Switzerland

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1. HISTORY OF SWISS HEDGE FUNDS

1.1 Facts and figures

Switzerland has historically always been considered an important player in the placement of alternative investments, especially hedge funds. It is difficult to obtain reliable figures, but estimates show that approximately five per cent of the total assets managed in Switzerland or an estimated amount of $300 billion are invested in hedge funds.

The vast majority of hedge funds placed in Switzerland are funds of hedge funds. Whilst there are approximately 8,400 single hedge funds worldwide, there are only about 100 single hedge funds into which investors with Swiss bank accounts are invested. The reason for the predominance of funds of hedge funds also lies in the guidelines of the Swiss Bankers Association on asset management mandates dated 21 December 2005, according to which alternative investments may be utilised for the purpose of diversification of a portfolio if they are structured according to the fund of fund principle or offer a similar degree of diversification by other means and are easily tradable.

As far back as 1995 Switzerland introduced a framework which allows hedge funds to seek approval for public distribution. Since then only somewhat over 70 funds of hedge funds and a handful of single manager hedge funds have been authorised. Most hedge funds distributed in Switzerland are not open to public distribution in or from Switzerland and are therefore still only open to qualified investors. The main reason for this can be seen in the fact that most offshore jurisdictions do not meet the requirements of the Swiss Financial Market Authority (FINMA) as to the level of supervision applied to funds domiciled in their jurisdiction.

The global single manager hedge fund industry holds approximately $1.72 trillion in assets (Source: Eurohedge Autumn 2009), of which approximately 35 per cent are managed out of Europe. However, only 153 single manager hedge funds were actually managed in Switzerland with approximately $13.7 billion (Source: Eurohedge Database 31 December 2008). Despite these small numbers, Switzerland ranks second in Europe behind the UK and closely followed by France. In addition, Switzerland's market share of the global fund of hedge funds industry is approximately 30 per cent (Source: InvestHedge September 2008). As various UK-based hedge fund managers either relocated to Switzerland during the last quarter of 2009 or communicated their decision to do so at the beginning of 2010, Switzerland seems well positioned to attract further growth in the sector.

The majority of hedge funds managed in Switzerland are domiciled abroad in an offshore jurisdiction. The Swiss market therefore has historically not been a 'producer' of hedge funds (but is very strong as a producer of other alternative funds) and the functions performed in Switzerland have always been of an auxiliary nature, ie marketing and distribution, research and analysis or advisory services. The main reason for this is that previous legislation allowed only for open-ended contractual investment funds, which again required a Swiss fund management company regulated by the Swiss Financial Market Authority. The limited partnership as the typical single hedge fund structure was not allowed as a legal entity for collective investment vehicles. In addition, the investment restrictions were too tight to reasonably accommodate the hedge fund industry. In 2007 new legislation entered into force which provides for the possibility to incorporate limited partnerships for the purpose of collective investment schemes and investment restrictions which allow for great flexibility in determining the investment policy.

1.2 Anticipated developments

Historically Switzerland had an uninviting tax environment and certain legal restrictions on hedge funds which compared disadvantageously to other jurisdictions. Due to major changes in foreign regulations relating to hedge fund industry, and the managers of hedge funds in particular, as well as the introduction of new tax regimes in the UK, Switzerland's environment for hedge funds has noticeably improved.

At the same time the Swiss authorities are initiating steps to create a more attractive environment for hedge funds and in December 2009 published a paper on the strategic directions for Switzerland's financial market policy. The greatest impairment identified in the funds business is the fact that access to the EU market is restricted. Presently these restrictions are limited to the undertakings for collective investment in transferable securities (UCIT) industry. However, these restrictions will be expanding to the Swiss alternative investment funds industry due to the proposed Alternative Investment Fund Managers Directive (AIFM Directive). The possible impacts of the directive on the business of hedge funds and the consequences for the financial markets are being heavily discussed not only in the EU, but also in Switzerland, and have not ceased since the regulatory details of the directive are known.

It has been noted positively in Switzerland that the final AIFM Directive has for the time being not closed the door on the private placement of third country AIFs in the EU and allows the delegation of functions to service providers established in non-member countries. Switzerland is a few steps ahead of many other non-EU hedge fund jurisdictions as it can rely on an internationally accepted regulatory standard and a well organised fund industry. However, from 2013 onwards the marketing of Swiss hedge funds or offshore hedge funds managed by a Swiss manager will most likely require that a cooperation agreement is in place between the Swiss Financial Market Authority, FINMA, and the various EU member state authorities. Marketing

will be limited to what is permissible under the private placement regimes of the individual EU member states. It is to be expected that FINMA will seek a cooperation agreement with the relevant EU member states. The most important milestone from a non-EU perspective will be whether or not ESMA closes down private placements from the year 2018 onwards. If and when this is the case marketing from Switzerland into the EU will require an EU passport, which basically means that the fund manager will need to become authorised under the laws of the principal EU member state in which it markets the hedge fund. In addition – and more importantly – there must be a tax information exchange treaty in place between the third country and each EU member state where the fund is being marketed. From a Swiss point of view it therefore remains to be seen whether hedge fund managers will prefer a jurisdiction outside the EU relying on the private placement regimes of the individual member states, or whether they will deem the EU authorisation as being advantageous when talking to their EU investors.

2. REGULATIONS GOVERNING HEDGE FUNDS AND ONSHORE MANAGERS

2.1 Domestic hedge funds

2.1.1 Types of domestic funds available for alternative investments

Domestic hedge funds are governed by the Collective Investment Schemes Act (CISA). The CISA provides for a choice between four different structures for alternative investments, two being open-ended and two being closed-ended structures. Whilst the closed-ended limited partnership for collective investments is by law restricted to qualified investors, the other three types of structures can be limited to qualified investors according to their fund regulations or articles of association. Collective investment schemes restricted exclusively to qualified investors may be fully or partially exempt from certain provisions of CISA as long as the purpose of investor protection guiding the provisions within CISA is not impaired.

Contractual investment fund

The contractual investment funds are open-ended investment structures and were the only type of fund structure accepted in Switzerland under the previous investment fund act. The relationship is governed by a tri-partite fund contract between the investors on the one hand and the fund management company as well as the custodian bank on the other hand. A second agreement, the custody agreement, is concluded between fund management company and custodian bank. Both fund management company and custodian bank must have their domicile in Switzerland and require authorisation from the FINMA. The fund contract and any amendments to it require FINMA approval.

SICAV

The SICAV is an open-ended corporate structure with a variable capital base. This allows the investors to redeem their units at the cost of the collective assets at net asset value.

The SICAV can be established as an umbrella fund with segregated sub-funds. The management of the SICAV can be maintained either in-house (self-managed SICAV) or may be outsourced to an external fund management company which has been approved by the FINMA.

The SICAV has two different share classes, being the company shareholders, who act as promoters of the vehicle and have funded the initial share capital at the time of incorporation, and the investor shareholders who hold ordinary shares. The initial investment amount is CHF 250,000 in the case of an outsourced fund management and CHF 500,000 in the case of a self-managed SICAV.

Limited Partnership for Collective Investments (LPCI)

The Limited Partnership for Collective Investments (LPCI) mirrors the limited partnership as commonly used in offshore hedge fund jurisdictions. Accordingly, it is set up with a general partner bearing unlimited liability and at least five limited partners. The general partner is required to be domiciled in Switzerland and must be a company limited by shares. It may only fulfil this function for one LPCI. The limited partners must be qualified investors.

The LPCI is a closed-ended structure with a fixed capital base. It was created more for private equity investments than for hedge fund structures, however, hedge funds specialising in illiquid assets may find this structure just as interesting.

SICAF

The SICAF is the closed-ended corporation with a fixed capital base, split into a fixed number of shares with a par value. Therefore no redemptions of shares by the company are possible. Contrary to the other structures set out above which are exclusively governed by the CISA, the SICAF is governed by the Swiss Code of Obligations to the extent that the CISA does not provide otherwise.

The structure is not subject to approval and is not governed by CISA at all if it is either quoted on a recognised Swiss stock exchange or if the investors are limited to qualified investors.

2.1.2 Regulation of domestic funds

All domestic hedge funds and all parties responsible for the management or custody of their assets are subject to prior authorisation by the FINMA. These include besides the SICAV, the fund management company of a contractual investment fund, the custodian banks, the asset managers and the distributors of the hedge funds. In general, authorisation is granted if the following can be proven:

- persons responsible for management and business operations: have a good reputation; guarantee proper management; and possess the requisite professional qualifications;
- the significant equity holders (ie holding 10 per cent or more of the equity): have good reputation; and do not exert their influence to the

detriment of prudent and sound business practice;
- internal regulations and appropriate organisational structures ensure compliance;
- sufficient financial guarantees are available; and
- to the extent the FINMA makes this a condition for its granting of authorisation, compliance with the code of conduct of the relevant industry body.

2.1.3 Investment restrictions

CISA has provided for a specific and very flexible set of rules for the investment techniques and restrictions applicable to alternative investment vehicles. In particular, a fund for alternative investments may enter into credit facilities up to 50 per cent of the net assets and overall leverage exposure may reach up to 600 per cent of the fund's net assets. Short selling is explicitly admissible and up to 100 per cent of the fund's assets may be pledged.

2.2 Foreign hedge funds

2.2.1 Public distribution versus private placement

Foreign hedge funds can only be offered publicly in or from Switzerland if they have received prior approval from the FINMA. Foreign hedge funds offered exclusively to qualified investors are not subject to approval in Switzerland. As shown above, most hedge funds offered in Switzerland are restricted to private placement and therefore only target qualified investors.

It has to be noted that all activities directed at the distribution of funds have to be deemed to be public unless the advertising is directed exclusively at qualified investors using the typical marketing tools for this market (eg personal contacting, road shows).

Qualified intermediaries are:

- regulated financial intermediaries, such as banks, security dealers, fund managers and regulated asset managers of funds;
- regulated insurance companies;
- public corporations and pension funds with professional treasury management;
- treasury management of major companies;
- private investors possessing financial assets of at least CHF 2,000,000, provided they have made the required declaration;
- investors who have entered into an asset management contract in writing with a regulated financial intermediary (an independent promoter would usually only be in contact with the regulated financial intermediary); and
- independent asset managers and investors who have entered into an asset management contract in writing with an independent asset manager meeting the legal criteria.

2.2.2 Requirements for authorisation for public distribution

If there is an intention to publicly advertise a foreign hedge fund in or from Switzerland, the fund will require the following:

- in the country of domicile the hedge fund has to be subject to public supervision protecting the investor;
- the supervision has to be equivalent to the protection granted by Swiss law with respect to organisation, investor rights and investment policy;
- appointment of a licensed representative in Switzerland for the units distributed in or from Switzerland;
- appointment of a licensed Swiss bank as paying agent in Switzerland for the units distributed in or from Switzerland;
- the prospectus and the relevant corporate documents have been approved by the FINMA; and
- the designation of the fund must be chosen in a manner as not to be misleading, in particular, it must be consistent with the investment policy actually pursued.

2.3 Fund managers

2.3.1 Terminology

Under Swiss law, fund managers are referred to as asset managers to avoid confusion with the fund management company, which deals with the overall management of the fund, including the fund administration. The fund management company may (but does not have to) outsource the asset management to an external fund or asset manager, being a corporation or an individual person. In the event of such delegation, the fund management company is responsible for only mandating persons who are properly qualified to undertake the tasks assigned to them and for meeting the necessary measures for instruction and monitoring of the implementation.

In the context of this chapter the term ‘fund managers’ is used as a synonym for the investment or asset manager as entity, whilst the term ‘fund management company’ is used for the entity responsible for the overall management of the fund, including all administrative tasks, such as accounting, net asset value calculation, determination of issue and redemption prices, filing tax returns for the fund, etc). The individual partner of the fund manager is referred to as the principal of the fund manager.

2.3.2 Swiss fund managers

Fund managers domiciled in Switzerland presently must only seek authorisation from the FINMA if they manage a Swiss-based fund. In this context it has to be noted that FINMA has implemented a practice according to which foreign funds with a Swiss-based fund manager are only granted approval for public distribution if the fund manager has the requisite FINMA authorisation, even if this authorisation is not required in the country of origin of the fund.

Swiss fund managers of foreign collective investment schemes may apply for authorisation if this is required under the applicable foreign jurisdiction and provided the foreign fund is subject to adequate supervision in the country of its origin. This possibility was a measure to ensure that Swiss fund managers could maintain their mandates for UCITS funds. However, this means that Swiss-based managers of hedge funds are generally excluded

from the possibility of voluntary supervision as it will be difficult to prove that the typical hedge fund jurisdictions such as the Cayman Islands and British Virgin Islands meet the qualifications of the Swiss regulator. In view of the AIFM Directive it may be prudent to extend the voluntary authorisation to Swiss-based hedge fund managers in order to reduce competitive disadvantages they may have for providing services to EU AIFs. Because the Swiss Fund Association (SFA) welcomed the IOSCO proposals for regulation of hedge fund managers and such a regulation was also envisaged by the Swiss regulator in its hedge fund report it, is safe to say that Switzerland will be seeing a certain level of regulation of the Swiss-based hedge fund managers. FINMA is in the process of evaluating the AIFM Directive with the aim of putting into place a regulatory framework for managers of alternative funds. At the same time the Swiss regulator has confirmed that it wants Switzerland to remain an attractive location for hedge fund managers.

2.3.3 Foreign fund managers

The fund management company may delegate the asset management to a foreign fund manager provided the latter is subject to adequate supervision in its country of origin and is sufficiently qualified to conduct its investment management mandate properly.

3. TAXATION

3.1 General remarks

3.1.1 Overview over Swiss tax regime

Switzerland, being a confederation with 26 independent cantons and approximately 2,600 communes, the Swiss tax system has three different levels of taxation, the federal, cantonal and communal level. Each level has its own tax authority and the federal and cantonal levels each have their own set of rules and every commune sets its own tax rate. Structuring taxes therefore also includes the choice of residence within Switzerland. Geneva, despite comparatively high tax rates, currently appears to be the heart of the hedge fund industry.

The corporate profit tax rates depend on the canton and range from around 14 per cent to 25 per cent. The corporate tax rate in Geneva is 24 per cent. In addition, a corporate wealth tax of 0.1 to 0.5 per cent applies. All cantons are presently able to grant additional tax privileges for companies obtaining the majority of their income from activities abroad.

Swiss individual tax rates are progressive and the differences among the cantons are substantial. While the top income rates in certain cantons are as low as 20 per cent, they can be as high as 45 per cent (eg Geneva) in others. On top there is a compulsory state pension plan, which is not capped. The contributions amount to approximately six per cent for employees and 11 per cent for self-employed persons. It is this high tax burden on the salary components which make Switzerland relatively unattractive to hedge fund managers who are used to special regimes abroad. In addition there is a wealth tax levied of approximately 0.1-1.5 per cent.

At present, most cantons still grant lump sum taxation to non-Swiss nationals taking up residence in Switzerland, provided they have not had residency in Switzerland at any time during the last 10 years. The lump sum taxation essentially allows individuals to be taxed on their expenditure in Switzerland, usually calculated on five times the annual rent of their house in Switzerland, provided, however, that the taxation basis may at no time be lower than the income from Swiss sources as well as certain other items of income, including treaty-favoured income. Individuals under a lump sum taxation must refrain from all gainful activities in Switzerland. At present the lump sum taxation is under discussion in Switzerland and the Canton of Zurich actually abolished it with effect from 1 January 2010.

3.1.2 Use of offshore jurisdictions in fund structures in general

Often in hedge fund structures the fund management company or the fund itself are domiciled in a foreign offshore jurisdiction and the fund manager may or may not be offshore. This has both tax and regulatory implications in Switzerland.

Both the federal and cantonal tax administrations as well as the FINMA are prepared to give advance rulings on the recognition of the offshore structure, if the full facts regarding the type and extent of management activities are disclosed to them. This allows players to gain pre-approval for their structure, thus eliminating the risk of being qualified as a Swiss collective investment scheme *post factum*.

Tax aspect

From a tax point of view it is important that effective management of the companies domiciled offshore is not done in Switzerland. The Swiss tax administrations have developed certain criteria to define whether a fund is effectively managed out of Switzerland or from abroad:

- the purpose of the offshore company should be to the point;
- the offshore company actually employs qualified staff and has rented adequate office space in the offshore jurisdiction (criterion of substance);
- no part of the day-to-day management of the offshore company is undertaken from Switzerland;
- Swiss residents preferably should not hold offices in the offshore company, or should by all means be in the minority with other officers also taking an active role in the decision-making process;
- bank accounts should ideally be in the jurisdiction of the offshore company's jurisdiction; and
- Swiss residents should not have signatory powers on the bank accounts and should also not have means of indirect access, eg electronic banking.

In the past, Swiss tax authorities successfully disregarded offshore structures on the grounds of their having been implemented for mere tax planning purposes. Therefore it is advisable to substantiate the economic or legal justification for the use of the offshore structure.

Regulatory aspect

Similarly the Swiss regulator would look at an offshore fund as being a Swiss fund if the place of main management was in Switzerland. Pursuant to Article 42 CISO (being the ordinance relating to the CISA) the Swiss regulator considers the following to be the main management of a fund.

The unalienable duties of the directors of a Swiss corporation are:

- the ultimate management of the company and the issuing of the necessary directives;
- the establishment of the organisation;
- the structuring of the accounting system and of the financial control as well as the financial planning insofar as this is necessary to manage the company;
- the appointment and removal of the persons entrusted with the management and the representation;
- the ultimate supervision of the persons entrusted with the management, in particular, in view of compliance with the law, the articles of incorporation, regulations, and directives;
- the preparation of the business report as well as the preparation of the shareholders' meeting and the implementation of its resolutions; and
- the notification of the judge in case of over-indebtedness.

The following duties of a Swiss fund would have to be performed in Switzerland and may not be performed in Switzerland by a foreign fund:

- the decision on the issuance of units;
- the decision on the investment policy and asset valuation;
- the asset valuation;
- fixing of the issuance and redemption price;
- determination of the distribution of profits;
- determination of the contents of the prospectus, the annual or semi-annual reports as well as of further investors' publications; and
- accounting.

Provided that none of the above activities are exercised in Switzerland the Swiss regulator will accept the management of the foreign fund as being abroad.

3.2 Basic principles of taxation

When looking into taxation there are various tax principles which apply and which can be combined in an ‘open architecture’ to create the tax structure suiting the hedge fund and the principals of the fund manager best. The following can only provide a very superficial overview over certain basic principles of taxation.

3.2.1 Taxation of hedge funds domiciled in Switzerland

From a tax point of view, the various types of funds can be classified into two groups, the first being the SICAV, the contractual fund and the LPCI which are all partially tax transparent, the second being the SICAF – which is treated identically to any other corporation in Switzerland and therefore is not tax transparent for any type of taxes.

Income/profit taxation

The partially tax transparent structures are treated as tax transparent for the purpose of income or profit taxation as long as they do not directly own real estate.

Transfer stamp tax

For the purposes of stamp tax the partially transparent vehicles do not qualify as securities dealers and therefore are transfer stamp tax exempt. SICAFs are subject to transfer stamp tax.

Withholding tax

However, the partially transparent vehicles are subject to withholding tax on the net profits excluding capital gains if they are accumulating funds and on the effective distributions in the case of distributing funds. Funds with a mixed policy of accumulation and distribution are treated separately. Distributions of accumulating funds are only subject to withholding tax to the extent that the profits have not already been taxed during the accumulation period. Special rules apply to profits derived by the fund from direct ownership of real estate as well as to funds.

SICAFs are subject to withholding tax. The tax is levied on the profits distributed to the investors.

Special rules apply to funds of funds domiciled in Switzerland, where the principle is to create full transparency over all levels of the funds which the fund of fund is invested into with a final taxation on the level of the fund of funds. However, this principle is not applied in the event that the following criteria are all met by the fund of funds:

- the fund of funds is a Swiss partially transparent fund;
- the documentation of the fund of funds shows beyond doubt that the investment strategy is to achieve capital gains (achieving net profits excluding capital gains of less than two per cent of its NAV); and
- the fund of funds provides an annual aggregate overview over the *pro rata* investments of the various funds it was invested in.

3.2.2 Taxation of corporations domiciled in Switzerland

Remuneration on cost-plus basis

Assuming that the Swiss-based corporation will only be holding an advisory role fulfilling auxiliary functions (as was the rule in the past) and all fund management (including investment management) activities remained offshore, the adviser could be remunerated on a cost-plus basis, the value to be added to the costs being between five and 20 per cent, depending on the level of services performed by the Swiss company.

Receipt of management and performance fees

Performance and management fees received by a Swiss corporation qualify as taxable profits. In the context of determining the profit of the Swiss company the tax administrations will in particular review whether the internal transfer prices between the Swiss and non-Swiss companies as well

as the income paid out to the principals of the fund manager is at arm's length and whether the costs of the various companies are in an acceptable ratio to the profits of that company.

3.2.3 Taxation of individuals

Permanent foreign establishment of a Swiss tax resident

Under Swiss domestic law (unilateral exemption and no tax treaty required) a Swiss tax resident individual actually working abroad a substantial part of its time and having offices in a foreign jurisdiction is likely deemed to have a permanent establishment abroad. The profits attributable to this permanent foreign establishment are unilaterally tax exempt. This requires an allocation of profits between Switzerland (where the individual will have taxable profits) and abroad, the foreign income usually being 20 to 50 per cent. Rulings can be negotiated with the cantonal tax authorities to fix the exact deemed income allocated abroad.

Taxation of carried interest

In 2008, the Federal Tax Administration drafted a circular on the taxation of distributions to the individual hedge fund and private equity managers resident in Switzerland. This draft had been based on lengthy discussions among the various stakeholders in order to obtain a more favourable tax regime with respect to the carried interest and the performance fee. For various reasons, including political, it now seems extremely unlikely that such a circular would be published. Whereas some may bemoan the absence of certainty, others will welcome an increased degree of flexibility.

Generally speaking, the principals of the fund managers are taxed according to the following rules:

- As long as the entire carried interest (or performance fee as the case may be) is fully booked with the Swiss or foreign corporation operating as fund manager, and is taxed as such, the following applies:
  - the participation in the fund manager held by the principal qualifies as a private asset. Thus all capital gains resulting from the sale of participations in the foreign corporation are tax free, subject to the rules relating to indirect partial liquidation;
  - all arm's length payments made to the principal as remuneration for its activity as employee of the Swiss or foreign corporation operating as fund manager qualify as salary and are taxable income. Likewise a performance-based bonus, which is due under the employment contract, is taxable income; and
  - dividends received from the Swiss or foreign corporation operating as fund manager qualify as taxable income. However, for participations of more than 10 per cent the cantons must provide for a reduced taxation.
- If the fund management is done by the principal personally (and not through a corporation) or through a limited liability partnership (LLP) in which the principal has a participation, the principal is entitled to receive the carried interest as well as the management fees and taxation

will follow the following principles:

- the participation in the LLP qualifies as business asset;
- capital gains, management fee and carried interest qualify as income from independent gainful activity; and
- distributions of a fund managed by a third party and held as a private asset qualify as tax free capital gains.

4. SIDE POCKETS FOR HEDGE FUNDS

Most Swiss hedge funds are fund of funds of an open-ended nature which allow the investor to request redemption of its fund shares at net asset value at regular intervals. They are therefore dependant on maintaining a certain liquidity level. During the recent upheavals on the financial markets certain Swiss hedge funds were not able to divest fast enough to maintain the liquidity. At the same time investors were seeking to redeem their fund shares to a greater extent than usual. These two simultaneous occurrences created severe liquidity problems. In the context of these difficulties FINMA approved the creation of side pockets provided that: the hedge fund seeks FINMA approval prior to creation; investor rights are maintained; and the creation of side pockets is in the interest of all investors into the fund.

The side pockets aim at dividing the liquid assets from the illiquid assets, the latter being transferred into side pockets, which create a separate portfolio mirroring the investors' participation in the original portfolio which now only contains the liquid assets. However, whilst the original portfolio continues to be actively managed, the side pocket is liquidated over the period of time necessary to sell off the illiquid assets. Redemptions are excluded from the side pocket. FINMA ruled that the liquid fund would not be entitled to accept new investors until the side-pocket has been fully liquidated.

Technically the creation of side pockets would require that certain investor protection measures contained in the CISA would be put out of force by emergency law as the existing possibilities of investor participation effectively prevent a timely and adequate reaction to a liquidity crunch.

Side pockets could, on the one hand, be created by means of a new share class within the existing fund, which however requires an amendment to the existing fund documentation which is riddled with obstacles such as the entitlement of the investor to ask for redemption in cash and the right of investors to object to the amendments during a 30-day period. In particular the necessity to redeem shares in the event of a liquidity crunch obviously is counter-productive.

Another possibility would involve the creation of a new fund for the side pocket assets. The issue arises that the new fund most likely would not comply with the investment restrictions and the need for risk diversification. In addition, it would be debatable to say the least whether the transfer of assets from the existing fund to the new fund would be allowed without the investors getting the chance to object.

The recent crisis has shown that thought has to be given to the possibility of creating side pockets when drafting the fund documentation.