

Switzerland

Regulation

HEDGE FUNDS 2009

Hedge fund managers/advisors

Regulation

Authorization requirements and process

Under Swiss law, nearly any party responsible for the management of a collective investment scheme or the safekeeping of assets held in it is required to obtain authorization under the Federal Act on Collective Investment Schemes (Collective Investment Schemes Act, CISA) of 23 June 2006 by the Swiss Financial Market Supervisory Authority (FINMA) prior to commencement. The following parties are required to obtain authorization:

- fund management company
- custodian bank
- asset manager of a Swiss collective investment scheme
- representative of foreign collective investment schemes
- distributor
- collective investment schemes (product license)

Asset managers of foreign collective investment schemes may apply for authorization from the FINMA if the relevant requirements are fulfilled (see section below, Hedge fund structures).

A fund manager, hereinafter referred to as an asset manager of collective investment schemes, may act for a – either Swiss or foreign – collective investment scheme. Swiss hedge funds are qualified as open-ended collective investment schemes which may be in the form of a contractual fund or an investment company with variable capital (SICAV). Further, Swiss hedge funds can also be established in the form of a (closed-end) limited partnership for collective investment (LP). Therefore, if the asset manager isn't a person holding executive powers at a fund management company or an investment

company, investment decisions need to be delegated to him/her. The asset manager shall conclude written agreements with the fund management company, the SICAV or the LP, such agreement to govern the respective rights and obligations as well as, other material matters.

The asset manager's license is granted if the persons responsible for management and the business operations have a good reputation, guarantee proper management, and possess the requisite specialist qualifications. As for the specialist qualifications, asset managers of hedge funds must have a solid education and a minimum of five years of work experience. The significant equity holders of the asset manager (that is, owners of at least 10 percent of capital or voting rights) must have a good reputation and must not exert their influence to the detriment of prudent and sound business practice. Furthermore, compliance with the duties stemming from the CISA must be assured by internal regulations and an organizational structure and sufficient financial guarantees must be available. In addition, the asset manager must appoint an auditor that is recognized by the FINMA.

Asset managers who are already subject to other official supervisory control (that is, as a bank pursuant to the Federal Act on Banks and Savings Institutions, as a securities trader pursuant to the Stock Exchange Act or as an insurance institution pursuant to the Federal Act on the Supervision of Insurance Companies) are granted exemption from the authorization requirements.

To apply for authorization, an asset manager must file an application which demonstrates that the premises set out above are adhered to. Once submitted, the application is processed by the FINMA.

Typical timescale to receive approval

If the authorization requirements as set out above are in place, the FINMA will make the decision within approximately two to four months.

Regulatory capital requirements

CISA states that for achieving authorization an asset manager must provide sufficient financial guarantees. What is meant by sufficient financial guarantees is stated by the ordinance on collective investment schemes of 22 November 2006 (CISO).

Sufficient financial guarantees are available if the minimum full paid-in capital of CHF 200,000 and minimum equity corresponding to 25 percent of fixed costs incurred during the previous financial year with a cap at CHF 20 millions. Fixed costs include personnel costs, depreciation of fixed assets, impairments, provisions, and losses.

Such minimum capital and equity requirement must be met at all times.

Significant restrictions on marketing to investors

Concerning an authorized Swiss hedge fund, compliance with the codes of conduct of a specific industry body is required. Currently, such regulations are issued by the Swiss Funds Association.

If foreign hedge funds are distributed publicly in or from Switzerland, binding documents such as their sales prospectus, articles of association, or fund contract require the approval of the FINMA. Furthermore, a representative and a paying agent must be appointed for the distribution of units in Switzerland.

The term public distribution is defined in the FINMA-circular "Public advertising within the meaning of the collective investment schemes legislation" (FINMA-circular 2008/8). Advertising is not deemed to be public if it is directed exclusively towards qualified investors as defined by the CISA. As long as advertising is not deemed to be public, a foreign hedge fund distributed in or from Switzerland does not need a Swiss distribution license.

Hedge fund structures

Regulation

Authorization requirements

In order for a collective investment scheme to be authorized, it has to meet the conditions and requirements of the Collective Investment Schemes Act (CISA). There are no requirements on the jurisdiction in which the asset manager has to be located (location possible in Switzerland or abroad).

Asset managers of foreign collective investment schemes may apply for authorization from the SFBC provided that their place of residence or registered office is in Switzerland, they are subject to supervision under foreign legislation and the foreign collective investment scheme that they manage is subject to supervision of an equivalent standard to that required in Switzerland.

Restrictions on types of investments, concentration levels, and the manner in which hedge funds can invest and/or strategies

By the CISA, investments in securities, precious metals, real estate, commodities, derivatives, units of other collective investment schemes, as well as other assets and rights are permitted. Investments may be conducted that have only limited marketability, are subject to strong price fluctuations, exhibit limited risk diversification, and are difficult to value.

Leverage is permitted only up to a certain percentage of the fund's net assets. Credits may only be raised in the amount of 50 percent of the funds net assets. Further, hedge funds may commit to an overall exposure of up to 600 percent of the fund's net assets. Mainly the CISO and also the FINMA regulate the details.

Rules regarding the publishing of the accounts and prospectuses

Each open-ended collective investment scheme shall publish an annual report within four months of the close of the financial year. The data it needs to contain is stated by the CISA. Furthermore a semi-annual report must be issued within two months after the end of the first half of the financial year. The report contains an un-audited statement of net assets or un-audited balance sheet and income statement, as well as other information stated by the CISA. There is no specific rule to the publishing of the accounts by a hedge fund.

The prospectus must be offered free of charge to interested persons prior to an agreement being concluded or prior to subscription. It is prohibited to use the term hedge in the fund name, because it is misleading, as a hedge fund does not exert hedging instruments for the purpose of hedging but for speculation. Furthermore, there is a general requirement that reference must be made in the fund name, as well as, in the prospectus and marketing material, to the special risks involved in hedge funds.

In addition the asset management shall refrain from non-guaranteed promises of performance and misleading performance comparisons.

Time-scale of establishment of a hedge fund

If the relevant requirements for a simplified authorization procedure are fulfilled (prospectus must comply with a template recognized as minimal standard by the FINMA and comply with a standard the FINMA has accepted as binding towards the relevant holder of authorization), Swiss hedge funds for qualified investors can be approved within four weeks and such for public investors within eight weeks after receipt of the filed application. If the simplified procedure does not apply, the time period may vary between three and six months. Further, Swiss hedge funds directed exclusively towards qualified investors can be exempt by the FINMA from certain provisions of the CISA.

Approval for foreign hedge funds will take longer (time-period among other things depending on the complexity of the product).

Investors

Regulation

Restrictions on which type of investors can invest in a hedge fund and/or the minimum/maximum number of investors in a hedge fund

Hedge funds can be established for public investors or exclusively for qualified investors. There are no restrictions on the maximum or minimum numbers of investors. Nevertheless, in case of a single investor, open-ended collective investment schemes are only permitted, if such investor is an institution or ancillary institution in the occupational pensions sector, a regulated life insurance institution or a tax-exempt domestic social security institution, and compensation fund. The restriction of investor eligibility to such investor must be disclosed in the relevant documents that are required for obtaining authorization by the FINMA.

The FINMA may make its approval or authorization of the collective investment scheme in relation to a single investor dependent on further conditions.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.