty to subject themselves to supervision for asset managers of collective investment schemes.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

See question 18.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 19.

In the case of a SICAV that is exclusively open to qualified investors, FINMA may, under certain conditions, grant exemptions to appoint a custodian bank.

LPs do not have to deposit the fund's assets with a Swiss custodian bank or any other regulated institution. Therefore, the assets are generally not subject to special treatment in the event of the fund's bankruptcy. However, if the assets are held with a Swiss bank within the meaning of the BA, the assets deposited with that bank are, in the case of the bank's bankruptcy, subject to the same rules as open-ended funds.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

Generally, the same rules apply as for retail funds. See question 21.

FINMA may, upon request, fully or partially exempt non-retail funds from certain reporting requirements under CISA (eg, the duty to publish a semi-annual report or to publish prices). Exemptions must be established in the fund regulations.

Separately managed accounts**33 How are separately managed accounts typically structured in your jurisdiction?**

Managed accounts are usually structured by arranging for the mainly institutional client to appoint a (Swiss) bank or securities dealer for the purpose of holding the client's assets in an account. In addition, the respective bank or securities dealer, or an outside asset manager, is given discretionary investment management authority to acquire and dispose of assets in the account. Operational duties in areas such as investment compliance, risk management, reporting and accounting can be delegated to a fund management company.

34 What are the key legal issues to be determined when structuring a separately managed account?

The standard of care owed to the client, any limitation of liability, fee structure, transparency and reporting requirements and applicable investment limitations are often among the most important terms for a separately managed account.

The discretionary investment management mandate given by the client to the investment manager as well as the account relationship with the bank or securities dealer are typically governed by the statutory provisions set out in the Swiss Code of Obligations and by the relevant agreements between the parties. Guidelines and codes of conduct regarding investment management issued by FINMA and industry organisations (in particular, the Swiss Bankers Association and SFAMA) define accepted minimum standards for investment management mandates, which do not directly apply to the individual relationship with a separately managed account client, but clarify the scope of the general duty of care and other obligations of the investment manager.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management or marketing of separately managed accounts is currently not subject to an authorisation requirement in Switzerland and, therefore, can be provided to investors in Switzerland on a cross-border basis also.

Domestic banks, securities dealers and asset managers of collective investment schemes offering their clients separately managed accounts, are supervised by FINMA also with regard to the provision

of this (additional) service. On the other hand, domestic IAMs providing portfolio management services for separately managed accounts in accordance with a discretionary mandate given by a client, are not currently subject to an ongoing prudential supervision but are required to become a member of a recognised self-regulatory organisation for purposes of compliance with Swiss anti-money laundering regulations.

The rules on fund distribution must be considered if investment funds are used in separately managed accounts, whereas the discretionary investment management agreement entered into with a separately managed account client may qualify for an exemption if certain conditions are met (see question 8).

General**36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?**

The Swiss financial market regulation is undergoing major changes. In November 2015, the Federal Council adopted the dispatch on the Financial Services Act (FinSA) and on the Financial Institutions Act (FinIA). FinSA, inter alia, sets forth new cross-sector prerequisites for providing financial services as well as requirements applicable to offerings of financial instruments. FinIA essentially harmonises the organisational requirements and authorisation rules for asset managers of individual client assets and collective assets (including funds and pension schemes), trustees, fund management companies and securities houses.

The new laws, if adopted by the Swiss Parliament, will not come into effect before the middle of 2019, with transitional periods for compliance with some of the new rules. As part of their introduction, there will be substantial carve-outs but also material amendments to CISA, which will still govern product-specific regulation for funds. The following aspects are particularly noteworthy in the context of fund management:

- licence requirements for fund management companies and asset managers of collective assets will be governed by FinIA;
- the concept of 'distribution' under CISA will be replaced by the concept of 'offer' under FinSA and the licence for distributors will be abandoned;
- a client adviser register for client advisers, which are not subject to prudential supervision, will be introduced;
- rules of conduct under FinSA will apply to fund management companies and asset managers;
- FinSA will introduce a client segmentation similar to the Markets in Financial Instruments Directive; and
- product documentation requirements will be improved for investors under FinSA.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The listing of domestic and foreign funds on a Swiss stock exchange is governed by the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, and the applicable self-regulation of the respective stock exchange.

The listing rules of the main Swiss stock market, the SIX Swiss Exchange, contain specific requirements for the listing and the maintenance of the listing of different types of collective investment schemes, namely investment funds, exchange traded structured funds and – in practice, most relevant – real estate funds and actively or passively managed exchange-traded funds (ETFs). In particular, minimum capitalisation and free float requirements apply if no market maker is appointed for the fund units. Implementing trading provisions contain further conditions for market making of ETFs. Furthermore, it is a listing requirement that domestic and foreign funds are approved or authorised by FINMA. On the other hand, FINMA will not approve, for distribution, a foreign fund that is an ETF or has the term 'ETF' in its name unless all of its share classes are listed on a recognised Swiss stock exchange. The prospectus submitted to FINMA for approval serves as the listing prospectus. FINMA requires the fund regulations of an ETF to include specific information (eg, applicable replication method and market making).

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

There is neither a general regulatory system nor any general FINMA guidance on the redomiciliation of overseas vehicles to Switzerland.

FINMA may, in an individual case, accept two forms of repatriation of an overseas vehicle to Switzerland:

- transfer of assets of an overseas vehicle into a newly created domestic fund by exchange of units of the overseas vehicle or by redemption of units in kind to the investors of the overseas vehicle and following contribution in kind as new investors of the domestic fund on the same day. The then empty overseas vehicle will be liquidated; and
- transfer of domicile of the overseas vehicle to Switzerland, whereby the overseas vehicle needs to be transformed into a domestic fund, complying with all applicable Swiss laws and regulations.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than marketing restrictions referred to in question 7, there are no special statutory restrictions in this regard.

However, the ability of foreign investors to invest in domestic funds may be limited by the applicable fund regulations.

Certain domestic investors, such as Swiss pension schemes, may be restricted to a certain extent by law to invest in funds established or managed abroad.

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