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# Alternative Funds

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## Law and Practice

*Contributed by Bär & Karrer Ltd*

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## 1. General

### 1.1 General Overview of Jurisdiction

Switzerland is an attractive jurisdiction thanks to the stability of its economy and legal framework, as well as its extensive and reliable infrastructure and developed financial sector. Thanks to a strong education system and attractive living conditions, it is also able to train, retain and attract a talent pool.

Switzerland is primarily an important hub for the distribution of alternative investment funds. It is home to a number of sophisticated investors interested in alternative investments: pension funds, large insurers and re-insurance companies, global wealth managers and large institutional investors, as well as a significant number of high net worth individuals and family offices. According to a report prepared by Swiss Banking and Boston Consulting Group, a high proportion of Swiss investment managers invest in alternative asset classes (about 18% of assets managed in Switzerland in 2017; see Swiss Banking and Boston Consulting Group: Switzerland – A strong hub for investment management, 2018). Allocations tend to focus on real estate and, to a lesser extent, hedge funds. By contrast, private equity, commodities, infrastructure and other asset classes are less common, although there is increasing attention for infrastructure and private debt investments.

Furthermore, a number of alternative investment fund managers are based in Switzerland. These actors are focused on hedge funds and private equity. Based on the annual report of the Swiss Financial Market Supervisory Authority (FINMA) for 2018, there are 212 licensed managers of collective investment schemes. This figure arguably understates the number of alternative investment fund managers, since financial institutions that are licensed as a fund management company, a bank or a securities dealer can also manage alternative investment schemes without requiring this licence. Furthermore, asset managers can also operate with a business model that does not necessarily require a licence (eg, if they only intervene in an advisory role).

By contrast, Switzerland is less attractive than some jurisdictions for setting up an alternative investment fund, eg, the Cayman Islands, Ireland or Luxembourg. As per year-end 2018, there were 50 real estate funds and 66 so-called other funds for alternative investments.

## 2. Funds

### 2.1 Types of Alternative Funds

As mentioned above, the number of alternative investment funds domiciled in Switzerland is relatively low. Due to tax constraints, Swiss law collective investment schemes are typically established to cater to a domestic investor base, eg,

Swiss pension funds, Swiss insurance companies, and Swiss high net worth individuals.

The bulk of alternative investments tend to focus on real estate, which are treated as a regulatory category of their own. Other alternative funds tend to be funds of funds or multi-manager funds in various alternative investment strategies, although several funds are single-manager funds invested in hedge funds, commodities or private equity.

### 2.2 Fund Structures

Alternative funds can be set up in Switzerland as open-end funds, such as contractual funds managed by a fund management company or an investment company with variable capital (*Société d'investissement à capital variable* or SICAV), or as closed-end funds, such as an investment company with fixed capital (*Société d'investissement à capital fixe* or SICAF) or as a limited partnership for collective investments (LPCI).

Alternative funds can also be organised as a company limited by shares. If they are listed on a Swiss stock exchange or restricted to qualified investors, within the meaning of the Federal Act on Collective Investment Schemes of 23 June 2006 (CISA, SR 951.31), they do not fall within the scope of the CISA. Instead, Swiss corporate law and, in the case of a listed company, the listing rules and any additional regulations of the stock exchange, apply to the establishment and operation of such investment companies.

Contractual funds and SICAVs are subject to the same investment rules. Open-end alternative funds usually fall within the category of “other funds for alternative investments”, which provides the broadest flexibility in terms of permitted investments. However, depending on the strategy, an investment fund or SICAV could be set up as an “other fund for traditional investments” or even, if it can meet the exacting investment restrictions applicable to Undertakings for Collective Investment in Transferable Securities (UCITS), a securities fund.

By contrast, the LPCI is conceived primarily as a vehicle for investments in venture capital, private equity and construction, real estate and infrastructure, as well as alternative investments by qualified investors, and is not subject to stringent requirements on permissible investments. In practice, LPCIs have been mainly used for private equity investments or investments in real estate projects. There are currently 19 licensed LPCI in Switzerland.

There are also currently 12 investment companies listed on SIX Swiss Exchange, which mainly invest directly or indirectly in private equity and venture capital as well as hedge funds, and a further 17 real estate companies. BX Swiss also listed shares of 16 investment companies which are invested in real estate as well as, to a lesser extent, venture capital and private equity.

## 2.3 Regulatory Regime

The regulatory framework for establishing and operating alternative funds and for their managers is governed by the CISA and its implementing ordinances:

- the Ordinance on Collective Investment Schemes of 22 November 2006 (CISO, SR 951.311);
- the Ordinance of the Swiss Financial Market Supervisory Authority on Collective Investment Schemes of 27 August 2014 (CISO-FINMA, SR 951.312); and
- the Ordinance of the Swiss Financial Market Supervisory Authority on Collective Investment Schemes of 6 December 2012 (CISIO-FINMA, SR 951.315.2).

FINMA is responsible for the supervision of fund management companies, asset managers of collective investment and distributors. In this capacity, it is also responsible for authorising or approving Swiss collective investment schemes as well as the distribution of foreign collective investment schemes. In this capacity, FINMA has published several circulars which address specific issues of collective investment schemes law (such as the distribution of collective investment schemes). Furthermore, it has also recognised a number of guidelines of the Swiss Funds/Asset Management Association (SFAMA) as expressing a minimum prudential standard, which means that all institutions are required to comply with these guidelines as a matter of law, regardless of SFAMA membership.

The CISA provides four different investment vehicles for structuring Swiss collective investment schemes, which either fall into the category of open-end or closed-end collective investment schemes. Open-end collective investment schemes give the investors the right to request the fund or a related party to redeem their units at their net asset value at regular intervals. There is no such right for closed-end investment schemes. The CISA allows for two types of open-end collective investment schemes: the contractual investment fund and the SICAV. Closed-end investment schemes can be established as LPCIs or SICAFs.

The contractual investment fund and the SICAV are fairly interchangeable vehicles. By contrast, the SICAF and the LPCI do not share many commonalities other than being closed-end structures: the SICAF is an investment company organised as a company limited by shares which is open to retail investors, whereas the LPCI is a special form of limited partnership reserved for qualified investors.

With the exception of the LPCI, all investment vehicles under the CISA can be used for any investment strategy. As mentioned above, open-end alternative funds will typically be set up as “other funds for alternative investments” which provide the broadest flexibility in terms of permitted investments. If the requirements relating to investment strategy are met, an alternative fund can be set up as an other

fund for traditional investments or even, if the demanding restrictions for UCITS can be satisfied, a securities fund. Furthermore, if a fund is offered only to qualified investors, certain requirements can be waived thus offering additional flexibility in this area.

The LPCI is conceived primarily as a vehicle for investments by qualified investors in venture capital, private equity and construction, real estate and infrastructure projects, as well as alternative investments.

In addition, alternative funds may also be structured as an investment company which does not fall within the scope of the CISA, provided that it is either listed on a Swiss stock exchange or restricted to qualified investors (within the meaning of the CISA). Instead of the rules of the CISA, Swiss corporate law and, in the case of a listed company, the listing rules and any additional regulations of the stock exchange apply to the establishment and operation of such investment companies.

As mentioned above, the investment limitations depend on the specific type of collective investment scheme. Among open-end collective investment schemes, open-end collective investment schemes for alternative investments offer the broadest range of possible investments and strategies. In particular, they may invest in investments that:

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

Open-end collective investment schemes for alternative investments can also leverage their investments. In particular, they may:

- raise loans for an amount of up to 50% of the fund's assets;
- pledge or cede as collateral no more than 100% of the fund's net assets;
- commit to an overall exposure of up to 600% of the fund's net assets; and
- engage in short selling in accordance with the fund regulation and enter into securities lending and repo transactions.

The fund's regulations must explicitly set out these investment restrictions. FINMA may, however, allow for exemptions from these principles on a case-by-case basis, in particular when the alternative fund is reserved for qualified investors.

LPCIs are not subject to particular restrictions on their investments. An LPCI can, for example, invest in risk capital, including private equity, debt and hybrid forms. They

can also invest in construction, real estate and infrastructure projects, as well as alternative investments, generally speaking. To safeguard the interest of limited partners, an LPCI can take control of companies and sit on the board of target companies. Furthermore, no particular restriction applies to borrowing.

Furthermore, the CISA sets out prohibitions on self-dealing and dealing with related parties in connection with construction, real estate and infrastructure projects.

## 2.4 Loan Origination

Swiss and foreign funds can, like any person, as a matter of principle, originate most types of loans as a matter of Swiss banking law, including commercial loans and mortgages, as long as they do not take deposits from the public (or hold themselves out as taking deposits) and do not refinance themselves from the banks in a significant manner.

Consumer finance, by contrast, is a regulated industry in Switzerland and funds cannot originate or broker consumer credit, including overdrafts on credit cards, consumer loans or leasing agreements, unless they are duly regulated, which is generally not the case. By contrast, there are no limitations on investing in this asset class on the secondary market and funds can purchase portfolios of consumer credit receivables.

## 2.5 Cryptocurrencies and Non-traditional Assets

Open-end collective investment schemes for alternative investments could, in theory, invest in assets that:

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

This definition would allow this category of funds to invest in cryptocurrencies or other non-traditional assets. However, FINMA has not yet approved any such fund investing in cryptocurrencies.

There is, by contrast, no particular restriction on offering or managing collective investment schemes focusing on cryptocurrencies or other non-traditional assets set up in another jurisdiction.

Asset managers are free to manage investments in cryptocurrencies and other non-traditional assets. FINMA granted a licence to an asset manager of collective investment schemes investing in cryptocurrencies in 2018.

## 2.6 Regulatory Approval Process

As a practical matter, most alternative investment funds distributed or managed in Switzerland are organised under the laws of another jurisdiction and then either distributed

exclusively to qualified investors or placed exclusively with regulated qualified investors.

Although the regulatory regime varies depending on the route that is followed, in both cases no regulatory approval is required.

### Swiss Funds

Swiss funds, by contrast, including alternative funds and funds for qualified investors, must be approved by FINMA. The authorisation process usually starts with a preliminary discussion with FINMA. Based on the outcome of such discussion, the application will be prepared and filed. The alternative fund has to demonstrate that it complies with the regulatory requirements and explain its business model and investment strategy.

The approval process does not have a set duration. It varies depending on the complexity and scope of the application, the investment strategies and the organisation of the fund itself. FINMA seeks to approve alternative funds that are open to all investors within a deadline of eight weeks and funds that are limited to qualified investors within four weeks. These timeframes start when FINMA has received all required documents for the application and they are merely indicative.

### Foreign Alternative Funds

These are not subject to a regulatory approval process. However, if they are distributed to retail investors (ie, non-qualified investors in the sense of the CISA), FINMA must authorise their distribution. FINMA will grant the authorisation if the following conditions are met:

- the collective investment scheme, the fund management company or the fund company, the asset manager as well as the custodian, are subject to public supervision intended to protect investors;
- the regulatory framework regarding the organisation of the fund management company, the fund company and the custodian, the rights granted to investors and investment policy are equivalent to the framework set forth by the CISA;
- the name of the collective investment scheme is not deceptive and does not create confusion;
- the fund has appointed a Swiss representative and Swiss paying agent; and
- FINMA and the foreign supervisory authorities have entered into an agreement on the co-operation and exchange of information regarding the distribution of the fund.

As a practical matter, FINMA only approves UCITS for distribution to retail investors in Switzerland. Existing foreign alternative funds, however, have maintained their authorisation and can continue to be distributed to the public.

## 2.7 Requirement for Local Investment Managers

Swiss collective investment schemes require a local fund management company, which may, however, delegate certain fund administration activities and asset management to foreign asset managers who are supervised by a recognised supervisory authority. Therefore, foreign managers or advisers cannot act as a fund management company for Swiss funds.

To delegate tasks to third parties, written agreements must precisely describe the delegated tasks, the powers and responsibilities, the authority to further delegate any tasks, reporting duties and inspection rights. The delegation of tasks should not prevent the audit company from auditing or FINMA from supervising the activities of the alternative fund. In particular, where tasks are delegated to foreign managers, the licensee must be able to demonstrate that the regulatory audit company, FINMA and itself are able to exercise their inspection rights and enforce them under the law. Moreover, the respective agreements must be reviewed by the regulatory audit company before the outsourcing occurs.

## 2.8 Other Local Requirements

Swiss alternative funds must be administered in Switzerland. Consequently, the ultimate supervision of the alternative fund must be carried out in Switzerland. This means that the members of the executive board of the fund management company must reside in a place where they can ensure the proper management of the fund's business operations. Practically speaking, this implies that they must reside in Switzerland or in the neighbouring areas. Furthermore, the fund management company must have offices and staff in Switzerland.

Similar requirements apply to alternative funds in the form of a SICAV or an LPCI. In a Swiss LPCI, the general partner must be a company limited by shares having its seat in Switzerland. It can only act as general partner of one LPCI.

By contrast, the fund management company may delegate the authority to take investment decisions to third parties domiciled abroad, typically foreign asset managers. The asset managers will need to be supervised by a recognised supervisory authority, which has entered into a co-operation agreement with FINMA, if it is a condition in their home country that the delegation of decisions to managers in third countries must be based on the existence of a co-operation agreement. This is typically the case for EU member states under the Directive on Alternative Investment Fund Managers (AIFMD) or US investment advisers. Part of the assets of several Swiss collective investment schemes is handled by foreign investment managers through managed accounts.

## 2.9 Rules Concerning Other Service Providers

Swiss open-end alternative funds are required to appoint a custodian which must be a licensed bank under the Swiss

Federal Act on Banks and Saving Banks of 8 November 1934 (Banking Act; BankA, SR 952.0) and which must have an appropriate organisation that can act as custodian under the CISA. Subject to the approval of FINMA, alternative funds may instead appoint a prime broker. If the prime broker is a licensed Swiss securities dealer or a Swiss bank, a separate custodian is not required.

Foreign alternative funds that are distributed in Switzerland are required to appoint a Swiss representative and a Swiss paying agent. This requirement does not apply to foreign alternative funds that are placed exclusively with:

- supervised financial intermediaries (eg, banks, securities dealers and insurance companies, as well as central banks); or
- investors that have entered into a written discretionary asset management agreement with a supervised financial intermediary, provided marketing activities only target the asset manager and not the investors directly. The Swiss representative must be licensed as such by FINMA and only Swiss banks may act as Swiss paying agents.

Fund management companies, SICAVs, SICAFs and LPCIs must appoint a regulatory auditor licensed to carry out audits in compliance with the CISA, which acts as an extension of FINMA, carrying out most on-site audits and reporting to FINMA.

The above rules do not apply to investment companies that are not subject to the CISA because they are listed on a Swiss stock exchange or restricted to qualified investors (within the meaning of the CISA). Such investment companies are free to appoint external service providers insofar as they comply with Swiss corporate law and, in the case of a listed company, with the listing rules and additional regulations of the stock exchange.

## 2.10 Requirements for Non-local Service Providers

As explained above (see **2.7 Requirement for Local Investment Managers**), non-local managers or advisers cannot act as fund management companies of Swiss collective investment schemes. Similarly, only Swiss banks can act as a custodian bank of Swiss collective investment schemes. The custodian bank may delegate the custody of all or part of the assets to foreign banks, however, as long as it continues to be responsible for the careful selection, instruction and oversight of the foreign custodians.

Alternative funds may also delegate investment decisions to third parties domiciled abroad which are subject to recognised supervision. Where foreign law requires that there is a co-operation agreement for the exchange of information between the competent supervisory authority and FINMA, a Swiss alternative fund may only delegate investment decisions to a foreign asset manager if FINMA has entered into

such a co-operation agreement. However, there are no registration requirements for third parties.

Other non-local service providers, eg, outsourced providers of IT services, must be carefully selected and properly qualified to perform the outsourced task, but are not subject to any registration requirements in Switzerland.

## 2.11 Tax Regime

Swiss collective investment schemes (ie, contractual funds, SICAVs and LPCIs) are viewed in a transparent manner from a Swiss corporate income tax perspective. They are therefore not subject to Swiss corporate income tax on their income or gains (except if they directly hold real estate situated in Switzerland; although a collective investment scheme directly holding real estate situated in Switzerland may be tax-exempt for the purposes of corporate income tax if its investors consist exclusively of tax-exempt occupational pension institutions).

Distributions made by tax-transparent Swiss collective investment schemes are subject to withholding tax at a 35% rate; however, to the extent that such distributions are made from capital gains or income from directly-held real estate, no withholding tax applies. Swiss investors may claim a refund of withholding tax if they declare the income in their annual tax return (individual investors) or account for it in their financial statements (corporate taxpayers and partnerships). Foreign investors may qualify for an exemption from Swiss withholding tax under the so-called affidavit procedure, which is an exemption provided for by Swiss internal law irrespective of the applicability of a treaty. The exemption requires that more than 80% of the Swiss collective investment scheme's assets are from a non-Swiss source and that the investors demonstrate (typically, via their bank) that they are not Swiss residents.

SICAFs and investment companies that are incorporated as a Swiss corporation not regulated under the CISA (see 2.2 **Fund Structures**, above) are taxed as corporate entities and are hence subject to corporate income tax and tax on net equity. In addition, their distributions are subject to withholding tax at 35%.

## 2.12 Double-tax Treaties

In general, tax transparent funds (SICAVs, contractual funds and LPCIs) do not qualify for benefits under double-tax treaties concluded by Switzerland, since these funds are not subject to income tax in Switzerland. There are, however, a number of double-tax treaty counterparties with whom Switzerland has concluded competent authority agreements, on the basis of which the Swiss funds are entitled to a (full or partial) reduction or refund of foreign withholding taxes on behalf of the Swiss tax-resident investors holding parts of the fund.

SICAFs and non-regulated investment companies that are incorporated in Switzerland are entitled to the ordinary double-tax treaty benefits available to Swiss tax-resident companies.

## 2.13 Use of Subsidiaries for Investment Purposes

Alternative funds are free to use subsidiaries to hold investments, provided that the sole purpose of the subsidiary is to hold investments for the fund and the investment restrictions of the fund are complied with.

## 2.14 Origin of Promoters/Sponsors of Alternative Funds

Most promoters of Swiss alternative funds are Swiss asset managers, banks, insurance companies or pension funds. European and US asset managers have also, albeit more rarely, promoted alternative funds in Switzerland to access Swiss investors.

## 2.15 Origin of Investors in Alternative Funds

Swiss alternative funds have a broad base of investors. A significant number of investors are based in Switzerland, which is the domicile for many large institutional investors and is also home to a large number of wealthy private individuals. A second important share of investment comes from clients of Swiss private banks, who are domiciled in a number of jurisdictions. Due to tax constraints, direct investment by foreign investors in Swiss collective investment schemes is significantly less frequent than investment by Swiss investors.

## 2.16 Destination of Investments Made by Alternative Funds

Alternative funds domiciled in Switzerland invest worldwide, including in North America, Europe, Asia, South America and emerging markets, and across different asset classes.

## 2.17 Key Trends

Several fund projects have been launched to promote Swiss start-ups. In this context, there has been increased interest in using LPCIs, although the interest remains limited. Another trend is the increasing popularity of private debt funds.

Furthermore, fund platforms that offer access to third-party investment products have been set up in Switzerland to facilitate market access for new funds and managers. However, such platforms have not yet become very important for the distribution of alternative investment funds.

Finally, according to FINMA, a further key trend in the asset management industry more generally is digitalisation. As was the case in previous years, the low interest rate environment put pressure on the asset management industry's cost base and potential to earn returns. As a result, outsourcing of non-core functions (in some cases – where permitted by the



CISA – even to non-supervised institutions) has increased and the use of digital technology to improve efficiency and cut costs has been adopted on a wider basis throughout the whole financial services industry. Again, it is uncertain to what extent alternative investment funds are directly affected by these developments.

## 2.18 Disclosure/Reporting Requirements

### Disclosure

Open-end alternative funds or their manager must disclose their fund regulations, their investment policy, their investment techniques (whether the fund uses leverage or engages in short-selling) and the maximum amount of management fees, in their prospectus. Furthermore, the prospectus must include a copy of the fund regulations. Finally, the alternative fund or its manager must publish an annual and semi-annual financial report.

Upon request, open-end alternative funds or their managers must disclose information on the basis for the calculation of the net asset value per unit. Furthermore, investors may ask for information regarding a specific transaction by the fund, including the exercise of voting rights, creditors' rights or risk management.

These obligations do not extend to LPCIs. Limited partners have, however, a far broader right to inspect the business accounts of the partnership and to obtain information about the performance of the LPCI at least once every quarter.

### Reporting

Open-end collective investment schemes and LPCIs are required to maintain accounts and publish an annual and semi-annual report.

The annual report must be audited and made available to the investors within four months of the end of the financial year. The annual report must contain: the financial statements; information on the number of shares/units issued and redeemed during the financial year as well as the total number of shares/units outstanding; the inventory of the fund's assets at market value; valuation principles; a breakdown of buy and sell transactions; the performance of the open-end collective investment scheme, possibly benchmarking it with comparable investments; and information on matters of particular economic or legal importance (amendments to the regulations, a change of manager or custodian bank, a change of directors or officers, legal disputes).

Furthermore, within two months of the end of the first half of the financial year, a semi-annual report must be published including, among others, unaudited financial statements, information on shares issued and redeemed during that period and the number of shares outstanding, an inventory of the fund's assets at market value, and a breakdown of buy and sell transactions.

Moreover, open-end alternative funds or their management company must regularly report the respective net asset value.

Investment companies that are not subject to the CISO are subject to the general rules on financial reporting, which vary depending on whether the company is listed.

## 2.19 Anticipated Changes

### FinSA/FinIA

On 15 June 2018, the Federal Act on Financial Services (FinSA) and the Federal Act on Financial Institutions (FinIA) were ratified by the Swiss Federal Assembly. The new Acts entail far-reaching changes to the offering of financial products, including alternative funds, to Swiss investors. The FinSA will standardise the rules of conduct that apply in connection with the offering of financial products.

More importantly, the regime regarding the marketing of foreign alternative funds will undergo fundamental changes: neither a Swiss representative nor a Swiss paying agent will need to be appointed for funds offered exclusively to qualified investors, other than high net worth individuals who have opted to be treated as qualified investors.

Moreover, distributors of collective investment schemes will no longer require a licence from FINMA. However, client advisers who provide financial services including investment advice and, possibly, marketing of financial instruments, including funds, will need to be registered in a newly-established register of client advisers, unless they work for a supervised financial institution. This requirement also applies to client advisers of foreign financial service providers who provide financial services to clients in Switzerland. Although the Federal Council has the authority to waive this requirement for foreign client advisers of supervised entities, subject to equivalent prudential supervision provided exclusively to professional clients, the drafts of the implementing ordinances circulated in the consultation process suggest that this waiver will only benefit client advisers who work for institutions that are part of a financial group subject to consolidated supervision by FINMA.

### L-QIF

In June 2019, the Federal Department of Finance initiated a consultation process regarding a new type of fund or more specifically, a new regime for funds that are limited to qualified investors – so-called Limited Qualified Investor Funds (L-QIF). Under this regime, fund management companies and SICAVs will be able to create new funds that are limited to qualified investors, without seeking the prior approval of FINMA. This should lower the costs to set up funds and considerably reduce their time to market, because no approval procedure by FINMA is required. In particular, innovative and alternative funds which today are often set up abroad, are expected to benefit from the new regime.

## 3. Managers

### 3.1 Legal Structures Used by Fund Managers

Under the CISA, fund management companies must be organised as a company limited by shares.

By contrast, the legal requirements for asset managers of collective investment schemes are less stringent. Asset managers of collective investment schemes can be organised as companies limited by shares, partnerships limited by shares, limited liability companies, general partnerships or limited partnerships. In practice, however, most asset managers are organised as companies limited by shares or limited liability companies.

Foreign asset managers of collective investment schemes may open a branch in Switzerland, subject to certain additional requirements.

### 3.2 Regulatory Regime

Fund management companies are subject to stringent licensing requirements, in terms of governance, organisation and capital adequacy, comparable to the requirements applicable to banks and securities dealers.

Subject to a limited *de minimis* exemption provided in the CISA for asset managers of foreign collective investment schemes, asset managers of alternative funds have to obtain a licence from FINMA before they can engage in asset management activities for alternative funds. The licensing requirement applies to Swiss asset managers of Swiss and foreign collective investment schemes. The licence is subject to specific requirements that include, *inter alia*, minimum capital requirements and rules regarding the organisation and operation of the asset manager. Banks, securities dealers and fund management companies can also act as an asset manager without seeking an additional licence.

Investment advisers of alternative funds which provide only advisory services do not need to be licensed by FINMA. If they have the authority to execute orders on behalf of clients, including an alternative fund, they are treated as an asset manager of collective investment schemes, however, and must be licensed by FINMA, unless they remain within the limits set for the *de minimis* exemption.

### 3.3 Tax Regime

Swiss investment management companies are subject to corporate income tax at federal, cantonal and communal level on their net profit as accounted for in their statutory financial statements and, as the case may be, adjusted for tax purposes. They may also be subject to tax on their net equity at cantonal and communal level. Where they regularly trade in stock capital, bonds or funds, they may have to register as a securities dealer for stamp taxes. There is no such registration obligation for fund management companies that

predominately trade in derivatives, commodities, real estate or precious metals. The registration as a securities dealer for stamp taxes triggers reporting obligations towards the Swiss tax authorities for most trades conducted by the fund management company.

There is no special tax status available for fund management companies and their partners or employees; however, managers investing their private wealth in alternative funds can earn tax-free capital gains on their investments.

### 3.4 Rules Concerning “Permanent Establishments”

Funds established outside Switzerland can be managed by a Swiss fund management company without triggering a taxable presence in Switzerland for the fund.

Foreign funds may be considered as Swiss taxpayers for withholding tax if their board of directors or similar steering body is predominately composed of Swiss tax-resident persons or their board meetings are predominately held in Switzerland, and if the assets of the fund are in custody with a Swiss bank.

### 3.5 Taxation of Carried Interest

There are no special rules for the taxation of carried interest in Switzerland; therefore, carried interest is generally subject to ordinary corporate income tax (if earned by a fund management company) or personal income tax (if earned by Swiss resident managers).

Where a manager can demonstrate that carried interest is paid from capital gains earned by a fund from the disposal of underlying assets, it may be considered as a capital gain in the hands of the manager, and therefore benefit from an exemption from personal income tax.

### 3.6 Outsourcing of Investment Functions/Business Operations

As mentioned above, local fund management companies can delegate certain administrative and asset management activities to Swiss asset managers of collective investment schemes or foreign asset managers who are supervised by a recognised supervisory authority, provided they comply with the regulatory requirements (see **3.8 Local Regulatory Requirements for Non-local Managers** for further details).

In addition, they can delegate further tasks to third parties in a written agreement setting out the delegated tasks, the powers and responsibilities of the parties, the authority to further delegate any tasks (if permitted), reporting duties and inspection rights. The outsourcing of certain functions should, however, not hinder oversight by FINMA. In practice, the requirements to outsource investment functions or business operations are exacting and a careful review is required to ensure that the regulatory framework is complied with.

### 3.7 Local Substance Requirements

Swiss asset managers of collective investment schemes must be managed in Switzerland. Consequently, their ultimate supervision must be carried out in Switzerland. This means that the members of the executive board of a Swiss asset manager of collective investment schemes must reside in a place that enables them to ensure proper management of the business operations. Practically speaking, this means that they must reside in Switzerland or in the neighbouring countries.

Furthermore, Swiss asset managers need to employ local employees and have office space in Switzerland to comply with the regulatory requirements.

### 3.8 Local Regulatory Requirements for Non-local Managers

As explained above (see **2.8 Other Local Requirements**), an alternative fund or its fund management company (as the case may be) may delegate investment decisions to a non-local asset manager, provided that the latter is supervised by a recognised supervisory authority, which has entered into a co-operation agreement with FINMA, whenever such jurisdictions condition the delegation to managers in third countries on the existence of co-operation agreements. This is typically the case for EU member states under the AIFMD.

## 4. Investors

### 4.1 Types of Investor in Alternative Funds

There is a significant appetite for alternative funds in Switzerland, due to the significant number of sophisticated investors. The market is composed mainly of institutional investors such as private and public pension funds, insurance companies, family offices and financial intermediaries, for example, banks and asset managers, which invest on behalf of their clients in Switzerland and abroad. There are, however, also a significant number of high net worth individuals who invest directly, or through their family office, into alternative funds.

### 4.2 Marketing of Alternative Funds

Open-end Swiss alternative funds can be marketed to all investors, including to retail investors after they have been approved by FINMA. However, they may, particularly if they seek exemptions from certain provisions of the CISA, limit themselves to qualified investors. By contrast, only qualified investors can invest in LPCIs.

As mentioned above, the bulk of alternative investment funds that are marketed in Switzerland are organised under the laws of foreign jurisdictions. Foreign alternative funds can be distributed to retail investors only if they have been authorised for distribution in Switzerland by FINMA. Most alternative investment funds are not authorised for distribution

to the public. Consequently, they can only be distributed to qualified investors or placed with supervised financial investors or under the umbrella of an asset management agreement.

As a matter of principle, even if a foreign alternative fund is distributed to qualified investors, it needs to appoint a Swiss representative and a Swiss paying agent, and the Swiss representative has to enter into distribution agreements with the persons distributing the alternative fund in Switzerland before it can be distributed to qualified investors. Furthermore, the distributor may need to be licensed in Switzerland or in its home jurisdiction (see also **2.9 Rules Concerning Other Service Providers**). This requirement, among others, does not apply if the collective investment scheme is placed exclusively with supervised financial institutions.

Under the CISA, the following are considered qualified investors:

- supervised financial institutions (ie, banks, securities dealers, insurance companies, fund management companies, asset managers of collective investment schemes and central banks, but not portfolio managers and investment advisers, even if they are members of a self-regulatory organisation);
- public bodies and pension funds with professional treasury management;
- corporations with professional treasury management;
- investors who have entered into a written discretionary asset management agreement with a supervised financial intermediary or an independent asset manager, provided such investors have not opted out of their qualified investor status;
- independent asset managers (if the relevant independent asset manager meets the requirements of the CISA and undertakes in writing to exclusively use the fund-related information for clients who are themselves qualified investors); and
- high net worth individuals, provided they have declared that they want to be treated as qualified investors.

### 4.3 Rules Concerning Marketing of Alternative Funds

#### Requirements for Distributors of Alternative Funds

Marketing activities pertaining to Swiss and foreign alternative funds in Switzerland are governed by the CISA and its implementing ordinances.

In principle, offering or advertising a specific collective investment scheme in any form is deemed “distribution”, subject to limited exceptions, the most important one being marketing addressed exclusively to supervised financial intermediaries, which does not qualify as distribution. Therefore, anyone involved in the marketing of alternative

funds is considered a distributor of collective investment schemes.

Swiss distributors of collective investment schemes have to obtain a licence from FINMA. Foreign distributors of alternative funds may only engage in distribution activities in Switzerland if:

- the fund is exclusively distributed to qualified investors;
- the foreign distributor is subject to adequate supervision in its home country; and
- the distributor has entered into a distribution agreement with the Swiss representative of the respective fund.

Switzerland does not recognise any formal exception for pre-marketing of alternative investment schemes. Therefore, as a practical matter, pre-marketing activity needs to be limited to creating brand awareness for large fund management companies and asset managers, or sounding out investment interest early in the inception phase before the key terms of the fund have been determined.

Additionally, Swiss legislation against unfair competition sets out a number of prohibited marketing practices with respect to marketing activities in Switzerland.

The regime for the distribution of collective investment schemes in Switzerland will fundamentally change when the FinSA and FinIA come into force, as anticipated, on 1 January 2020 (see **2.19 Anticipated Changes** for further details).

### Requirements for Marketing Materials

The prospectus of a Swiss alternative fund must contain, inter alia, information on:

- the alternative fund;
- the types of shares it issues and the rights they carry, including the terms and conditions for the redemption of shares;
- the investment policy and investment restrictions;
- the fees payable to the fund management company, the custodian and any other third party;
- other fees and costs, such as performance fees, commissions, retrocessions and other financial benefits and rebates;
- information on taxes (including any withholding taxes);
- the fund management company and custodian; and
- third parties that carry out delegated tasks.

In addition, the fund's regulations, the prospectus and any other marketing material distributed to non-qualified investors in Switzerland must contain a notice regarding the special risks involved in alternative investments. FINMA has to approve the wording of such warning and it must be placed on the first page of the fund's regulations and its prospectus.

Foreign alternative funds which are being distributed in Switzerland must supplement their prospectus with a "Swiss wrapper", containing specific Swiss information, including the names of the Swiss representative and paying agent and the place where the prospectuses, the last annual and semi-annual reports, as well as the articles of association or the fund contract, can be obtained without additional cost. This information must also be included on all marketing material used in connection with distribution in Switzerland.

Foreign alternative investment funds that are distributed exclusively to qualified investors or placed exclusively with regulated qualified investors, without engaging in distribution, are not required to include a sales restriction. However, it is usual and in line with best market practice to include a specific Swiss disclaimer at least in the prospectus (if any) and the relevant marketing document of an alternative fund.

### 4.4 Local Investors

There are no restrictions per se on local investors investing in Swiss alternative funds. However, certain financial institutions and other qualified investors, such as pension funds and insurance companies, are only allowed to invest a certain amount of their net assets in alternative investment funds. In particular, pension funds are allowed to invest directly in alternative funds only if this possibility is specifically covered by their investment regulations and if they comply with the general principles for safe and diversified asset management.

### 4.5 Regulatory Regime

Swiss alternative funds must file their prospectus and any amendment thereto with FINMA. Other marketing material does not need to be filed with or approved by FINMA.

The prospectus of foreign alternative funds that are distributed to non-qualified investors in Switzerland must be approved by FINMA. By contrast, no such requirement applies if the distribution is limited to qualified investors or if there is no distribution, because the alternative fund is placed with supervised financial institutions, or under the umbrella of a discretionary asset management agreement.

Marketing activities pertaining to Swiss and foreign alternative funds in Switzerland are governed by the CISA and its implementing ordinances (see above **4.4 Local Investors**).

### 4.6 Disclosure Requirements

As part of the authorisation process, FINMA must ascertain that significant equity holders (ie, persons who directly or indirectly controls at least 10% of the capital or votes, or who can materially influence the business activities in another way) of alternative funds have a good reputation and do not exert their influence to the detriment of prudent and sound business practice. Furthermore, any change of such persons needs to be approved by FINMA. This information is, however, not public.

Furthermore, SICAVs are required to maintain a register of shareholders, and a register of the beneficial owners of the shares held by company shareholders who own, directly or in concert with third parties, more than 25% of the capital or shares of the SICAV. These registers are not open to the public but law enforcement agencies may seek to access this information in accordance with applicable rules of procedure.

Investment companies that are not subject to the CISA are also required to maintain a register of shareholders and, if they are not listed on a stock exchange, a register of beneficial owners. Unlike the SICAV, however, these obligations apply to all shareholders and are not limited to the company shareholders.

Listed, invested investment companies are subject to the more stringent rules on the disclosure of substantial shareholdings and, consequently, they are subject to the obligation to hold a register of beneficial owners. Under this regime, whoever holds, directly, indirectly or in concert with other persons, a significant shareholding in a company listed on a Swiss exchange must inform the company within four trading days of crossing or reaching thresholds set at 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50% and 66⅔% of the voting rights. The company is subsequently required to disclose this fact to the market.

#### 4.7 Tax Regime

Swiss resident corporates, as well as individuals investing their business assets, are taxed on the book income or gain from their investments in alternative funds, according to ordinary income tax rules. The only exception applies to income received from a fund that earns income from a direct investment in Swiss real estate. Since such income is taxed at the level of the fund, the investors can claim an adjustment of their book income to prevent the same income being taxed twice. Income from SICAFs, which are taxed as ordinary corporations, may qualify for participation exemption when distributed to a corporate investor.

Individual investors are taxed annually on the income earned by the fund; the taxation takes place upon distribution or accumulation of income by the fund. No income tax is due in relation to the distribution or accumulation of capital gains

from the sale of underlying assets by the fund, as well as in relation to income earned from direct real estate held by the fund. In addition, individual investors are subject to annual wealth tax on the net asset value of the funds held. Funds authorised for distribution in Switzerland have to publish their income tax and wealth tax data annually in a public database of the Swiss federal tax administration.

#### 4.8 FATCA/CRS Compliance Regime

Switzerland has entered into a FATCA intergovernmental agreement (IGA). The Swiss IGA follows the Model 2 IGA. Accordingly, a “Swiss financial institution” (as such term is defined in the Swiss IGA) is required to register with the US Internal Revenue Service (IRS) and enter into a Foreign Financial Institution (FFI) agreement. Under the Swiss IGA, the reporting Swiss financial institution must supply its US-related accounts directly to the IRS. Furthermore, it should be noted that the Swiss IGA provides for certain exemptions with respect to Swiss collective investment schemes. The Swiss IGA, as well as the Swiss Federal Act on the Implementation of the FATCA Agreement with the United States of America (SR 672.933.6), came into force on 30 June 2014 and non-compliance with the provisions of the Act or the Swiss IGA may be sanctioned by a fine of up to CHF250,000. Unlike most jurisdictions, which have entered into a Model 1-type IGA, Switzerland has not issued any official guidance notes regarding the implementation of the Swiss IGA. However, a committee known as the FATCA Qualification Committee, headed by the State Secretariat for International Financial Matters (SIF) and consisting of representatives of the major financial industry associations including SFAMA, publishes a Q&A section in order to provide some assistance regarding questions arising from the implementation of the Swiss IGA.

Switzerland has also created the necessary legal basis for the implementation of CRS. The national legislation came into force and data has been collected since 1 January 2017.

Certain collective investment schemes may qualify as non-reporting financial institutions. Additionally, for an automatic exchange of information to actually take place, an international agreement between the respective countries is needed. Switzerland has entered into such agreements with more than 100 countries.

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