DOES MY FUND NEED TO MEET THE 1 MARCH DEADLINE FOR A REPRESENTATION SERVICE?

LUIS PEDRO AND RODOLPHE CHATAGNY, OF OLIGO SWISS FUND SERVICES, TALK ABOUT THE UPCOMING DEADLINE TO APPOINT A SWISS REGULATED REPRESENTATIVE

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For all existing foreign investment funds proposed to Swiss-based investors, there is a mandatory obligation to appoint a Swiss regulated representative and paying agent. The deadline to be compliant is the 1 March 2015. For newly created funds this obligation is immediate.

Since Switzerland is not part of the European Union, the Alternative Investment Fund Managers Directive (AIFMD) rules don't apply. For distribution of foreign investment funds the equivalent new regulation in Switzerland focuses on the product instead of the manager. As a consequence, complexity and associated costs of being compliant with new Swiss regulation are low when compared with AIFMD. The Swiss model for regulation of foreign investment funds works on a full delegation of responsibilities: the Financial Market Supervisory Authority (FINMA) delegates the supervision of foreign investment funds distributed to Swiss-based clients to regulated companies called Swiss representatives.

> "COMPLEXITY AND ASSOCIATED COSTS OF BEING COMPLIANT WITH NEW SWISS REGULATION ARE LOW WHEN COMPARED WITH AIFMD"

The revision of the Swiss Federal CISA (Collective Investment Schemes Act) entered into force in January 2013. Until the 28 February 2015 there is a transition period to allow all concerned entities to be compliant with the new regulation.

Among other things, the newly introduced CISA revision now requires that all foreign investment funds addressed to Swiss investors must have, before the end of February 2015, a Swiss regulated representative in order to be allowed for distribution. The need for a Swiss regulated representative already existed in the past but only for foreign investment funds approved for retail distribution in Switzerland.

SWISS REPRESENTATIVES

These Swiss-based companies are highly regulated and must boast well-defined internal procedures that had to apply for a licence from the FINMA. The representative serves the foreign investment funds with regard to Swiss investors and FINMA. Besides the Swiss representative, the appointment of a Swiss paying agent (i.e. a bank) is also mandatory for a foreign investment fund, if distributed in Switzerland.

DOES A FOREIGN INVESTMENT FUND NEED A SWISS REPRESENTATIVE?

The pre-condition to understand if a foreign fund needs a Swiss representative is simple: it implies to know if a foreign investment fund is doing any distribution activity in Switzerland. According to the revised CISA the distribution of collective investment schemes is defined as: 'any offering of and advertising for collective investment schemes that is not exclusively directed at investors as: regulated financial intermediaries such as banks, securities traders, fund management companies and asset managers of collective investment schemes, as well as central banks; and regulated insurance institutions.' Proposing an investment fund to all other entities, such as pension funds, independent asset managers, high-net-worth individuals, etc., is considered distribution.

DISTRIBUTION OF FOREIGN INVESTMENT FUNDS

The concept of distribution has replaced that of public solicitation, which was the one prevailing in the application of the latest CISA; this changed radically. Under the revised CISA, basically all marketing activities will be regarded as distribution, unless such activities are directed at specific prudentially supervised entities (regulated qualified investors). The law has evolved especially for funds addressed to qualified investors (i.e. private placement) which were not regulated in the past. While in the past, requirements for qualified investors were minimal, as of 1 March 2015 all the funds (for qualified investors and/or retail investors) must have a regulated representative in Switzerland. For example, if a foreign investment fund sends emails to potential clients it is considered distribution. After appointing a Swiss regulated representative, a foreign fund (or any third-party marketer that is a regulated distributor) will be allowed to continue to be distributed in Switzerland.

QUALIFIED, NON-QUALIFIED AND REGULATED QUALIFIED INVESTORS

There's a little subtlety in the Swiss legislation regarding the type of investors: it differentiates between qualified investors and regulated qualified investors (often called 'super-qualified' investors).

Banks, insurance companies and regulated CISA Asset Managers (fund managers that manage investment funds above CHF 100m in Switzerland) are regulated qualified investors. It will not be deemed distribution the contact and/or the purchase of fund units on behalf of clients by regulated qualified investors.

Pension funds, independent asset managers (acting on behalf of clients under a discretionary asset management contract), HNWI and family offices are considered qualified investors. It is considered distribution to send any information of a foreign investment fund to these investors.

All other investors are non-qualified (retail) investors and, besides a Swiss representative and paying agent, foreign funds addressed to these clients must apply for a FINMA's specific approval.

TYPES OF SWISS REGULATED REPRESENTATIVE

As defined by FINMA, there are two distinct types of regulated representative companies. The first is a lighter version and was introduced with the revision of CISA: the license to represent foreign investment funds that are addressed to Swiss qualified investors only.

The second is the full representation license that allows few companies to represent funds addressed to both Swiss qualified and non-qualified (retail) investors. The choice of using one or the other depends mostly from the type of fund investors: is the foreign investment fund distributed to qualified investors only, or to both qualified and retail investors? Having a foreign investment fund approved for retail distribution in Switzerland requires a FINMA approval. The complexity of approval depends on the fund's legal structure, domiciliation and strategy. Interestingly, European Ucits funds can be relatively easily approved for retail distribution in Switzerland. Foreign funds that are approved for retail distribution in Switzerland will require a Swiss representative that has the full representation license.

THE IMPORTANCE OF DUE DILIGENCE FROM THE SWISS REPRESENTATIVE

One of the main goals of the new Swiss regulation is to guarantee better protection for the investors, in other words, to try to avoid that foreign investment funds without quality are proposed to Swiss investors. The fund's image and reputation in Switzerland can be easily linked to those of the Swiss representative. In this context, it is of most importance to choose a Swiss representative with the capacity to make a proper operational due diligence on the fund and on its service providers. The Swiss representative should also be able to propose and facilitate any modifications needed in the funds' documentation or procedures in order to comply with the Swiss law.

IN SUMMARY

As European AIFMD and Fatca are subjects that most of fund managers already dealt with, it's now time to deal with CISA in Switzerland. In this context, It is Important to retain the following points:

- If a fund addresses to at least one existing or prospective Swiss-based investor (that is not a regulated qualified investor), this is considered distribution;
- In the process between the investment fund and the final investor, the fund needs to assess if there is any activity that is considered distribution under the Swiss regulation. For example, if a bank adds the fund to a recommendation list, it will be considered distribution;
- Only regulated qualified investors can be contacted without being considered distribution.

For any questions regarding funds representation and distribution, please feel free to contact Oligo Swiss Fund Services (a regulated Swiss representative for funds addressed to both qualified and retail Swiss investors): info@oligofunds.ch ■