

FAQ

Structured products

(Status: 23 December 2010)

1. Who is permitted to publicly offer structured products in Switzerland?

Anyone is allowed to publicly offer structured products in Switzerland as long as the issue, guarantee or distribution of the structured product is handled by an institution pursuant to Art. 5 para. 1 let. a of the Collective Investment Schemes Act¹ (CISA; SR 951.31) or a branch pursuant to Art. 4 para. 1 let. b of the Collective Investment Schemes Ordinance² (CISO; SR 951.311).

2. To what extent is the distribution of publicly offered structured products in Switzerland considered to be an activity requiring a licence for securities dealers?

Distribution encompasses all the activities involved in publicly placing structured products made available by an issuer. This process takes place in the primary market up to the point of issue. Anyone can publicly offer structured products in the primary market provided they comply with the provisions of Art. 5 CISA. After issuance, the products can be bought and sold (traded) on the secondary market. Distribution is distinct from trading. Trading on the secondary markets is fully subject to the Stock Exchange Act³ (SESTA; SR 954.1) and Art. 5 CISA (cf. FINMA Circular 08/5⁴ "Securities dealers").

3. Under what conditions may a foreign institution pursuant to Art. 5 para. 1 let. a no. 4 CISA publicly offer structured products in Switzerland or from Switzerland?

A foreign institution pursuant to Art. 5 para. 1 let. a no. 4 CISA must have a branch in Switzerland in accordance with Art. 4 para. 1 let. b CISO, unless the structured product is listed on a Swiss stock exchange. This restriction is only applicable if no other institution pursuant to Art. 5 para. 1 CISA carries out the issue, guarantee and/or distribution.

4. To what extent must the branch in Switzerland pursuant to Art. 4 para. 1 let. b CISO conduct activities in connection with structured products?

¹ http://www.admin.ch/ch/d/sr/c951_31.html

² http://www.admin.ch/ch/d/sr/c951_311.html

³ http://www.admin.ch/ch/d/sr/c954_1.html

⁴ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-05.pdf>

The minimum requirement is that the branch in Switzerland be able to provide a simplified prospectus (No. 8 of the Guidelines on informing investors about structured products⁵ issued by the Swiss Bankers Association, hereinafter referred to as “SBA Guidelines”). Otherwise the branch is not required to be involved in the distribution of structured products.

5. Which companies qualify as branches?

A branch of a foreign institution pursuant to Art. 4 para. 1 let. b CISO may be a representative office, a branch office, a subsidiary, a sister company or a group company provided that it comes under consolidated supervision at group level.

6. When is the requirement to produce a simplified prospectus not applicable?

A simplified prospectus is not required for products listed or designated for listing on the SIX Swiss Exchange, since the listing prospectus of SIX Swiss Exchange fulfils all the legal requirements for transparency. The requirement to produce a prospectus is also not applicable to products which satisfy the transparency requirements under Art. 5 para. 2 CISA by complying with foreign supervisory rules (for example, a prospectus is produced which complies with the EU prospectus guidelines) and which are distributed from Switzerland, but not in Switzerland.

7. Does public advertising of structured products (e.g. a newspaper advertisement) render the product subject to a prospectus requirement if it is designated for listing?

If a structured product is designated for listing on the SIX Swiss Exchange, the requirement to produce a simplified prospectus is not applicable. However, it must be ensured that the legal requirements are fulfilled appropriately until the listing prospectus is available (term sheet and/or offering circular).

If, contrary to the original intentions, the product is not listed (e.g. due to lack of demand) but over-the-counter trading takes place instead, the exemption under Art. 4 para. 4 let. a CISO is no longer applicable and a simplified prospectus must be produced immediately.

8. Do structured products become subject to a prospectus requirement if they are provisionally admitted for trading on the SIX Swiss Exchange, but the listing prospectus has not yet been drawn up?

If a structured product is provisionally admitted for trading on the SIX Swiss Exchange, the requirement to produce a simplified prospectus does not apply. However, it must be ensured that the legal requirements are fulfilled appropriately until the listing prospectus is available (term sheet and/or offering circular).

⁵ http://www.swissbanking.org/999989_e.pdf

9. Do structured products become subject to a prospectus requirement if they are accepted for trading on a foreign stock exchange (which satisfies the transparency requirements under Art. 5 para. 2 CISA by complying with foreign supervisory rules) and they are advertised publicly in Switzerland indicating Swiss contact details?

Yes, the requirement to produce a prospectus applies when structured products are offered to the public in Switzerland (unless the products are also listed on a Swiss stock exchange). If the structured products are offered to the public under EU law or are listed for trading on a regulated market in the EU, the requirement to produce a simplified prospectus is not applicable once the following conditions are met:

- A prospectus is available that complies with EU prospectus guidelines and contains the following three elements: information about the issuer, information about the security, and a summary of the product.

The summary must contain supplementary references or an appendix providing the additional minimum information required in a Swiss simplified prospectus as follows:

- Supplementary information on the guarantor, if applicable, cf. No. 5 (a) SBA Guidelines⁶;
- Information about clearing, cf. No. 5 (c) SBA Guidelines;
- If the security is not listed, reference to that effect, cf. No. 5 (c) SBA Guidelines;
- Further information about restrictions on transferability, tradability, trading details (brief reference to liquidity/tradability in the secondary market, even if the product is not listed on an exchange), cf. No. 5 (c) SBA Guidelines (reference may be made to information provided elsewhere in the EU prospectus);
- Supplementary redemption details, cf. No. 5 (c) SBA Guidelines (reference may be made to information provided elsewhere in the EU prospectus);
- Fees, if any, imposed on the purchaser during the term of the investment subsequent to issue, cf. No. 5 (c) SBA Guidelines;
- Reference to tax treatment in Switzerland, cf. No. 5 (c) SBA Guidelines;
- Brief supplementary explanations/comments on the significant risks for investors (product-specific risks, issuer risks), cf. No. 5 (d) SBA Guidelines;
- Supplementary explanations/comments on the underlying asset(s), cf. No. 5 (e) SBA Guidelines (reference may be made to information provided elsewhere in the EU prospectus);
- Reference to a web site on which unforeseen changes to the conditions for structured products which were not agreed contractually are announced, cf. No. 5 (f) SBA Guidelines;
- Applicable law and place of jurisdiction, cf. No. 5 (g) SBA Guidelines;
- Indication that the structured products are neither a collective investment scheme nor subject to authorisation by the supervisory authority, cf. No. 5 (h) SBA Guidelines;

⁶ http://www.swissbanking.org/999989_e.pdf

Furthermore, the requirements stipulated in No. 1–3 and 6–10 SBA Guidelines apply analogously.

10. Are structured products subject to a prospectus requirement if they are listed for trading on a foreign stock exchange (which satisfies the transparency requirements under Art. 5 para. 2 CISA by complying with foreign supervisory rules) and it is advertised publicly in Switzerland, but foreign contact details are given?

Yes, the requirement to produce a prospectus applies once structured products are offered to the public in Switzerland (for exceptions, see question 9). For further information on what comes under “public advertising”, see FINMA-RS 08/8⁷ “Public advertising – collective investment schemes”.

11. Are structured products subject to a prospectus requirement if they are listed for trading on a foreign stock exchange (which satisfies the transparency requirements under Art. 5 para. 2 CISA by complying with foreign supervisory rules) and they are published on a web site aimed at investors in Switzerland, e.g. term sheet with/without contact information?

Yes, the requirement to produce a prospectus applies when a structured product is offered to the public in Switzerland (for exceptions, see question 9). For further information about what comes under “public advertising”, see FINMA-RS 08/8⁸.

12. Is the publication of price information on market information systems (e.g. Reuters, Bloomberg) considered as a public offer?

No. Such market information systems provide information about prices and issuers (including contact details) and a broad range of other market information in various locations. This information is not directly linked, however; in each case it represents a separate service offered by information providers aimed at a wide circle of parties interested in the market (e.g. analysts, issuers, journalists, investors). Furthermore, users of such information systems request the information on their own initiative; the information is not presented by the provider in such a way as to suggest it is an advertising medium or that an advertising element is present. For further information about what comes under “public advertising”, see FINMA-RS 08/8⁹.

13. Is a simplified prospect required if prices for foreign structured products in the secondary market are published along with other related information (e.g. term sheet with/without contact details) on electronic (trading) platforms and stock exchange platforms which are aimed at investors in Switzerland?

Yes, such products fall under the prospectus requirement, since this form of publication qualifies as public advertising under FINMA-RS 08/8¹⁰, which also applies analogously to structured products. This type of published information is not regarded as public advertising only if it includes an adequate liabil-

⁷ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf>

⁸ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf>

⁹ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf>

¹⁰ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf>

ity disclaimer (exemption clause) or access restrictions (see margin no. 27 et seq. FINMA-RS 08/8¹¹). For example, every visitor to the web site must take note of the disclaimer and, moreover, before an online transaction is made.

14. At what stage must a simplified prospectus be made available?

A simplified prospectus must be made available to any and every interested party when a product is issued and whenever a contract is concluded. However, structured products are usually offered for subscription prior to issue and investors receive indicative term sheets or other documentation on the product. These materials already contain the most important key terms, but the price-related or variable parameters are only indicative, not definitively fixed. The issuer does not definitively fix the relevant market terms until issuance. To allow investors to properly inform themselves about the structured product, the indicative term sheets or other materials provided at subscription prior to issue must contain appropriate information on the main characteristics of the structured product (key terms), its prospects for profits and losses, and the significant risks for the investor.

15. Does the legal requirement for a standardised format (Art. 5 para. 2 let. a CISA) mean that the information in the simplified prospectus has to follow the same order of presentation as the SBA guidelines on informing investors about structured products¹²?

No, the information in the simplified prospectus does not have to follow the same order of presentation as the guidelines. The simplified prospectus must, however, be structured according to the following three main categories, under which come all the relevant details to be outlined in such a prospectus:

1. Product description
2. Prospects for profits and losses
3. Significant risks for the investor

Simplified prospectuses on all structured products issued on or after 1 April 2009 must be organised in this manner.

16. What distinguishes structured products from collective investment schemes?

Compliance with the formal legal criteria for a collective investment scheme under Art. 7 and 119 CISA differentiates such a scheme from structured products. The decision by an issuer to give a product the legal form of a structured product or by a fund management company to give a product the legal form of a collective investment scheme must be made prior to the product launch and communicated to investors (labelling; see question 18).

The supervisory authority retains the right to intervene in the event of misuse of the legal form and the violation of transparency rules. This is the case, for instance, if a structured product is referred to as an

¹¹ <http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf>

¹² http://www.swissbanking.org/999989_e.pdf

"investment fund/collective investment scheme" and the expression "investment fund/collective investment scheme" is used in any form (or any abbreviations) in any kind of misleading way, e.g. if a structured product is claimed to be subject to authorisation or monitoring by the supervisory authority or if the structured product is insufficiently labelled. Any risk of misunderstanding is to be avoided. The criminal sanctions specified in CISA are applicable.

17. What criteria are used to determine if a Special Purpose Vehicle (SPV) qualifies as a collective investment scheme, in particular foreign SPVs (where domicile and head office are located abroad)?

A structured product issued through an SPV is distinguished from a collective investment scheme in the same manner as described in question 16. Hence, it is irrelevant whether the SPV issues only one product (single issuance), several products (multi-issuance) which are isolated from each other (e.g. as cells of a protected cell company) or several products ("multi-issuance") which are not isolated from each other, as long as they do not legally qualify as a collective investment scheme according to the formal legal criteria prescribed in Art. 7 and Art. 119 CISA.

If an SPV qualifies as a collective investment scheme under the law of its domicile country or according to the practice of the supervisory authorities abroad to which it is subject, then it always qualifies as a foreign collective investment scheme in Switzerland. Whether a foreign collective investment scheme can be authorised in Switzerland is determined individually based on whether it meets the formal legal criteria for a foreign collective investment scheme (Art. 119 and 120 CISA). If a structured product does not qualify as a collective investment scheme abroad, it may be distributed or listed in Switzerland without authorisation as long as it is not deemed in Switzerland to be a collective investment scheme on the basis of legal criteria.

18. How is it to be made clear that a structured product is neither a collective investment scheme nor subject to authorisation by the supervisory authority so as to be sure to avoid all risk of confusion and potential fraud (labelling)?

A reference to this effect must appear prominently on the first page (and namely not in the footnotes in small print) of the simplified prospectus and all other documentation (indicative term sheets, offering circular, etc.), and be highlighted in bold.

19. Under what conditions does distribution of a structured product based on one or more collective investment schemes qualify as indirect distribution of a collective investment scheme? Under what circumstances is indirect distribution of this type permissible?

If more than one third (33.3%) of the value of a structured product depends on a collective investment scheme, this qualifies as indirect distribution of the collective investment scheme in question. For passive (static and non-static) products, this value is based on the time of issuance. Adjustments that occur later causing the one-third threshold to be exceeded are of no consequence as long as they follow rules that are defined in advance. For actively managed products (with scope for discretionary management), the value is based on the time at which investment decisions may be made.

Indirect distribution of a collective investment scheme is permissible if the collective investment scheme itself can also be offered to the investors in question (because appropriate authorisation and approvals have already been granted). This means that a structured product, where 100% of the value

- depends on a Swiss collective investment scheme available for purchase by the public, may be publicly distributed;
- depends on a foreign collective investment scheme available for purchase by the public in Switzerland (approval granted pursuant to Art. 120 CISA), may be publicly distributed;
- depends on a Swiss collective investment scheme which is not available for purchase by the public but only by qualified investors, may not be publicly distributed;
- depends on a foreign collective investment scheme which is not available for purchase by the public in Switzerland (no approval granted pursuant to Art. 120 CISA), may not be publicly distributed (see questions 20 and 21 for more information about what qualifies as a foreign collective investment scheme).

20. Under what circumstances may structured products based on a fund of funds be distributed to the public?

A fund of funds is treated just like any other collective investment scheme. There is no "look through" on its investments. Hence, question 19 applies here as well.

21. Under what circumstances may structured products based on multiple sub-funds of an umbrella fund be distributed to the public?

Multiple sub-funds of an umbrella fund are treated as independent products. Hence, it is irrelevant whether a structured product is based on multiple individual funds or multiple sub-funds of an umbrella fund. See also question 19.

22. If I have further questions, whom do I contact?

markets@finma.ch or phone +41 31 327 91 00