
Switzerland

Distribution of Collective Investment Schemes (CIS) and Key Regulatory Developments

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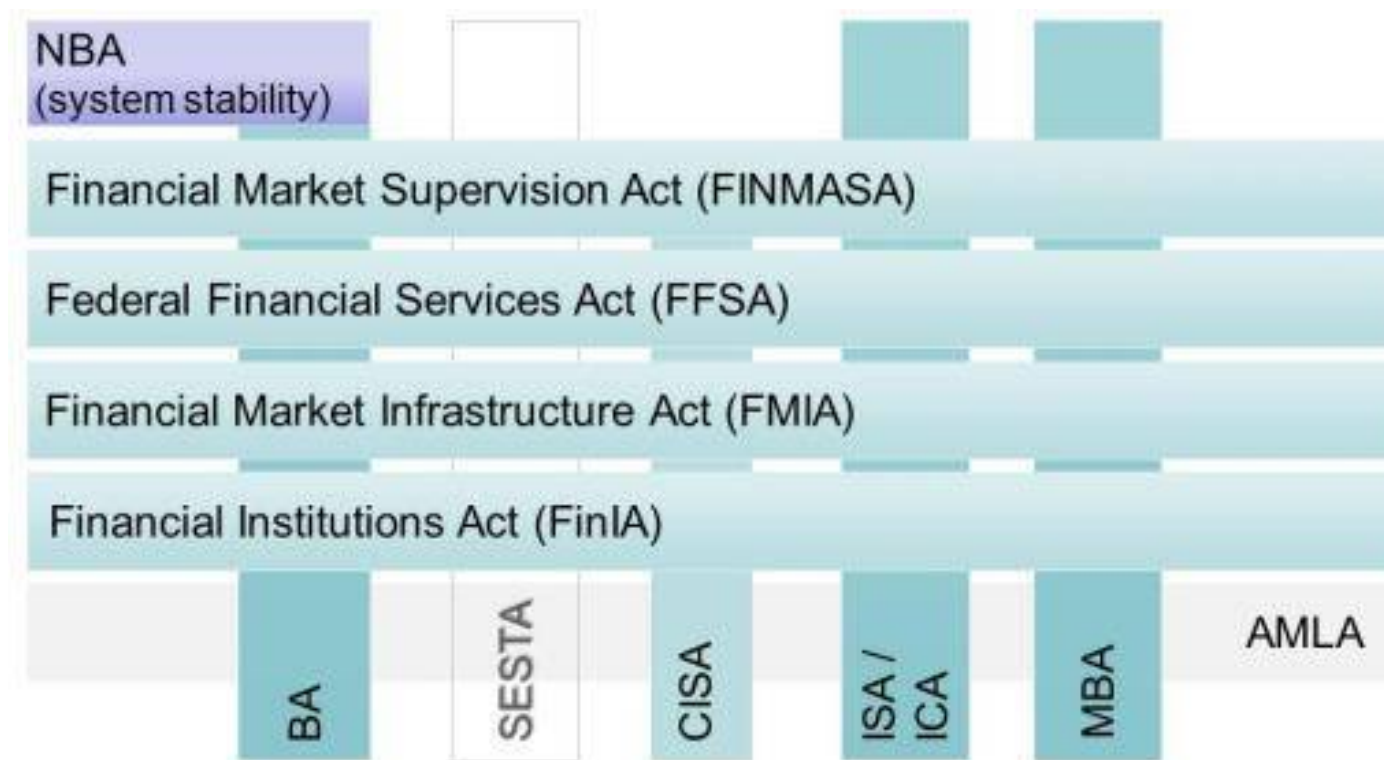
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Introduction

- The new architecture of the Swiss financial market regulation:



Source: Federal Department of Finance DFF

Distribution of CIS in Switzerland

■ Concept of "distribution"

- Former concept of "public offering" replaced by the one of "distribution" with CISA
- Definition of "distribution" (Article 3 CISA and Article 3 CISO)
 - Principle: any advertisement that is not directed exclusively at regulated qualified investors (Article 10 (3)(a) and (b) CISA) is considered to be distribution
 - Exceptions:
 - Provision of information following an unsolicited request from an investor and/or an "execution only" client
 - "Managed" clients (discretionary) of regulated financial intermediaries or of independent asset managers (subject to certain conditions)
 - "Advisory" clients of regulated financial intermediaries or of independent asset managers (subject to certain conditions)
 - Publication of prices, NAV and tax information
 - Proposal of employee participation schemes in the form of collective investment (codification of the FINMA practice)

Distribution of CIS in Switzerland

- **Example triggers - distribution VS no distribution?**
 - Cold calls to prospective investors, including emails, faxes, etc.?
 - Marketing a fund or strategy which is yet to be established ?
 - Arranging meetings with prospective investors by phone, email, etc. ?
 - One on one meetings with Swiss investors outside Switzerland ?
 - One on one meetings with Swiss investors inside Switzerland ?
 - Distributing investor letters, risk reports, presentations, DDQs, etc. ?
 - Attending or speaking at seminars attended by professional investors ?
 - Attending or speaking at seminars attended by any types of investors ?
 - Providing offering documents ?
 - Having a website which has no mention of Switzerland or CHF ?
 - Having a website which mentions Switzerland ?

Distribution of CIS in Switzerland

- **Reverse solicitation ... still works under CISA, but:**
 - No prior influence or approach by distributor, Swiss representative or asset manager
 - Investor requests, on an unsolicited basis, information regarding a specific security
 - Narrow scope of application (Swiss finish) means that reverse solicitation can only be serviced on a selective basis with regard to the above requirements and should be properly documented (e.g., written investor request)
- **Information obligation** of distributor applies
- **Duty to document**
 - Obligation to establish a protocol regarding the result of the assessment of investor's needs and reasons for recommendation of a collective investment scheme (Article 34a CISO)

Distribution of CIS in Switzerland

■ Concept of "Qualified Investors"

| | | |
|-------------------------|---------------------------------|--|
| Qualified Investors | Regulated Qualified Investors | <ul style="list-style-type: none"> - Regulated qualified investors: banks, securities dealers, fund management companies, managers of collective investment schemes and central banks (Art. 10 para. 3 lit. a CISA). - Regulated insurance institutions (Art. 10 para. 3 lit. b CISA). |
| | Unregulated Qualified Investors | <ul style="list-style-type: none"> - Public entities and retirement benefit institutions (pension funds) with professional treasury management (Art. 10 para. 3 lit. c CISA) - Companies with professional treasury management (Art. 10 para. 3 lit. d CISA). - High net worth individuals, if they have declared in writing that they wish to be deemed Qualified Investors (+ conditions) ("opt-in" pursuant to Art. 10 para. 3 bis CISA, Art. 6 and 6a CISO). - Investors who have conclude a written discretionary asset management agreement with a regulated financial intermediary or with an independent asset manager (+ conditions) unless they exercise their right to "opt-out" pursuant to Art. 10 para. 3 ter CISA. <p>△ Independent Asset Managers: see strict requirements according to FINMA Circular 2013/9.</p> |
| Non Qualified Investors | Non Qualified Investors | Investors other than Regulated Qualified Investors and Unregulated Qualified Investors. |

Distribution of CIS in Switzerland

■ Distribution to "Qualified Investors"

| Target Investor | Place of distribution | Location of Distributor | Out of scope or in scope of CISA | Requirement for Distributor | Requirement for Fund |
|---|------------------------------------|------------------------------------|---|---|--|
| Regulated Qualified Investor | Switzerland or outside Switzerland | Switzerland or outside Switzerland | Out of scope (Art. 3 para. 1 CISA) | N/A | N/A |
| Unregulated Qualified Investor pursuant to CISA or foreign law | outside Switzerland | Switzerland | Out of scope (Art. 2 para. 1 lit. e CISA a contrario and Art. 1 CISO) | N/A | N/A |
| Unregulated Qualified Investor | Switzerland | Switzerland | In scope | "Appropriate supervision" of distributor + Licence as a distributor required (Art. 19 para. 1bis CISA, Art. 30a CISO)* | No registration with FINMA, but (1) Swiss representative and paying agent (2) Name of the fund not misleading (Art. 120 para. 4 CISA) |
| Unregulated Qualified Investor | Switzerland | outside Switzerland | In scope | "Appropriate supervision" of distributor + Licence as a distributor required (Art. 19 para. 1bis CISA, Art. 30a CISO) | No registration with FINMA, but (1) Swiss representative and paying agent (2) Name of the fund not misleading (Art. 120 para. 4 CISA) |

Distribution of CIS in Switzerland

- **Determining status of investor – practical examples**

- *Example 1*

- Pension Fund = unregulated Qualified Investor
- Requirements for distribution in Switzerland to such investor:
 1. Representation agreement between the foreign CIS and a Swiss representative
 2. Paying agent agreement between the foreign CIS, the custodian (if any) and the Swiss paying agent
 3. Distribution agreement between the Swiss representative and the distributor (in Switzerland or abroad)
 4. Distributor to be subject to "appropriate supervision" for its distribution activities in its home jurisdiction
 5. CIS documentation and marketing materials to be supplemented with Swiss specific disclosures (i.e., Swiss annex with prescribed minimum contents – SFAMA Guidelines)

Distribution of CIS in Switzerland

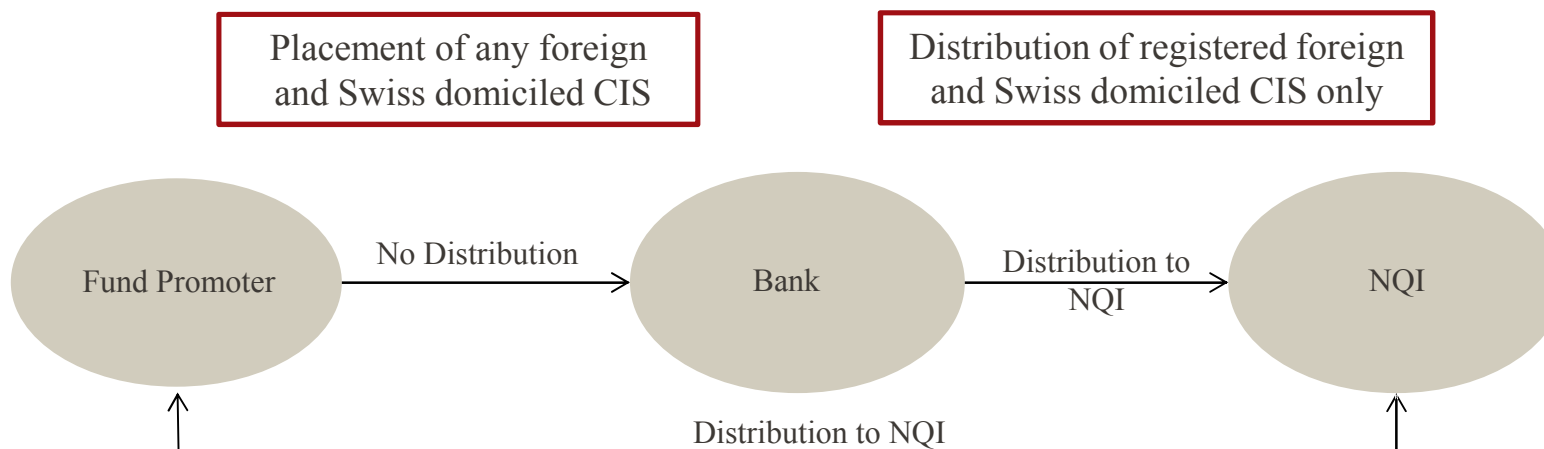
- **Determining status of investor – practical examples**

- *Example 2*

- HNWI = unregulated Qualified Investor, provided that:
 1. Written declaration (opting-in); and
 2. Either (A) Net financial assets of CHF 500'000 and sophisticated (i.e., knowledge and experience) OR (B) Net wealth of CHF 5 million (of which up to CHF 2 million may be direct real estate investments)
- Same requirements to distribution as in previous example
- If the conditions are not met, distribution limited to:
 1. Swiss CIS not dedicated to Qualified Investors, and/or
 2. Foreign CIS approved by FINMA for distribution to non-qualified investors

Examples - distribution / marketing scenarios

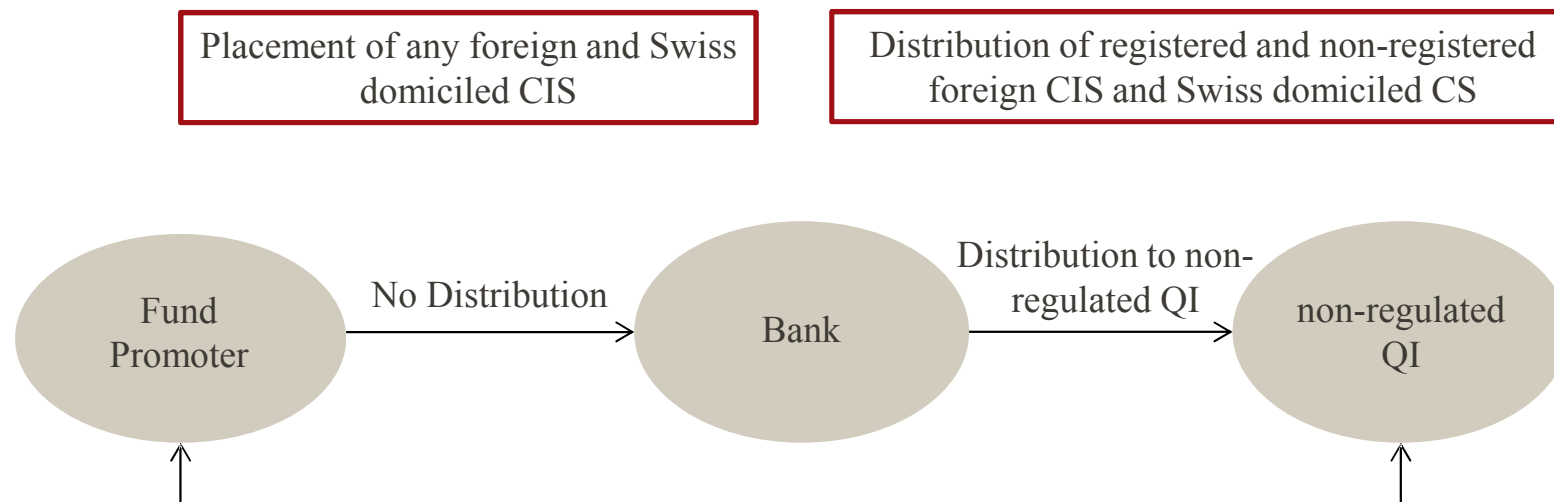
- **Distribution to regulated financial intermediary who further distributes to NQI with no discretionary or advisory agreement**



- Distribution of registered foreign CIS and Swiss domiciled funds only
- FINMA approval of foreign CIS required (may not be available to all foreign CIS, subject to strict regulatory requirements)
- Appointment of Swiss Representative and Swiss Paying Agent mandatory
- Entering into a Distribution Agreement in accordance with the SFAMA model distribution agreement for NQI ("SFAMA NQI Agreement")

Examples - distribution / marketing scenarios

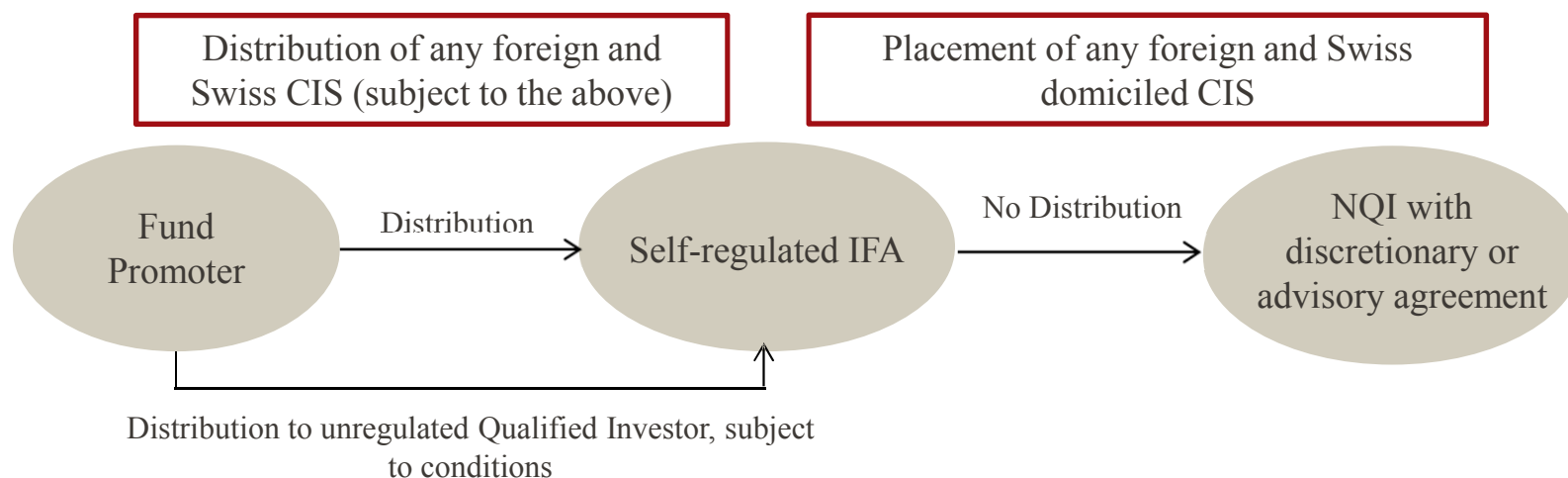
- **Distribution to regulated financial intermediary who further distributes to non-regulated QI with no discretionary or advisory agreement**



- Distribution of registered and non-registered foreign CIS and Swiss domiciled CIS
- Appointment of Swiss Representative and Swiss Paying Agent mandatory
- Entering into a Distribution Agreement in accordance with the SFAMA model distribution agreement for non-regulated QI ("SFAMA QI Agreement")

Examples - distribution / marketing scenarios

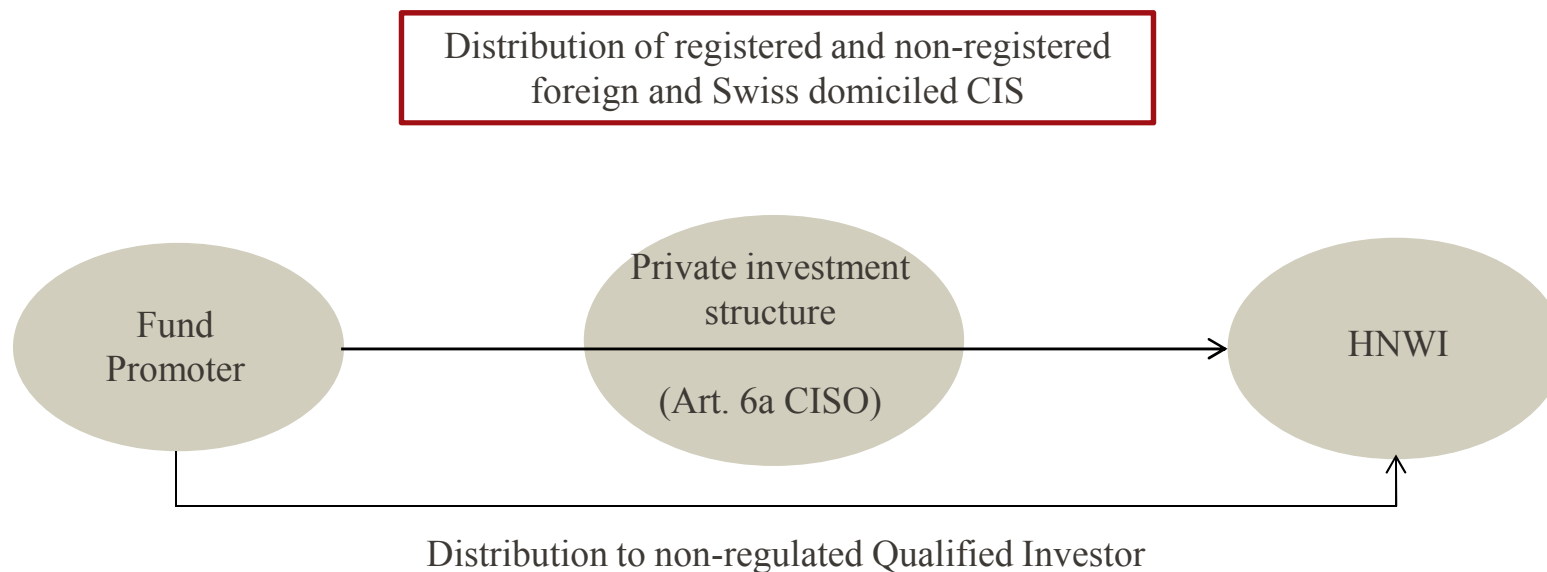
- **Distribution to IFA with discretionary or advisory agreement with NQI**



- Appointment of Swiss representative and Swiss paying agent
- Written self-certification by IFA (including (a) use of CIS information by IFA for only client that are Qis, and (b) certification as to IFA status)
- No conclusion of a distribution agreement with the IFA, but written self-certification required
- Distribution agreement with the Swiss representative in accordance with the SFAMA QI Agreement (Fund Promoter)

Examples - distribution / marketing scenarios

- **Distribution to a private investment structure (Article 6a CISO)**



- Appointment of Swiss representative and Swiss paying agent mandatory
- Distribution agreement in accordance with the SFAMA QI Agreement
- Verification of, and certification of status by, private investment structure in accordance with Article 6a CISO

Frequent questions – distribution

- Timing of appointment of the Swiss representative and paying agents
 - Trigger: "Distribution"
 - Special case of "pre-marketing/sales" activities
- Compliance with SFAMA Distribution Rules
- Role of Swiss paying agent
- Role of foreign custodian and transfer agent (if any)
- Termination of:
 - Distribution agreement?
 - Representation agreement / Paying agency agreement?
- "Swiss Information" for the distribution to unregulated QI
 - Contents and format
 - Trailer fees / rebates mandatory disclosures

Managed accounts

- Managed account = financial service, not a financial product
- Cross-border offering of services requirements:
 - No registration, approval or licensing in Switzerland, provided that:
 1. No presence in Switzerland (i.e., no representative office, or branch)
 2. Not a remote member of Swiss exchange
 3. No marketing of consumer loans
 - Facts-driven analysis of offering to make sure that only financial service
- Marketing of "strategies"
- Management of client's assets on the basis of powers of attorney
- Consumer protection limitations (i.e., governing law, forum, etc.)

Key Regulatory Developments for CIS in Switzerland

- **FMIA – disclosure of shareholdings / derivatives, and other rules > in force**
- **FinSA/FinIA – draft legislation in discussion : key issues**
 - Financial Services to be regulated in a similar way as under MiFID II, incl. rules of conduct and suitability, but with potential key differences (e.g., client classification, opting-in/-out, remuneration guidelines, rebates/inducements, supervision of advisors or distributors, Base Information Fact Sheet, cross-border activities, no target market analysis/restrictions, different rules on research)
 - Supervision of independent asset managers and trustees
 - No supervision of advisors
 - Distributor status to be abolished
 - Swiss and foreign "client advisors" requirements (i.e., registration, training, etc.)
 - Public register of "client advisors"
 - Consequences for cross-border activities / marketing of CIS
- **FinSA/FinIA : currently pending before Parliament / entry into force in 2018/2019**

Questions



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