

Update

Newsflash July 2014

The Revised SFAMA Guidelines on Distribution and Transparency

The revised Swiss Collective Investment Schemes Act ("**CISA**") and the revised Swiss Collective Investment Schemes Ordinance ("**CISO**") entered into force on March 1, 2013. This revision led to the issuance of a new circular of the Swiss financial regulator, the FINMA Circular "Distribution of Collective Investment Schemes" (FINMA-Circ. 2013/9). The FINMA Circular entered into force on October 1, 2013.

In this context, the Swiss Funds & Asset Management Association ("**SFAMA**") issued on May 22, 2014 its revised Guidelines on the Distribution of Collective Investment Schemes ("**Distribution Guidelines**") as well as its revised Guidelines on Duties Regarding the Charging and Use of Fees and Costs ("**Transparency Guidelines**") that specify certain requirements regarding the distribution of funds and investors information (collectively the "**Guidelines**"). The purpose of this Newsflash is to inform you of the main requirements deriving from the Guidelines.

Background

The Guidelines have been recognized as a minimum standard by the Swiss Financial Market Supervisory Authority ("**FINMA**"). This means that the Guidelines are of a general application, regardless of a SFAMA membership. The Guidelines entered into force on July 1, 2014.

I. Distribution Guidelines

a) Scope of application

Under the current legal framework, funds marketing activities directed towards regulated qualified investors (such as banks, securities dealers, fund managers and fund asset managers) fall outside of the scope of the CISA, whereas marketing activities directed to non-qualified investors and non-regulated qualified investors (such as pension funds and other institutional investors) are considered as distribution and thus subject to the CISA requirements. The Distribution Guidelines are hence not applicable to offer or proposal of funds units/shares to regulated qualified investors.

The Distribution Guidelines are applicable to fund promoters, in particular to fund managers, SICAVs and

Swiss representatives of foreign funds distributed in Switzerland. Foreign funds must appoint a Swiss representative not only for distribution to Swiss non-qualified investors but also non-regulated qualified investors.

It is to be stressed that the Distribution Guidelines incorporate several provisions applicable to distributors ("**Provisions for Distributors**"). The Provisions for Distributors are applicable to all distributors, including foreign-based distributors. They must be incorporated in the distribution agreement entered into between the foreign distributors and the Swiss representative. The SFAMA will make available revised template distribution agreements to its members shortly.

b) Obligations of the promoters

According to the Distribution Guidelines, fund promoters must:

- > select distributors with due diligence;
- > enter into distribution agreements on the basis of the template to be issued by the SFAMA;

- > control whether the distributors have the professional resources to perform their tasks;
- > monitor the distributors. The nature of the monitoring depends on the regulatory status of the relevant distributor. The Distribution Guidelines provide for four categories of distributors. The monitoring of foreign-based distributors will be performed through an annual confirmation to be sent by the foreign distributors to the Swiss representative; and
- > issue internal directives, which set out the policy and the guiding principles applicable to the selection and monitoring of distributors.

c) Obligations of the distributors

As indicated above (see I.a), the distributors must comply with the Provisions for Distributors that are annexed to the Distribution Guidelines and to be incorporated in the distribution agreements.

The Provisions for Distributors apply to distribution to non-qualified investors and to non-regulated qualified investors.

In a nutshell, distributors have specific information duties. The scope of these duties depends on the regulatory status of investors. Non-qualified investors must be informed in a full extent (information on risks, investment characteristics and opportunities of the funds and determination of investors' needs). Regarding distribution to high-net-worth individuals, the distributors must take the investors personal needs into account, in particular their risk tolerance and capacity. The high-net-worth individuals may waive their rights to be provided with said information.

The distributors are also required to select and monitor the sub-distributors. Sub-distributors have to comply with the Provisions for Distributors as well.

d) Actions to be taken

Promoters and Swiss representatives of foreign funds will have to take the following actions:

- > categorization of distributors based on the four categories set out in the Distribution Guidelines;
- > amendment of the existing distribution agreements to reflect the SFAMA template;
- > amendment of the existing internal directives.

Distributors will have to take the following actions:

- > amendment of their internal directives;
- > amendment of the existing distribution and/or sub-distribution agreements to reflect the SFAMA template.

II. Transparency Guidelines

a) Scope of application

In substance, the Transparency Guidelines are applicable to Swiss representatives of foreign funds, and distributors (Swiss or foreign) of these funds in Switzerland. In particular, the Transparency Guidelines apply to foreign funds distributed to qualified investors and non-qualified investors by their incorporation by reference in the distribution agreement entered into with the Swiss representative.

If foreign regulations provide for more stringent rules in the context of a distribution in Switzerland, Swiss investors shall also benefit from these rules. The relevant foreign rules must be explicitly and exhaustively listed in the appendix to the prospectus.

b) Duty of information on fees and costs

The Transparency Guidelines embody a **general duty to disclose** information regarding fees and costs in the funds documentation, such as the prospectus.

Information on fees and costs may be provided on a standardized basis. In addition to the general information, the Transparency Guidelines provide for a **specific duty to disclose** information regarding fees and costs upon request and free of charge, provided certain conditions are met, in particular, if the investors have a justified interest.

c) Duty of information regarding retrocessions

Retrocessions refer to any commissions, kickbacks, trailer, or finder's fees that are paid typically by the fund managers, SICAVs or their agents to intermediaries, such as distributors and advisors.

Retrocessions are permitted, but are subject to a disclosure requirement, namely:

- > the **person who pays** retrocessions has a duty to disclose in the fund documentation that such retrocessions are paid and for which services. The names of the recipients of the retrocessions do not have to be disclosed;
- > the **person who receives** retrocessions must inform investors free of charge and **without any prior request** about the amount of the compensation they may receive for distribution (e.g. by giving the calculation parameters or compensation ranges). **Upon request**, the recipients of the retrocessions must disclose the amounts they actually receive for the distribution of the fund(s);

- > if the receipt of retrocessions implies possible conflict of interests, the existence of such conflicts and their nature are to be disclosed to the investors by the recipient of the retrocessions.

d) Duty of information regarding rebates

Rebates are defined as any payment by fund managers, SICAVs or their agents directly to investors which result in a reduction of the fee or cost attributable to the fund.

Rebates are permitted provided they are granted based on objective criteria, such as the amount of the fees generated by the investors. Objective criteria may be combined. Criteria and conditions at which rebates are granted must be disclosed in the fund documentation, typically in the fund prospectus.

Upon request, the objective criteria for granting rebates and the corresponding amounts have to be disclosed. The names of the beneficiaries of rebates do not need to be disclosed.

e) Actions to be taken

The following actions must be taken:

- > amendment of the fund documentation;
- > amendment of the distribution
- > agreements; establishment of internal directives on the granting of rebates.

III. Transitional periods

The revised CISA and CISO have introduced a two year transitional period which will end on March 1, 2015. This deadline applies in particular to the requirements applicable to Swiss representatives and distributors in the context of the distribution of foreign funds to qualified investors. The transitional period applies only to representatives and distributors that have started their activities in Switzerland before March 1, 2013.

As of July 1, 2014, the **Distribution Guidelines** will be applicable to all distributors and representatives that have started their activities after March 1, 2013. Existing distribution agreements must be amended by June 30, 2015.

According to the **Transparency Guidelines**, fund managers and SICAVs must amend the fund documentation and submit it for approval by FINMA by February 28, 2015. Regarding foreign funds distributed to non-qualified investors in Switzerland, the respective fund documentation has to be amended and submitted for approval by FINMA by May 31, 2015.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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