



## New SFAMA Guidelines on the Distribution of Collective Investment Schemes from 22 May 2014

### 1. Introduction

With the partial revision of the Collective Investment Schemes Act (CISA), which came into force on 1 March 2013, the Swiss Collective Investment Schemes Law has departed from the term «public advertising» and in its place introduced the term «distribution». From a supervisory point of view, this demands a rethinking, as the term «public advertising» has, since the coming into force of the first Swiss Investment Fund Act (Anlagefondgesetz, AFG) in 1966, been of strong influence as an important demarcation criterion.

In addition, with the partial revision of the CISA, certain regulations for the distribution of collective investment schemes to qualified investors were introduced. With the new system, three channels of distribution with differing legal consequences were introduced: distribution activities as per art. 3 CISA, which do not qualify as distribution in the sense of CISA and therefore are not subject to the CISA; distribution to qualified investors as per art. 10 para. 3, 3bis and 3ter CISA; and distribution to non-qualified, i.e. retail investors. This new distribution concept required considerable amendments of the SFAMA Guidelines on the Distribution of Collective Investment Schemes.

### 2. Content of the new SFAMA distribution guideline

On 22 May 2014, the SFAMA passed the new Guideline on the Distribution of Collective Investment Schemes (subsequently: «SFAMA Distribution Guideline»). It was recognised as a minimum standard by the FINMA, and entered into force on 1 July 2014. The interim provisions set forth in art. 158d para. 4 CISA (transitional period until 28 February 2015 for the appointment of a representative of foreign collective investment schemes and a paying agent and the fulfilment of further requirements regarding distribution of collective investment schemes exclusively to qualified investors) and in art. 144c para. 5 CISO

(transitional period until 28 February 2015 for the supervision of the financial intermediary in his country of domicile for the distribution of collective investment schemes exclusively to qualified investors and completion of a written distribution agreement with a representative of collective investment schemes), remain reserved. Existing distribution agreements require amendments by 30 June 2015. This will also include as yet merely verbally concluded distribution agreements with distributors without licensing obligation.

The SFAMA Distribution Guideline is valid for the distribution of all collective investment schemes, meaning both Swiss and foreign funds, and for the distribution to qualified and to non-qualified investors.

The SFAMA Distribution Guideline is only valid for distribution in Switzerland, meaning not for distribution from Switzerland to foreign countries. For distribution activities of Swiss providers abroad, the regulations of the respective country have to be honoured.

Responsibility for the compliance with the SFAMA Distribution Guideline lies with the fund management companies, the SICAV as well as the representative of foreign collective investment schemes (subsequently «Provider»). The Provisions for Distributors as presented in the attachment to the SFAMA Distribution Guidelines shall be an integrated part of the distribution agreements with the distributors.

The SFAMA Distribution Guideline differentiates between the following categories of distributors:

- distributors requiring permits (art. 13 para. 2 lit. g CISA);
- exempt distributors (art. 13 para. 3 CISA in conjunction with art. 8 CISO);
- distributors not requiring permits: persons with domicile abroad or in Switzerland that distribute shares of a Swiss collective investment scheme solely to

qualified investors (FINMA-Circ. 2013/9, No. 62);

- foreign distributors: financial intermediaries with domicile abroad that distribute foreign collective investments schemes in Switzerland solely to qualified investors (art. 19 para. 1bis CISA und art. 30a CISO).

Concerning the selection of distributors, it goes without saying that the Providers may solely work with distributors that provide for a guarantee of proper business conduct. Concerning the cooperation with and the supervision of distributors, the Providers need in particular to secure the following:

- review of the distributor's professional and personal resources;
- if required, appropriate support, schooling and education for the distributor;
- commitment from the distributor for the required audits and confirmations;
- termination of the distribution agreement in case of repeated or serious breaches;
- transmission of duties of SFAMA-Distribution Guideline in event of use of sub-distributors.

Further, the Provider must issue an internal directive and in particular regulate the criteria and procedure for the selection of distributors, define the responsibilities for the conclusion of distribution agreements, issue regulations for the continued support and supervision of distributors, and regulate action in the event of breaches and the reporting duties.

### 3. Provisions for distributors according to the attachment to the SFAMA-Distribution Guideline

The provisions for distributors in the attachment of the SFAMA Distribution Guideline are also valid, both for the distribution to non-qualified investors and to qualified investors. They are also valid for all mentioned categories of distributors (distributors re-

quiring permits, exempt distributors, distributor not requiring permits and foreign distributors). As long as distribution activities do not count as distribution in the sense of CISA, the stipulations for the distributors are of course not applicable.

The provisions for distributors contain organisational stipulations for the distributor. In particular, the distributor shall secure the continuous compliance with the provisions, employ personnel with sufficient professional education and experience, and fulfil the duty to report as per art. 16 CISA. A notification or authorisation requirement as per art. 16 CISA exists in the case of an alteration of organization or the respective organisation documents (e.g. articles of association, organisational regulations) of the distributor, a change in the persons responsible for the management and the business operations (e.g. Members of the Board of Directors and the Executive Management), change in qualified shareholders, or appearance of facts which might call into question the good reputation or the guarantee of proper management by the persons responsible for the management and the business operations or by the qualified shareholders (e.g. opening of legal case).

The provisions for the distributors came into force as the SFAMA Distribution Guideline as per No. 42 of the regulations on 1 July 2014. The duty to provide information remains as per ciph. III B. This may mean that these duties to provide information may be applicable as of immediately.

### 3.1 Distribution in direct client contact

Regarding the duty to disclosure in dealing with clients via direct client contact with individual consultation, the following points are of particular noteworthiness:

- a) When distributing to non-qualified investors and to high net worth individuals with direct client contact, the individual requirements, the risk tolerance and the risk ability of the investor shall be clarified (ciph. 5.1 of the provisions for distributors).
- b) When distributing to non-qualified invest-

tors, there is additionally an individual duty of the distributor of disclosure of the investment character, the opportunities and the threats of the collective investment scheme (ciph. 5.2 of the provisions for distributors).

- c) In all distribution activities falling under CISA, the SFAMA Transparency Guideline shall be complied with (ciph. 5.3 of the provisions for distributors).
- d) In all distribution activities falling under CISA, die minutes requirements under art. 24 para. 3 CISA shall be complied with (ciph. 5.4 of the provisions for distributors).

The duty to examine the individual requirements, the risk tolerance and the risk ability (lit. a above) when giving individual advice already exists based on the minutes requirements under art. 24 para. 3 CISA. Subsequently, these regulations affect not only the non-qualified investors and high net worth individuals, but all investors. In our opinion, an individual duty of disclosure on investment character, opportunities and threats (lit. b above) also exists in general based on the minutes requirements under art. 24 para. 3 CISA, and is not limited to non-qualified investors. Ciph. 5.1 and 5.2 of the regulations for the distributors therefore basically contain, in our opinion, no additional duties. As far as these duties of clarification and disclosure are not to be understood in more comprehensive manner than the regulations on minutes requirements under art. 24 para. 3 CISA, they may be deleted without replacement.

### 3.2 Distribution without direct client contact

When distributing without direct client contact (e.g. via electronic channels) the following duties of disclosure in particular exist:

- a) an indication of the exclusion of consultation shall be provided;
- b) the duties of disclosure as per ciph. 3.1 lit. b and c above may occur in standardised form;
- c) with a written disclaimer, there are no duties of disclosure as per ciph. 3.1 lit. b and c above.

When distributing without direct client con-

tact, the question is raised whether the minutes requirements as per art. 24 para. 3 CISA may generally be waived. In our opinion, this is only the case when the distribution occurs not only without direct client contact, but also without personal recommendation to purchase a collective investment scheme (art. 1, guidelines of the Swiss Bankers' Association on minutes requirements under art. 24 para. 3 CISA, see separate «short&simple» from November 2013 - [Link](#)). Even if no personal recommendation to purchase a collective investment scheme is made, and thus no minutes requirement under art. 24 para. 3 CISA exists, standardised information according to the SFAMA Distribution Guidelines on the investment character as well as the opportunities and threats presented by the offered collective investments scheme (lit. b above) shall be given. The fact that the SFAMA Transparency Guideline must also be complied with in the distribution without direct client contact already follows from the Transparency Guideline itself. In distribution without direct client contact, the investor can in writing waive information on the character of the investment, the opportunities and threats to the offered collective investment scheme, as well as the information as per SFAMA Transparency Guidelines (lit. c above).

### 3.3 Other important provisions

Other important points in the provisions for distributors concern the duty to document in case of reverse solicitation, the free documentation on the offered collective investment scheme (prospectus, KIID, annual report, semi-annual report), the renunciation of aggressive distribution practices (cold calling, spamming etc.) and the ban on portfolio churning and front running. In addition, there are duties of documentation for the distributor concerning the organisational measures taken, the demands on professional education and experience, consultation and risk disclosure, and the waiver on information.

### 3.4 Auditing plan

According to the new auditing plan, an audit by an auditing firm affects the distributors requiring permits and exempted distributors.

The distributors not requiring permits as well as the foreign distributors are required to deliver an annual confirmation of the compliance to the provisions for distributors.

#### **4. Important changes compared to the former SFAMA Distribution Guideline**

Basically, the concept of the current SFAMA Distribution Guideline has been maintained. An important change concerns the differentiation of the four categories of distributors. This differentiation has taken place in particular as a consequence of the expansion of fund distribution regulation to the distribution to qualified investors. In particular, the provisions for distributors now also have to be incorporated into the distribution agreement in case of exclusive distribution to qualified investors. The existing placement agreements are required to be amended by 30 June 2015 at the latest.

In addition, the distributors requiring permits are bound to have annually audited not only compliance with the provisions for distributors but also the duties to inform according

to art. 16 CISA. Thus, the supervision of the non-prudentially supervised distributors is strengthened. In contrast to the distributors requiring permits and the exempt distributors, the distributors not requiring permits and the foreign distributors shall only provide an annual confirmation concerning compliance with the provisions for distributors as these distributors shall only distribute to qualified investors.

According to no. 31 of the new SFAMA Distribution Guideline, the distributor shall document the consultation and, when distributing to non-qualified investors, the risk disclosure, for example in a meeting note. This duty presumes a consultation, as do the minutes requirements under art. 24 para. 3 CISA, and should basically not go further than the already existing minutes requirements.

#### **5. Final notes**

It is to be welcomed that the new SFAMA-Distribution Guideline keeps to the proven concept of the previous guideline. However

it is questionable whether an expansion of the regulations to distribution to qualified investors was necessary. However, when distributing exclusively to qualified investors by distributors not requiring permits as well as by foreign distributors, an annual confirmation of compliance with the provisions for distributors is sufficient, which will limit the additional burden for the affected distributors.

Zurich, July 2014

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