

European Securities and
Markets Authority (ESMA)
103 rue de Grenelle
75007 Paris
France

Basel, 8 January 2015

Swiss Funds & Asset Management Association (SFAMA) response to the ESMA consultation paper “Call for evidence - AIFMD Passport and third country AIFMs” (submission online on the ESMA website)

Dear Sir or Madam,

We would like to thank you to give us the opportunity to voice our opinion on the above-mentioned subject.

Basically we share the content of the public document sent to you by EFAMA as of today. Given that our members will address their answers directly to your organization through your website, SFAMA has decided not to complete the ESMA questionnaire, but to submit you more input relative to the Swiss regulation.

Our paper is split into two parts. The first of those (section I) contains fundamental remarks on the significance of the EU Marketing and Management Passport (“**passport**”) for Switzerland. The second part (section II) comprises an analysis comparing Swiss legislation with the AIFMD, on the basis of which we have assessed the conformity of our regulations to the AIFMD.

I. SIGNIFICANCE OF THE EU MARKETING AND MANAGEMENT PASSPORT FOR SWITZERLAND

In 2013, Switzerland amended its Collective Investment Schemes Act (“**CISA**”) in line with the EU’s Alternative Investment Fund Managers Directive (“**AIFMD**”), with a view, among other things, to profiting from the “marketing” (i.e. distribution) opportunities available under the AIFMD.

The partial revision of the CISA and the cooperation agreements with the EU member states concluded in July 2013 that the AIFMD conditions for the management of European alternative investment funds delegated to Swiss asset managers have been met, thus allowing for the marketing of alternative investment funds to professional investors in the EU.

With a regulation equivalent to that in the EU, Switzerland has established the basis and conditions for EU market access in this area.

Certain Swiss institutions have thus constructed their marketing strategies on the premise of the possible extension of the passport to third countries. The obstacles encountered by a majority of our members with the national private placement regimes - these regimes are not scalable, entails high legal uncertainty and costs (regarding legal/regulatory advice by external consultants / lawyers in or to understand the different local rules applying) – strengthen the importance of the AIFMD passport for Switzerland.

By 22 July 2015, ESMA will have to submit to the European Parliament, the Council and the Commission an advice on the extension of the passport to the AIFMs and AIFs of third countries.

Your advice will be based on Article 67 para. 2 b of AIFMD. This stipulates the following:

- i. compliance of EU AIFMs with all the requirements established in the AIFMD, with the exception of Article 21;*
- ii. compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;*
- iii. existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;*
- iv. any issues relating to investor protection that might have occurred;*
- v. any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive.*

Paragraph 4 of Article 67 mentions, that: *“if ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard”.*

We would like to draw your attention on the fact that concerning i. and ii., Switzerland has implemented the AIFMD standards in its system of regulation. Hence, Switzerland is ready for EU market access. In section II, you will find a comparative analysis of the conformity of our regulation to the AIFMD. It is important to stress that the AIFMD does not require any equivalence of third country regulation. Despite this lack of an explicit equivalence requirement, Switzerland has already implemented all AIFMD standards in its regulation to ensure that it meets the market access conditions.

Concerning iii., we would like to highlight that Switzerland has concluded cooperation agreements with the EU member states in July 2013. Furthermore, FINMA has been an ordinary member of IOSCO since 1996 and actively participates in the meetings of the IOSCO

Board and the European Regional Committee, as well as various committees and task forces relevant to Switzerland.

The provision iv. should not pose any problems. In fact, Switzerland further strengthened investor protection with the partial revision of the CISA.

In respect of provision v., FINMA should ensure that it can perform its supervisory functions.

SFAMA welcomes the fact that ESMA will make its assessment and the Commission its decision, for each third country separately, rather than together as a whole. In the second part of this paper we would like to draw your attention to a comparison between Swiss legislation and AIFMD, supporting the statement that Switzerland stands clearly apart from other third countries in this respect.

II. ANALYSIS OF THE AIFMD COMPATIBILITY OF SWISS REGULATION

1. Relevant regulations in Switzerland

- Collective Investment Schemes Act of 23 June 2006 (as amended on 1 January 2014) (“**CISA**”).
- Collective Investment Schemes Ordinance of 22 November 2006 (as amended on 1 January 2014) (“**CISO**”).
- The completely revised Collective Investment Schemes Ordinance of FINMA of 14 October 2014 (“**CISO-FINMA**”).
- FINMA Circular 2013/9 Distribution of collective investment schemes (28 August 2013).
- FINMA Circular 2010/1 Minimum standards for remuneration schemes of financial institutions (21 October 2009, as amended on 1 June 2012).
- SFAMA Guidelines on Duties Regarding the Charging and Use of Fees and Costs (22 May 2014).
- Code of Conduct of the Swiss Funds & Asset Management Association (“**Code of Conduct**”) of 7 October 2014.

2. Comparison of legal regimes

a. General authorization requirement for asset managers of collective investment schemes

Modelled after the AIFMD, the scope of the CISA was extended to cover all asset managers of collective investment schemes, i.e. in particular, it now also covers “persons who manage foreign collective investment schemes in or from Switzerland” (Art. 2 para. 1 let. c CISA). Correspondingly, it is now no longer only asset managers of Swiss collective investment schemes that are subject to an authorization requirement, but instead all “asset managers of collective investment schemes” (Art. 13 para. 2 let. f CISA).

The authorization requirements have been increased in some cases, and brought in line with the requirements under the AIFMD.

Article 18a para. 1 CISA sets out the core duties of an asset manager under the CISA. The asset manager must ensure proper portfolio and risk management for one or more collective investment schemes. This definition corresponds to that in the AIFMD.

The fund management company may delegate investment decisions as well as specific tasks, provided this is in the interest of efficient management. Moreover it shall appoint only those persons who are properly qualified to execute the task, and ensure they receive their instruction, monitoring and control required for the implementation of the assigned tasks.

It may only delegate investment decisions to asset managers of collective investment schemes who are subject to a recognized supervision. Where foreign law requires an agreement on cooperation and the exchange of information with foreign supervisory authorities, it may only delegate investment decisions to asset managers abroad where such an agreement exists between FINMA and the relevant foreign supervisory authorities for the investment decisions concerned.

An asset manager may additionally perform administrative activities and certain ancillary services (e.g. fund business for foreign collective investment schemes, under the condition that an agreement on cooperation and the exchange of information exists between FINMA and the relevant foreign supervisory authority in the country in which the foreign collective investment scheme is domiciled; discretionary management of individual portfolios, investment advice, the distribution of collective investment schemes, and the representation of foreign collective investment schemes).

b. De minimis exceptions

As is the case with the AIFMD, the CISA also has a de minimis rule.

Art. 2 para. 2 let. h CISA sets out rules exempting asset managers of collective investment schemes from the requirement to obtain authorization pursuant to Art. 13 para. 2 let. f CISA, provided certain prerequisites are met.

First and foremost, the investors in the collective investment scheme have to be qualified investors. One of the following requirements must then also be met:

- the assets under management, including the assets acquired through the use of leveraged finance, amount in total to no more than CHF 100 million;
- the assets under management of the collective investment schemes consist of non-leveraged collective investment schemes for which investors are not permitted to exercise redemption rights for a period of five years after their first investment is made in each of these collective investment schemes, and amount to no more than CHF 500 million; or
- the investors are exclusively group companies of the group of companies to which the asset manager belongs.

Article 1b CISO also sets out principles for the calculation of these thresholds.

This extended view, which corresponds to the AIFMD, is aimed at preventing the splitting of assets under management across different group companies to remain below the threshold and thus circumvent the authorization requirement.

The value of the total assets under management must be calculated on at least a quarterly basis, under due consideration of any leverage effect. If there is no market price for the assets under management, their value is determined on the basis of the capital commitments or nominal value of the collective investment vehicles concerned.

FINMA determines the details for calculating the assets and the leverage effect. Since the value of the collective investment assets under management may fluctuate, the possibility of the value

of the assets rising and exceeding the threshold cannot be ruled out. In such an event, Art. 1b para. 3 CISO states that the asset manager must notify FINMA to this effect within 10 days, and must submit an application to FINMA for approval pursuant to Article 14 et seqq. CISA within 90 days.

Unlike the AIFMD, the CISA does not provide for an exemption to the authorization requirement for cases in which the thresholds are occasionally exceeded. Hence the CISA is stricter than the European regulation in this respect.

c. Authorization requirements

The partial revision of the CISA added some more detailed provisions on the capital requirements of an asset manager and on the appropriate organizational structure. The new Art. 12a CISO contains some significant provisions on organizational structure. As in the AIFMD, the asset manager must ensure it has proper and appropriate risk management, an internal control system and a compliance system covering its entire business activities.

Risk management must be organized so that all material risks can be adequately identified, assessed, controlled and monitored (Art. 12a para. 2 CISO).

The asset manager must also separate risk management, the internal control system and compliance in functional and hierarchical terms from the operating units, in particular from the investment decisions (portfolio management) function (Art. 12a para. 3 CISO). The completely revised CISO-FINMA will address these issues in more detail.

The Collective Investment Schemes Ordinance also contains detailed provisions (Art. 19 et seqq. CISO) regarding the “sufficient financial guarantees” required in accordance with Art. 14 para. 1 let. d CISA of an asset manager of collective investment schemes organized under Swiss law. i.e. the minimum capital required. As before, the minimum capital required is CHF 200,000. However, if a Swiss asset manager manages foreign funds, the minimum capital required is CHF 500,000. Furthermore, own funds amounting to at least one quarter of the fixed costs must be held. This amount increases by 0.02% of the amount by which the value of the portfolio exceeds the amount of CHF 250 million, up to a maximum of CHF 20 million (Art. 21 para. 1 c CISO).

The CISA imposes stricter requirements than the AIFMD in terms of minimum capital and capital adequacy of asset managers.

d. Delegation

Concerning the AIFMD delegation rules, in particular the “letter box entity” rules, the Swiss rules on delegation and substance which were contained in the FINMA Circular 2008/37 have been abrogated with the entry into force of the CISO-FINMA as of 1 January 2015. New rules are set up in Art. 66 CISO-FINMA and we expect that FINMA will precise the principles of Art. 66 in due time.

e. Other exemptions

Unlike the ESMA Guidelines on Key Concepts of the AIFMD, with the exception of Art. 7 para. 1 CISA, Switzerland does not have any explicit provisions exempting family offices from collective investment schemes legislation.

f. Cooperation agreements

The need to conclude cooperation agreements with the competent supervisory authorities in EU member states was recognized at an early stage and set down in the CISA.

On 16 July 2013, FINMA and ESMA signed cooperation agreements on behalf of all 27 EU national competent authorities for securities markets regulation.

g. Custodian banks

The partial revision of the CISA led to more specific and stricter requirements regarding the custodian banks of Swiss collective investment schemes. The new and amended provisions are aimed at improving investor protection and adopting international standards (in particular AIFMD), and also continue to allow Swiss custodian banks to perform the safekeeping of fund assets for foreign collective investment schemes if delegated to them.

The CISA previously contained only general provisions regulating the organization and activity of custodian banks, and more specific detail has been added as part of the partial revision of Swiss collective investment schemes legislation. In particular, detailed provisions have been adopted which require the custodian banks (like all CISA licensees) to ensure that it has an appropriate risk management, an internal control system and a compliance system, with the corresponding separation of functions from the operating units (Art. 12a and Art 102a et seq. CISA, Art. 77 et seq. CISO-FINMA). Furthermore, new detailed provisions with regard to the duties of the custodian bank in general and to the delegation of safekeeping have been implemented in the CISO in order to align the respective rules with the AIFMD (Art. 104 and 105a CISO). For example, specific duties regarding the timely settlement of transactions, the safekeeping of assets held in custody and the ownership verification and record keeping have been implemented (Art. 104 para 1 CISO). Moreover, it has been specified, in Art. 105a CISO, that a custodian bank must, when it delegates the safekeeping of assets to a third-party custodian, i.a., verify and monitor whether the latter possesses an appropriate organisational structure and the specific qualifications required and whether it is subject to external audits.

In addition, the liability of custodian banks of Swiss collective investment schemes was increased in order to largely approximate the liability of a custodian bank to the standard as set forth by the AIFMD. According to Art. 145 para. 3 CISA, if a custodian bank assigns the fulfillment of a task to a third party, it is liable for the losses caused by that third party unless it proves that it applied the degree of due diligence required in the given circumstances with regard to selection, instruction and monitoring (reversal of the burden of proof). Furthermore, the safekeeping of financial instruments may, in general, be transferred only to regulated third-party custodians and collective securities depositories (Art. 73 para. 2^{bis} CISA).

When adopting the liability regime as set forth in Art. 145 para 3 CISA, the legislator took, i.a., into consideration that, in 2010, Switzerland enacted a new Intermediated Securities Act (FISA) which regulates the custody of certificated and uncertificated assets by custodians and ensures the protection of property rights of investors (Art. 1 FISA). This act strengthens the position of investors (such as collective investment schemes) vis-à-vis their custodians (e.g. Art. 17 FISA states that, if a custodian bank is subject to compulsory liquidation, the investors' securities are excluded *ex officio* from the custodian's estate).

Although the Swiss regulatory liability regime for the losses of financial instruments by the custodian bank of Swiss collective investment schemes has not been completely aligned to the regime set forth by the AIFMD, the above described recent adaptations to the Swiss legislation

have the same effect, because in practice, the liability of the custodian bank may be contractually increased between the fund, the depositary, and the sub-depositary.

h. Remuneration policy

On 11 February 2013, ESMA published its *Final Report Guidelines on sound remuneration policies under the AIFMD*. According to Annex 2 of the AIFMD, the remuneration policy for AIFMs must be consistent with sound and effective risk management, and must promote this. Furthermore, it may not encourage risk-taking which is inconsistent with the risk profiles, contractual conditions or instruments of incorporation of the AIFs managed. The remuneration policy must also be in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors in such AIFs, and must include measures to avoid conflicts of interest (these must be specified in detail according to the ESMA Guidelines).

Where asset management is outsourced to Switzerland, these provisions already apply today. The ESMA Guidelines state that when delegating portfolio management or risk management activities according to Article 20 of the AIFMD, the AIFM must ensure that:

- the entities to which portfolio management or risk management activities have been delegated are subject to regulatory requirements on remuneration that are equally as effective as those applicable under these Guidelines; or
- appropriate contractual arrangements are put in place with entities to which portfolio management or risk management activities have been delegated in order to ensure that there is no circumvention of the remuneration rules set out in the present Guidelines. These contractual arrangements should cover any and all payments made to the delegates' identified staff as compensation for the performance of portfolio or risk management activities on behalf of the AIFM.

Swiss AIFMs will have to comply with the AIFMD once the AIFMD passport is available for third countries. However, Switzerland already has comparable rules in place today (cf. SFAMA Code of Conduct, margin no. 43 which refers to FINMA Circular 2010/1 Minimum standards for remuneration schemes of financial institutions which should comply with CRD IV).

i. Corporate social responsibility

Corporate social responsibility comprises rules governing remuneration, conflicts of interest, asset stripping and transparency: unlike the CISA, the AIFMD features very detailed rules in these respects.

j. Risk management

The principles of risk management feature in the revised CISO-FINMA. Precise rules are expected to be covered by a FINMA circular or a FINMA approved self-regulation initiative in the near term.

k. Reporting

According to the AIFMD, AIFMs must draw up reports on the AIFs and submit these to the competent authorities. In total, AIFMs must provide fresh data on a regular basis on 130 individual points at the manager level and for each individual fund. This corresponds to a large amount of data that must be gathered from various sources at different intervals and in different formats. All of this information has to be checked and validated at different times.

In Switzerland the Swiss Financial Market Supervisory Authority (FINMA) does not directly control the fund activities. The supervision is ensured by audit firms which are controlled by the Federal Audit Oversight Authority (FAOA). With the total revision of CISO FINMA as of 14 October 2014, the scope of the supervision shall be extended.

III. CONCLUSION

Our conclusion is that Switzerland has a regulation which is conform with AIFMD.

While in certain areas covered above in more details, the rules of Switzerland are stricter as the one of AIFMD, a few rules are less strict at present than in the EU. Specific amendments to the legal basis in Switzerland would certainly be possible in this regard, should they prove to be necessary.

Switzerland has already adapted its regulation in line with the AIFMD with a view to the extension of the EU passport. It stands clearly apart from other third countries in this respect.

EU market access is of fundamental importance to the Swiss asset management industry.

Moreover, we are confident that the extension of the passport for third countries will be positive for the European Union as more providers will deepen the funds market. Competition will increase to the benefit of investors, certainly in terms of the breadth of products offered and maybe also in terms of fees.

We thank you very much for your attention. Should you have any further questions, please do not hesitate to contact us at any time

Sincerely yours

Swiss Funds & Asset Management Association SFAMA



Markus Fuchs
Managing Director



Delphine Calonne
Senior Legal Counsel