Newsletter July 2014

New SFAMA Guidelines on Duties Regarding the Charging and Use of Fees and Costs (Transparency Guidelines) and on the Distribution of Collective Investment Schemes (Distribution Guidelines) both of 22 May 2014.

A. New SFAMA Guidelines on Duties Regarding the Charging and Use of Fees and Costs (Transparency Guidelines) of 22 May 2014 (hereafter "Transparency Guidelines")

On 22 May 2014, the SFAMA issued the abovementioned Transparency Guidelines, which are recognised as minimum standard by the FINMA.

1. General Duty to provide Information

The Transparency Guidelines specify in more detail the duty to provide information to the investor as required in Art. 20 para. 1.c of the Federal Act on Collective Investment Schemes (CISA). They apply also to foreign funds distributed in Switzerland as well as to their representatives and the persons which distribute these funds in Switzerland.

If foreign law provides for stricter rules regarding distribution in Switzerland and these rules are set down in the pertinent fund documents, it must be ensured that Swiss investors also benefit from them. The relevant rules must be explicitly and exhaustively listed in the appendix to the sales prospectus regarding specific information for Swiss investors. The provisions of the Transparency Guidelines apply to all persons and funds only with regard to the relevant activities in Switzerland or from Switzerland.

The following is to be disclosed in the fund documents such as the fund contract, investment regulations, prospectus or annual report regarding the charging of fees and costs:

- the fees and costs the licensee or its agents may charge to the fund, such as management fees for the fund management company, custody fees for the custodian, management fee and performance fee (if any) for the asset manger and distribution fee for the distributors as well as the incidental costs;
- the level of such fees; bands or maximum rates may also be specified (in such cases, the actual fees charged must be disclosed in the annual report);
- the level of the fees and incidental costs in the last reporting period.
- commissions and fees incurred in connection with the issue and redemption of units which may be charged to the investors.

The fees and costs may be listed individually or they can be aggregated under one or more terms (e.g. "all-in fee" or "flat fee"), if certain conditions are observed.

The following is to be disclosed in the fund documents regarding the use of fees and costs:

- whether the fees may be paid to third parties for the provision of services in connection with the performance of the fund business, without disclosure of the identity of the third party or the amounts paid to them; as well as
- the services concerned.

Additionally to the general information, the licensees and their agents are obliged to answer justified enquiries from current or former investors (to the latter in relation to the period during which they were invested) free of charge under certain conditions.

2. Duties in Connection with the Use of Fees and Costs (Retrocessions and Rebates)

Moreover, the Transparency Guidelines specify the duties in relation with the use of fees and costs (retrocessions and rebates).

Under the Transparency Guidelines retrocessions are deemed to be payments and other soft commissions paid by fund management companies, SICAVs and SICAFs and their agents (hereafter "Financial Intermediaries") for distribution activities in respect of fund units. The granting of retrocessions is permit-

ted irrespective of the contractual relationship between the recipient of the retrocessions and the investor (asset management agreement, advisory agreement, execution only) and irrespective, whether the service qualifies as distribution or not pursuant to Art. 3 CISA.

However, the licensees who pay retrocessions have to disclose in the fund documents that retrocessions are paid and for which services they are paid. The name of the service providers do not have to be mentioned. The recipients have to ensure transparent disclosure as well. They must inform the investors, unsolicited and free of charge, about the amount of the compensation they may receive for the distribution. On demand, they must disclose the amounts they actually receive for the distribution of the investment funds held by the investors concerned. In the event that the receipt of retrocessions for distribution activities may give rise to conflicts of interest, the existence of the conflicts of interest and their nature are to be disclosed to the investors in a suitable and sufficiently specific form.

Rebates are defined as payments by the Financial Intermediaries directly to investors from a fee or cost charged to the fund with the purpose of reducing the said fee or cost to a contractually agreed amount. Rebates are permitted provided that

- the Financial Intermediaries pay the rebates from the fees due to them (so that they are not charged additionally to the fund's assets);
- they are granted on the basis of objective criteria;
- all investors (irrespective of whether they are qualified investors or not), who qualify on the basis of these objective criteria and require rebates are also granted these within the same timeframe and to the same extent; and
- they are disclosed transparently in the fund documents as set forth hereafter.

The fund documents must disclose whether investors may be granted rebates on the fees or costs, and – if so – subject to which conditions (= objective criteria). Moreover, at the request of the investor, the Financial Intermediaries must disclose free of charge the objective criteria for granting rebates and the corresponding amounts. They do not have to disclose the names of the recipients of rebates.

3. Effective Date and Transitory Provisions – Action required

The Transparency Guidelines entered into force on 1 July 2014.

The Swiss representatives of foreign funds must submit fund contracts, investment regulations or sales prospectuses amended in line with these Transparency Guidelines to the FINMA for approval **no later than 1 June 2015**. It is therefore recommended, that the fund documents such as the prospectus, management regulations or statutes as well as distribution agreements are reviewed whether they comply with the new Transparency Guideline. Moreover, the internal guidelines may have to be revised in terms of retrocessions (disclosure) and granting of rebates (objective criteria and disclosure).

With respect to the granting of rebates (see section 2 above), compliance with the respective provisions is only required once the corresponding amendments have been made to the fund contract, investment regulations or sales prospectus.

B. New SFAMA Guidelines on the Distribution of Collective Investment Schemes of 22 May 2014 (hereafter "Distribution Guidelines")

On 22 May 2014, the SFAMA issued the abovementioned Distribution Guidelines, which are recognised as minimum standard by the FINMA.

1. General Remarks

The Distribution Guidelines apply to fund management companies, SICAVs, SICAFs and Swiss representatives of foreign collective investment schemes (hereafter "Providers") with respect to collective investment schemes distributed in Switzerland.

According to the Distribution Guidelines, distributors are deemed to be all third parties who are engaged by the Providers to distribute collective investment schemes (hereafter "Distributors"). As a consequence, also financial intermediaries domiciled abroad which distribute foreign collective investment schemes in Switzerland exclusively to qualified investors, are Distributors according to the Distribution Guidelines.

All Distributors have to enter into a written distribution agreement with the Provider on the basis of the currently valid versions of the model distribution agreement issued by the SFAMA. The Provisions for Distributors in the Appendix to the Distribution Guidelines (hereafter "Provisions for Distribution", see section 3 below) must form an integral part to the written distribution agreement between the Distributor and the Provider in Switzerland.

Should the Providers themselves distribute collective investment schemes, they have to comply with the Provisions for Distributors.

2. Selection, Collaboration with and Supervision of Distributors

As a basic principle, the Distribution Guidelines provide that the Providers must select exclusively Distributors that can guarantee the proper conduct of business activities.

Providers must check whether the Distributors have the personal and professional resources to perform their task. Where necessary, Providers must ensure appropriate support, instruction, and training to Distributors to enable them to comply with the Provisions for Distributors at all times.

Moreover, the Providers are obliged to supervise the Distributors. In particular, they must establish appropriate controls which allow them to determine any significant changes in the Distributor's legal form, structure, staffing, business activity and/or business conduct, and also with regard to the means and methods used by the Distributor to distribute the collective investment schemes. Furthermore, the Providers have to oblige the Distributors that their auditing company (where applicable) examines annually their compliance with the Provisions for Distributors and other duties under the CISA. Financial intermediaries domiciled abroad which distribute foreign collective investment schemes in Switzerland exclusively to qualified investors shall provide to the Provider a written confirmation by the end of January each year, that they are in particular permanently compliant with the Provisions for Distributors in terms of the distribution to qualified investors.

In case of repeated or gross violations, the distribution agreement must be terminated and the FINMA must be informed.

3. The Provisions for Distributors in the Appendix of the Distribution Guidelines

The Provisions for Distributors include in particular provisions regarding organisation of the Distributors, duties about information and documentation of the Distributors.

As far as the Distributor's organization is concerned, the Distributor ensures in particular that only persons are employed for providing advice on collective investment schemes who have the necessary professional training and experience to satisfy the principles of the Provisions for Distributors.

In terms of the duties of information the Provisions for Distributors provide that the Distributor acts exclusively in the interest of the investor. After this basic rule, the Provisions for Distributors enlist the duties to be observed when the Distributor distributes the collective investment schemes in direct contact to the investor, where individual advice is given, followed by the rules to be observed when the collective investment schemes are distributed by way of electronic distribution channels or by way of other means without direct contact with the investor.

With regard to the documentation the Distributors must issue written regulations or documentation which governs in particular

- the organizational measures taken which enables the Distributor to permanently observe the Provisions for Distributors,
- the requirements for professional training and experience, and instruction and training of the employees who provide advice on collective investment schemes,
- the advice and – where applicable – the explanations of risks.

4. Delegations to Sub-Distributors

The Distributor may delegate tasks delegated to it by the Provider to sub-distributors subject to the Provider's approval. In case of such delegation to sub-distributors, the Distributor is obliged to supply the Provider with all such information which the Provider requires in order to perform its monitoring duties. The Distributor must impose on any sub-distributors the obligation to observe the Provisions for Distributors.

5. Effective Date and Transition Period – Action required

The Distribution Guidelines entered into force on 1 July 2014, subject to the transitional provisions in Art. 158d para. 4 CISA and Art. 144c para. 5 Ordinance to the Collective Investment Schemes (CISO). These articles concern the following:

- Foreign collective investment schemes which are distributed exclusively to qualified investors must appoint a Swiss representative and paying agent until 1 March 2015 (158d para. 4 CISA).
- The financial intermediary who distributes foreign collective investment schemes exclusively to qualified investors in Switzerland has to enter into a written distribution agreement with the Swiss representative of such foreign collective investment schemes until 1 March 2015 (144c para.5 CISO).

Existing distribution agreements must implement the Distribution Guidelines no later than 30 June 2015.

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The content of this Newsletter does not represent legal advice and may not be used as such. For a personal consultation, please get in touch with your contact at Suter Howald Attorneys at Law. Should you have further questions in relation to the topics in this Newsletter, please contact:

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