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MONTHLY REVIEW OF HEDGE FUNDS & ALTERNATIVE INVESTING

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# SWISS FUND DISTRIBUTION

 **AIMA CANADA DEBATES COMMUNICATION  
OF HEDGE FUND RISK**

 **AIMA CANADA HITS THE LINKS FOR CHARITY**

 **MAY 2015 HEDGE FUND PERFORMANCE TABLES**

# Swiss Fund Distribution



Colin Vidal, of  
Hugo Fund Services,  
discusses the recent  
changes in Switzerland's  
regulatory landscape



**Colin Vidal**  
Hedge Fund Analyst  
& Portfolio Manager



Swiss legislators have taken a very different approach towards fund regulation than their European counterparts. In their revision of the Collective Investment Scheme Act (CISA) with regard to distribution to qualified investors, the Swiss focus exclusively on 'acts of distribution' and have done away with such requirements as regulatory reporting or the establishment of local substance. The resulting framework is pragmatic, easily implementable, economical and, more importantly, allows any fund structure from any jurisdiction to continue to raise assets in Switzerland.

With the 1 March, 2015 deadline for compliance right around the corner, the requirements are by now wellknown. As a brief reminder and breaking it down to its most basic form (see diagram on next page), a fund has three agreements to put in place:

1. A representation agreement appointing a Swiss FINMA- regulated representative;
2. Distribution agreement(s) appointing any regulated entity(ies), soliciting investors in Switzerland, as a distributor;
3. A paying agency agreement appointing a Swiss bank as its paying agent

Without delving into all the details, there are of course other requirements such as the need for mandatory wording and the need for suitability questionnaires for prospective investors. The reality is of course slightly more complex but remains just as straightforward to comply with.

Nonetheless, as with any new legislation, many grey areas persist. As one of the earliest Swiss representatives for qualified investors, Hugo Fund Services has analysed hundreds of fund structures and investment managers for representation. From this due diligence, a variety of interesting questions and issues have arisen; we discuss just a few below.

## **Collective Investment Scheme Act**

Under CISA, a representative must verify that any entity involved in distribution in Switzerland is authorised to distribute collective investment schemes and is subject to regulatory supervision in its jurisdiction. Unfortunately no common definition of distribution exists across regulatory bodies and jurisdictions; therefore, the issue becomes one of interpretation of the law and a clear understanding of the spirit of the law. This has been particularly relevant in dealing with US investment managers.

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With the lion's share of managers coming from the United States, Hugo has had to contend with the challenge of matching US securities law with Swiss fund law – a virtually impossible task. US managers registered as investment advisors with the SEC rely mostly on two specific exemptions from the general provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933 to distribute shares of their funds in the US. Although an accepted industry practice, this is not a specific authorisation for distribution of funds and therefore a strict interpretation of the law would preclude a representative from concluding a distribution agreement for Switzerland. Recall that under CISA, the representative must enter into a distribution agreement with the distributing entity; typically the investment manager when the fund acts as its own distributor. Only a deeper understanding of the law and what it is attempting to achieve makes it possible to find a solution to this regulatory conundrum, thereby allowing US managers to continue to access the Swiss qualified investor market under certain conditions.

**The SFAMA Solution**

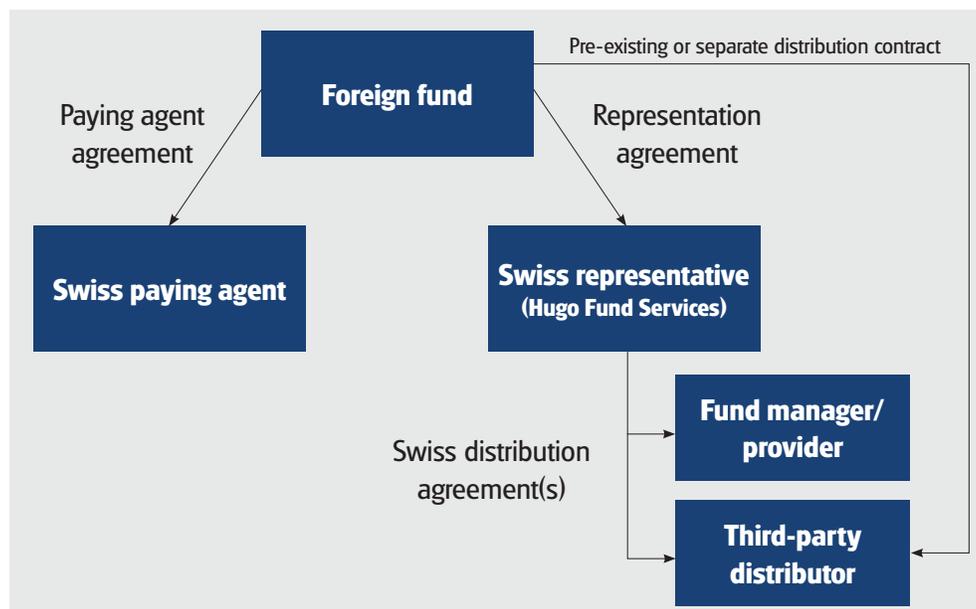
Another set of issues has arisen within the private equity universe, where CISA seems to be particularly ill-adapted. One issue comes from the fact that often a private equity vehicle is marketed on the basis of a draft PPM and therefore without a fund actually in existence. This begs the question, whether the offering of a 'not yet existing' fund constitutes distribution and requires the appointment of a representative and paying agent. This is actually addressed by the Swiss Fund and Asset Management Association (SFAMA) that concludes an act of distribution exists if a promoter has established the main characteristics of the fund (investment policy, contracting parties, fees, etc). Therefore, the appointment of a representative and paying agent is required ahead of any distribution activities to potential limited partners and maintained as long as a Swiss investor remains in the fund. Nonetheless, this need not be kept in place if no Swiss investors subscribe to the fund.

The pre-launch offer of a private equity vehicle creates another question in terms of the requirement to insert Swiss mandatory wording in the offering documents, or more commonly for private equity funds the limited partnership agreement. The representative actually has a duty to ensure that such wording is included and must verify all final documents to be used for marketing in Switzerland. CISA provides little to no guidance regarding this but prudence suggests that a Swiss section be added in the initial draft of the offering documents with Swiss mandatory wording identifying the representative appointed by the promoter.

**Conclusion**

The aforementioned examples are just a few out of many existing issues and there are certainly more to come as we all navigate these uncharted waters. Yet these examples highlight the complexities that can exist when dealing with new legislation and especially with disparate regulatory jurisdictions, for which ultimately there may very well be no perfect solution. As this is a new industry with a new set of actors, there is no formal business practice to rely on. Ultimately, it is the experiential learning gained from working with a very diverse set of structures and numerous funds that has enabled Hugo Fund Services to find the best and most legally appropriate solutions for its clients. \*

*Colin Vidal has 20 years of experience gained across the fund and asset management industries as a hedge fund analyst, portfolio manager of several fund of funds as well as in business development for a private equity firm. Positions held were at Aforge Capital Management, Bay Capital Management and Access International Advisors in New York.*



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