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Gibraltar Funds Review

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Building a Gibraltar Fund into a Swiss Management Framework

One of the most relevant questions for a Swiss manager when considering the option of a Gibraltar Fund is how this fits into the Swiss Legal and Regulatory framework, in particular the Collective Investment Schemes Act (CISA) which governs the promotion of non-Swiss collective investment schemes in Switzerland. This, along with the guidance offered by the Swiss Federal Banking Commission (SFBC) on public offering and private placements allows us to create a picture of how a Gibraltar Experienced Investor Fund might fit into a Swiss asset manager's business model.

By way of background it is worth noting that CISA imposes relatively strict rules with regard to investment restrictions (permitted investments, limited leverage etc.), subscriptions/redemptions as well as administration, all of which place Switzerland at a regulatory disadvantage relative to hedge fund jurisdictions such as Gibraltar. Furthermore, Swiss collective investment schemes are as a general rule

subject to a 35% withholding tax on any income realised by the fund, or on redemption of shares or interests in the fund. Although it is possible that most or even all of this withholding tax is refunded, this depends on the residency of the investor, and remains a major issue for non-Swiss resident investors. There is no withholding tax on distributions or redemptions from a Gibraltar Fund.

A Gibraltar Experienced Investor Fund (EIF) is a fund that is geared as its name suggests towards 'experienced investors' as defined under Gibraltar law. There are no investment restrictions, diversification requirements or leverage restrictions (other than those that the manager chooses to include in the prospectus) imposed by law or regulation. In Switzerland, an EIF would be categorised under CISA as a 'foreign collective investment scheme.' It may not be marketed to retail investors or 'publicly offered' in Switzerland without prior approval by FINMA. In practice, this registration is not

usually possible as the investment policy of the hedge fund will not comply with the corresponding restrictions applicable to Swiss collective investment schemes. However, typically the target market for an EIF will not be a public market but rather the private banking and institutional client for alternative investments.

Marketing of an EIF as an unregistered foreign collective investment scheme in Switzerland is permissible only to the extent that the marketing does not constitute a 'public offering.' This public offering concept encompasses all forms of direct and indirect marketing of collective investments regardless of the form of the offering but there are specific exemptions, e.g., publicity which is directed solely at Qualified Investors and which is made through the usual channels (such as one-to-one contacts, road shows, etc.) without any advertising being made to the general public. Such publicity will not constitute a form of public offering for the purposes of the legislation. Similarly, the publication of subscription prices, NAV and similar information which is made by regulated financial intermediaries will not constitute a public offering (provided such publication does not contain contact details). As such, interests in a Gibraltar EIF may be

offered in or from Switzerland within the limits of private placement exemption.

Typically, interests in an EIF might be offered to Qualified Investors (the target group for these types of funds) through this private placement. The concept of Qualified Investors comprises the following categories of investors.

- (1) regulated financial institutions such as banks, broker-dealers and fund management companies;
- (2) regulated insurance companies;
- (3) public entities and retirement benefit institutions (pension funds) with professional treasury management;
- (4) companies with professional treasury management;
- (5) high-net-worth individuals, defined as being individuals holding, directly or indirectly, a minimum wealth of CHF 2 million in net financial assets; and
- (6) investors having entered into a written discretionary management mandate with either:
 - (a) a regulated financial institution (i.e. those which are referred to under (1) above); or
 - (b) an independent asset manager, provided that the said asset manager is subject to (i) AML supervision; (ii) rules of conduct of a recognised professional organisation; and (iii) the relevant management agreement complies with the directives of a recognised professional organisation (e.g. Swiss Bankers' Association guidelines) (a 'Qualifying Asset Manager'); and



- (7) Qualifying Asset Managers, which fall within the 'qualified investors' definition since the entry into force on 1 October 2007 of the revised SFBC Circular 03/118.

Alternative investments and hedge funds are an integral part of even a typical asset allocation for most of these Qualified Investors. The Gibraltar EIF offers an EU fund product, with the security that dealing with an onshore and OECD white-listed jurisdiction offers, but with the flexibility that the manager or promoter is able to build in to the product on the basis that it is not a retail instrument. Used appropriately, the EIF can also offer managers flexibility in being able to allocate appropriate and permitted percentage allocations of discretionary management contracts to alternative or hedge fund strategies that could be managed through the EIF, i.e., a manager would be able to allocate part of a DPM to an EIF provided the manager was operating

within its guidelines/risk profile etc.

For additional information on funds visit the practice area page on www.gibraltarlawyers.com or our microsite www.gibraltar-funds.com.



ISOLAS recognised as leading funds law firm in Gibraltar

FD FundDomiciles.com

ISOLAS received the award for Best Gibraltar Law Firm in Funds at a gathering that included the major law firms and players in the Funds Industry at the Chesterfield Mayfair Hotel in London in January 2011.

The shortlist for Gibraltar for what is currently the only award of its kind for Funds Law Firms in Gibraltar was limited to two candidates. On collecting the award, Joey Garcia, on behalf of ISOLAS, explained that "I am delighted to receive this award on behalf of the Funds Team at ISOLAS. It is recognition by our peers on an international level of the quality of service received and ISOLAS' position at the leading edge of a very competitive and fast moving funds industry in Gibraltar." When asked for comment, Albert Isola, partner in charge of Funds at ISOLAS, was "very pleased with the news of winning the award. The fact that Gibraltar is represented at an International Funds event of this importance is recognition that Gibraltar is a real and viable alternative to the more established funds Jurisdictions and this has only been possible as a result of the work and efforts of all the players in the local funds sector. I am very proud that our growing Funds team at ISOLAS have played their small part in this process."

Gibraltar emerges on to the level playing field

With the Income Tax Act 2011 coming into force on 1 January 2011, a new corporate tax rate of 10% entrenches Gibraltar's position as an onshore specialist finance centre with a regulatory environment and reputation to be proud of.

A flat rate of corporate tax of 10% now replaces the exempt company regime which had existed in Gibraltar for over a decade. Add to this Gibraltar's membership of the EU, the passporting of services this engenders and its white-listing by the OECD, Gibraltar is making its strongest case for the label of EU domicile of choice.

The advantages of its status and legal/fiscal environment extend beyond corporate tax; no wealth tax, no withholding tax on dividends, no capital gains tax, no stamp duty as well as very attractive levels of personal tax. Gibraltar's economy has, throughout the global financial crisis, continued to grow at 5.5% and employment remains at an all-time high. The local professional workforce, bi-lingual English/Spanish, and primarily trained in the UK, can offer the expertise and modern funds solutions you require at salary rates still much lower than other financial jurisdictions due to its lower than average cost of living.



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For further information, or for any enquiries relating to Gibraltar, or Gibraltar EIF's please feel free to contact joey.garcia@isolas.gi and selwyn.figuera@isolas.gi

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The information contained in this leaflet is not intended as legal advice and should not be construed or relied on as such.