short&simple

1/2015

# New SFAMA Code of Conduct

## 1. Situation

The Board of the Swiss Funds & Asset Management Association (SFAMA) passed a new Code of Conduct on 7 October 2014 which was recognized by the FINMA on 14 November 2014 as a minimum standard. It came into force on 1 January 2015, and is to be put into practice by the relevant CISA Institutes (fund management companies, SICAVs, limited partnerships for collective investments, asset managers of collective investment schemes and representatives of foreign collective investment schemes) by 31 December 2015.

## 2. Reference to main provisions

Respecting the Code of Conduct issued by SFAMA is a requirement for the CISA Institutes to obtain a license (Art. 14 para. 2 CISA). It defines the duty of loyalty and due diligence and the duty to provide information of the licensees' and their agents' (Art. 20 CISA). The SFAMA Code of Conduct refers to the individual relevant provisions in the Collective Investment Schemes Act (CISA) and in the Collective Investment Schemes Ordinance (CISO), as well as to the main circulars (FINMA circular 13/8 market conduct rules, FINMA circular 2010/1 remuneration schemes) and the self-regulation (Guidelines on the duty to keep minutes according to Art. 24 para. 3 CISA (see short&simple 4/2013 Link) and SFAMA Guidelines on the Calculation and Publication of Performance Data of Collective Investment Schemes, Guidelines on the Calculation and Disclosure of the TER of Collective Investment Schemes and Guidelines for the Distribution of Collective Investment Schemes). With the new SFAMA Code of Conduct, the Code of Conduct of the Swiss Fund Industry and the Code of Conduct for Asset Managers of Collective Investment Schemes are merged, which were released so as to put the FINMA-circular 09/1 Guidelines on Asset Management into practice. This merger of the two codes of conduct into one code of conduct is something definitely to be welcomed. However, the opportunity was missed to also integrate the individual portfolio management by CISA Institutes. Therefore, CISA Institutes, which in addition to their activity as CISA licensee still provide individual portfolio management services also have to observe further rules of conduct which were released for the implementation of the FINMA circular 09/1 and which were recognized by the FINMA as a minimum standard (list as per FINMA circular 08/10, self-regulation as a minimum standard).

## 3. Release of internal directives

The SFAMA Code of Conduct explicitly requires for various topics that specific regulations are to be put into practice by the CISA Institutes in internal directives. Thus, in particular the following topics have to be regulated in internal directives:

- Allocation of securities trades as well as the charging of costs and expenses which are incurred in addition to the fee in order to avoid favoring certain investors (Ciph. 30 s. CoC);
- Details on the selection of counterparties via which the transactions are settled (best execution) (Ciph. 33 ss. CoC);
- Details concerning organizational measures for purposes of identification, prevention, elimination, monitoring and disclosure of conflicts of interest (Ciph. 42 CoC);
- Personal account dealings of staff as well as receipt and granting of discounts and other benefits (invitations, presents etc.) (Ciph. 44 ss. CoC);
- Exercise of membership and creditors' rights. For this topic, it is advised to also consult SFAMA's "Fachinformation Ausübung von Mitgliedschafts- und Gläubigerrechten" [not available in English] (Ciph. 50 ss. CoC);
- The process for the participation in class actions (Ciph. 55 CoC);
- Internal control system (ICS), risk management and compliance (Ciph. 60 ss. CoC); particular attention is to be paid to the following: rules of conduct and responsibilities for extraordinary circumstances; access to software used for the valuation, recording deals and controlling; adequate risk management; appropriate business continuity management (BCM); valuation of the collective investment scheme's assets; compliance function; rules of conduct and responsibilities for cases in which the CISA Institute is active in the fund business and in asset management, investment advice and/or safekeeping and technical administration of collective investment schemes;
- Engagement of distributors: the internal directives have to satisfy the requirements set forth by the SFAMA Guidelines on the Distribution of Collective Investment Schemes (Ciph. 118 CoC, Ciph. 30 ss. SFAMA Distribution Guidelines).

In light of the new SFAMA Code of Conduct, the CISA Institutes should review their valid internal regulations and amend them as necessary. The duty to bring the internal regulations in line with the SFAMA Code of Conduct should also be used as opportunity to update, harmonize and complete all internal regulations.

## 4. Scope of application for representatives of foreign collective investment schemes

### 4.1 Representatives of foreign collective investment schemes – distribution to non-qualified investors

The SFAMA Code of Conduct is also applicable for representatives of foreign collective investment schemes (Ciph. 9 CoC). Should distribution be effected to non-qualified investors, the following duties are applicable for the representatives of foreign collective investment schemes: the duties in respect of due diligence (section III B), the duties of disclosure (section III C) as well as the duties of due diligence and loyalty in the distribution of collective investment schemes (section III D). Regarding the duty of loyalty, the general provisions as per Art. 20 CISA are applicable to the representative and, insofar as affected (e.g. for the avoidance of conflicts of interest)

also the regulations as per Art. 31 ss. CISO. The implementing provisions set forth in section III A of the SFAMA Code of Conduct are, however, basically not applicable for representatives of foreign collective investment schemes.

**4.2 Representatives of foreign collective investment schemes – distribution to qualified investors**

Should distribution occur solely to qualified investors, only the duties in respect of due diligence (section III B) and the duties of due diligence and loyalty in the distribution of collective investment schemes (section III D) are applicable to the representative, however, not the duties of disclosure (section III C). As the effective distribution activities in Switzerland have to be decisive, this must also be applicable to foreign collective investment schemes which are available to non-qualified investors but are distributed in Switzerland solely to qualified investors as per Art. 10 para. 3, 3bis and 3ter CISA.

According to Art. 133 para. 5 CISO, publication and reporting regulations are not applicable to foreign collective investment schemes exclusively sold to qualified investors. The same applies to the SFAMA Guidelines on the Calculation and Publication of Performance Data of Collective Investment Schemes and the SFAMA Guidelines on the Calculation and Disclosure of the TER of Collective Investment Schemes: these are not applicable to representatives of foreign collective investment schemes provided that the collective investment schemes are distributed to qualified investors only. And in the case the distribution activities are limited to qualified investors only, the requirement to keep certain provisions of the agreement between the investment manager and the principal in writing are not applicable either (Ciph. 102 ss. CoC).

**Final comments**

In the context of the partial revision of the Swiss law on collective investment schemes which came into force on 1 March 2013, the duties of due diligence and to provide information of the CISA Institutes have been broadened. In particular, new provisions were introduced on the disclosure of all charges, fees and distribution costs incurred by the investors (Art. 20 para. 1 lit. c CISA) and on the duty to take minutes (Art. 24 para. 3 CISA). These new provisions were implemented in the SFAMA Transparency Guideline (see short&simple 3/2014 Link) and in the Guidelines on the duty to keep minutes according to Art. 24 para. 3 CISA (see short&simple 4/2013 Link). Furthermore, specific adjustments to the internal organization were necessary in order to bring it in line with Art. 12 and 12a CISO in the areas of the internal control system, risk management und compliance, the transition period for which had expired on 1 March 2014 (Art. 144c para. 3 CISO). Also, a clear tendency is recognizable that the individual regulatory provisions need to be implemented in the internal regulations of the CISA Institutes more comprehensively and in more detail.

Although the SFAMA Code of Conduct does not contain any substantial material changes apart from those based on the partial revision of Collective Investment Schemes Act and its implementing Ordinance, larger or smaller amendments to the internal regulations of the CISA Institutes may be necessary based on this Code of Conduct. The deadline to implement the new Code of Conduct by 31 December 2015 thus offers a good opportunity to adjust the internal regulations of any CISA Institute. With regard to the risk management and the risk controlling, the new provisions of Art. 67 ss. of the FINMA Ordinance of Collective Investment Schemes (CISO-FINMA) are applicable, which are similarly to be put into practice by 31 December 2015 by the fund management companies, SICAVs and asset managers of collective investment schemes.

Zurich, January 2015


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