



Modified Rules on Public Advertising of Foreign Investment Funds in Switzerland

Eric Stupp, Bär & Karrer Attorneys at law, Zurich, explains the new rules on advertising foreign investment funds. Stupp is the Head of the Financial Services Practice Group at the firm.

The offering of financial services into Switzerland on a purely cross-border basis is in many instances possible without triggering any authorization requirements under Swiss law. The professional offering of foreign fund units in Switzerland, however, follows a different regulatory route which is specified in the Circular of the Swiss Federal Banking Commission on Public Advertisement.¹ Foreign funds may only be professionally marketed in Switzerland if each of the funds to be offered has obtained an authorization by the Swiss Federal Banking Commission.

Application for Authorization

An application for authorization of a foreign investment fund must be accompanied by proof that the foreign investment fund meets all the prerequisites of the Swiss fund regulations. The authorization process is rather time-consuming and cumbersome. Thus, the application as well as the documentation of the fund must be submitted to the Swiss Federal Banking Commission in an official Swiss language (i.e. German, French or Italian). This means that documents that exist only in an English version need to be translated.

Exceptions

The Circular of the Swiss Federal Banking Commission on Public Advertisement provides important carve-outs to the authorization requirement. As a consequence, the Circular is

of the utmost importance for those foreign fund providers and financial intermediaries in Switzerland, alike, who intend to promote foreign, unregistered funds in Switzerland.

As a rule of thumb, foreign investment funds which have not been authorized by the Swiss Federal Banking Commission may only be sold to investors in Switzerland if no 'public advertising', as defined by the Circular, occurs. Advertising is considered to be public if various qualitative and quantitative requirements are fulfilled. The Circular considers the use of any type of advertising media that serves to directly or indirectly offer or distribute investment funds as 'Advertising' for the purposes of the Circular. The 'Advertising' is public if more than 20 persons during a fiscal year are targeted insofar as these 20 persons do not fall within a distinct category of qualified intermediaries or investors. With respect to the 20-persons rule, it does not matter whether the persons are contacted simultaneously or whether the advertising was successful.

No numerical limitation exists if the foreign investment funds are exclusively offered to institutional investors with professional treasury functions. The same is true if the foreign investment funds are sold through banks, broker-dealers and independent asset managers to their customers - as long as these intermediaries are entitled to take investment decisions

¹ Circular of the Swiss Federal Banking Commission: Public Advertisement in the sense of the Swiss Investment Fund Regulations

(Public Advertisement/Investment Funds), dated 28 May 2003 (last modification: 25/26 January 2006).

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on behalf of the customer, based on written asset management contracts.

Liberalising Regulatory Framework

The Swiss Federal Banking Commission has recently liberalised the regulatory framework of public advertising of foreign investment funds by amending its circular on public advertising thereby, finally, responding to requests put forward by the financial services industry.


From 1 April 2006, banks and securities dealers are allowed to provide information on investment funds, which are not admitted to public distribution in Switzerland, to high-net-worth individuals.² They may also sell these fund units to such persons without triggering the respective registration requirements under the Swiss Federal Act on Investment Funds provided that:

- the bank/securities dealer has entered into a written investment advisory agreement with the client;

- the client proves that he/she directly or indirectly holds a minimum of 5 million Swiss francs in financial assets (which need not necessarily be deposited with the respective bank/securities dealer).

Also, the investment advisory agreement must be concluded for an indefinite time and the respective bank/securities dealer is required to periodically monitor the financial resources of the client.

Independent asset managers, which are not subject to supervision by the Swiss Federal Banking Commission, do not profit from this liberalisation. They have, therefore, to enter into asset management agreements and not only investment advisory agreements in order to be able to promote and sell unregistered foreign investment funds to their customers.

As a final remark, one should bear in mind that a thorough analysis is necessary in order to assess whether a foreign security qualifies as a foreign fund under the Swiss fund regulations. 

² Note 16a and 16b of the Circular of the Swiss Federal Banking Commission on Public Advertisement.