

Retail investment funds in Switzerland: regulatory overview

Andrea Huber, Oliver Widmer, Nils Harbeke and Joseph A Steiner, Pestalozzi Attorneys at Law

global.practicallaw.com/1-501-3469

MARKET STRUCTURE

1. What is the structure of the retail funds market? What have been the main trends over the last year?

Swiss Funds Market and Structure. The Swiss funds market managed a total asset volume of CHF1,298.1 billion in November 2020. This volume was mainly distributed among the following fund categories:

- Equity funds.
- Bond funds.
- Mixed-asset funds.
- Money market funds.
- Real estate funds.
- Commodity funds.
- Alternative investments.

With a combined market share of 73.47%, the ten top providers in the Swiss fund market were:

- UBS.
- Credit Suisse.
- Swisscanto.
- Blackrock.
- Pictet.
- Vontobel.
- Lombard Odier.
- JPMorgan.
- GAM.
- Swiss Life.

The Swiss retail funds market can be grouped into open-ended and closed-ended retail funds. Open-ended investment fund options greatly outnumber closed-ended investment fund options in terms of primary investment fund options for retail investors.

Trends and developments. In 2020, a new regulatory regime entered into force, consisting of:

- The Financial Services Act (FinSA).
- The Financial Institutions Act (FinIA).
- Amendments to the Collective Investment Schemes Act (CISA) (*see below, Closed-Ended Retail Funds*).

As part of this regulatory development, market trends such as sustainable investments, tokenisation of units or shares in funds, and digitalisation, have progressed well in 2020, despite COVID-19.

The Swiss funds market is expecting a new fund vehicle in 2022, known as the Limited Qualified Investor Fund (L-QIF), which will be limited to qualified investors (*see Question 18*).

Open-Ended Retail Funds

Swiss Open-Ended Retail Funds. On 13 January 2021, the total number of all Swiss open-ended funds approved by the Swiss Financial Market Supervisory Authority (FINMA) was 1,753. Of these funds, about 1,000 were Swiss retail funds. The figure for foreign open-ended retail funds approved by FINMA for marketing in Switzerland was about eight times higher at 8,135. Open-ended retail funds established in Switzerland can be structured as either:

- **Contractual Funds (*Fonds Commun de Placement*) (FCPs).**
A retail FCP is based on a collective investment scheme agreement (fund contract) between the retail investors, the fund management company and the custodian bank. Depending on the investment policy and the asset class a retail FCP is invested in, the retail FCP market can further be subdivided into:
 - securities funds (equivalent to EU UCITS);
 - real estate funds;
 - "other funds for traditional investments";
 - "other funds for alternative investments".
- **Investment Companies With Variable Capital (*Société d'Investissement à Capital Variable*) (SICAVs).** A SICAV is a share corporation with no-par-value shares, whose share capital is divided into:
 - management shares; and
 - (retail) investors' shares.

- Depending on the investment policy and asset class a retail SICAV is invested in, the retail SICAV market can further be subdivided into:
 - securities funds (equivalent to EU Undertakings for the Collective Investment in Transferable Securities (UCITS));
 - real estate funds;
 - "other funds for traditional investments";
 - "other funds for alternative investments".

The majority of Swiss retail FCPs and retail SICAVs are "other funds for traditional investments". While securities funds rank second for retail FCPs, there is currently no retail SICAV in the securities fund category. The establishment of "other funds for alternative investments" plays a minor part for both fund structures.

Foreign Open-Ended Retail Funds. These are usually established abroad in the form of either:

- **Foreign FCPs.** A foreign FCP is an accumulation of assets on the basis of a fund contract (or other agreement with similar effect) for the purpose of collective investments, managed by a fund management company with its registered office and main administrative office based in another jurisdiction.
- **Foreign SICAVs.** A foreign SICAV is a company or scheme with a registered office and main administration office based in another jurisdiction, which is created for the purpose of collective investments, and whose investors are entitled to redeem their units or shares at the net asset value (NAV) in relation to either the company itself or a closely associated company.

Foreign FCPs or SICAVs that are approved by the Swiss Financial Market Supervisory Authority (FINMA) for marketing in Switzerland are subdivided by FINMA into the following categories:

- UCITS (euro-compatible) and securities funds equivalent.
- Non-UCITS for traditional investments.
- Non-UCITS for alternative investments.

Almost all approved foreign FCPs or SICAVs (8,135 in total) are classified as UCITS (euro-compatible) and securities funds equivalent. Only a few are classified as non-UCITS for traditional investments and non-UCITS for alternative investments. The main countries where such foreign retail funds are established, and from which they are marketed (via a Swiss representative) into Switzerland, are Luxembourg, Ireland, the UK, Germany and France.

Exchange-Listed Open-Ended Investment Funds. Several FINMA-approved open-ended retail funds are also admitted to trading on a Swiss stock exchange, including:

- **Sponsored Investment Funds.** Many open-ended funds are admitted to trading on the SIX Swiss Exchange-sponsored investment funds segment under the Rules for Sponsored Investment Funds. The admission of such investment funds requires, for example:
 - the funds to be approved by FINMA (in advance);
 - the settlement of transactions in the investment funds to be possible through a recognised settlement system;
 - Swiss security numbers to be attached to the funds;
 - the appointment of a sponsoring securities firm to carry out certain functions such as market making.

- **Exchange-Traded Funds (ETFs).** ETFs are not deemed to be investment funds for the purpose of Rules for Sponsored Investment Funds. Therefore, only the SIX Swiss Exchange Listing Rules (Listing Rules) are relevant as to the requirements for listing ETFs funds. Under the Listing Rules, at the time of listing the ETF must have, for example:
 - at least CHF100 million of assets under management;
 - an approval from FINMA as an open-ended FCP or SICAV; and
 - a market maker that fulfils certain requirements as set out by the Listing Rules.

Closed-Ended Retail Funds

Swiss Closed-Ended Retail Funds. Closed-ended investment fund options for retail investors have not played an important role in the Swiss retail funds market since the entry into force of the Swiss Collective Investment Schemes Act (CISA) on 1 January 2007, as recently amended, which replaced the previous Swiss Investment Funds Act of 18 March 1994. Two closed-ended retail funds investment fund structures are available to retail investors in Switzerland:

- **Non-Listed Investment Companies With Fixed Capital (*Société d'Investissement a Capital Fixe*) (SICAFs).** CISA introduced the SICAF as a closed-ended investment fund option. A SICAF is a company limited by shares under the Swiss Code of Obligations whose sole purpose is the investment of collective capital, and whose shareholders can consist of retail investors. As of January 2021, no SICAF has been established or registered under CISA. Only closed-ended funds in the form of limited partnerships for collective investment schemes (LPs) have been established. However, these are not accessible for retail investors.
- **Exchange-Listed SICAFs.** As an alternative to a FINMA-approved SICAF, retail investors can invest in exchange-listed SICAFs that are not required to obtain approval from FINMA under CISA. For retail investors, the transparency or disclosure rules of a stock exchange, as well as the shareholders' participation rights (under the Swiss Code of Obligations and financial market infrastructure regulations) can be viewed as sufficient protection. For example, the SIX Swiss Exchange has created a separate segment for exchange-listed SICAFs and adopted specific listing rules for them. Accordingly, a Swiss investment company with the purpose of pursuing collective investment schemes to generate income and capital gains can be listed and included on the SIX Investment Index if, among other things, at the time of listing it laid down the investment policy in its articles of association and achieved a minimum level of investment. However, a track record is not required. Foreign-domiciled investment companies can also request inclusion if they have their primary listing on the SIX Swiss Exchange and commit to the reporting requirements.

Foreign Closed-Ended Retail Funds. Foreign closed-ended retail funds are companies and schemes:

- With their registered office and main administrative office based in another jurisdiction.
- Created for the purpose of collective investments.
- Whose investors are not entitled to redeem their units or shares at the NAV in relation to either the company itself or a closely related company.

At present, there is no FINMA-approved foreign closed-ended collective investment scheme in Switzerland.

2. How are interests in the open and closed-ended funds accessed and priced?

Prices for open-ended retail funds are fixed once a day at their net asset value, and reflect the fund's performance. This value is the fund's assets minus its liabilities. Open-ended retail funds are offered through fund management companies, which sell their units directly to investors.

In exchange-listed SICAFs, investors are able to purchase shares through a brokerage firm on the secondary market. Such shares can be purchased or sold at whatever price the fund is trading at during the day.

3. Are there any other retail fund options not mentioned in

There are no further retail fund options.

FUND VEHICLES AND STRUCTURES

4. What are the main legal vehicles used to set up a retail fund and what are the key advantages and disadvantages of using these structures?

Open-Ended Retail Funds

Legal Vehicles. The legal vehicles used for open-ended retail funds in Switzerland are:

- **FCPs.** An FCP is based on a fund contract between the retail investors, the fund management company and the custodian. Under the fund contract, the fund management company commits itself to involve the investors in accordance with the units they have acquired in the FCP and to manage the fund's assets in accordance with the fund contract (and the corresponding investment policy and strategy). The investors' interests in an FCP are called "units".
- **SICAVs.** A SICAV is an open-ended fund:
 - in the form of an incorporated company limited by shares;
 - with own legal personality;
 - whose sole purpose is the collective investment in assets.
- A SICAV is only liable in relation to its company assets. Its share capital and numbers of shares are not specified in advance. The shares are divided into management shares and investor shares. The minimum capital requirement is CHF500,000 (or under certain circumstances only CHF250,000), which must be paid up by the management shareholders. Each share carries one vote. In contrast to FCPs, there is no agreement between the investors and the custodian bank. The SICAV can carry out the entire administration (self-administered SICAV) or delegate it to an authorised fund management company that is responsible for the marketing of the shares and the portfolio management (externally administered SICAV). In either case, a SICAV can only delegate investment decisions to authorised asset managers. The investors' interests in a SICAV are called "shares".

Advantages. From the investors' perspective, SICAVs have an advantage over FCPs, in that the SICAV structure allows investors to have membership rights (voting and control rights) in the fund. From an asset manager's perspective, SICAVs allow asset managers that do not have sufficient resources to obtain a licence as a fund management company to establish collective investment vehicles for their own clients, over which they can exercise a degree of control.

Disadvantages. From the investors' perspective, FCPs (in contrast to SICAVs) do not provide additional membership rights to information, protection and participation, as the investors are not shareholders of the fund. A SICAV can only manage its own assets and is specifically prohibited from rendering services such as portfolio and risk management to third parties.

Closed-Ended Retail Funds

Legal Vehicles. The legal vehicle used for closed-ended retail funds in Switzerland is the SICAF. A retail SICAF subject to CISA is a closed-ended fund in form of an incorporated company limited by shares with its own legal personality whose:

- Sole purpose is collective investment in assets.
- Investors are not limited to "qualified investors" (see Question 11).
- Shares are not listed on a Swiss stock exchange.

In contrast to SICAVs, the share capital consists only of investor shares. The minimum capital requirement is CHF500,000. Each share carries one vote. In contrast to FCPs, there is no agreement between the investors and the custodian bank. The SICAF carries out the entire administration. However, it can delegate the investment decisions as long as the delegation is deemed to be in the interests of adequate administration. The investors' interests in a SICAF are called "shares".

Limited partnerships for collective investment schemes (LPs) can also be established as a type of closed-ended fund. An LP is a partnership that is incorporated based on the provisions of the Code of Obligations and whose sole purpose is collective investment in speculative assets (risk capital). At least one partner bears unlimited liability (the general partner), while the other partners (the limited partners) are only liable up to their committed contribution. The general partner must be a Swiss company limited by shares and it can only be the general partner of one single LP. The limited partners cannot include any retail investors and such funds can only be subscribed to by "qualified investors" (see Question 11). Therefore, this vehicle is not suitable for the Swiss retail funds market.

Advantages. SICAFs are open to retail investors and can offer a wide range of investment opportunities to retail investors.

Disadvantages. A SICAF can only manage its own assets and is specifically prohibited from rendering services such as portfolio and risk management to third parties.

REGULATORY FRAMEWORK AND BODIES

Key Statutes, Regulations and Rules

5. What are the key statutes, regulations and rules that govern retail funds? Which regulatory bodies regulate retail funds?

Regulatory Framework

The regulatory framework governing Swiss retail funds and foreign retail funds marketed in or from Switzerland consists of the following statutes and implementing ordinances:

- Collective Investment Schemes Act (CISA).
- Collective Investment Schemes Ordinance (CISO).
- Collective Investment Schemes Ordinance of the Swiss Financial Market Supervisory Authority FINMA (CISO-FINMA).
- Ordinance of the Swiss Financial Market Supervisory Authority FINMA on Bankruptcy of Collective Investment Schemes (CISBO-FINMA).
- Financial Institutions Act (FinIA).
- Financial Institutions Ordinance (FinIO).
- Financial Institutions Ordinance of the Swiss Financial Market Supervisory Authority FINMA (FINIO-FINMA).
- Financial Services Act (FinSA).
- Financial Services Ordinance (FinSO).
- Anti-Money Laundering Act (AMLA).
- Anti-Money Laundering Ordinance of the Swiss Financial Market Supervisory Authority FINMA (AMLO-FINMA).

In addition, the following circulars and guidelines published by FINMA also form part of the relevant regulatory framework:

- 2016/07 FINMA Circular 'Video and online identification'.
- 2013/08 FINMA Circular 'Market conduct rules'.
- 2013/03 FINMA Circular 'Audit'.
- 2010/01 FINMA Circular 'Remuneration schemes'.
- 2009/01 FINMA Circular 'Guidelines on asset management'.
- 2008/10 FINMA Circular 'Self-regulation as a minimum standard'.

Based on 2008/10 FINMA Circular 'Self-regulation as a minimum standard', market participants must also observe various guidelines from the Swiss Asset Management Association (previously the Swiss Funds and Asset Management Association (SFAMA)), which have been recognised by FINMA as minimum standards within the industry, such as:

- SFAMA's Code of Conduct.
- SFAMA Guidelines for Money Market Funds.
- SFAMA Guidelines on the Key Investor Information Document related to Securities Funds and Other Funds for Traditional Investments.

- SFAMA Guidelines on the Valuation of the Assets of Collective Investment Schemes and the Handling of Valuation Errors in the Case of Open-End Collective Investment Schemes.
- SFAMA Guidelines on the Distribution of Collective Investment Schemes.
- SFAMA Guidelines on the Calculation and Disclosure of the Total Expense Ratio (TER) of Collective Investment Schemes.
- SFAMA Guidelines on the Calculation and Publication of Performance Data of Collective Investment Schemes.
- SFAMA Guidelines on the Duties regarding the Charging and Use of Fees and Costs.
- SFAMA Guidelines on Real Estate Funds.

The SFAMA guidelines and rules are currently under review because of the recent amendments to the regulatory framework and the entry into force of FinSA on 1 January 2020. Where necessary, these guidelines will be updated to reflect the new Swiss regulatory regime.

Regulatory Bodies

For Swiss retail funds and foreign retail funds, the relevant regulatory bodies are the:

- **FINMA.** FINMA is the licensing and supervisory authority for:
 - fund management companies;
 - SICAVs;
 - SICAFs;
 - foreign collective investment schemes that are marketed in Switzerland to non-qualified investors (*see Question 11*);
 - the representatives of foreign retail funds;
 - custodian banks; and
 - asset managers of collective assets.
- **FINMA is responsible for approving these financial institutions (or financial intermediaries) as well as the fund products. FINMA is also the competent supervisory authority for anti-money laundering purposes.**
- **Swiss Asset Management Association.** The Swiss Asset Management Association is the representative industry association for collective investment schemes and their managers in Switzerland. It is a self-regulatory body whose industry standards are recognised by FINMA as minimum standards, and is therefore of great significance to the Swiss funds market.
- **Auditors.** A dual supervisory regime applies for auditing purposes, under which regulated fund management companies, SICAVs, SICAFs and asset managers must be audited by a FINMA-recognised auditor. FINMA-recognised auditors must verify that the financial institution's conduct complies with the relevant contractual, statutory and regulatory provisions.

Local or State Legislation

6. Within the jurisdiction, are there local state, provincial or similar laws that could apply to retail funds?

There are no local or regional securities laws applicable to collective investment schemes in Switzerland. The Swiss funds market and prospectus requirements are regulated at a federal level. The cantons do not have legislative nor supervisory power over collective investment schemes or fund products, or the issuance of such products.

Authorisation/Licensing of Funds

7. Do retail funds themselves have to be authorised, licensed or registered?

Open-Ended Retail Funds

Swiss open-ended retail funds and foreign open-ended retail funds must be authorised by FINMA. For details of fund vehicles and structures, see *Question 1* and *Question 4*. The requirements are as follows:

- **Swiss Open-Ended Retail Funds:**
 - **FCPs.** For the establishment of a Swiss retail FCP, both the fund management company must obtain a licence from FINMA (see *Question 8*) and the fund contract requires FINMA authorisation. If the FCP is structured as an umbrella fund (that is, if it includes sub-funds), each sub-fund must be approved by FINMA;
 - **SICAVs.** For the establishment of a Swiss retail SICAV, both the SICAV itself and its constitutional documents (the articles of association and the investment regulations) must be approved by FINMA. The SICAV and the persons managing or administering the assets are therefore subject to different specific licensing requirements (see *Question 8*). The SICAV is both a licensed entity and an authorised fund product. If the SICAV is structured as an umbrella fund, each class must be approved by FINMA.
- **Foreign Open-Ended Retail Funds.** Before foreign retail FCPs or SICAVs (or similar schemes) can be marketed in or from Switzerland, FINMA must approve the fund documentation. The person(s) responsible for marketing the foreign collective investment schemes must therefore submit the relevant fund documentation for approval to FINMA (that is, the fund contract, the articles of association, the investment regulations and the fund prospectus). A foreign investment fund must meet the following requirements for authorisation:
 - the collective investment scheme, fund management company or fund entity, asset manager of the collective investment scheme and the custodian bank must each be subject to public supervision intended to protect investors;
 - the fund management company or fund entity and the custodian bank must be subject to regulatory provisions equivalent to the provisions of CISA in relation to organisation, investor rights and investment policy;
 - the designation of the collective investment scheme must not provide grounds for confusion or deception;

- a representative and a paying agent must be appointed for the offering of units or shares in Switzerland;
- there must be an agreement on co-operation and the exchange of information between FINMA and the relevant foreign supervisory authorities.

FINMA-approved open-ended retail funds are then registered with FINMA. FINMA publishes lists of authorised Swiss retail FCPs and SICAVs as well as foreign retail funds on a regular basis. A difference between FINMA-approved Swiss open-ended retail funds and foreign retail funds is that foreign open-ended retail funds must have a prospectus approved by FINMA.

Closed-Ended Retail Funds

Swiss and foreign closed-ended funds must be authorised by the FINMA. For details of fund vehicles and structures, see *Question 1* and *Question 4*. The requirements are as follows:

- **Swiss Closed-Ended Retail Funds:**
 - **SICAFs.** For the establishment of a Swiss retail SICAF, both the SICAF itself and its constitutional documents (the articles of association and the investment regulations) must be approved by FINMA. The SICAF is both a licensed institution and an authorised fund product. The SICAF and the persons managing or administering the assets are therefore subject to different specific licensing requirements (see *Question 8*).
 - **LPs.** This is not applicable in the Swiss retail investments funds market (see *Question 4*).
- **Foreign Open-Ended Retail Funds.** For the authorisation requirements related to the marketing of foreign closed-ended retail funds in or from Switzerland, see above, *Open-Ended Retail Funds*.

Authorisation/Licensing of Managers/Operators

8. Do the operators of retail funds have to be authorised, licensed or registered? What are the key requirements that apply to managers and operators of retail funds?

Open-Ended Retail Funds

Authorisation/Licensing/Registration Requirements. On the product level, Swiss retail FCPs or SICAVs require authorisation from FINMA under CISA and CISO. A fund management company (that is, an entity that manages investment funds independently in its own name and for the account of investors) requires a licence from FINMA under the FinIA and FinIO. (For details of fund vehicles and structures, see *Question 1* and *Question 4*.)

The general licensing requirements include, among other things, that:

- The place of management must effectively be in Switzerland.
- The persons responsible for the management and the business operations must have a good reputation, guarantee proper management and business conduct and have the necessary professional qualifications.
- The significant equity holders must have a good reputation and must not exert their influence to the detriment of prudent and sound business practice (significant equity holders" are persons who hold (directly or indirectly) 10% or more of the equity or voting rights).

- The internal regulations and an appropriate organisational structure must ensure that the regulatory obligations are complied with.
- Sufficient financial guarantees must be available.

For the authorisation requirements related to the marketing of foreign retail funds in or from Switzerland, see *Question 7, Open-Ended Retail Funds*.

Other Key Requirements. Further key requirements include the following:

- **Custodians of FCPs or SICAVs.** Swiss retail FCPs and SICAVs must have a FINMA-licensed custodian bank responsible for the safekeeping of the assets (see *Question 12*). The custodian is a party to the fund contract (in relation to the FCP) or to the contract with the SICAV and is responsible for the safekeeping of the funds' assets, the issuance and redemption of units and payment transactions on behalf of the fund. The general requirements are that the custodian must:
 - be a bank under the Swiss Banking Act;
 - have an appropriate organisational structure to act as a custodian for collective investment schemes.
- **Asset Managers of FCPs or SICAVs.** Asset managers of FCPs or SICAVs (that is, persons who manage assets on a commercial basis in the name of and on behalf of collective investment schemes) require a licence from FINMA under the FinIA as an asset manager of collective assets. The general licensing requirements include, among other things, that:
 - the place of management must effectively be in Switzerland;
 - the persons responsible for the management and the business operations must have a good reputation, guarantee a proper management and business conduct and have the necessary professional qualifications;
 - the significant equity holders must have a good reputation and must not exert their influence to the detriment of prudent and sound business practice (significant equity holders are persons who hold (directly or indirectly) 10% or more of the equity or voting rights);
 - the internal regulations and an appropriate organisational structure must ensure that the regulatory obligations are complied with;
 - sufficient financial guarantees must be available.
- **Portfolio Managers of FCPs or SICAVs.** The licensing requirements for a portfolio manager are more relaxed than the licensing requirements for an asset manager of collective assets. However, for an asset manager of collective assets to be eligible to apply for a licence as portfolio manager only, it must:
 - only have "qualified investors" (see *Question 11*); and
 - have assets under management, including assets acquired through the use of leveraged finance, of less than CHF100 million, or, if unleveraged, the assets under management must be less than CHF500 million in total and the investors must have no redemption rights in the first five years after making the first investment.

- **Representatives of Foreign Retail Funds.** A foreign retail fund must appoint a representative and a paying agent in Switzerland to market the fund. The Swiss representative represents the foreign retail fund in Switzerland based on a representative agreement. The representative must fulfil certain obligations, such as, for example, the duty to inform and notify FINMA. Foreign retail funds are not required to have a Swiss-based custodian bank. See *Question 7, Open-Ended Retail Funds*.

Closed-Ended Retail Funds

Authorisation/Licensing/Registration Requirements. The authorisation requirements for closed-ended retail funds are the same as for open-ended retail funds (see above, *Open-Ended Retail Funds*).

Other Key Requirements. The key requirements for closed-ended retail funds are the same as for open-ended retail funds (see above, *Open-Ended Retail Funds*).

Active and Passive Management

9. Are the different types of retail funds typically actively managed or passively managed? Or can they be either?

Open-ended retail funds can be either actively managed or passively managed.

MARKETING OF FUNDS

10. Who can market retail funds?

Open-Ended Retail Funds

Swiss Open-Ended Retail Funds. In relation to marketing, the FinSA distinguishes between the following activities:

- **Advertising.** For Swiss retail FCPs and SICAVs, advertising does not trigger any authorisation or specific obligation under CISA, nor does it trigger prospectus requirements (as long as the offering threshold is not reached) or any other regulatory obligation under FinSA. Persons responsible for the advertising must therefore only:
 - clearly indicate that the marketing material is for advertising purposes;
 - mention the prospectus and key information document and the place where these documents can be obtained by the retail investors, if they are already available.
- **Offering.** If advertising of Swiss retail FCPs and SICAVs is deemed to be an offer under FinSA, the fund management company of an FCP or the SICAV must provide a prospectus as well as a key information document to the retail investors under FinSA. As long as such an offer does not reach the threshold for the provision of financial services, no further regulatory requirements are triggered under FinSA.

- **Provision of Financial Services.** Under FinSA, a financial service includes investment advice and asset management, as well as any activity addressed directly at clients that is specifically aimed at the acquisition or disposal of a financial instrument, such as units in FCPs or shares in SICAVs. If the offering of units in FCPs or shares in SICAVs also constitutes the provision of a financial service for these purposes, the responsible person or entity will qualify as a financial service provider and, as such, can only provide the services towards Swiss-based investors subject to FinSA and the respective regulatory obligations. These obligations include the duty to register client advisers with a Swiss client adviser register and the duty to affiliate the financial service provider with a Swiss ombudsman's office.

Foreign Open-Ended Retail Funds. Unlike advertising Swiss retail FCPs and SICAVs, advertising foreign retail funds triggers the marketing authorisation obligations under CISA (*see Question 7, Open-Ended Retail Funds*). Those marketing foreign open-ended retail funds must publish a key information document for retail investors under FinSA. If the offering of units in FCPs or shares in SICAVs also constitutes the provision of a financial service, the responsible person(s) or entity will qualify as a (foreign) financial service provider and, as such, can only provide the services towards Swiss based investors subject to FinSA and the relevant regulatory obligations.

Closed-Ended Retail Funds

Swiss Closed-Ended Retail Funds. The same applies to Swiss retail SICAFs as for the marketing of Swiss open-ended retail funds (*see above, Open-Ended Retail Funds: Swiss Open-Ended Retail Funds*).

Foreign Closed-Ended Retail Funds. The same applies to foreign closed-ended retail funds as for the marketing of foreign open-ended retail funds (*see above, Open-Ended Retail Funds: Foreign Open-Ended Retail Funds*).

11. To whom can retail funds be marketed?

Open-Ended Retail Funds

CISA distinguishes between "qualified investors" and "non-qualified investors". Qualified investors include:

- Regulated financial intermediaries, such as banks, securities firms, asset managers of collective assets, fund companies, and portfolio managers.
- Regulated insurance companies.
- Foreign clients subject to prudential supervision as regulated financial intermediaries.
- Central banks.
- Public entities with professional treasury operations.
- Occupational pension schemes and other institutions whose purpose is to serve occupational pensions with professional treasury operations.
- Companies with professional treasury operations.
- Large companies meeting at least two of the following criteria:
 - a balance sheet total of CHF20 million;
 - turnover of CHF40 million; and/or
 - equity of CHF2 million.

- Private investment structures with professional treasury operations created for high-net-worth retail clients.
- National and supranational public entities with professional treasury operations.
- High-net-worth retail clients and their private investment structures if they declare that they wish to be treated as professional clients (opting out). A high-net-worth-individual must alternatively satisfy one of following criteria:
 - on the basis of training, education and professional experience or on the basis of comparable experience in the financial sector, they possess the necessary knowledge to understand the risks associated with the investments, and have at their disposal assets of at least CHF500,000; or
 - they have at their disposal assets of at least CHF2 million.
- retail clients receiving portfolio management or investment advice within a permanent portfolio management or investment advice relationship from a regulated financial intermediary such as a bank, or a foreign financial intermediary that is subject to FinSA or equivalent prudential supervision (provided they have not declared that they do not wish to be treated as such).

Non-qualified investors are any investors that are not deemed to be qualified investors.

Approved Swiss retail FCPs and SICAVs, as well as foreign open-ended retail funds, can be marketed to any type of investor, including non-qualified investors.

For the marketing of Swiss retail FCPs and SICAVs as well as foreign open-ended retail funds, *see Question 10*.

Closed-Ended Retail Funds

The same as for open-ended retail funds applies for Swiss retail SICAFs and foreign closed-ended retail funds marketing towards qualified investors (*see above, Open-Ended Retail Funds*).

For the marketing of Swiss retail SICAFs as well as closed-ended foreign retail funds, *see Question 10*.

ASSETS PORTFOLIO

12. Who holds the portfolio of assets? What regulations are in place for its protection?

Open-Ended Retail Funds

Swiss retail FCPs and SICAVs must entrust the safekeeping of the portfolio of assets to a custodian bank that has a licence under the Swiss Banking Act (*see Question 8*).

- **Bankruptcy of the Custodian Bank.** If a Swiss custodian bank goes bankrupt, the assets are not included in the bank's bankruptcy estate. Instead, the assets (except cash deposits) are segregated from the bank's bankruptcy estate in favour of the fund management company or the SICAV, subject to any claims by the custodian bank against the depositor.
- **Bankruptcy of the Retail Fund.** In case of bankruptcy of the fund management company or the SICAV, the assets held by the custodian bank are segregated in favour of the investors.

Closed-Ended Retail Funds

For Swiss retail SICAFs, the same applies as for open-ended retail funds (see above, *Open-Ended Retail Funds*).

INVESTMENT AND BORROWING RESTRICTIONS

13. Are there any investment or diversification restrictions for retail funds? If so, what are they?

Open-Ended Retail Funds

Investment and Risk Diversification. For open-ended FCPs and SICAVs, the investment and risk diversification rules primarily depend on the specific type of fund. The funds must also define the rules in the fund contracts or articles of association and investment regulations. The rules are as follows:

- **Securities Funds.** Securities funds can invest in, among other things:
 - transferable (equity or debt) securities and dematerialised securities (book-entry securities) that are traded on a stock exchange or another regulated market;
 - derivatives, investment funds, money market instruments and deposits.
- Investments in precious metals or commodities are not allowed. The fund management company or SICAV must observe specific risk diversification rules in relation to each permitted investment (by asset class). For example, it can only invest up to 10% of the fund's assets in securities or money market instruments of the same issuer.
- **Real Estate Funds.** Real estate funds can invest in, among other things:
 - real estate;
 - real estate companies;
 - real estate investment funds;
 - foreign real estate assets; and
 - mortgage notes.
- Subject to certain restrictions, the use of derivatives is also permitted. Investments must be diversified by type of property, purpose of usage, age, building fabric and location. For example, real estate funds must spread their investments over at least ten properties and the market value of a single property cannot exceed 25% of the fund's assets.
- **"Other Funds for Traditional Investments".** Such funds can invest in, among other things:
 - securities;
 - precious metals;
 - real estate;
 - derivatives and structured products; and
 - units in collective investment schemes.

In particular, they may invest in asset classes that have only limited marketability, strong price fluctuations and limited risk diversification. FINMA may grant, on a case-by-case basis, exceptions to the applicable investment and risk diversification rules.

Closed-Ended Retail Funds

Investment and Risk Diversification in Relation to SICAFs. SICAFs can invest in the same asset classes as "other funds for traditional investments" (see above, *Open-Ended Retail Funds*). SICAFs must define the investments and set out the risk diversification in its articles of association and in the investment regulations. FINMA may additionally permit other asset classes.

14. Are there borrowing restrictions or conditions for retail funds? If so, what are they?

Open-Ended Retail Funds

For FCPs and SICAVs, the investment techniques and borrowing restrictions primarily depend on the specific type of fund and the rules in the fund contracts or articles of association and investment regulations, as follows:

- **Securities Funds.** Securities funds can deploy investment techniques such as securities lending, entering into repurchase agreements, borrowings and pledging collaterals up to a certain percentage rate in relation to the fund's net asset value (NAV), for the purpose of efficient asset management. For example, FCPs or SICAVs can only borrow funds on a temporary basis and only up to 10% of NAV. Collaterals are permitted up to an amount of 25% of NAV.
- **Real Estate Funds.** Real estate funds can borrow funds. However, to secure their liabilities, they must maintain an adequate proportion of the fund's assets in short-term fixed-interest securities or in funds available at short notice. The loans (credit facilities) must be included in the maximum level of encumbrance permitted by law. Therefore, the encumbrance cannot exceed on average one-third of the market value of all real estate assets.
- **"Other Funds for Traditional Investments".** Such funds can deploy broadly the same investment techniques as securities funds. However, they can also engage in short selling and are subject to different borrowing restrictions. For example:
 - borrowings must not exceed 25% of NAV;
 - not more than 60% of NAV can serve as collateral; and
 - the overall exposure must not exceed 225% of NAV.
- FINMA may grant, on a case-by-case basis, exceptions to the applicable investment techniques and borrowing restrictions.

Closed-Ended Retail Funds

Investment Techniques and Borrowing Restrictions in Relation to SICAFs. SICAFs can deploy the same investment techniques as "other funds for traditional investments" (see above, *Open-Ended Retail Funds*). The SICAF must define the investments and set out the risk diversification in its articles of association and in the investment regulations.

REDEMPTION OF INTERESTS

15. Can participants redeem their interest? Can the manager or operator place any restrictions on the issue and redemption of interests in retail funds? Are there any restrictions on the rights of participants to transfer or assign their interests to third parties?

Open-Ended Retail Funds

Restrictions on Redemption of Interest. In principle, investors can request the redemption of their units in FCPs or shares in SICAVs at the net asset value at any time. However, the regulations of a fund whose value is difficult to calculate or that has limited marketability, can provide that redemption can only be requested on specific dates. However, these dates must be at least four times per year and this must be explicitly stated in the fund regulations and the prospectus. In addition, at the justified request by the fund management company or the SICAV, the FINMA can restrict the right of redemption at any time, depending on the particular investments and investment policy of the fund. The restrictions must be stated in the fund regulations and the prospectus. However, the right to redeem at any time can only be suspended for a maximum of five years.

Restrictions on Rights to Transfer or Assign Interests to Third Parties.

There are no statutory restrictions on transferring the investors' units in an FCP. However, restrictions can be determined in the fund contract. Shares in a retail SICAV are always freely transferable.

Closed-Ended Retail Funds

Restrictions on Redemption of Interest. Investors cannot request the redemption of their shares in retail SICAFs.

Restrictions on Rights to Transfer or Assign Interests to Third Parties.

Shares in retail SICAFs are freely transferable, provided the SICAF's articles of association do not contain transfer restrictions. If restrictions apply, the board of directors of the SICAF can deny a transfer, based on grounds set out in the SICAF's articles of association, and make an offer to the seller of the shares to take over the shares at their intrinsic value (either for its own account, the account of other shareholders or the account of third parties).

REPORTING REQUIREMENTS

16. What are the general periodic reporting requirements for retail funds?

Open-Ended Retail Funds

Investors. All facts subject to a disclosure requirement (in relation to which investors are entitled to lodge objections with FINMA (see below)), as well as the dissolution of an investment fund, must be published in an appropriate publication media. The fund prospectus determines the applicable publication media, which can be either:

- Print media (for example, the *Neue Zürcher Zeitung*)
- A publicly accessible electronic platform approved by FINMA (for example, www.fundinfo.com or www.swissfunddata.ch).

In particular, the following must be published by the fund management company or the SICAV:

- Annual report, indicating where the report can be obtained free of charge, within four months of the end of the financial year.
- Semi-annual report, indicating where the report can be obtained free of charge, within two months of the end of the first half of the financial year.
- The issue and redemption price or net asset value (NAV) each time units or shares are issued or redeemed. Prices for securities funds must be published at least twice a month and prices for real estate funds and funds where the right of redemption at any time is restricted must be published at least once a month.
- Details of any amendments to the following (including an indication of where the amendments can be obtained free of charge):
 - prospectus or key investor document (KID);
 - fund contract or articles of association and investment regulations.

In addition, investors can request further information from the fund about:

- The basis for the calculation of the NAV.
- Further details on individual businesses.
- The exercise of membership or creditors' rights or risk management on claiming a legitimate interest.

Regulators. Open-ended retail funds have certain notification duties. For Swiss retail FCPs and SICAVs, FINMA must be notified in relation to any:

- Change in the persons responsible for the management and business operations (and any facts that could bring into question the good reputation and guarantee of proper management by these persons).
- Change in significant equity holders, with the exception of company shareholders in a SICAV (and any facts that could bring into question either the good reputation of those equity holders or prudent and sound business practice due to their influence).
- Change in relation to the financial guarantees, particularly if the minimum requirements are no longer met.
- Change of executive persons entrusted with the performance of the custodian bank's duties.
- Amendments to the prospectus or KID and the fund contract or articles of association and investment regulations.

FINMA must approve any change of circumstances relevant to the continued authorisation of the collective investment scheme.

For foreign retail funds, the Swiss representative must notify FINMA of any:

- Measures taken by a foreign supervisory authority against the fund, specifically any withdrawal of approval.

- Changes to the relevant documents of the foreign fund such as:
 - the prospectus or KID;
 - the fund contract or articles of association and investment regulations;
 - any other documents necessary for approval under applicable foreign laws and those for Swiss collective investment schemes.

Closed-Ended Retail Funds

The reporting requirements for closed-ended retail funds are essentially the same as for open-ended retail funds (see above, *Open-Ended Retail Funds*).

TAX TREATMENT

17. What is the tax treatment for retail funds?

Open-Ended Retail Funds

Funds. At the Swiss retail fund level, the following are relevant to the fund management company or SICAV:

- **Corporate Income Tax.** Swiss retail FCPs and SICAVs are fiscally transparent and therefore not subject to corporate income tax. The fund's income is directly attributed to the investors. The only exception applies to income derived from directly owned real estate that is subject to corporate income tax at the level of the fund.
- **Capital Tax.** Swiss retail FCPs and SICAVs are fiscally transparent and therefore not subject to capital tax (which is levied at cantonal and communal level). They are only subject to capital tax for directly owned real estate.
- **Withholding Tax.** Profit distributions or accumulated profits from non-distributing (yearly deemed distributions) FCPs and SICAVs are generally subject to a 35% withholding tax. However, no withholding tax is due to the extent that such distributions or accumulated profits derive from real estate. In addition, qualifying capital gains and capital contributions by the investors can also be distributed without being subject to withholding tax, provided they are reported separately.
- **Issuance Stamp Tax.** The issue of interests in FCPs or SICAVs is not subject to issuance stamp tax.

Resident Investors. At the resident investor level, the following taxes are relevant:

- **Income Tax.** Distributions or accumulated profits of non-distributing FCPs or SICAVs are in principle subject to income tax at the level of the individual investors. Distributions or accumulated profits stemming from realised qualifying capital gains or from directly owned real estate are not subject to income tax, provided they are reported separately by the collective investment scheme. Income derived from foreign open-ended collective investment schemes are subject to the same taxation rules. Qualifying capital gains derived from the sale of interests or shares in collective investment schemes are exempt from income tax.

- **Withholding Tax.** Withholding tax withheld from distributions or remitted on accumulated profits can be fully reclaimed by resident investors under national law.

Non-Resident Investors. Non-resident investors are not subject to Swiss income tax merely due to an investment in a Swiss FCP or SICAV. Withholding tax on distributions or accumulated profits of non-distributing funds is levied independently of the state of residence of the investor. Non-resident investors may qualify for an exemption from Swiss withholding tax under the affidavit procedure (applicable to Swiss funds that generate at least 80% of income from foreign sources), or may be able to reclaim Swiss withholding tax under an applicable double tax treaty.

Swiss Securities Transfer Tax. If a Swiss securities dealer (as defined for this purpose in Swiss tax law) is involved as a party or intermediary in the transaction, secondary market transactions in fund interests, as well as primary market transactions (issuance) in interests in non-Swiss funds, may be subject to Swiss securities transfer tax. The redemption (sale for cancellation) of fund interests is exempt from Swiss securities transfer tax.

Closed-Ended Retail Funds

Funds. At the Swiss retail fund level, the following taxes are relevant to SICAFs:

- **Corporate Income Tax.** SICAFs are subject to corporate income tax at ordinary rates.
- **Capital Tax.** SICAFs are subject to cantonal and communal capital tax, at rates depending on the specific tax domicile within Switzerland.
- **Withholding Tax.** SICAFs' distributions, but not accumulated profits, are subject to withholding tax at a rate of 35%.
- **Issuance Stamp Tax.** The issue of shares in a SICAF is subject to issuance stamp tax at a rate of 1% on the total consideration received by the SICAF in consideration for the issue of shares. There is an exemption from issuance stamp tax for SICAFs for the first CHF1 million.

Resident Investors. At the resident investor level, the following taxes are relevant:

- **Income Tax.** Distributions from SICAFs and similar foreign closed-ended collective investment schemes are subject to income tax, regardless of the source of income at the level of the SICAF. Capital gains derived from the sale of shares in SICAFs and similar foreign closed-ended collective investment schemes are exempt from income tax.
- **Withholding Tax.** Withholding tax withheld from distributions can be fully reclaimed by resident investors under national law.

Non-Resident Investors. Non-resident investors are not subject to Swiss income tax merely due to an investment in a Swiss SICAF. Withholding tax on distributions is levied independently of the state of residence of the investor. Non-resident investors may be able to reclaim Swiss withholding tax under an applicable double tax treaty.

Swiss Securities Transfer Tax. If a Swiss securities dealer (as defined for this purpose in Swiss tax law) is involved as a party or intermediary in the transaction, secondary market transactions in fund interests, as well as primary market transactions (issuance) in interests in non-Swiss funds, may be subject to Swiss securities transfer tax.

REFORM

18. What proposals are there (if any) for the reform of retail fund regulation?

Draft legislation is currently being discussed by the Swiss Parliament to strengthen the competitiveness of the Swiss fund market. The proposal does not relate to the Swiss retail investment fund market, but to the Swiss alternative investment fund market for qualified investors. If the reform is adopted, a new fund investment vehicle, known as the Limited Qualified Investor Fund (L-QIF) will be introduced into the Swiss market.

Contributor Profile

Andrea Huber

Pestalozzi Attorneys at Law

T +41 44 217 92 41

M +41 44 217 92 17

E andrea.huber@pestalozzilaw.com

W www.pestalozzilaw.com

Professional qualifications. Switzerland, Attorney at law

Areas of practice. Financial services regulation; asset management; investment funds; securities; banking and finance; capital markets.

Languages. English, German

Oliver Widmer

Pestalozzi Attorneys at Law

T +41 44 217 92 42

M +41 44 217 92 17

E oliver.widmer@pestalozzilaw.com

W www.pestalozzilaw.com

Professional qualifications. Switzerland, Attorney at law; England & Wales, Solicitor (non-practising)

Areas of practice. Capital markets; financial services regulations; banking; investment funds; domestic and cross-border financing transactions; securities; asset management; corporate and commercial law.

Languages. English, German, French

Nils Harbeke

Pestalozzi Attorneys at Law

T +41 44 217 92 24

M +41 44 217 92 17

E nils.harbeke@pestalozzilaw.com

W www.pestalozzilaw.com

Professional qualifications. Attorney at law; Swiss Certified Tax Expert

Areas of practice. Financial services tax.

Languages. English, German

Joseph A Steiner

Pestalozzi Attorneys at Law

T +41 44 217 92 71

M +41 44 217 92 17

E joseph-a.steiner@pestalozzilaw.com

W www.pestalozzilaw.com

Professional qualifications. Switzerland, Attorney at law

Areas of practice. Financial services regulation; blockchain & crypto assets, asset management; investment funds; banking and finance; capital markets.

Languages. English, German, Japanese

