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Switzerland

Alternative Investment Funds

Contributor

Wenger Vieli

Martin Peyer

Partner | m.peyer@wengervieli.ch

Zarah Kronbach

Associate | z.kronbach@wengervieli.ch

Orlando Battaglia

Senior Associate | o.battaglia@wengervieli.ch

Joël Doswald

Senior Associate | j.doswald@wengervieli.ch

This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Switzerland.

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Switzerland: Alternative Investment Funds

1. What are the principal legal structures used for Alternative Investment Funds?

In Switzerland, most alternative investment funds ("**AIFs**") qualify as collective investment schemes under the Collective Investment Schemes Act ("**CISA**"). The CISA and its implementing ordinance, the Collective Investment Schemes Ordinance ("**CISO**"), provide for both, open-ended and closed-ended fund structures to set-up AIFs.

Open-ended collective investment schemes may be set-up as contractual fund managed by a fund management company or as an investment company with variable capital (*société d'investissement à capital variable*; "**SICAV**"). They provide the investors either a direct or indirect right to redeem their units/shares at the net asset value. Open-ended collective investment schemes fall in one of the following three categories based on their type of investments: (i) securities funds which comply with the requirement for undertakings for the collective investment in transferable securities ("**UCITS**") in the European Union, (ii) real estate funds and (ii) so-called other funds for traditional investments or alternative investments.

Closed-ended collective investment schemes, by contrast, do not provide for redemption rights of the investors. They may be established in the form of a limited partnership for collective capital investments ("**LPCIs**") or an investment company with fixed capital (*société d'investissement à capital fixe;* "**SICAF**"). The SICAF and the LPCI do not have much in common except being closed-ended fund structures. The LPCI is a special form of limited partnership reserved to qualified investors similar to limited partnership fund structures in other jurisdictions, whereas the SICAF is an investment company organised as a company limited by shares which is also open to retail investors. The SICAF can be used for any permitted investment strategy. LPCIs typically invest in risk capital such as venture capital, private equity, real estate, and infrastructure projects as well as alternative investments.

Open-ended AIFs in Switzerland are often structured as "other funds for *alternative* investments" since they provide the broadest flexibility in terms of permitted investments. Depending on the investment strategy, an investment fund or a SICAV can also be set up as "other fund for *traditional* investments" or even a securities fund if it can meet the demanding restrictions applicable to UCITS. Closed-ended AIFs are usually setup in the form of an LPCI.

AIFs 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 CISA, 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.

Further, in March 2024 the amended provision of the of the CISA and the CISO to implement a new category of collective investment schemes, the Limited Qualified Investor Fund ("**L-QIF**") entered into force. The L-QIF does not require a license or an approval from the Swiss Financial Market Supervisory Authority ("**FINMA**") and, therefore, significantly reduces setup costs and time to market. In addition, running costs are also lower as the L-QIF is not supervised by FINMA. Nevertheless, the L-QIF is subject to the provisions of the CISA. The L-QIF must be structured as one of the above-mentioned forms for Swiss collective investment schemes – except for a SICAF, which is not permitted as a legal form for an L-QIF – and does not constitute a new type of legal entity. The liberal investment guidelines and the limited requirements for risk diversification make the L-QIF an ideal candidate for alternative investments and innovative fund strategies.

Although the CISA would have allowed room for more flexibility with regard to investment restrictions and investment techniques of the L-QIF, the CISO imposes similar restrictions as the ones applicable for alternative investments. Also with respect to other areas, the L-QIFs will have to comply with additional limitations that are not known to similar foreign collective investment schemes.

2. Does a structure provide limited liability to the investors? If so, how is this achieved?

Yes. For AIFs in corporate form, in particular in the case of LPCIs, the liability of investors who usually participate as limited partners, is general limited to the capital they have committed to invest (while the general partner's

liability is unlimited). In the case of a SICAV or a SICAF whose capital is divided into shares, the liability of a shareholder is limited to its capital contribution by law. Also, investors in contractual AIFs are generally not liable for liabilities of the AIF.

In case of contractual funds and SICAVs who are setup as umbrella funds with several sub-funds, the liability of each sub-fund is restricted to its own liabilities and investors in one sub-fund cannot be held liable for liabilities of other sub-funds.

Investors who at the same time also involved in the management of the fund (e.g. as director of a SICAV or as general partner of a LPCI) may, however, become liable for damages caused by a breach of their duties towards the AIF.

3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

The majority of existing AIFs in Switzerland is setup as a (open-ended) contractual fund. Although Swiss law allows for closed-ended fund structures since the entry into force of the CISA in 2006, only 25 closed-ended AIFs are currently licensed by FINMA (compared to 1926 open-ended collective investment schemes).

The structure that is chosen for setting up an AIF does not mainly depend on the asset class or the fund's investment strategy but is rather driven by the flexibility and the tax treatment of a specific fund structure.

4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

As outlined in question 1, the CISA differentiates between open-ended and closed-ended collective investment schemes. Both types of fund structures can be used for Swiss AIFs.

Moreover, the CISA further distinguishes open-ended collective investment schemes based on their type of investments (securities funds, real estate funds and other funds for traditional investments or for alternative investments). The SICAF can be used for any permitted investment strategy whereas the LPCI is mainly used for investments in private equity and real estate projects.

5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

Contrary to closed-ended AIFs, open-ended collective investment schemes, give investors either a direct or indirect legal entitlement to redeem their units at the net asset value at the expense of the collective assets.

The fund regulations of an AIF with difficult valuation or limited marketability may provide for exceptions to the right of redemption at any time. For such funds, the redemption right may thus only be exercised on the dates provided for in the fund regulations, but at least four times a year. Also, FINMA may restrict the right of redemption at the request of the AIF for up to five years in case the fund invests either in (i) assets which are neither listed nor traded on another regulated market open to the public; (ii) mortgages or (iii) private equity investments.

The fund management company and the SICAV may provide in the fund regulations for a pro rata reduction of redemption requests when a certain percentage or threshold is reached for a certain date (*gating*) if exceptional circumstances exist and if this is in the interest of the remaining investors. The details of such gating must be disclosed in the fund regulations and be approved by FINMA.

Furthermore, the AIF's fund regulations may provide that redemption may temporarily be suspended if (i) a market that on which the valuation of a significant portion of the fund's assets depends is closed or trading on such a market is restricted or suspended; (ii) a political, economic, military, monetary or other emergency exists; (iii) transactions of the AIF are no longer possible because of foreign exchange controls or other restrictions on the transferability of the fund's assets or (iv) numerous units are redeemed and the interests of the other investors would be significantly impaired as a result.

6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

In general, the manager of an open-ended AIF is required to assess the fund's liquidity and other material risks at regular intervals under various scenarios and document them accordingly. For this purpose, the manager must establish specific procedures to assess and monitor liquidity risks, e.g., by conducting scenario analysis

including stress tests for open-ended AIFs.

With the amendment of the CISO in March 2024, a statutory legal basis for the creation of side pockets has been introduced allowing FINMA to authorise the AIF to segregate individual illiquid investments provided that this is foreseen in the fund documents.

7. Are there any restrictions on transfers of investors' interests?

The transferability of investors' interests depends on the legal structure of an AIF.

Open-ended AIFs in general are not subject to statutory restrictions on transfers of investors' interests. However, such restrictions may be included in the fund's regulations, in particular, if the AIF is restricted to qualified investors.

Moreover, since LPCI are designed as a legal structure only available to qualified investors, the transferability of interests in an LPCI is restricted to qualified investors. Further, the transferability of a partnership interest may be restricted in the partnership agreement by the consent of the general partner.

In most cases, the fund documents of open-ended Swiss collective investment schemes and LPCIs, including AIFs, foresees a compulsory redemption if an investor no longer fulfils the eligibility requirements to invest in the fund or if interests of all the other investors may be jeopardised by such investment.

Lastly, transfer restrictions in the articles of association are mandatory for investment companies not subject to the CISA (see question 1) to ensure only qualified investors as shareholders.

8. Are there any other limitations on a manager's ability to manage its funds (e.g., diversification requirements)?

The manager's ability to manage its funds depend primarily on the limitations set out in the fund documents of the respective funds.

In addition, the CISA sets out certain rules for specific types of funds which the manager has to comply with. Contractual funds and the SICAV, for example, must apply the principles of risk diversification in their investments. As a general rule, they may only invest a certain percentage of the fund assets with the same debtor or company. Moreover, restrictions apply for related party transactions in connection with real estate, construction and infrastructure projects for real estate funds.

9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

In general, resident investors are subject to income tax with regard to accrued or distributed income from AIFs (transparent treatment of the fund), unless the income is attributable to direct real estate investments. However, capital gains are generally tax free for individual investors holding the interests in the AIF as part of their private assets. Additionally, accrued or distributed income from Swiss AIFs is subject to withholding tax. Withholding tax can be reclaimed by resident investors by declaring the income in the individual's tax return.

Non-resident investors are not subject to Swiss income taxes. However, accrued or distributed income of Swiss AIFs is subject to withholding tax. A refund of such withholding by non-resident investors is only possible based on applicable double tax treaties or if at least 80% of the AIF's income is non-Swiss sourced. If at least 80% of the AIF's income is non-Swiss sourced and if approval is obtained from the Swiss Federal Tax Administration, a deduction of the withholding tax by the AIF might not be required (Affidavit).

Distributions, capital gains as well as accrued profits are subject to Swiss corporate income taxes as part of a resident company's net earnings. However, tax-exempt domestic pension fund investors are not subject to income tax and may receive a full refund of withholding tax deducted by the AIF. Additionally, if the investors of an AIF are exclusively tax-exempt domestic pension fund institutions, the AIF may apply for the notification procedure for the purposes of the withholding tax. With regard to the refund of the withholding tax for foreign pension funds and sovereign wealth funds, see above. Additionally, there is also a tax-exemption for foreign states and foreign occupational pension institutions for securities transfer tax purposes.

The target investors may have an influence on the structure of AIFs while the target investments, apart from real estate, do not influence the fund structure.

10. What rights do investors typically have and what restrictions are investors typically subject to with respect to the management or operations of the Alternative Investment Fund?

Under Swiss law, collective investment schemes, irrespective of their legal form, have to be managed by a third party on behalf of the investors (*Fremdverwaltung*). Investors are generally not involved in the management or the operations of an AIF. Even though the manager must act in the interests of the investors, investors do not have the right to issue instructions.

11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?

In general, all Swiss fund structures allow for certain customization. In case a fund is only open for qualified investors, FINMA may grant additional exemptions from certain provisions of the CISA on request of the AIF.

The L-QIF provides the highest level of flexibility with respect to applicable investment guidelines and risk diversification rules and allow an AIF to invest, e.g,. all its funds in a single asset or a single type of assets (see also question 1).

12. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Asset managers of AIFs in Switzerland are subject to stringent licensing requirements, in terms of governance, organisation and capital adequacy, comparable to the requirements applicable to banks and securities firms.

Subject to limited *de minimis* exemptions for asset managers of Swiss and foreign AIFs up to a certain amount of assets under management in the Financial Institutions Act ("**FinIA**"), Swiss asset managers of AIFs are required to obtain a licence as manager of collective assets from FINMA before they can engage in asset management activities for AIFs. Asset managers below the threshold for assets under management of the *de minimis* exemptions need to be licensed as portfolio manager and are under the ongoing supervision of a supervisory organisation instead of direct supervision by FINMA. In order to receive a licence, asset managers have to fulfil, *inter alia*, minimum capital requirements and rules regarding the organisation and the operation of the asset manager.

Banks, securities firms, insurance companies and fund management companies can also act as an asset manager for AIFs without seeking an additional licence.

There is no licensing requirement from FINMA for persons who only provide investment advisory services to AIFs, without having any decision-making power regarding investments. Investment advisers which are not subject to prudential supervision, however, must register in a Swiss register for client advisers.

13. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Swiss AIFs are subject to licensing requirements from FINMA irrespective of their organisational structure, i.e. whether they are established contractually or as a company, and the type of investors. However, the CISA exempts investment companies organised as a company limited by shares from its scope, if (i) all their shareholders are qualified investors, or (ii) they are listed on a Swiss stock exchange.

Moreover, AIFs structured as L-QIFs are exempted from the licencing requirement under the CISA (see question 1).

Foreign AIFs only require a license from FINMA when offered to non-qualified investors. Yet, no licensing requirements apply for foreign AIFs if these are exclusively offered to qualified investors in Switzerland. Nevertheless, Swiss law provides for certain rules regarding offering and marketing of AIFs (see section 4 below).

14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

The administration and ultimate supervision of a Swiss AIF must be carried out in Switzerland. Therefore, the members of the executive board of Swiss fund management companies or Swiss managers of collective assets must be resident in Switzerland or neighbouring areas so that they can ensure proper management of business operations.

However, it is possible to delegate investment decisions to third parties, even if these are not domiciled in

Switzerland. Such third party must be subject to authorisation requirements and supervision which is at least equivalent to Switzerland and possess the necessary skills, knowledge and experience and have the required authorisations. Where foreign law requires an agreement on cooperation and the exchange of information with the foreign supervisory authorities, investment decisions may only be delegated to third parties abroad if such an agreement is in place between FINMA and the foreign supervisory authorities relevant for the respective investment decisions. This is typically the case for member states of the European Union under the Directive on Alternative Investment Fund Managers ("**AIFMD**").

Furthermore, it is also permissible for Swiss AIFs to mandate advisors domiciled abroad.

15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?

See answer to question 14.

16. What service providers are required by applicable law and regulation?

Fund management companies, SICAVs, SICAFs and LPCIs are obliged to appoint a regulatory audit company, acting as an extension of FINMA and carrying out most on-site audits regarding regulatory compliance and report to FINMA.

Open-ended Swiss AIFs organised as SICAVs must appoint a custodian which must be a Swiss bank. It is also possible, subject to the approval of FINMA, for AIFs to appoint a prime broker. This may replace the custodian if the prime broker is a licensed Swiss securities firm or a Swiss bank.

Swiss law further requires that foreign AIFs offered or marketed in Switzerland appoint a Swiss representative and a Swiss paying agent unless exclusively qualified investors who are not high-net-worth individuals or private investment structures set up for them who opted to be treated as professional clients under the Financial Services Act ("**FinSA**") are approached.

17. Are local resident directors / trustees required?

The administration and ultimate supervision of a Swiss AIF must be carried out in Switzerland. Therefore, the members of the executive board of Swiss fund management companies or Swiss managers of collective assets must be resident in Switzerland or neighbouring areas so that they can ensure proper management of business operations. There is more flexibility, however, for the members of the board of directors of a Swiss AIF incorporated as a SICAV or a SICAF as well as for the AIFs' manager.

18. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

The management of Swiss AIFs may not be carried out by foreign managers or advisers (see answer to question 14).

However, certain fund administration activities and the asset management may be delegated to foreign asset managers provided that they are supervised by a recognised supervisory authority. The delegated tasks, powers and responsibilities, authority to further delegate any tasks, reporting duties and inspection rights must be precisely described in written agreements. Also, the delegating AIF must ensure that its regulatory audit company will still be able to carry out its audit irrespective of the delegation of the tasks and that FINMA's supervision of the AIF will not be impeded.

19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

In case an AIF is managed without a required FINMA license, FINMA has a broad range of enforcement tools to uphold and enforce regulatory requirements. Considering the aims and general principles of the financial market law and the circumstances of the particular case, FINMA decides on the necessary measure depending on the nature and gravity of the violation or irregularity.

20. What is the typical level of management fee paid? Does it vary by asset type?

In general, management fees can be determined freely. Usually, the manager's remuneration consists of a management fee and, as the case may be, a performance fee. The management fee is generally represented by a percentage of the assets under management (AuM).

In practice, the level of management fees depends on the asset class in which the fund invests (i.e. private equity, venture capital, real estate, etc.) and its investment strategy. Also the AIF's size has an influence on the management fees to be paid by the investor.

21. Is a performance fee typical? If so, does it commonly include a "high water mark", "hurdle", "water-fall" or other condition? If so, please explain.

Performance fees and carried interest arrangements (in particular for private equity funds) are often part of the compensation model for the manager of an AIF.

Typically, the manager is only entitled to a performance fee if a minimum return ("hurdle rate") is achieved. Until the hurdle rate is reached, all investors usually participate in the profits in proportion to their contributions. From the profit exceeding the hurdle rate, a certain percentage is attributed to the manager as a performance bonus, while the remainder is distributed among the investors in proportion to their contributions. It is further common that such a performance allocation is subject to a "high water mark" or based on a water-fall.

If a performance fee is charged, the AIF's documents must include information to allow the investor to understand the calculation method, the benchmark/index or other comparative figures used, and the performance fee's impact on the investors' return.

22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?

Economic benefits to initial investors by way of different treatment due to investor classes or fee discounts are permissible provided that such unequal treatment of investors is justified by objective reasons. In other words, initial investors may receive economic benefits only if there are objective reasons for such benefits.

23. Are management fee "break-points" offered based on investment size?

Management fee "break-points" based on the investment size are sometimes offered.

24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?

First loss programs are not widely implemented for Swiss AIFs and used primarily in very specific circumstances.

25. What is the typical terms of a seeding / acceleration program?

Seeding or acceleration program are not commonly used by Swiss AIF. In specific cases, tailored benefits for initial investors are offered.

26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?

For Swiss AIFs, it is common to have both a management fee and a performance related fee. Although there is no standardized ration, a recent study has shown that for the Swiss asset management industry as a whole, performance based compensation only accounts for approx. 7% of total fees (decreasing by about 6% each year over the last two years).

27. What restrictions are there on marketing Alternative Investment Funds?

Marketing of Swiss AIFs does not trigger licensing requirements from FINMA. However, marketing may be considered as a financial service under the FinSA which leads to the applicability of the respective rules for the provision of financial services, i.e., inter alia, rules of conduct at the point of sale, organisational measures, a duty to register client advisors and a requirement for the financial services provider to affiliate to an ombudsman's office if no exemption applies. Also, it must be referenced to the special risks of alternative investments in the fund's name, prospectus and other marketing materials. Marketing of certain types of AIFs may be restricted with regard to non-qualified investors.

Foreign AIFs only require a license if they are offered to non-qualified investors (i.e. retail investors), but not when offered exclusively to qualified investors (such as e.g. securities firms, insurance companies or licensed fund management companies, managers of collective assets,

pension funds with professional treasury operations, or large companies of companies with professional treasury operations) or retail clients who entered into an investment advisory or an asset management agreement with regulated Swiss or foreign financial intermediaries. Yet, the offering and marketing of foreign AIFs to not high-net-worth individuals or private investment structures created for them who have opted to be treated as qualified investors triggers a requirement for the AIF to appoint a Swiss representative and a paying agent.

28. Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

Unlike in the European Union, Swiss law does not provide for a defined concept of "pre-marketing", i.e. general information about a specific collective investment scheme that falls short of marketing, in the law.

Yet, any activity directed specifically at the purchase or sale of units in a collective investment scheme qualifies as a financial service and is subject to the corresponding rules of the FinSA (see question 27). If an advertisement does not contain enough information about the terms of an offering and the AIF or if it does not intend to draw the attention to a particular financial instrument and to sell it, the advertisement will fall short of an offer.

Also, for sales activities to be deemed a financial service pursuant to the FinSA, the collective investment scheme in question must exist or its key terms should be defined. This is the case if it is either already established or, at the latest, if the key characteristics (e.g. name of the collective investment scheme, main actors, investment policy, fees, issuing and redemption terms) that will enable investors to make a decision to invest have already been definitely determined.

Against this backdrop, exploratory discussions with investors on their general interest to invest in a new fund that is still in the early stage of its inception or abstract discussions with potential investors not relating to a specific product are not deemed to constitute financial services or an offer and, thus, the requirements of the FinSA do not apply. This is the case, for example, if information is provided on certain investment strategies or asset classes without reference being made to an actual specific product.

29. Can Alternative Investment Funds be marketed to retail investors?

Marketing of open-ended Swiss AIFs and Swiss AIFs in the form of a SICAF is not restricted. While open-ended AIFs can be marketed to all investors including retail investors, many open-ended AIFs limit themselves to qualified investors, especially if they seek exemptions from certain provisions of the CISA from FINMA.

Foreign AIFs may only be marketed to retail investors if they are approved by FINMA. Approval is granted if, *inter alia*, (i) the AIF, the manager and the custodian are subject to public supervision intended to protect investors; (ii) with regard to organization, investor rights and investment policy, the AIF and the custodian are subject to regulations which are equivalent to the Swiss provisions; (iii) the name of the collective investment scheme does not provide grounds for confusion or deception; (iv) a representative and a paying agent are appointed in Switzerland; and (v) there is an agreement on cooperation and the exchange of information between FINMA and the relevant foreign supervisory authority for the AIF.

An exemption applies for retail clients who have concluded an investment advisory or an asset management agreement with a regulated Swiss or foreign financial intermediary. To them, foreign AIFs may be offered without approval of FINMA.

30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?

There is no specific type of AIF in Switzerland which is tailored for retail investors.

31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?

Swiss law differentiates between qualified investors and non-qualified investors. Whether an investor may invest in an AIF does not depend on the respective asset class but on the type of investment fund.

For AIFs which are opened to retail investors, there are no qualification requirements for the investors. If an AIF is restricted to qualified investors, only the following investors (which are deemed qualified investors) are allowed:

- Swiss and foreign financial intermediaries

(such as banks, securities firms and asset managers)
- Swiss and foreign supervised insurance companies
- central banks
- public entities, institutions and foundations with professional treasury operations
- occupational pension schemes with professional treasury operations and other occupational pension institutions with professional treasury operations
- national and supranational public entities with professional treasury operations
- companies with professional treasury operations
- large companies (i.e. companies exceeding two of the following thresholds: (i) balance sheet total of CHF 20 million; (ii) turnover of CHF 40 million; (iii) equity of CHF 2 million)
- private investment structures with professional treasury operations created for high-net-worth retail clients
- high-net-worth retail clients (i.e. an investor who satisfies one of the following criteria: (i) necessary knowledge to understand the risks associated with the investments and assets of least CHF 500,000 at its disposal; or (ii) assets of at least CHF 2,000,000 at its disposal) and private investment structures created for them that have declared that they wish to be treated as professional clients pursuant to the FinSA (opting out)
- Swiss and foreign collective investment schemes and their management companies which are not already deemed to be institutional clients within the meaning of the FinSA who have declared that they wish to be treated as institutional clients and, thus, as qualified investor.

Moreover, retail clients who have concluded an investment advisory or an asset management agreement with a regulated Swiss or foreign financial intermediary are also deemed qualified investors.

32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?

No. Marketing to public bodies and pension funds is not subject to special restrictions and no license is required. Government entities such as government pension funds and other national and supranational public entities are deemed qualified investors if they have professional treasury operations. Marketing of AIFs to such investors may, however, qualify as a financial service (see question 27) and, thus, trigger the respective requirements for the provision of financial services.

33. Are there any restrictions on the use of intermediaries to assist in the fundraising process?

The use of intermediaries to assist in the fundraising process is not restricted. Also, no licensing requirements for intermediaries apply merely because of their mere assistance in the fundraising process. However, such activities may qualify as financial service so that the intermediary falls within the scope of the FinSA. This is also true for foreign intermediaries who target clients in Switzerland.

In essence, an intermediary subject to the FinSA, must comply with the rules of conduct at the point of sale, organisational rules, a requirement to affiliate to an ombudsman's office and a duty to register client advisors in a Swiss client advisors register, unless an exemption applies.

34. Is the use of “side letters” restricted?

No, Swiss law does not explicitly restrict the use of side letters. Yet, the general rules of conduct have to be complied with and AIFs and their managers must comply with their duty of loyalty and treat investors equally. Consequently, from a practical point of view, side letters can only be used for objective purposes, such as facilitating the commitment of anchor investors, and if these principles are not breached. In this context, commitments to provide detailed information do not raise any particular issue as long as all investors benefit from the additional transparency. By contrast, it would typically not be permissible to reduce fees for the exclusive benefit of one individual investor or to promise preferred returns under a side letter if there are no objective reasons for such benefits.

In case the use of side letters negatively impacts the fund, civil liability or administrative measures could be triggered.

35. Are there any disclosure requirements with respect to side letters?

Swiss law does not provide for specific disclosure requirements. Especially if the use of side letters triggers a conflict of interest, the side letter arrangement has to be disclosed.

36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?

Most common terms in side letters are terms regarding reduced fees or comfort regarding expenses. Moreover, access to additional disclosure (e.g. with respect to the underlying investments for the purpose of risk management) or the ability to participate in co-investments may also be agreed in a side letter.

Contributors

Martin Peyer
Partner
m.peyer@wengervieli.ch

Zarah Kronbach
Associate
z.kronbach@wengervieli.ch

Orlando Battaglia
Senior Associate
o.battaglia@wengervieli.ch

Joël Doswald
Senior Associate
j.doswald@wengervieli.ch