

New Swiss Marketing Rules

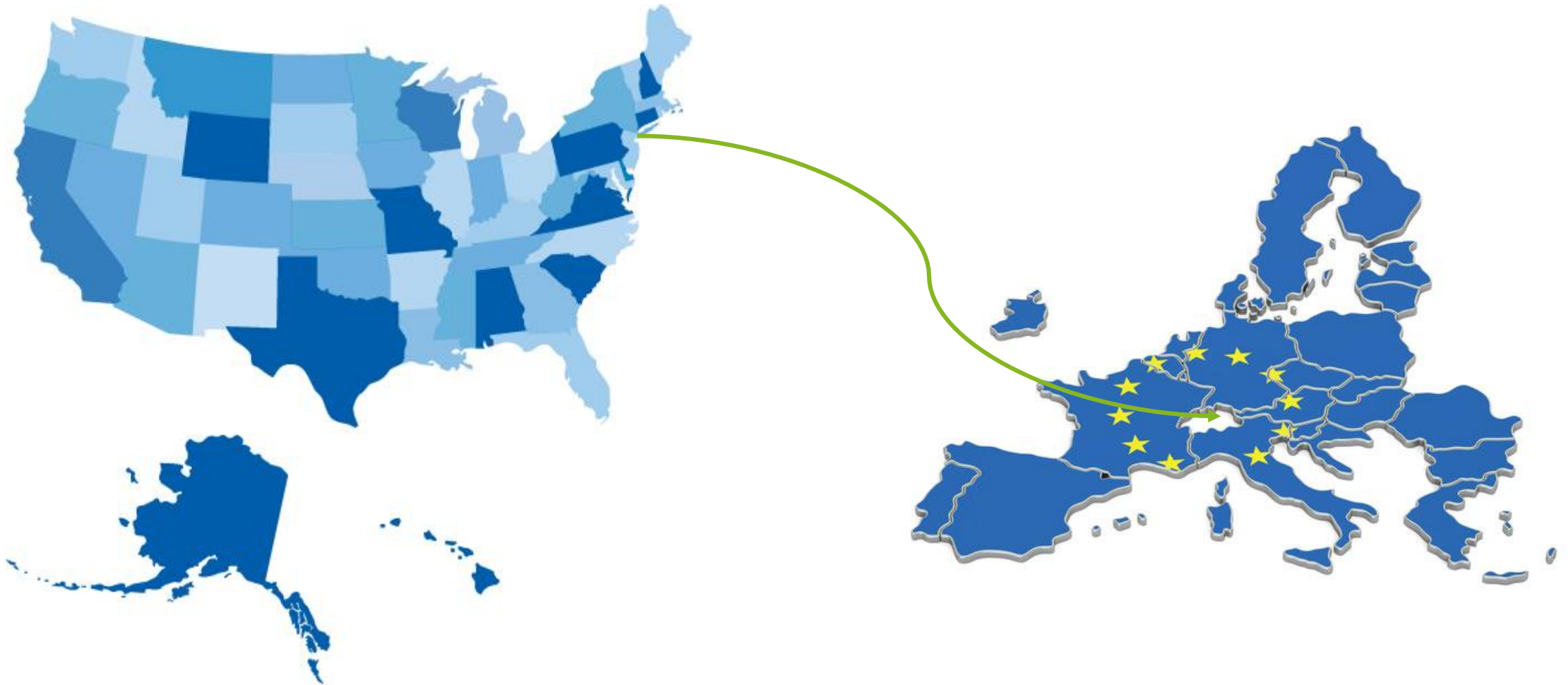
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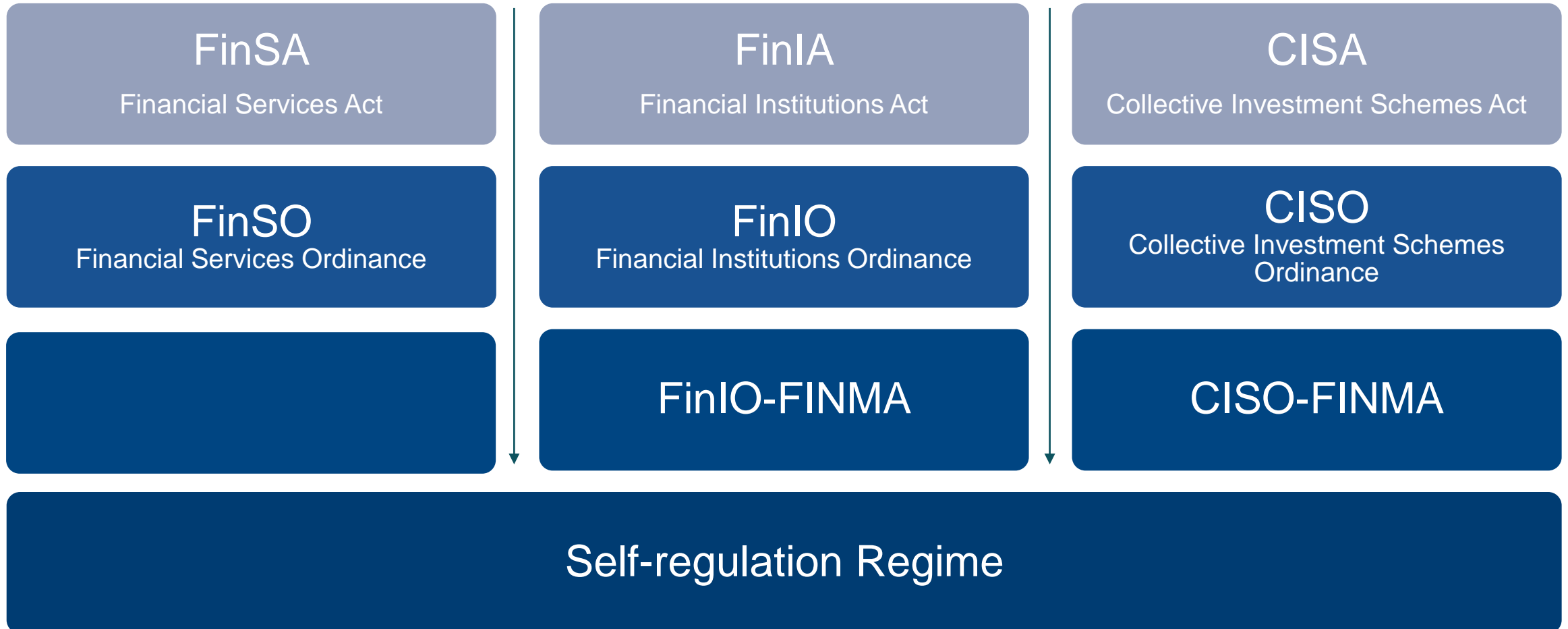
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Cross-border Financial Services



New Swiss Financial Market Law Architecture



FinSA: Scope (1/3)

- FinSA applies to
 - financial service providers
 - client advisers
 - producers and providers of financial instruments
- "Financial instruments" includes
 - equity securities and debt instruments, including bonds
 - collective investment schemes (funds) and structured products
 - Derivatives and certain deposits
- "Financial service providers" means persons who provide financial services on a commercial basis *in Switzerland* or *for clients in Switzerland*

FinSA: Scope (2/3)

- "Financial services" means:
 - any activity addressed directly at certain clients that is specifically aimed at the acquisition or disposal of financial instruments
 - receipt and transmission of orders in relation to financial instruments
 - portfolio management
 - investment advice
 - granting of loans to finance transactions with financial instruments
- ... but does not include:
 - lending (other than to finance financial instrument transactions)
 - advisory services in connection with M&A activities
 - placement of financial instruments (with or without firm commitment)

FinSA: Scope (3/3)

- Territorial scope of application
 - services provided "in Switzerland"
 - services provided "for clients in Switzerland"
 - natural persons: Swiss domicile vs. temporary stays in Switzerland (FAQ of the Swiss Client Adviser Registers)
 - legal entities: registered office in Switzerland
- Exemption: reverse solicitation
 - FinSA does not apply to cross-border services provided
 - at the *express initiative* of the client; or
 - under a client relationship entered into at the *express initiative* of the client
 - no or at least **no Switzerland-specific marketing activities** must precede (rare!)
 - reverse solicitation confirmation of the client not sufficient



FinSA: MiFID II

- FinSA is modelled after EU Directive 2014/65/EU on Markets in Financial Instruments ("MiFID II")
- MiFID II "light"
- No substitute compliance

FinSA: Client Segmentation (1/4)

- Professional clients
 - (1) Swiss and foreign banks, securities firms (broker-dealers), asset managers, insurance companies, and other financial intermediaries that are subject to **prudential supervision**
 - (2) Central banks
 - (3) Public entities, pension schemes and companies with **professional treasury operations**
 - (4) Companies exceeding two of the following parameters: (a) CHF 20m balance sheet total; (b) CHF 40m annual gross revenues; (c) CHF 2m equity
 - (5) Private investment structures with **professional treasury operations** created for HNWI
- Institutional clients: (1) and (2) above plus supranational public entities with **professional treasury operations**
- Retail clients: clients that are *not* professional clients

FinSA: Client Segmentation (2/4)

- "**Prudentially supervised**" means that a Swiss or foreign financial intermediary is comprehensively supervised, including with respect to capital adequacy and liquidity requirements as well as rules of conduct and AML rules
- "**Professional treasury operations**" means that the relevant entity has entrusted, on a permanent basis, the management of its funds to a professionally qualified person, employed by it or elsewhere, with experience in the financial sector

FinSA: Client Segmentation (3/4)

- Voluntary changes of status and the (slightly confusing) terminology for this:
 - "opting out" = opting out from protection, i.e., "opting up" from retail client to professional client status or from professional client to institutional client status
 - "opting in" = opting into protection, i.e., "opting down" from institutional client to professional client status or from professional client to retail client status
- HNWI (or private investment structures created for them) may "opt out" from the retail client status by declaring that they wish to be treated as professional clients if they can make plausible that they:
 - have the necessary knowledge to understand the risk associated with the investments and dispose of financial assets of at least CHF 500,000; or
 - dispose of financial assets of at least CHF 2,000,000

FinSA: Client Segmentation (4/4)

- "Opting out" (up) from the protection as professional client to the status of institutional clients by
 - occupational pension schemes with professional treasury operations
 - companies with professional treasury operations
 - Swiss and foreign collective investment schemes (funds) and their management companies which are not already deemed to be institutional clients
- Professional clients that are not institutional clients may "opt in" (down) to the protection of retail clients
- Institutional clients may "opt in" (down) to the protection of professional clients
- Only one step in either direction, i.e., no "opting out" by HNWI to institutional client status and no "opting in" by institutional clients to retail client status

FinSA: Rules of Conduct (1/2)

- Rules of conduct
 - apply to financial services rendered to retail clients
 - do *not* apply to financial services rendered to institutional clients
 - professional clients may waive the rules marked below in green
- Duty to provide information, e.g. re risks, "opting in" possibility, ombudsman's mediation proceeding, key information document, prospectus, etc.
- Appropriateness: Where the financial service provider does not take account of the entire client portfolio it must enquire the client's knowledge and experience and whether the financial instrument is appropriate for the client
- Suitability: Where the financial service provider takes account of the client portfolio it must enquire about the client's financial situation, investment objectives, knowledge, and experience

FinSA: Rules of Conduct (2/2)

- Documentation of
 - financial services agreed
 - advice against a transaction for lack of appropriateness or suitability
 - clients' needs and grounds for recommendations
- Rendering of account regarding
 - composition, valuation, and development of the portfolio
 - costs for the financial services
- Transparency and care in client orders
 - principle of good faith and equal treatment when handling client orders
 - best execution
 - use of clients' financial instruments by financial service provider requires consent
 - prohibition of short selling with financial instruments of retail clients

FinSA: Organization (1/2)

- Financial service providers:
 - must have an appropriate organization;
 - must ensure that:
 - their staff possess the necessary skills, knowledge, and experience to perform their work; and
 - only persons listed in the client adviser register act as client advisers (does not apply to prudentially supervised Swiss financial service providers); and
 - may engage third parties that have the necessary skills, knowledge, experience, and authorizations (whilst remaining liable themselves for most of the rules of conduct obligations)

FinSA: Organization (2/2)

- Financial service providers:
 - must take organizational measures to prevent conflicts of interest or to prevent disadvantages for clients stemming from conflicts of interest
 - must disclose to the clients if disadvantages for clients cannot be excluded
 - may accept compensations (retrocessions, kick-backs, finder's fees, etc.) from third parties only if:
 - they have informed the clients and the clients have waived such compensation; or
 - they pass the compensation on to the clients in full
 - must take measures to prevent staff from misusing information gained by virtue of their function for own-account transactions
- How do such organizational duties apply to foreign financial service providers?

FinSA: Registration of Client Advisers (1/3)

- As a rule, foreign (and certain Swiss) financial service providers must register their client advisers in one of the FINMA authorized Swiss client adviser registers
- Exemption for foreign financial service providers that:
 - are prudentially (comprehensively) supervised abroad; and
 - offer their services in Switzerland only to (per se) professional or institutional clients
 - CAVEAT: Exemption does *not* apply with respect to opting-out (up) HNWI
- Client advisers are natural persons who (a) provide financial services on behalf of a financial service provider and (b) are in contact with the clients
- Registration bodies licensed by FINMA:
 - regservices.ch by BX Swiss AG, Zurich
 - Association Romande des Intermédiaires Financiers (ARIF), Geneva
 - PolyReg Services GmbH, Zurich

FinSA: Registration of Client Advisers (2/3)

– Registration requirements

- knowledge of rules of conduct and professional expertise
 - phase-in period: by December 31, 2021
 - evidenced by diplomas, certificates, confirmation of employers, tests, etc.
- professional indemnity insurance (taken out by the financial service provider)
 - coverage: CHF 500,000 up to CHF 10m, depending on number of client advisers
 - foreign insurance policy accepted if it covers damages for activities in Switzerland
- affiliation (of the financial service provider) with an ombudsman's office
- no conviction of criminal offences relating to financial services or property
- no administrative ban on work in the financial industry

FinSA: Registration of Client Advisers (3/3)

- Registration process
 - online
 - approx. 30 days
 - renewal after 24 months
- Contents of client adviser register
 - name, function and position of client adviser
 - name and address of financial service provider
 - fields of activity (type of financial service)
 - education and (continuing) professional training
 - name of ombudsman's office

FinSA: Ombudsman's Office

- As a rule, all financial service providers have to affiliate with an ombudsman's office
- Exemption for financial service providers that offer their services only to per se professional clients or institutional clients
- Ombudsman's office = official mediator, approved by the Swiss Federal Department of Finance, e.g. FINOS, Zurich
- Aims at settling legal claims between client and financial service provider in mediation proceedings
- No decision power
- Very simple affiliation process (on-line)

FinSA: Advertising, Documents

- Advertising for financial instruments must:
 - be clearly indicated as such ("This document constitutes advertising.")
 - mention the prospectus and the key information document for the financial instrument in question, as well as where these can be obtained
 - correspond to the details given in the prospectus and the key information document
- Clients are entitled at all times to receive a copy of their file and all other documents concerning them that the financial service provider has prepared within the context of their business relationship
- cf. right to information under Data Protection Law

FinSA: Prospectus Requirements (1/3)

- Similar to EU prospectus requirements
- Rule: Prospectus is required for
 - any **public offer** for the acquisition of **securities**; and
 - admission of securities to trading on a trading venue
- Numerous exemptions, e.g.:
 - for offers (a) to **professional clients** only, (b) to less than 500 investors, (c) with a minimum denomination of CHF 100,000
 - for certain types of securities/transactions
- Securities are standardized certificated and uncertificated securities, derivatives, and intermediated securities, which are suitable for mass trading

FinSA: Prospectus Requirements (2/3)

- Prospectuses must be reviewed by a FINMA licensed reviewing body prior to its publication
- Reviewing bodies licensed by FINMA
 - BX Swiss AG
 - SIX Exchange Regulations AG
- Exemption: **Prospectuses for collective investment schemes (funds)** are reviewed by FINMA
- Key information document (KID) for units in funds and certain other financial instruments that are offered to retail clients

FinSA: Prospectus Requirements (3/3)

- "Offer" means any communication that:
 - contains sufficient information on the terms of the offer and the financial instrument; and
 - is customarily intended to draw attention to a certain financial instrument and to sell it
- ... but does not include
 - making available of information at the initiative of the client (if not been preceded by advertising)
 - merely making available of factual information
 - preparation and making available of legally or contractually required information and documents on financial instruments to existing clients or financial intermediaries
- An offer is a "public" offer if it is addressed to an unlimited group of persons

FinSA: Structured Products

- Structured products may be offered to retail clients only if these are issued, guaranteed or secured in an equivalent manner by:
 - a Swiss bank, insurance company or securities firm; or
 - a foreign institution that is subject to equivalent prudential supervision
- Exemption if offered under a permanent portfolio management or investment advice relationship
- Structured products combine a classic financial instrument (bond, share) with a derivative
 - Investment products: capital protection, yield enhancement, participation, with additional credit risk
 - Leverage products

CISA: Foreign Funds (1/2)

- Foreign open-end funds:
 - Structured as companies
 - companies or schemes with their registered and head office abroad
 - whose purpose is collective capital investment; and
 - where the investors have a legal claim against the company or an affiliate to redeem their units at the net asset value
 - Contractual funds
 - assets accumulated on the basis of a fund or similar contract
 - for the purpose of collective investment; and
 - that are managed by a fund management company with its registered and head office abroad

CISA: Foreign Funds (2/2)

- Foreign closed-end funds
 - companies and schemes with registered and head office abroad
 - whose purpose is collective capital investment; and
 - where the investors have *no* legal claim against the company or an affiliate to redeem their units at the net asset value

CISA: Offers to Non-qualified Investors

- Foreign funds must be approved by FINMA ("registered") before they are offered in Switzerland to **non-qualified investors**
- Qualified investors
 - professional clients pursuant to FinSA including "opting-out" HNWI; and
 - retail clients for whom a (Swiss or foreign) bank, securities firm or asset manager provides asset management or investment advice under a long-term asset management or investment advisory relationship, unless they have declared that they do not wish to be considered as qualified investor

CISA: Offers to "Opting-out" HNWI

- Foreign funds that are offered in Switzerland to "opting-out" HNWI do not need to be "registered" but require a **Swiss paying agent** and a **Swiss representative**
- Exception, if funds are offered under a long-term (asset management [?] or) investment advisory relationship
- Swiss paying agent must be a Swiss bank
- Investors may request the issue and redemption of units from the Swiss paying agent
- Swiss representative must be authorized by FINMA, represents the fund towards the investors and FINMA, and ensures compliance with the reporting obligations and the rules of conduct
- Place of jurisdiction at the domicile of the representative or the investor

CISA: Swiss Legend

- Swiss legend in prospectuses for "opting-out" HNWI*
 - offering limited to qualified investors
 - name and address of Swiss representative
 - name and address of Swiss paying agent
 - location where prospectus and other fund documents can be obtained
 - medium where publications are made
 - information on retrocessions and rebates
 - place of performance and jurisdiction
- Short version legend in marketing material

** according to 2015 template of Asset Management Association Switzerland (formerly SFAMA)*

FinIA: Swiss Branch and Representative Office

- Foreign financial institutions require a license from FINMA if they have a "physical presence" in Switzerland:
 - branch license if the persons in Switzerland can conclude transactions on behalf of the foreign financial institution
 - representative office license if the persons in Switzerland forward client orders to the foreign financial institution (introducing brokers) or represent it for marketing or other purposes
- Grey area where there is no physical presence in Switzerland but:
 - regular client visits in Switzerland
 - regular "road shows" in Switzerland
 - use of Swiss phone numbers, Swiss domain names, Swiss symbols, etc.



Excursus: FinMIA

- Stock exchanges and other trading venues
- Derivatives trading (clearing, reporting, and risk mitigation duties)
- Disclosure of participations in listed companies (3, 5, 10, 20, 25, $33\frac{1}{3}$, 50, and $66\frac{2}{3}\%$ of voting rights)
- Public tender offer if $33\frac{1}{3}\%$ of the voting rights are exceeded
- Insider trading
- Market manipulation

Thank you. Questions?



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