4/2013

Revision of the Collective Investment Schemes Act (CISA) – minutes requirements under Art. 24 para. 3 CISA in application of the guidelines of the Swiss Bankers Association (SBA)

1. Introduction

On 1 January 2014, the new Art. 24 para. 3 of the Federal Act on Collective Investment Schemes (CISA) and the new Art. 34a of the Collective Investment Schemes Ordinance (CISO) shall enter into force. Art. 24 para. 3 CISA reads as follows:

"The licensee and third parties included in distribution hold in written form the requirements of the client and the reasons for each recommendation for the purchase of a defined collective investment scheme. These written minutes are presented to the client."

Art. 34a CISO stipulates that form and content of the minutes must comply with rules of conduct issued by a self regulatory organisation recognised as minimum standard by the Swiss Financial Market Supervisory Authority (FINMA) according to Art. 7 para. 3 FINMASA. In November 2013, the Swiss Bankers Association (SBA) released guidelines as regards requirements of minutes under Art. 24 para. 3 CISA. Upon the guidelines being raised to the level of minimum standard, they become binding on all parties involved in distribution. They also enter into force on 1 January 2014, and will remain in force until 31 December 2015 (Art. 9 Guidelines).

Art. 24 para. 3 CISA was only added to the law in the process of resolving differences between the two houses of parliament. Those opposing this outcome argued that the introduction of a requirement to keep minutes was planned in the Financial Services Act (FIDLEG), and thus should apply not only to the distribution of collective investment schemes, but to all financial instruments. However, the (as compared to other financial products) discriminating special treatment of collective investment schemes obtained majority support, and thus became law.

The aim of the requirement to establish minutes is to ensure that the advisors provide client-specific advice, and that such advice was to be put down in writing for the purposes of verification. No collective investment schemes not tailored to his or her requirements should be sold to an investor. The advisory minutes shall thus provide evidence of the advice given, which ultimately benefits both licensees and investors.

2. Who has to keep minutes?

The minutes requirement only affects persons or parties distributing collective investment schemes. Consequently, the requirement does not apply when only „non distribution activities" within the meaning of CISA occur (to separate distribution from non-distribution please refer to the short & simple Nr. 2013/9: Link). In particular, there is no minutes requirement when advice is directed towards financial institutions as per Art. 10 para. 3 (a) / (b) CISA (meaning banks, securities dealers, fund management companies, asset managers of collective investment schemes, central banks and regulated insurance institutions), and when advice is provided within the guidelines of advisory contracts as per Art. 3 para. 2 CISA. A requirement to keep minutes not only exists for distribution to non-qualified investors, but also to qualified investors, in particular to pension institutions and high net worth individuals.

It is arguable whether the minutes requirement applies to independent wealth managers or multi-level distribution involving distributors that do not qualify under Art. 10 para. 3 a/b CISA. Although it concerns "distributors" as defined by the CISA, there is in our view no minutes requirement in such instances. According to the guidelines only a personal recommendation forming part of an individual client consultation is to be minuted (see the below part. 3). Information on the investment objects, the client risk profile, as well as the reasons for the recommendation would in such event not be possible, as long as they go beyond the general information contained in the fund documentation. This view is in line with the principle expressed in Art. 24 para. 3 CISA, according to which the requirement to establish minutes is valid for "the licensee and the third parties participating as distributors".

3. Minutes: when (Art. 1 guidelines)?

According to Art. 1 of the guidelines, minutes are to be written only in connection with a personal recommendation for the purchase of one or several collective investment schemes by the licensee (or a third party as distributor). A recommendation is considered to be personal when the recommendation has been directed towards a specific person. However, no minutes are required in the case of collective recommendations addressed towards a plurality of persons, as for example at road shows.

Furthermore, the minutes are only required in the event of a recommendation to ***purchase*** one (or several) collective investment schemes. Conversely, no minutes are required when the client advisor offers the client a personal recommendation to ***hold*** on to or ***sell*** one (or several) collective investment schemes. Should the recommendation to sell form part of a recommendation to purchase another investment scheme, the requirement to write minutes regains validity.

With regard to simple review meetings of a portfolio, without giving a recommendation to purchase collective investment schemes, no minutes are consequently required.

4. Minutes: what (Art. 2 and 3 guidelines)?

The minutes must contain the following information:

- The client's investment objective and risk profile. Existing information provided by the client for the creation of the general investment profile can in this case be used.
- Reasons for the personal recommendation of the client advisor for the purchase of one (or several) collective investment schemes.

This ensures that the advisor clarifies the investor's requirements in the first instance,

and recommends an investment in line with these requirements thereafter.

5. Minutes: how (Art. 4 and 5 guidelines)?

The only requirement with regard to the minutes is that it can be supplied or reproduced (particularly in the event of legal proceedings) without being altered. Thus the written minutes and minuting can be carried out in electronic form.

With regard to the choice of the language to be used for the minutes, this should mirror the language used in the consultation with the client. As an alternative, there is the possibility to draw up the minutes in the language chosen by the client for its relations with the bank. The choice of another language, e.g. the language used internally by the financial institution providing the consultation (above all English) is, however, not foreseen, unless the investor explicitly agrees thereto.

6. Disclosure to the investor (Art. 6 and 7 guidelines)

If there is a minutes requirement, the minutes are to be supplied to the client. The minutes can be sent or provided to the client directly or via letter, fax, email or other web-based form. The minutes need not be signed.

If the advice to purchase one (or several) collective investment schemes takes place via correspondence, the delivery of the minutes is not required if the correspondence contains the ascertained information on the client's investment objective, a note on the client's risk profile, and the reasons for the client advisor's personal recommendation to purchase one or several collective investment schemes (see the above point 4).

Finally, there is the possibility for the client to waive the right to be supplied with the minutes. This waiver must however be expressly and clearly stated.

A general waiver of the obligation to establish minutes, e.g within the realms of General Terms and Conditions, is in our view not permitted. It is unclear whether in the event of a waiver of a being supplied with minutes on the part of the client, the establishment of the minutes can be avoided. In favour of an absence of an obligation to write minutes is the fact that the minutes requirement should offer the investor additional protection which he or she may prefer to do without. On the other hand, the argument against the waiver is the fact that CISA constitutes binding public law, and neither the CISA nor the guidelines foresee the waiving of the duty to create minutes. For reasons of providing evidence in civil or regulatory disputes, it is recommended to write minutes internally.

7. Final notes

The extent of the minutes is directed – in addition to its binding minimum content (see the above point 4) – fundamentally at a particular (sales) consultation. As a possible solution, please find attached to this publication a sample of such minutes. The sample covers the stipulated minimum requirements. Possible adjustment should be considered. The general rule of thumb is that the information in the minutes should be written so as to be understandable to a third party not closely involved in the specific case.

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Attachment: Protocol template

Name and first name of client:	
Name and first name of advisor:	
Time and place of consultation:	
Investment objectives[1]	
Risc profile[2]	
Notes	

Reasons for the personal recommendation of the **purchase** of one (or several) collective investment schemes	
Information on the collective investment scheme recommended for purchase	
Reasons for the recommendation	

[1/2] With regard to the information on the investment aims and the information on the risk profile of the client, existing information supplied by the client for the purposes of drawing up the general investment profile can be used (Art. 2 of the guidelines on the protocol requirement according to Art. 24 para. 3, Federal Law on Collective Investment Schemes (CISA) Swiss Bankers Association).