

## Client Alert



September 25, 2015

### **Continued Appointment of Swiss Representative and Paying Agent once Distribution to Qualified Investors in Switzerland Terminates?**

The question whether, in case of foreign funds distributed to qualified investors into or within Switzerland, the appointment of a Swiss representative and a Swiss paying agent must be maintained even after the termination of all distribution activities into or within Switzerland has been subject to quite some controversy.

In late August, the Swiss Funds & Asset Management Association SFAMA published „Frequently Asked Questions“ (cp. Circular 26/2005; the „SFAMA-FAQ“) providing guidance regarding this and related questions in connection with the duty to appoint a Swiss representative and a Swiss paying agent for foreign collective investment schemes exclusively to qualified investors into or within Switzerland.

This Client Alert aims to provide a summary of SFAMA's view on the above mentioned question as expressed in the SFAMA-FAQ.

It is important to note that FINMA has not approved the statements made in the SFAMA-FAQ, but only acknowledged it. Thus, and although the guidance is largely in line with statements made by FINMA officers at public events, the SFAMA-FAQ are not binding for FINMA or even the courts.

#### **1. Introduction**

As a consequence of the 2013 revision of the Swiss Collective Investment Schemes Act (CISA), a Swiss representative and a Swiss paying agent must be appointed for all foreign funds being distributed into or within Switzerland. Such appointment must take place before any distribution activities are initiated.

A transition period for foreign funds exclusively distributed to qualified investors has ended on 1 March 2015. Importantly, according to the SFAMA-FAQ, no representative and paying agent needs to be appointed if a foreign collective scheme was distributed in Switzerland prior to 1 March 2015 but distribution was ceased before the transitional period expired on 28 February 2015.

#### **2. Duration of appointment**

The question, whether a Swiss representative and Swiss paying agent must remain in place even after a fund has definitely ceased to be distributed into or within Switzerland, has been the subject of controversy since the entry into force of the revised CISA on 1 March 2013.

The SFAMA-FAQ support a view that distinguishes between closed-end and open-end funds.

##### **■ Open-end funds**

In case of open-end funds (e.g. funds whose investors have a legal entitlement to redeem their units at the NAV), the need to have a Swiss representative and a Swiss paying agent in place is principally linked to the existence of distribution activities into or within Switzerland. Thus, once an open-end fund has definitively

ceased its distribution activities in Switzerland, in principle, both the Swiss representative and Swiss paying agent are no longer required (and the respective Swiss representative and paying agency agreements may be terminated). Potential investor protection concerns are mitigated by the fact that Swiss investors still being invested at that point in time may redeem their units at any time.

To the extent the redemption right is subject to conditions or a notice period, termination of paying agent and representative functions is only permitted as per the time when the investors could actually redeem their fund units.

## ■ Closed-end funds

With respect to closed-end funds (i.e. funds with a fixed number of units which are not redeemable), for investor protection reasons (given that investors, after the fund's final closing, will remain invested in the fund for several years and may have restricted redemption possibilities, if any) the continued appointment of a Swiss representative and Swiss paying agent is required.

Nevertheless, it shall be possible to terminate the contracts with the Swiss representative and the Swiss paying agent if and to the extent it can be shown that there are no investor protection concerns; according to the SFAMA-FAQ this is the case, e.g., if no Swiss investors are/remain invested. Thus, with respect to closed-end funds, both Swiss representative and Swiss paying agent are, in principle required throughout the term of the fund, but there may be exemptions.

For the sake of clarity, note that the above guidance does not apply to (i) funds licensed by FINMA for retail distribution, which are subject to a separate set of rules, and (ii) funds exclusively available to regulated financial intermediaries and regulated insurance institutions, which are not regulated under the CISA.

The NKF Banking, Finance & Regulatory Team is happy to advise clients with regard to their individual options for action, to possibly terminate existing agreements and thus ensure a more cost efficient fund structure going forward.

## Contacts

### **Sandro Abegglen, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8310 (direct dial)  
Email: sandro.abegglen@nkf.ch

### **Urs Hofer, Associate**

Dr. iur., Attorney-at-law  
Telephone: +41 58 800 8479 (direct dial)  
Email: urs.hofer@nkf.ch

### **François M. Bianchi, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8352 (direct dial)  
Email: francois.m.bianchi@nkf.ch

### **Yannick Wettstein, Associate**

M.A. HSG, Attorney-at-law  
Telephone: +41 58 800 8495 (direct dial)  
Email: yannick.wettstein@nkf.ch

### **Luca Bianchi, Associate**

lic. iur., Attorney-at-law, DAS UZH in Finance  
Telephone: +41 58 800 8444 (direct dial)  
Email: luca.bianchi@nkf.ch

### **Thomas Hochstrasser, Associate**

MLaw, Attorney-at-law  
Telephone: +41 58 800 8242 (direct dial)  
Email: thomas.hochstrasser@nkf.ch