

**PRIVATE PLACEMENT OF INVESTMENT FUNDS IN SWITZERLAND:
LONG AWAITED DRAFT SWISS FEDERAL BANKING COMMISSION ("FBC") CIRCULAR RE PUBLIC MARKETING HAS
BEEN PUBLISHED ON 7 NOVEMBER 2002 - COMMENTS MAY BE FILED WITH FBC UNTIL 6 JANUARY 2003**

FBC says that proposed Circular codifies and clarifies its existing practice although draft contains new aspects worth discussing.

Key Points:

- public marketing triggers license requirement for funds as well as distributors
- definition of public marketing: use of marketing devices of any kind which serve to directly or indirectly offer funds
 - type and form of marketing devices irrelevant (e.g. fact sheets and price publications considered marketing)
 - rule: any marketing directed to more than 20 investors in total over the lifetime of the fund considered public marketing
 - exemptions: no public marketing (i.e. targeting of more than 20 investors permitted) if there is a "qualified relationship" between targeted investor and person/entity from which advertising originates
 - qualified relationship exists in the following cases (list conclusive):
 - distribution exclusively to institutional investors with professional finance department (to manage own financial matters) (caveat: only if marketing material used is usual for this type of business, i.e. personal contacts, road shows)
 - fund based discretionary investment management services by Banks, Securities Dealers and independent investment managers (caveat: agreement must exist prior to marketing, be subject to management fees and has to comply with Swiss Bankers' Association standards)
 - fund based non-discretionary investment advisory services by Banks and Securities Dealers if:
 - written advisory agreement
 - subject to advisory fees
 - net assets of client invested into securities above CHF 5'000'000.-
 - development of portfolio monitored
 - advisor provides client with investment proposals regularly

- in-house funds of Banks: no public marketing if in-house funds are solicited to existing advisory clients of a bank and advisory agreement is amended into a discretionary management agreement
- distributors: also indirect distribution (through managed fund-accounts or similar structured fund-like investment management services) subject to license requirement if marketed publicly
- internet: considered public marketing if directed to Swiss investors.
 - directed to Swiss investors if website:
 - contains address in Switzerland
 - contains links to distributors or financial intermediaries in Switzerland
 - publishes prices in CHF
 - is in German, French or Italian
 - refers to legal provisions relevant for Swiss investors
 - contains hyperlinks to other websites or media with a relationship to Switzerland
 - exemptions:
 - specific disclaimer (which may not be skipped) or
 - access restrictions based on
 - domicile of investor
 - type of investor (with qualified relationship as defined above)
- not covered by draft Circular:
 - cross-border distribution: *our view*: as a rule, not subject to Swiss investment fund legislation (principle of territoriality). Caution if foreign company is member of a group with presence in Switzerland (caveat: internet is global, i.e. above principles must be considered even if foreign domain, platform / servers located abroad).
 - fund trading platforms: *our view*: "look through" because platforms are, since mere intermediaries, to be treated as if fund/promoter/manager, i.e. one "client" of the platform, would offer directly on its own website. This means:
 - license requirement for funds offered: depending on qualified relationship (as defined above)
 - distribution license requirement for promoter of platform: none since it "inherits" the status of its clients

NOTE: the information contained in this document is based on a draft circular published by the FBC. In addition, where indicated, it states our personal view which may not be the view of the FBC. None of the information contained herein is to be regarded as binding legal advice; public marketing issues have to be analysed on a case by case basis.