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CHAMBERS GLOBAL PRACTICE GUIDES

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# Investment Funds 2023

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**Switzerland: Law & Practice**

Andrea Huber, Oliver Widmer and Nils Harbeke  
Pestalozzi Attorneys at Law Ltd.

# SWITZERLAND

## Law and Practice

### Contributed by:

Andrea Huber, Oliver Widmer and Nils Harbeke  
Pestalozzi Attorneys at Law Ltd. see p.23



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## 1. Market Overview

### 1.1 State of the Market

#### Switzerland as an Asset Management Hub

Switzerland has a high level of political stability combined with a reasonable legal and regulatory framework, moderate corporate tax rates and a highly skilled labour force. Among European asset management hubs, Switzerland takes a leading position with respect to offering favourable conditions for the asset management industry. However, fund structures domiciled in Switzerland that are available for alternative investments are often not a suitable alternative to well-established non-Swiss alternative investment fund (AIF) offshore locations such as Jersey, Guernsey or the Cayman Islands, or onshore locations such as Luxembourg and Ireland.

With a long banking and finance tradition, Switzerland is also a leading light in the international asset management industry, which constitutes one of the main pillars of the country's financial centre. One survey of asset managers conducted in 2022 found that a competitive regulatory framework and non-discriminating access to international markets are important requirements for future growth. Asset managers see the integration of ESG into the investment process as part of their fiduciary duty to their clients.

#### Swiss Fund Market in 2022

While the Swiss fund market continued to suffer from negative performances in the third quarter of 2022, the sustainability sector provided a ray of hope thanks to sustained net inflows. In terms of volume, the entire fund market has fallen back to the level of two years ago. The negative performance on the stock markets in the 3rd quarter of 2022 left further traces on the Swiss fund market. The volume thus shrank in the first nine months of 2022 from CHF1,516 billion (year-end

2021) to CHF1,274 billion, which corresponds to a decline of 15.9% or CHF242 billion. In the 3rd quarter, the decline amounted to CHF59 billion.

At -15.3% since the beginning of the year, most of the decline was due to performance losses. Meanwhile, net outflows from the funds in 2022 amounted to CHF9.5 billion; in the third quarter, the figure was CHF5.1 billion. All fund categories were affected, apart from money market funds (+CHF6.5 billion), with the highest outflows in the third quarter again taking place in equity funds (-CHF6.3 billion) and bond funds (-CHF3.3 billion).

Sustainability funds bucked this trend. The statistical data on which this market is based also includes funds that will not qualify as sustainable in the future according to the self-regulation of the Asset Management Association Switzerland (AMAS). CHF13.9 billion flowed into the sustainable market according to Morningstar in 2022. At the end of the third quarter, the volume in sustainability funds was nevertheless significantly lower than at the beginning of 2022, at CHF320.331 billion rather than CHF368.871 billion. The reason for this was the 16.9% decline in performance in this fund market.

Following the expiration of the referendum period for amending the Collective Investment Schemes Act (CISA), the introduction of a limited qualified investor fund (L-QIF) is expected to enter into force in 2023. The L-QIF is neither subject to approval nor supervised by the Swiss Financial Market Supervisory Authority (FINMA). However, it is only open to qualified investors and must be managed by an institution that is approved and supervised by FINMA, typically a fund management company (administration and portfolio management). Therefore, there will only be indirect supervision by FINMA.

## 2. Alternative Investment Funds

### 2.1 Fund Formation

#### 2.1.1 Fund Structures

##### Legal Framework

The key statutes and implementing ordinances governing the establishment and operation of AIFs and their managers are as follows:

- the Swiss Collective Investment Schemes Act (CISA);
- the Swiss Collective Investment Schemes Ordinance (CISO);
- the Swiss Collective Investment Schemes Ordinance of the Swiss Financial Market Supervisory Authority (CISO-FINMA); and
- the Swiss Ordinance of FINMA on Bankruptcy of Collective Investment Schemes (CISBO-FINMA).

In addition, the following legislation sets out the legal framework for financial institutions acting as fund management companies and investment managers of AIFs and their assets:

- the Swiss Financial Institutions Act (FinIA);
- the Swiss Financial Institutions Ordinance (FinIO); and
- the FINMA Swiss Financial Institution Ordinance (FinIO-FINMA).

Finally, sales of financial instruments including AIFs to clients in Switzerland are governed by:

- the Swiss Financial Services Act (FinSA); and
- the Swiss Financial Services Ordinance (FinSO).

##### Open-Ended Funds

There are two forms of regulated Swiss open-ended collective investment schemes. Swiss-

domiciled AIFs are typically structured as fund of funds in the form of open-ended funds, as either:

- contractual investment funds (FCPs) with no legal personality; or
- corporate funds in the form of an investment company with variable capital (SICAV) in the category of “other funds for alternative investments”.

“Other funds for alternative investments” include open-ended collective investment schemes whose investments, structure, investment techniques (short selling, borrowing of funds, etc) and investment restrictions exhibit a risk profile that is typical for alternative investments. FCPs and SICAVs are subject to the same investment rules.

Reference to the special risks involved in AIFs must be made in the fund name, and in the prospectus and marketing material. The prospectus must be offered free of charge to interested persons prior to an agreement being concluded or prior to subscription. FINMA may allow transaction-related settlement services of a directly investing other fund for alternative investments to be provided by a regulated institution specialising in such transactions (prime broker). It may specify which monitoring functions must be undertaken by the fund management company and the SICAV.

Swiss investment fund regulation does not provide for additional vehicles specifically designed for AIFs. In practice, however, the Swiss fund structures available for alternative investments are often not suitable alternatives to well-established non-Swiss AIF offshore locations such as Jersey, Guernsey or the Cayman Islands, which provide for more flexibility as to the possible investments, leveraging and customisation.

Popular European onshore locations for AIFs include Luxembourg and Ireland.

Open-ended collective investment schemes are expected to be set up in the form of L-QIFs in accordance with CISA in the course of 2023. Such L-QIFs (as either FCPs or SICAVs) would only be available to qualified investors, and would be subject to indirect supervision.

### **Closed-Ended Funds**

As provided by CISA, Swiss-domiciled AIFs can also be structured as a limited partnership for collective investment schemes (Swiss LP) or a company with fixed capital (SICAF).

### **SICAF**

A regulated SICAF is a Swiss company limited by shares whose corporate purpose is limited to the investment and management of its own assets, with no entrepreneurial activity. However, as the regulatory framework provided by CISA is rather limited, the SICAF is substantially governed by the Swiss Code of Obligations. SICAFs have no practical relevance in Switzerland as Swiss limited companies are not subject to CISA and are therefore not regulated by FINMA if their shares are listed on a stock exchange or if their shareholders are exclusively qualified investors as defined by CISA and only registered shares are issued.

Investment companies benefit from this safe harbour (see **Unregulated Investment Companies** below). As a result, no SICAF is currently registered with FINMA and subject to prudential supervision by it.

### **Swiss LP**

The Swiss LP has been introduced not only for alternative investments but also for private equity investments, real estate, construction and infra-

structure projects. The sole purpose of a Swiss LP is collective investment, and it conducts investments in risk capital under rather flexible investment guidelines. A Swiss LP requires a partnership agreement, with at least one member being the general partner and therefore subject to unlimited liability for the commitments of the Swiss LP. This general partner must be a Swiss company limited by shares and can be appointed as a general partner of one Swiss LP only.

The minimum share capital requirement for the general partner is CHF100,000. However, no capital requirements apply to the Swiss LP. The investors in the Swiss LP are the limited partners, and are only liable for a specific amount. Only qualified investors as defined in CISA are eligible to invest in the Swiss LP. The Swiss LP is a structure regulated by FINMA, so must obtain a FINMA licence and is subject to ongoing prudential supervision by FINMA. There are currently approximately 20 Swiss LPs registered with FINMA.

Closed-ended collective investment schemes are expected to be set up in the form of L-QIFs in accordance with CISA in the course of 2023. Such L-QIFs (only in the form of Swiss LPs) would only be available to qualified investors and would be subject to indirect supervision.

### **Unregulated Investment Companies**

Unregulated investment companies are very popular as they are suitable for investments in alternative asset classes. Specifically, these companies are subject to the Swiss Code of Obligations only and are not within the scope of CISA if the shares of the investment company are listed on a Swiss stock exchange, or if only registered shares are issued and the investment is restricted to qualified investors.

If these conditions are not met, the investment company falls within the scope of the (regulated) SICAF, as described above. Unregulated investment companies domiciled in Switzerland are popular for investments in private equity, hedge funds, venture capital and real estate vehicles.

## 2.1.2 Common Process for Setting Up Investment Funds

### Licensing Requirements

All Swiss AIFs require a licence from FINMA, regardless of their organisational structure or the type of investors. Subject to limited de minimis exemptions provided in FinIA for asset managers of collective investment schemes, asset managers of AIFs must obtain a FINMA licence as the manager of collective assets prior to engaging in asset management activities for AIFs.

The length of the FINMA authorisation and approval process largely depends on the complexity of the fund, including its investment policy, investment techniques, etc, as well as the current workload of FINMA. As a rule of thumb, FINMA seeks to approve AIFs that are open to all investors within two months and AIFs that are only open to qualified investors within one month from the date it receives a complete filing. However, it is not unusual for FINMA approval processes to take up to six months in practice.

### Open-Ended Funds

#### *FCPs*

FCPs are established by a tri-party fund contract between the investors, the fund management company and the custodian bank. The fund management company and the custodian bank must be authorised by FINMA, and the fund contract – with the consent of the custodian bank – requires FINMA approval. Under the fund contract, the fund management company undertakes to manage the assets of the fund indepen-

dently and in its own name, in accordance with the fund contract. It is further obliged to ensure that the investors participate in the investments proportionally to their assets.

#### *SICAVs*

FINMA must authorise all SICAVs and approve their articles of incorporation and investment regulations.

The establishment of a SICAV, for the most part, takes place according to company law rules under the Swiss Code of Obligations. The only exception relates to corporation formation rules pertaining to contributions in kind, acquisitions in kind and particular advantages, as CISA governs those situations specifically.

To establish a SICAV, an act of incorporation in the form of a public deed is required. The deed must include the articles of incorporation and the investment guidelines. In addition, the officers of the SICAV must be appointed upon the incorporation of the SICAV. SICAVs may delegate management to a third party, which must be a fund management company subject to prudential supervision by FINMA.

#### **Closed-Ended Funds**

Both the Swiss LP and the SICAF require FINMA authorisation, and FINMA approval is required for their limited partnership agreement (for LPs) and the articles of incorporation and investment regulations (for SICAFs).

#### *SICAF*

The rules of the Swiss Code of Obligations apply to the establishment of a SICAF, which itself must obtain a FINMA licence confirming that its international organisation is appropriate according to CISA. Also, the articles of incorporation and the investment guidelines are subject to review

regarding their compliance with the applicable law and must be approved by FINMA. Currently, there are no SICAFs registered with FINMA.

### *Swiss LP*

The establishment of a Swiss LP, for the most part, takes place according to the company law rules on ordinary limited partnerships as provided in the Swiss Code of Obligations. The general partner must be a Swiss corporation and can only act in such capacity for one Swiss LP, unless it holds a FINMA licence as a manager of collective assets. Only qualified investors are eligible to invest in a Swiss LP.

### **Unregulated Investment Companies**

CISA provides that an investment company organised as a company limited by shares is not within the scope of CISA, provided that it has qualified investors and registered shares only, or that its shares are listed on a Swiss stock exchange. To establish an unregulated investment company, the ordinary process to form and register a corporation pursuant to the rules of the Swiss Code of Obligations is followed. The articles of incorporation must provide that only qualified investors can become shareholders. No regulatory licensing process or approval will be required in connection with setting up an unregulated investment company.

### **2.1.3 Limited Liability**

#### **Liability Limitations**

Investors are only liable for their investment in a Swiss open-ended AIF. Funds and SICAVs may be structured as umbrella funds with various sub-funds. In such cases, investors are only entitled to the income and assets of the sub-fund in which they are invested, and each sub-fund is only liable for its own liabilities.

With respect to a closed-ended Swiss LP, the general partner's liability is not limited, while the limited partners are only liable for their investment. With respect to a SICAF, the shares are those of a typical corporation. Therefore, investors are only liable for full payment of their investment.

### **2.1.4 Disclosure Requirements**

#### **Prospectus Requirements**

##### *Open-ended funds*

Open-ended AIFs including FCPs and SICAVs must issue a prospectus with information on the investment policy, the investment techniques including leverage and short selling, and the maximum level of management fees. Furthermore, the prospectus must include the fund regulations.

Any fund that may be offered to retail investors requires a key information document (KID) for investors. The minimum information to be included is set out in FinSO.

##### *Closed-ended funds*

Swiss LPs must issue a prospectus including the partnership agreement, which is subject to FINMA approval. The SICAF must issue a prospectus as well, including the articles of incorporation and the fund regulations. Currently, there are no SICAFs registered with FINMA.

##### *Foreign funds*

Foreign AIFs not approved by FINMA for marketing to retail investors can only be marketed to qualified investors in Switzerland. For further details, please see **2.3.6 Rules Concerning Marketing of Alternative Funds**.

#### **Reporting Requirements**

Open-ended collective investment schemes and Swiss LPs must maintain accounts and publish

an annual and semi-annual report. The annual report must be published within four months after the end of the financial year and must include the following:

- financial statements;
- information on the number of shares/units issued and redeemed during the financial year as well as the total number of shares/units outstanding;
- an inventory of the fund's assets at market value;
- valuation principles;
- a breakdown of buy and sell transactions; and
- the performance of the open-ended collective investment scheme (possibly benchmarked against comparable investments).

The report should also include information on matters of particular economic or legal importance, such as amendments to regulations, change of manager, custodian bank, directors or officers, and legal disputes.

The semi-annual report must be published within two months after the end of the first half of the financial year. Among other things, it must include unaudited financial statements, information on shares/units issued and redeemed during that period and the number of shares/units outstanding, the inventory of the fund's asset at market value and a breakdown of buy and sell transactions.

Upon request, open-ended AIFs or their managers must provide information regarding the basis of the calculation of the net asset value per unit. Investors may also require further information on a specific transaction, including the exercise of voting rights, creditors' rights or risk management.

Investment companies not subject to CISA must observe the general rules on financial reporting.

Foreign AIFs have no specific reporting obligations in Switzerland as they do not need to be approved by FINMA for marketing in Switzerland. This is different for foreign retail funds.

## 2.2 Fund Investment

### 2.2.1 Types of Investors in Alternative Funds

Due to the high number of sophisticated investors, there is significant appetite for AIFs in Switzerland. The market consists mainly of institutional investors, including private and public pension funds, insurance companies, family offices and financial intermediaries, which invest on behalf of their clients in Switzerland and abroad. There is also a significant number of high net worth individuals who invest into AIFs directly, or through their family office.

### 2.2.2 Legal Structures Used by Fund Managers

Please see **2.1.1 Fund Structures** for details on Swiss-domiciled fund structures.

### 2.2.3 Restrictions on Investors

There are no restrictions per se on local investors investing in Swiss AIFs. However, certain financial institutions and other qualified investors, such as pension funds and insurance companies, are only allowed to invest a certain amount of their net assets in AIFs. In particular, pension funds can invest directly in AIFs if they are specifically mentioned by the investment regulations and if they comply with the general principles for safe and diversified asset management.

## 2.3 Regulatory Environment

### 2.3.1 Regulatory Regime

Among open-ended collective investment schemes, open-ended AIFs offer the broadest



range of investments and strategies. In particular, they are specifically designed to carry out investments that have only limited marketability, are subject to strong price fluctuations, exhibit limited risk diversifications or may be difficult to value. They may engage in short selling and borrow funds.

Specifically, open-ended AIFs may invest in the following:

- securities;
- units in collective investment schemes;
- money market instruments;
- sight and time deposits with a maturity of up to 12 months;
- precious metals;
- derivative financial instruments whose underlying assets are securities, collective investment schemes, money market instruments, derivative financial instruments, indices, interest rates, exchange rates, loans, currencies, precious metals, commodities or similar instruments; and
- structured products.

FINMA can also authorise other investments, including commodities and commodity certificates, if mentioned by the investment regulations. AIFs are subject to lower restrictions than funds for traditional investments, which means that:

- loans can be raised for an amount up to 50% of the fund's net assets;
- up to 100% of the fund's net assets can serve as collateral;
- overall exposure can be up to 600% of the fund's net assets; and
- they can engage in short selling.

Swiss LPs can invest in risk capital, including private equity, debt and hybrid forms. They can also engage in construction, real estate and infrastructure projects, as well as alternative investments in general. They can take control of companies and have a board seat with these companies to safeguard the interests of the limited partners.

Swiss AIFs must comply with the general investment restrictions set out for the pertinent type of collective investment scheme. They can enter into derivative transactions if the economic effects of using derivatives do not result in a breach of the investment objectives as outlined in the fund regulations and the prospectus.

Restrictions to certain assets including residential real estate in Switzerland, banks, financial institutions and other industries may apply but are not driven by fund regulation.

### 2.3.2 Requirements for Non-local Service Providers

The fund management company, SICAV, Swiss LP, SICAF and investment manager of a fund domiciled in Switzerland must be subject to prudential supervision by FINMA and hold the pertinent licence. Only a Swiss-domiciled bank subject to prudential supervision by FINMA can act as the custodian bank of a Swiss-domiciled fund.

While Switzerland needs to be the effective place of management for Swiss funds, certain functions can be delegated to third parties, both in Switzerland and abroad, if they have the required capability, knowledge, experience and licences.

### 2.3.3 Local Regulatory Requirements for Non-local Managers

Non-Swiss domiciled managers cannot manage funds domiciled in Switzerland because the effective place of management needs to be in Switzerland (please see **2.3.2 Requirements for Non-local Service Providers**).

### 2.3.4 Regulatory Approval Process

Please see **2.1.2 Common Process for Setting Up Investment Funds**.

### 2.3.5 Rules Concerning Pre-marketing of Alternative Funds

Differing from the EU, Switzerland does not have a legally defined concept of “pre-marketing” – ie, general information that falls short of marketing a specific fund. In general, any activity addressed directly at certain clients that is specifically aimed at the acquisition or disposal of units in the fund qualifies as a financial service, triggering the respective requirements under FinSA. Separately, marketing activities may constitute an offer for the purposes of CISA, but even mere advertising below such threshold may already trigger certain requirements thereunder.

While pre-marketing is not an activity defined by law, for a sales activity to be considered as a financial service pursuant to FinSA, the fund in question must in principle exist or its key terms should at least be defined. This is the case if it is already established or, at the least, if the key characteristics such as the name of the fund, the main parties, the investment policy, fees, and issuing and redemption terms that will enable investors to make an informed decision have been established.

On this basis, exploratory discussions with potential investors on their general interest to invest in a new fund that is still in the early

stage of its inception or abstract discussions with potential investors not relating to a specific product are not deemed to constitute a financial service or an offer/advertising for a fund. This is the case, for example, if information is provided on certain strategies or composites without reference being made to an actual specific product.

### 2.3.6 Rules Concerning Marketing of Alternative Funds

**New Regulatory Regime – Duties under FinSA**  
FinSA and its implementing ordinance FinSO entered into force on 1 January 2020. Under FinSA, regulatory duties in connection with the marketing of AIFs to clients in Switzerland include the following:

- a duty to register the individuals who actually perform financial services on behalf of the (foreign) financial service provider in a new register of client advisers (although client advisers of foreign financial service providers are exempt from the duty to register under the condition that the foreign financial service provider is subject to prudential supervision and limits its financial services to per se professional and/or institutional clients in Switzerland);
- all financial service providers active in Switzerland, including those marketing funds, must join an ombudsman office, unless they are targeting per se professional and/or institutional clients only in Switzerland;
- a duty to categorise clients into private clients, professional clients and institutional clients (see **2.3.10 Investor Protection Rules** for the investor categories);
- a duty to comply with expanded conduct rules; and
- a duty to comply with certain organisational requirements, including by disclosing or passing on fees, commissions and other

remuneration or financial benefits received by financial service providers from third parties in connection with the provision of financial services, except where waived.

Furthermore, the entry into force of FinSA and the revised CISA necessitated changes to the self-regulation material published by the Asset Management Association Switzerland (AMAS). For example, AMAS has updated the code of conduct, the guidelines for real estate funds and the model distribution agreement, with the changes or revisions having entered into force on 1 January 2022.

### **Fund Distribution as a Financial Service**

From a fund perspective, many circumstances of a former fund distribution under CISA are deemed to be a “financial service” pursuant to FinSA. The terms “purchase” and “sale” of financial instruments pursuant to FinSA go beyond circumstances in which there is an effective purchase or sale of a financial instrument. The new regulatory concept has a broad definition and also includes any related activity, such as any other action that specifically targets the purchase or sale of a financial instrument.

To be characterised as a financial service, contact with an “end investor” is a prerequisite. The provision of information on financial instruments to supervised financial intermediaries is generally not regarded as a financial service under the new law.

Whether roadshows are considered as a financial service depends on the specific circumstances. Given that an activity is only deemed to constitute a financial service if potential end investors are addressed directly (ie, specifically targeting the acquisition or disposal of a specific financial instrument by a client), in many

cases roadshows will not be characterised as a financial service in the sense of FinSA and its implementing ordinance FinSO. In certain cases, however, it cannot be excluded that roadshows will constitute an offer or at least an advertisement in the sense of FinSA/FinSO.

### **Consequences**

If the offer of units in a collective investment scheme is made to per se professional and/or institutional clients only, the foreign collective investment scheme no longer needs to appoint a Swiss representative and paying agent. However, this exemption does not cover high net worth retail clients and private investment structures created for them that have declared that they wish to be treated as professional clients in the sense of FinSA, as clients that opt out do not qualify as qualified investors per se. If they are being approached as part of the offering, it is still necessary to appoint a Swiss representative and paying agent.

### **Offer Versus Financial Service**

Pursuant to FinSA, an offer is “any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself.” According to FinSO, it must be “customarily intended to draw attention to a certain financial instrument and to sell it.”

Certain scenarios do not constitute an offer in the sense of FinSA. Besides the clarification with respect to making factual information available and the mention by name of certain financial instruments, the most important clarification is the new specification in FinSO that making information available at the specific request or initiative of the client without prior advertisement does not constitute an offer.

Unlike the term “financial service”, which triggers point-of-sale-related duties including conduct and organisational rules and the requirement for registration in the register for advisers, the characterisation as an offer is mainly relevant for the requirement to publish a prospectus and a KID, and with respect to fund-specific duties. Most importantly, a foreign collective investment scheme only needs approval if it is offered to non-qualified investors in the meaning of CISA. The same applies essentially with respect to the requirement for a representative and paying agent when a financial product is to be offered to investors other than per se qualified investors.

### Transitional Period

With the transitional provisions of FinSO, the effective date of practically all new FinSA requirements was postponed until 1 January 2022.

As a result, the new regulatory regime regarding the distribution or offering of collective investment schemes has applied since 1 January 2022.

### 2.3.7 Marketing of Alternative Funds

Open-ended Swiss AIFs can generally be marketed to all types of investors but it is permitted to restrict them to qualified investors only.

Closed-ended Swiss LPs and unregulated investment companies can only be marketed to qualified investors, regardless of their investment strategy. However, the shares of an investment company that are listed on a Swiss exchange can be made available to non-qualified investors without triggering a licence obligation.

For further details, see **2.3.6 Rules Concerning Marketing of Alternative Funds.**

### 2.3.8 Marketing Authorisation/Notification Process

No authorisation or notification is required by FINMA prior to the marketing of alternative funds taking place.

### 2.3.9 Post-marketing Ongoing Requirements

There are no ongoing requirements for firms that have marketed an alternative fund in Switzerland.

### 2.3.10 Investor Protection Rules

In order to protect unsophisticated investors, many Swiss and foreign funds are limited to qualified investors. Pursuant to CISA, qualified investors include professional and institutional clients pursuant to FinSA. Qualified investors in the sense of CISA also include retail clients for whom a financial intermediary in accordance with FinSA or a foreign financial intermediary that is subject to equivalent prudential supervision provides portfolio management or investment advice in accordance with FinSA within the scope of a permanent portfolio management or investment advisory relationship, provided they have not declared that they do not wish to be treated as such (together, QI CISA).

Specifically, QI CISA include the following:

- financial intermediaries as defined in the Banking Act, FinIA and CISA;
- insurance companies as defined in the Insurance Act;
- foreign clients subject to prudential supervision as per the two preceding points;
- central banks;
- public entities with professional treasury operations;
- occupational pension schemes with professional treasury operations and other occupa-

- tional pension institutions providing professional treasury operations;
- companies with professional treasury operations;
  - private investment structures with professional treasury operations created for high net worth retail clients;
  - national and supranational public entities with professional treasury operations;
  - large companies exceeding two of the following parameters:
    - (a) a balance sheet total of CHF20 million;
    - (b) a turnover of CHF40 million; or
    - (c) equity of CHF2 million;
  - high net worth retail clients and private investment structures created for them that have declared that they wish to be treated as professional clients in the sense of FinSA (opting out); and
  - Swiss and foreign collective investment schemes and their management companies that are not already deemed to be institutional clients within the meaning of Art. 4 para. 3 lit. a or c FinSA in conjunction with Art. 4 para. 4 FinSA that have declared that they wish to be treated as institutional clients.

QI CISA under the first four categories above and national and supranational public entities with professional treasury operations qualify as “institutional clients” in the sense of FinSA.

### 2.3.11 Approach of the Regulator

Collaboration with FINMA is considered to be positive and helpful, including in connection with new technologies. The authority is also generally willing to discuss regulatory questions and projects on an informal basis. In addition, licensing proceedings now take less time than in the past.

## 2.4 Operational Requirements

The restrictions on AIFs mostly concern the eligible investor type, as well as the investments and investment technique limitations provided for each of the categories. For more information, please see **2.3.1 Regulatory Regime**.

The protection of assets is addressed separately by the requirement to appoint a custodian bank, which must be a licensed Swiss bank for open-ended AIFs and SICAFs. In addition to the banking licence, the organisation must be adapted to the purpose of acting as a custodian bank. Its role is not limited to the custody of assets: it is also responsible for the payment flows as well as the issuance and redemption of fund interests, and it is further entrusted with control functions pertaining to the compliance of the fund management company with its legal obligations.

## 2.5 Fund Finance

In contrast to other jurisdictions such as the USA or the UK, the Swiss fund finance market is still immature and in its infancy. However, borrowings by AIFs from non-bank lenders and bank lenders are permissible, and demand for fund financing is on the rise in Switzerland. Subject to certain regulatory restrictions, regulated AIFs may take out loans under different types of credit facilities agreements (be it a subscription line facility, an asset-backed fund finance facility or a hybrid facility form) to finance their investment purposes or strategy.

### Limits on Financing Transactions

(Regulated) AIFs must observe the regulatory limitation on leverage set by the Federal Council, particularly when negotiating and entering into facility agreements and financing-related security and pledge agreements. The law only permits leverage up to a certain percentage ratio of the fund’s net assets. Currently, the limits for

financing transactions related to the main types of regulated investment funds with an alternative investment strategy include the following.

- “Alternative investment funds as such” may take out loans for an amount not exceeding 50% of the fund’s net assets; they may pledge or transfer as collateral up to a maximum of 100% of the fund’s net assets and may commit to an overall exposure of up to 600% of the fund’s net assets.
- “Alternative investment funds specialising in real estate investments” may take out loans; 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. For example, funds available at short notice are cash positions or bank account deposits at sight and on demand with maturities of up to 12 months, as well as guaranteed credit facilities with a bank for up to 10% of the fund’s net assets. The credit facilities must be included in the maximum level of encumbrance permitted by law – ie, the encumbrance may not exceed on average one-third of the market value of all real estate assets of the investment fund.
- “Other funds for traditional investments” may take out loans for an amount not exceeding 25% of the fund’s net assets. They may only pledge or transfer as collateral up to 60% of the fund’s net assets and commit to an overall exposure of up to 225% of the fund’s net assets.

FINMA may regulate any details, allow the transaction-related services to be provided by a regulated institution specialising in such transactions (prime broker) and/or grant exemptions on a case-by-case basis in relation to the restrictions

(but also the permitted investments, the investment techniques and the risk diversification).

## Structure of Securities

The structuring of the security package depends on the type of financing transactions in which an AIF is involved. For example, there have been transactions in which the fund management pledged its compensation claims vis-à-vis the fund in favour of the lender, the compensation of which had to be paid into a bank account opened with the lending bank.

Provided that the fund documentation allows for subscription line facilities, the security package may also include a pledge over the claims and rights against the investors related to their unfunded capital commitments as well as the pledge over the respective bank account. Nevertheless, the latter seems to be not as common as in other jurisdictions, since there seem to be more regulatory hurdles in Switzerland that need to be assessed and addressed on a case-by-case basis if a regulated alternative investment fund intends to enter into a financing transaction.

## 2.6 Tax Regime

### Cross-Border Offering of Financial Services into Switzerland

As long as they do not involve maintaining a physical presence in Switzerland, the activities performed by a non-resident service provider from abroad should not create liability for Swiss income tax on the part of the service provider. The same holds true for Swiss securities transfer tax and Swiss VAT, provided, in the case of the latter, that the service does not qualify as a (taxable) “electronic service” to a customer in Switzerland who does not hold a Swiss VAT number. If employees of the service provider constantly travel to Switzerland for business (eg, meetings

with prospects or customers) or if the service provider has employees living in Switzerland, a Swiss tax (and regulatory) exposure may result.

## **Fund Taxation: General**

Swiss tax law does not distinguish between alternative and retail or non-retail funds but looks at whether the fund is closed-ended or open-ended and what the legal form of the fund is. Special tax rules apply to funds that directly hold real estate investments.

## **Application of Swiss Fund Tax Rules to Foreign Investment Funds**

The Swiss tax treatment of foreign collective investment schemes follows the tax treatment (as described below) of the Swiss scheme with the closest resemblance in terms of legal form and supervision. For an investment vehicle to be recognised as a “collective investment fund” for Swiss tax purposes, one of the following tests must be met:

- FINMA has granted a licence for the distribution of units of the fund in Switzerland;
- the investment fund is under the supervision of a recognised financial regulator; or
- the investment fund’s purpose of offering opportunities for collective investment (see below) holds true.

If an investment vehicle’s purpose is to offer opportunities for collective investment, the Swiss tax authorities examine the following in particular:

- whether the investment vehicle has been created for a limited period of time;
- if there is “third-party management” in place – ie, the investor has no or very limited rights to exercise power over the entity’s investment management;

- whether an offering memorandum exists;
- if reporting is carried out in a way similar to reporting for regulated collective investment schemes; and
- whether the investment vehicle has/uses bodies typical for collective investment schemes, such as an investment manager, a custodian bank, etc.

## **Swiss Income Taxation of Funds**

Depending on the type of collective investment scheme (eg, whether the fund is open-ended or closed-ended, and depending on its legal form), a (foreign) collective investment scheme is treated as being either transparent or opaque for Swiss corporate income tax purposes. If the collective investment scheme is transparent for Swiss tax purposes, then it cannot constitute a taxable entity for Swiss corporate income tax.

Swiss FCPs, SICAVs and LPs are fiscally transparent, and their income is directly attributed to the investors, so the fund is not taxed on the income. By way of exception, funds that directly hold real estate are liable to income tax for the income from such real estate, while under Swiss tax law that income is exempt from tax in the hands of the fund investor.

SICAFs are always fiscally opaque entities (ie, subject to corporate income tax like corporations), and income distributed to the fund investor is taxable in the hands of the fund investor (if the fund investor is liable to taxation in Switzerland).

## **Swiss Income Taxation of Investors**

Swiss tax law distinguishes between private assets and business assets.

For individual investors liable to income taxation in Switzerland and holding the fund units as

private assets, the income earned by transparent funds, whether distributed or not, is generally subject to ordinary income tax at the level of the investors. To the extent the fund income is derived from qualifying capital gains, it is tax-exempt if disclosed separately in the fund accounts or distributed by a separate coupon. The profits from direct (Swiss or foreign) real estate investments by the funds are also tax-exempt in the hands of the investor. Qualifying capital gains realised upon the sale of units in a collective investment scheme are tax-exempt.

Individuals holding the fund units as business assets and legal entities, if liable to income taxation in Switzerland, are subject to income tax for any income realised by a transparent fund, excluding direct (Swiss or foreign) real estate income.

Distributions from a SICAF to investors liable for income taxation in Switzerland are subject to income taxes in the same way as for dividends paid by any corporation. For qualifying participations, income tax relief may apply for individual investors, or participation relief for corporate investors.

## Swiss Fund Reporting for Investor Income Taxation

In order for an investor to be able to benefit from the Swiss income tax exemptions for qualifying fund income items, it must be possible for the Swiss tax authorities to distinguish taxable income items from tax-exempt income items. Financial products that do not enable a distinction between taxable income and tax-exempt items might be more difficult to sell, assuming an investor is mindful of the after-tax position. Without the necessary documentation, the investor is subject to a discretionary tax assessment based

on a market rate of return (in a worst-case scenario, any return is treated as taxable income).

The Swiss Federal Tax Administration (FTA) maintains a publicly accessible product list (course listing) summarising the relevant Swiss tax values for various kinds of financial products currently available on the market. Issuers of financial products may directly approach the FTA to have a product registered in the course listing. For more frequent issues, it would be more common for issuers to register their financial products with SIX Financial Information, which offers a service feeding the data relevant for Swiss tax purposes into the FTA's list.

## Swiss Tax Withholding Obligations of Funds

Regardless of whether a (foreign) collective investment scheme would be considered transparent or opaque for Swiss income tax purposes, the net income (except qualifying capital gains and income from directly held real estate) earned by a transparent Swiss fund is generally subject to Swiss withholding tax at 35%, whether distributed or retained. In the case of a SICAF, only actual distributions are subject to withholding tax.

In order for a foreign (ie, "non-Swiss") investment fund not to become subject to Swiss tax withholding obligations, the following three criteria must be met:

- the majority of the board members must be resident outside of Switzerland, whereby the board in its entirety actually assumes a true control function (regarding management and legal compliance), which it actually exercises at the meetings;
- all board meetings must be held outside of Switzerland; and



- for open-ended collective investment schemes, the custodian bank in the regulatory sense must be located outside of Switzerland. The function of the custodian bank is divided into control tasks and technical tasks. While the control tasks relate to legal compliance (applicable laws and articles of incorporation, etc), the technical tasks primarily cover the safekeeping of the fund assets, the issue and redemption of fund units, and payment transactions. While the technical tasks may be delegated to a provider in Switzerland, the control tasks must be performed by a custodian bank, administrator or trustee located outside of Switzerland.

## Withholding Tax Relief for Investors

Investors liable for income taxation in Switzerland may generally claim back the Swiss withholding tax in full. Other 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 reclaim Swiss withholding tax based on an applicable double tax treaty.

## Swiss Securities Transfer Tax

Switzerland levies a tax on transfers for a consideration of certain domestic securities or similar foreign instruments. The Swiss securities transfer tax is triggered if:

- taxable securities are transferred;
- the transfer is made against consideration;
- a Swiss “securities dealer” (as defined in Swiss tax law) is involved as a party or intermediary; and
- no tax exemption applies.

“Taxable securities” include but are not limited to investment fund units – whether the issuer of the securities is in Switzerland or overseas.

The term “Swiss securities dealer” includes but is not limited to:

- banks in Switzerland;
- brokers and professional securities dealers in Switzerland;
- asset and wealth managers in Switzerland; and
- Swiss companies with balance sheet assets of more than CHF10 million in taxable securities.

A business established outside Switzerland and not acting through a Swiss branch office is not a “Swiss” securities dealer; the same is true for a Swiss securities dealer’s branch office outside Switzerland.

The tax is levied on the consideration owed for the transfer of the securities. For securities issued by a Swiss issuer, the tax rate is 0.15%. For securities issued by a non-Swiss issuer, the tax rate is 0.3%. The Swiss securities dealer owes the tax. If the Swiss securities dealer acts as an agent or on behalf of a customer, market practice is that the Swiss securities dealer charges the tax to the customer.

## Exemptions

Exemptions from Swiss Securities Transfer Tax can be available for specific transactions or securities, or for specific parties (“exempt investors”). If the tax exemption applies because of the nature of the transaction or security, no Swiss securities transfer tax is levied at all. If the tax exemption applies because of the nature of a party involved, then 50% of the tax will fall away while another 50% charge continues to apply, unless the other party is also an exempt investor.

Exemptions available because of the nature of the transaction or the nature of the security

include issuing securities, with some exceptions: for example, the issue of rights in non-Swiss collective investment funds is not an exempt transaction.

Exemptions available because of the nature of a party involved include, for example, collective investment funds.

## 3. Retail Funds

### 3.1 Fund Formation

#### 3.1.1 Fund Structures

The majority of Swiss retail funds are open-ended and can take the form of either FCPs or SICAVs. The following asset classes are suitable for retail investors:

- securities funds (Swiss equivalent to the European UCITS);
- real estate funds; and
- other funds for traditional investments.

Although closed-ended structures such as SICAFs can be used for retail funds, no such vehicle has been registered in Switzerland since CISA was introduced in 2007.

For further information on the fund structures available in Switzerland, please see **2.1.1 Fund Structures**.

Different market participants can act as investment managers for these funds. The fund manager for an FCP must be a FINMA-licensed Swiss fund management company in order to obtain FINMA approval. Nevertheless, the fund management company can delegate the investment management to a licensed investment manager of collective assets if this is deemed to be in the interest of the investors.

#### 3.1.2 Common Process for Setting Up Investment Funds

Please see **2.1.2 Common Process for Setting Up Investment Funds** for all types of funds except the Swiss LP, which is not available to retail investors.

#### 3.1.3 Limited Liability

Investors are only liable for their investment in a Swiss open-ended fund, including FCPs and SICAVs.

The Swiss LP is not available to retail investors. With respect to a SICAF, the shares are those of a typical corporation, so investors are only liable for full payment of their investment.

#### 3.1.4 Disclosure Requirements

##### Prospectus Requirements

Please see **2.1.4 Disclosure Requirements**, which applies to both AIFs and retail funds.

##### Reporting Requirements

Further to the reporting requirements outlined under **2.1.4 Disclosure Requirements**, foreign retail funds (UCITS) approved by FINMA are subject to a number of reporting obligations, which are the responsibility of the Swiss representative. Ordinary amendments to the fund's documents must be reported to FINMA and, if material, published in Switzerland within 30 days of the relevant changes becoming effective in the home jurisdiction. For certain corporate actions, specific reporting obligations must be met prior to the effective action.

## 3.2 Fund Investment

### 3.2.1 Types of Investors in Retail Funds

Swiss retail funds are mainly established for and purchased by local investors.

## 3.2.2 Legal Structures Used by Fund Managers

Please see **2.1.1 Fund Structures** for Swiss-domiciled fund structures.

There are two forms of regulated Swiss open-ended collective investment schemes: FCPs and SICAVs. Both are subject to the same investment rules, and are divided into categories based on their investment strategy.

The category typically used for retail investors is securities funds (the Swiss equivalent to UCITS funds), which offer a conservative investment strategy. Real estate funds can also be structured as FCPs and SICAVs, which are open to retail investors. Finally, open-ended funds in the category of “other funds for traditional investments” are considered to follow strategies that present risks comparable to those of the other retail funds.

## 3.2.3 Restrictions on Investors

Anyone can invest in retail funds in Switzerland; there are no restrictions.

## 3.3 Regulatory Environment

### 3.3.1 Regulatory Regime

Securities funds are open-ended collective schemes that invest their assets in securities and comply with the laws of the European Union. They may invest in transferable securities issued on a large scale and in non-securitised rights with the same purpose traded on a stock exchange or on another regulated market. Permissible investments include securities, derivatives, shares of collective investment schemes, money market instruments and short-term deposits. However, precious metals, precious metal certificates, commodities or commodity certificates are prohibited. Short selling is not permitted. Admissible investment techniques

include, with limitations, securities lending, repurchase agreements, credit up to 10% of the net assets, and the pledging and transferring as security of up to 25% of net assets.

Real estate funds may invest, in particular, in real estate, real estate companies, interests in real estate funds and real estate assets abroad. The use of derivatives is permissible, subject to limitations. As security for loans, real estate funds may not encumber their real assets on average for an amount exceeding one-third of their market value.

### 3.3.2 Requirements for Non-local Service Providers

Please see **2.3.2 Requirements for Non-local Service Providers**.

### 3.3.3 Local Regulatory Requirements for Non-local Managers

Swiss funds can only be managed by a Swiss fund management company or an authorised Swiss fund in corporate form.

### 3.3.4 Regulatory Approval Process

Please see **2.3.4 Regulatory Approval Process**.

### 3.3.5 Rules Concerning Pre-Marketing of Retail Funds

See **2.3.5 Rules Concerning Pre-marketing of Alternative Funds**.

### 3.3.6 Rules Concerning Marketing of Retail Funds

Registration as a client adviser and affiliation with an ombudsman may be required for the marketing of retail funds. Please see **2.3.6 Rules Concerning Marketing of Alternative Funds** for further details.

### 3.3.7 Marketing of Retail Funds

All Swiss funds (except Swiss LPs) and investment companies can be marketed to anyone, unless they are specifically restricted to qualified investors in the fund documentation. Foreign UCITS funds approved by FINMA may also be offered to all investors.

### 3.3.8 Marketing Authorisation/Notification Process

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 KID and the place where these documents can be obtained by the retail investors, if they are already available.

Unlike advertising Swiss retail FCPs and SICAVs, advertising foreign retail funds triggers the marketing authorisation obligations under CISA. Those marketing foreign open-ended retail funds must publish a KID for retail investors under FinSA. If the offering of fund units 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.

### 3.3.9 Post-marketing Ongoing Requirements

There are no ongoing requirements for firms that have marketed a retail fund in Switzerland.

### 3.3.10 Investor Protection Rules

Swiss retail investors can only invest in Swiss open-ended products that are not restricted to qualified investors; they may not invest in Swiss LPs. They may only invest in foreign funds established as UCITS and approved by FINMA for marketing in Switzerland.

An open-ended Swiss fund structured as an “other fund for alternative investments” must include a written warning regarding the risks involved in the investment on the front page of the prospectus.

### 3.3.11 Approach of the Regulator

Please see **2.3.11 Approach of the Regulator.**

## 3.4 Operational Requirements

Please see **3.3.1 Regulatory Regime** regarding investment and borrowing limitations.

For information on the protection of assets, conduct rules and best practices, please see **2.4 Operational Requirements.**

## 3.5 Fund Finance

In principle, retail investment funds may take out loans in Switzerland for the purpose of efficient portfolio management. However, such borrowings are subject to certain regulatory restrictions that depend on the type or category of the respective retail investment fund. Currently, the following restrictions apply to retail investment funds that can be classified as follows, due to their holdings of investments (portfolio).

- Securities funds may take out loans for an amount not exceeding 10% of the fund’s net assets, but only on a temporary basis. Furthermore, such retail investment funds may only pledge or transfer (securities) as collat-

eral up to a maximum of 25% of the fund's net assets.

- Real estate funds may take out loans but, 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. For example, funds available at short notice are cash positions or bank account deposits at sight and on demand with maturities of up to 12 months, as well as guaranteed credit facilities with a bank for up to 10% of the fund's net assets. The credit facilities must be included in the maximum level of encumbrance permitted by law – ie, the encumbrance may not exceed on average one-third of the market value of all real estate assets of the investment fund.
- Other funds for traditional investments may take out loans for an amount not exceeding 25% of the fund's net assets. Furthermore, such retail investment funds may only pledge or transfer as collateral up to 60% of the fund's net assets and commit to an overall exposure of up to 225% of the fund's net assets.

FINMA may regulate any details and/or grant exemptions on a case-by-case basis in relation to the restrictions (but also the permitted investments, the investment techniques and the risk diversification). Please also see **2.5 Fund Finance** with respect to possible security packages.

### 3.6 Tax Regime

Swiss tax law does not distinguish between sorts of funds (alternative, retail or non-retail) but rather between the type of legal structure of the fund.

Please see **2.6 Tax Regime** for further comments.

## 4. Legal, Regulatory or Tax Changes

### 4.1 Recent Developments and Proposals for Reform

#### Limited Qualified Investor Fund (L-QIF)

A new type of investment fund is expected to be introduced in Switzerland in the course of 2023: the L-QIF, which is neither subject to approval nor supervised by FINMA. However, it is only open to qualified investors and must be managed by an institution that is approved and supervised by FINMA, typically a fund management company (administration and portfolio management). Therefore, there will only be indirect supervision by FINMA. It will be quicker and more cost-efficient to set up an L-QIF compared to the currently available Swiss fund structures.

On the investor side, pension funds and insurance companies in particular have expressed their interest in the new structure. The L-QIF will offer qualified investors a Swiss alternative to similar foreign fund structures, and is most comparable to Luxembourg's reserved alternative investment fund (RAIF). L-QIFs will be open exclusively to qualified investors. The launch of the new fund structure will not include the introduction of a new legal structure. Instead, it will be possible to launch an L-QIF in the form of an existing Swiss fund structure, namely a contractual fund, a SICAV or a Swiss LP. The bill adopted by the Federal Assembly does not contain any restrictions on possible investments or risk diversification, thus offering financial market participants maximum freedom in this regard. Only financial institutions subject to prudential supervision by FINMA can manage an L-QIF.

#### Sustainable Finance

As part of its mission to further strengthen the Swiss asset management industry's core role

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in sustainable finance, AMAS is taking the lead by laying down the framework conditions for manufacturing and managing sustainable collective investments. With this in mind, AMAS has developed a principle-based self-regulation for sustainable asset management. For the first time, institutions that produce and manage sustainable financial products are subject to binding organisational, reporting and disclosure obligations. AMAS has taken a principle-based approach to develop this self-regulation for its members, which will enter into force on 30 September 2023. With its explicit references to both institutional and product levels, it dovetails with the self-regulation process of client advisory introduced by the Swiss Bankers Association.

**Pestalozzi Attorneys at Law Ltd.** is a multicultural Swiss business law firm that has focused on high-end work for domestic and international clients since 1911. Pestalozzi lawyers are strong and empathetic, and are known for their truly independent approach to advising and representing their clients. The firm guides and supports its clients in their strategic business decisions, anticipates their future challenges and helps them solve their critical issues. Being fully integrated, Pestalozzi encounters no inter-

nal limits in shaping the most competent and efficient teams for clients' needs. With more than 100 professionals in Zurich and Geneva, the firm is at home in Switzerland's two main commercial hubs, and has developed a wealth of experience in its key industries of banking, life sciences, commodity trading and insurance. While being locally embedded, Pestalozzi has also developed sought-after expertise in dealing with multi-jurisdictional transactions and disputes.

## Authors



**Andrea Huber** is a partner and a member of Pestalozzi's financial services group. She specialises in banking and regulatory matters, including FinSA and FinIA, asset management/

investment funds, fintech, capital market transactions, compliance and white-collar crime. Andrea regularly represents clients in proceedings before the Swiss Financial Market Supervisory Authority (FINMA), the SIX Swiss Exchange and the CDB Supervisory Board (VSB Aufsichtskommission), and is an Authorised Representative of Issuers at the SIX Swiss Exchange.



**Oliver Widmer** is a partner and head of Pestalozzi's Financial Services Group and a member of the Private Clients Group. He primarily advises domestic and international banks, financial

institutions, wealth management service providers and high net worth individuals on banking, finance and capital markets matters.



**Nils Harbeke** is a partner and the head of Pestalozzi's tax practice group. He has particular strength in cross-border tax work and tax work for international clients, both

inbound and outbound. He has gained special experience and knowledge in tax work for regulated industries. Nils frequently works for leading Swiss and international financial institutions and life sciences companies.

Contributed by: Andrea Huber, Oliver Widmer and Nils Harbeke, **Pestalozzi Attorneys at Law Ltd.**

## **Pestalozzi Attorneys at Law Ltd.**

Loewenstrasse 1  
8001 Zurich  
Switzerland

Tel: +41 44 217 91 11  
Fax: +41 44 217 92 17  
Email: [zrh@pestalozzilaw.com](mailto:zrh@pestalozzilaw.com)  
Web: [www.pestalozzilaw.com](http://www.pestalozzilaw.com)





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