

European Securities and
Markets Authority (ESMA)
103 rue de Grenelle
F-75007 Paris

Basel, 8 January 2015
A.170.2/MTI

Swiss Bankers Association response to the ESMA consultation paper “Call for evidence - AIFMD passport and third country AIFMs” (submission online on the ESMA website)

Dear Sir or Madam,

We thank you for the opportunity to contribute to the call for evidence in relation to the AIFMD passport and third country AIFMs.

The Swiss Bankers Association (SBA) is the leading professional organization of the Swiss financial centre. It was founded in 1912 as a trade association and today has nearly 317 institutional members and approximately 18,500 individual members. Its main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both at home and abroad.

Please note that our contribution to the above mentioned consultation deals firstly with the significance of the EU marketing and management passport for Switzerland, and secondly with question 29 (i.e. equivalence between the Swiss regulatory regime and the EU regulatory regime).

I. Significance of the EU marketing and management passport for Switzerland

EU market access is of fundamental importance to Swiss banks and the Swiss asset management industry. From that perspective, we fully endorse, in principle, the extension of the passport to the AIFMs and AIFs of third countries. Moreover, we are confident that the extension of the passport for third countries will be positive for the European Union, as more providers will deepen the fund market. Competition will increase to the benefit of investors, certainly in terms of the breadth of products offered and most probably also in terms of fees. Without passporting the complexity of the heterogeneous local regulations in the different EU Member States will effectively hamper EU-wide distribution of EU AIFs to EU clients to the detriment of the latter.

By 22 July 2015, ESMA will have to submit to the European Parliament, the Council and the Commission its advice on the extension of the passport to the AIFMs and AIFs of third countries.

Your advice will be based on Article 67 para. 2 b of AIFMD. This stipulates the following:

- i. compliance of EU AIFMs with all the requirements established in the AIFMD, with the exception of Article 21;*
- ii. compliance of non-EU AIFMs with Articles 22, 23 and 24 in respect of each AIF marketed by the AIFM and, where relevant, with Articles 26 to 30;*
- iii. existence and effectiveness of cooperation arrangements for the purpose of systemic risk oversight and in line with international standards between the competent authorities of the Member State where the AIFs are marketed, in so far as applicable, the competent authorities of the home Member State of the EU AIF and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established;*
- iv. any issues relating to investor protection that might have occurred;*
- v. any features of a third-country regulatory and supervisory framework which might prevent the effective exercise by the competent authorities of their supervisory functions under this Directive.*

Paragraph 4 of Article 67 mentions, that: *“if ESMA considers that there are no significant obstacles regarding investor protection, market disruption, competition and the monitoring of systemic risk impeding the application of the passport to the marketing of non-EU AIFs by EU AIFMs in the Member States and the management and/or marketing of AIFs by non-EU AIFMs in the Member States in accordance with the rules set out in Article 35 and Articles 37 to 41, it shall issue positive advice in this regard”.*

We would like to draw your attention to the fact that concerning i. and ii., Switzerland has implemented the AIFMD standards in its system of regulation. Therefore, Switzerland grants market access to EU AIFMs (as well as to UCITS management companies). Hence, Switzerland is ready for EU market access. In section II you will find a comparative analysis of the conformity of our regulation to the AIFMD. Despite the lack of an explicit equivalence requirement, Switzerland has already implemented all AIFMD standards in its regulation to ensure that it meets the market access conditions.

Concerning iii., we would like to highlight that Switzerland entered into cooperation agreements with the EU member states in July 2013. Furthermore, FINMA has been an ordinary member of IOSCO since 1996 and actively participates in the meetings of the IOSCO Board and the European Regional Committee, as well as various committees and task forces relevant to Switzerland.

Provision iv. should not pose any problems. In fact, Switzerland has further strengthened investor protection with the partial revision of the Collective Investment Schemes Act (CISA).

In respect of provision v., FINMA, which is responsible for the prudential and conduct oversight of banks, insurance companies, exchanges, securities dealers, *collective investment schemes*, distributors and insurance intermediaries, is in a position to ensure that it can perform its supervisory functions. According to ESMA, Switzerland has “effective ongoing supervision and enforcement”. Moreover, according to your assessment and evaluation regarding the regulatory equivalence under EMIR “The Swiss financial supervisory regime is robust with a track record of effective supervision of financial markets including during the recent financial crisis”¹.

In the second part of this paper we would like to draw your attention to a comparison between Swiss legislation and AIFMD.

II. Analysis of the AIFMD-compatibility of Swiss regulation

First of all we would like to point out that there is, to a large extent, equivalence between the Swiss regulatory regime and the EU regulatory regime. For greater clarity, we will deal hereafter with the legal framework applicable to *collective investment schemes*, *tax matters*, and finally *money laundering*.

Revision of the Collective Investment Schemes Act

On 1 March 2013, most of the provisions of the revised Collective Investment Schemes Act (CISA) and of the consequently amended Collective Investments Schemes Ordinance (CISO) entered into force. One of the main objectives of the revision was to close gaps in Swiss regulation resulting from the continued development of international standards, in line with the EU’s Alternative Investment Fund Managers Directive (AIFMD).

- a. General authorization requirement for asset managers of collective investment schemes

Modelled on the AIFMD, the scope of the CISA was extended to cover all asset managers of collective investment schemes, i.e. in particular, it now also covers “persons who manage *foreign collective investment schemes* in or from Switzerland” (Art. 2 para. 1 let. c CISA).

The authorization requirements have been increased in some cases, and brought in line with the requirements under the AIFMD.

- b. De minimis exceptions

As is the case with the AIFMD, the CISA also has a de minimis rule.

¹ “ Final report / Technical advice on third country regulatory equivalence under EMIR – Switzerland ”, ESMA, September 2013

Art. 2 para. 2 let. h CISA sets out rules exempting asset managers of collective investment schemes from the requirement to obtain authorization pursuant to Art. 13 para. 2 let. f CISA, provided certain conditions are met.

First and foremost, the investors in the collective investment scheme have to be qualified investors. Article 1b CISO also sets out principles for the calculation of the relevant thresholds. Unlike the AIFMD, the CISA does not provide for an exemption to the authorization requirement for cases in which the thresholds are occasionally exceeded. Hence the CISA is stricter than European regulation in this respect.

c. Authorization requirements

The partial revision of the CISA added some more detailed provisions on the capital requirements of an asset manager and on the appropriate organizational structure. The new Art. 12a CISO contains some significant provisions on organizational structure. As in the AIFMD, the asset manager must ensure it has proper and appropriate risk management, an internal control system and a compliance system covering its entire business activities.

d. Custodian banks

The partial revision of the CISA led to more specific and stricter requirements regarding the custodian banks of Swiss collective investment schemes. The new and amended provisions are aimed at improving investor protection and adopting international standards (in particular AIFMD), and also continue to allow Swiss custodian banks to perform the safekeeping of fund assets for foreign collective investment schemes if delegated to them.

The CISA previously contained only general provisions regulating the organization and activity of custodian banks, and more specific detail has been added as part of the partial revision of Swiss collective investment schemes legislation. In particular, detailed provisions have been adopted which require the custodian banks (like all CISA licensees) to ensure that it has an appropriate risk management, an internal control system and a compliance system, with the corresponding separation of functions from the operating units (Art. 12a and Art 102a et seq. CISA, Art. 77 et seq. CISO-FINMA). Furthermore, new detailed provisions with regard to the duties of the custodian bank in general and to the delegation of safekeeping have been implemented in the CISO in order to align the respective rules with the AIFMD (Art. 104 and 105a CISO). For example, specific duties regarding the timely settlement of transactions, the safekeeping of assets held in custody and the ownership verification and record keeping have been implemented (Art. 104 para 1 CISO). Moreover, it has been specified, in Art. 105a CISO, that a custodian bank must, when it delegates the safekeeping of assets to a third-party custodian, i.a., verify and monitor whether the latter possesses an appropriate organisational structure and the specific qualifications required and whether it is subject to external audits.

In addition, the liability of custodian banks of Swiss collective investment schemes was increased in order to largely approximate the liability of a custodian bank to the standard as set forth by the AIFMD. According to Art. 145 para. 3 CISA, if a custodian bank assigns the fulfillment of a task to a third party, it is liable for the losses caused by that third party

unless it proves that it applied the degree of due diligence required in the given circumstances with regard to selection, instruction and monitoring (reversal of the burden of proof). Furthermore, the safekeeping of financial instruments may, in general, be transferred only to regulated third-party custodians and collective securities depositories (Art. 73 para. 2^{bis} CISA).

When adopting the liability regime as set forth in Art. 145 para 3 CISA, the legislator took, i.a., into consideration that, in 2010, Switzerland enacted a new Intermediated Securities Act (FISA) which regulates the custody of certificated and uncertificated assets by custodians and ensures the protection of property rights of investors (Art. 1 FISA). This act strengthens the position of investors (such as collective investment schemes) vis-à-vis their custodians (e.g. Art. 17 FISA states that, if a custodian bank is subject to compulsory liquidation, the investors' securities are excluded *ex officio* from the custodian's estate).

Although the Swiss regulatory liability regime for the losses of financial instruments by the custodian bank of Swiss collective investment schemes has not been completely aligned to the regime set forth by the AIFMD, the above described recent adaptations to the Swiss legislation have the same effect, because, in practice, the liability of the custodian bank may be contractually increased between the fund, the depository, and the sub-depository.

e. Remuneration policy

The ESMA Guidelines state that when delegating portfolio management or risk management activities according to Article 20 of the AIFMD, the AIFM must ensure that:

- the entities to which portfolio management or risk management activities have been delegated are subject to regulatory requirements on remuneration that are equally as effective as those applicable under these Guidelines; or
- appropriate contractual arrangements are put in place with entities to which portfolio management or risk management activities have been delegated in order to ensure that there is no circumvention of the remuneration rules set out in the present Guidelines. These contractual arrangements should cover any and all payments made to the delegates' identified staff as compensation for the performance of portfolio or risk management activities on behalf of the AIFM.

Where asset management is outsourced to Switzerland, these provisions already apply today.

Swiss AIFMs will have to comply with the AIFMD once the AIFMD passport is available for third countries. However, Switzerland already has rules in place today that provide equivalence (cf. SFAMA Code of Conduct, margin no. 43 which refers to FINMA Circular 2010/1 Minimum standards for remuneration schemes of financial institutions).

Tax matters

Double taxation agreements (DTAs) prevent double taxation and thus also remove obstacles to cross-border economic transactions. DTAs also govern administrative assistance in tax matters, which enables countries to exchange information for tax purposes. Switzerland has been applying the OECD standard in full since 2009. Since 2012, the standard also allows group requests.

Switzerland has also signed tax information exchange agreements (TIEAs). Unlike DTAs, which primarily govern the avoidance of double taxation, TIEAs deal solely with the exchange of information.

Overall, Switzerland has signed 49 DTAs in accordance with the international standard, of which 41 are in force, and 7 TIEAs, of which 3 are in force².

Moreover, on 19 November 2014, the “Federal Council approved a declaration on Switzerland joining the multilateral agreement on the automatic exchange of information in tax matters. This international agreement, which was developed within the framework of the OECD, forms a basis for the future introduction of the cross-border automatic exchange of information. The question regarding the countries with which Switzerland should introduce this exchange of data is not affected by the signing of the multilateral agreement; it will be presented to Parliament separately at a later stage.”³

Money laundering⁴

Switzerland attaches great importance to the integrity of its financial centre. It is engaged in developing standards aimed at fighting money laundering and terrorist financing at the international level and applies them consistently at the national level. Switzerland actively supports the fight against money laundering at a multilateral level. It is particularly involved in the Financial Action Task Force against Money Laundering and Terrorist Financing (FATF). By swiftly implementing the revised FATF recommendations (Financial Action Task Force), Switzerland is underscoring that it attaches high priority to its international obligations.

The Federal Council adopted the dispatch on the new Federal Act for Implementing the Revised FATF Recommendations in December 2013. The aim was to combat money laundering and terrorist financing even more efficiently. The Swiss Parliament approved the bill with minor changes in December 2014. The revised legislation will come into force

² <https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/doppelbesteuerung-und-amtshilfe.html>

³ <https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-55327.html>

⁴ <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/fighting-international-crime/money-laundering.html>

in 2015. Therefore the revised FATF Recommendations have now been transposed into national law.

To conclude, we would like to stress that Switzerland has a very strong interest in the extension of the EU passport. As mentioned above, it has already adapted its regulation in line with the AIFMD and is confident that such an extension will be positive for the European Union and in the end serve the interest of investors.

We thank you very much for your attention. Should you have any further questions, please do not hesitate to contact us at any time.

Yours sincerely,

Swiss Bankers Association

A handwritten signature in black ink, appearing to read 'J. Schaad', followed by a long, sweeping horizontal flourish.

Jakob Schaad

Mireille Tissot

Vice-President
of the Executive Board

Member of Senior Management