



## Changes for existing Asset Managers of collective investment schemes based on the new rules of conduct of the Swiss Funds & Asset Management Association SFAMA Rules of Conduct SFAMA

What changes in  
terms of the scope of  
application of the  
Rules of Conduct  
SFAMA compared to

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The new Rules of Conduct SFAMA for asset managers of collective investment schemes (“Asset Manager”) have entered into force on January 1, 2015. The Rules of Conduct SFAMA replace the rules of conduct as of March 31, 2009 for asset managers of collective

## the Rules of Conduct March 31, 2009?

The Rules of Conduct SFAMA are now explicitly not just only applicable to Asset Managers domiciled in Switzerland, but also to foreign licensed Asset Managers having a branch in Switzerland (N 8).

The application of the Rules of Conduct SFAMA is in case of a branch in Switzerland of a foreign Asset Manager however restricted to the business activities of the branch in Switzerland. The Rules of Conduct SFAMA are in other words not applicable to the international activities of a Swiss branch of a foreign Asset Manager, but to the international activities of a Swiss domiciled Asset Manager (N 17).

investment schemes (“Rules of Conduct March 31, 2009”).

This gap-analysis between the Rules of Conduct March 31, 2009 and the Rules of Conduct SFAMA in the form of FAQ inform Asset Managers having a FINMA-license as of January 1, 2015 about the required amendments of the existing documents and agreements respectively their new rights and obligations and in particular their date of entry.

## What is the deadline for the implementation of the changes foreseen in the Rules of Conduct SFAMA?

There is a transition period until December 31, 2015 within which the Asset Managers and their agents will have to finalize the implementation of the to be amended contracts (N 119). The transition period is explicitly only applicable to the amendment of existing contracts. All other duties, such as the multiple obligations for the issuance of new policies, must already be implemented as of January 1, 2015. You might thus have to take immediate action.

## Which new obligations are already

# applicable beginning January 1, 2015?

## **Provisions about distribution activities**

The Rules of Conduct SFAMA do also contain duties of care and loyalty regarding the distribution of collective investment schemes. These provisions require the introduction of a remuneration system in case of payment of distribution fees that fosters proper client advice and the maintenance of sustainable long-term relationships. The remuneration system should thus not just reward short-term oriented sales or even improper sales techniques incentivized by the size of the distribution fee (N 111 et seq.).

## **Provisions about any investment transactions and activities that might result in manipulation of prices**

Asset Managers may not engage in any investment transactions and activities that might result in manipulation of prices (N 28). The Rules of Conduct March 31, 2009 were talking about investment transactions and activities that actually result in a manipulation of prices. According to the Rules of Conduct SFAMA is thus now even the possibility or even the appearance of a manipulation of prices in the context of investment transactions and activities not permitted. Such activity respectively such investment transactions are thus deemed to be non-permissible manipulation of prices.

Such an activity respectively such an investment behavior is thus an improper manipulation of prices in the sense of the Rules of Conduct SFAMA, if they could be deemed to be an improper manipulation of prices respectively could appear to be an improper manipulation of prices on any market on which the Asset Manager is dealing in securities. Slightly negligent behavior is sufficient.

## **Duties to monitor compliance of the provisions about “commission sharing agreements” and “soft commissions”**

The compliance with written agreements that have been concluded with (an) other Asset Manager(s) involved in the management of a fund in the context of “commission sharing agreements” or “soft commissions” must be monitored by the Asset Manager (N 39).

## **Provisions about the salary and remuneration policy**

The Asset Manager must now pursue a salary and remuneration policy that complies with (i) the minimal standards set forth in the FINMA-circular 2010/1 remuneration systems and (ii) the principle of proportionality, its size, and its risk profile and which motivates its employees to promote the long-term success of the collective investment schemes (N 43). The ten principles set forth in the FINMA-circular 2010/1 remuneration system request a variable payment policy that intends the long-term success of the company, is covered by its economic results, considers the risk policy adequately and fosters risk awareness. All functions/employees of the company must be considered in this salary and remuneration policy.

## **Provisions about the information of investors**

The Rules of Conduct SFAMA do now contain various information obligations. The Asset Manager has to explain the funds managed, the investment characteristics, and investment

suitability in a customer conform, reader friendly format and language (N 78). These obligations to inform have to be adequate and appropriate for the specific product and are applicable to both Asset Managers of funds only distributed to qualified investors as well as Asset Managers of funds only distributed to non-qualified investors. Parts of the information obligations are already covered by the obligations according to the transparency guideline that has entered into force in 2014. The duties to inform are (i) in case of SICAV, SICAF, limited partnerships of collective investment schemes, and contractual funds also fulfilled by virtue of the prospectus, (ii) in case of securities funds and other funds for traditional investments also fulfilled by virtue of material information, and (iii) in case of real estate funds also fulfilled by means of the simplified prospectus.

The Asset Manager has to guarantee a consistent information policy that considers the risk potential and the risk complexity adequately and allows for the investor to get an objective picture of the performance of collective investment schemes. The choice of the extent and scope of the information remains up to the Asset Manager (N 80).

All fees and incidental costs incurred when issuing and redeeming units of collective investment schemes, and when managing collective investment schemes must be disclosed (N 89).

## Which new policies must already be introduced beginning as of January 1, 2015?

### **Policy on allocations**

An internal policy on allocations must now govern (i) the allocation of securities trades and similar transactions, if the Asset Manager has issued collective orders prior to allocation to the individual investment schemes and (ii) the charging of costs and expenses incurred in addition to the fee (N 30).

### **Internal policy on the execution of securities trades and other transactions**

The specific details for the settlement of transactions on the securities, foreign exchange and other markets at terms in line with the market, while ensuring best execution, must be governed in an internal policy (N 36).

### **Policy regarding conflicts of interests**

The Rules of Conduct SFAMA foresee that the details of the organizational and administrative measures to identify, prevent, and monitor conflicts of interests must be governed in an internal policy (N 42).

### **Policy on the exercise of membership and creditors' rights**

The exercise of membership and creditors' rights as well as the cases in which they can be

waived must be foreseen in an internal policy (N 51).

### **Policy about the participation in class actions**

The Asset Manager is free to decide whether in the interest of the investors to participate in class actions, whether to appoint a proxy, or whether to assign a claim. The Asset Manager must issue an internal policy governing the process if they decide to participate in class actions (N 54 et seq.).

## Which documents must be amended as of January 1, 2015?

### **Written power of attorney**

All assets deposited with a bank must at all times solely be managed on the basis of a written power of attorney. This power of attorney may now however also contain an authorization regarding liquidation transactions (N 22). A written power of attorney means that it must be signed individually by the account holder or a duly appointed representative of the account holder. An individually signed power of attorney on a corresponding sample form of a bank likely fulfills this requirement.

### **Policy on “commission sharing agreements” or “soft commissions” reflected in the file**

A clear policy on the use of “commission sharing agreements” or “soft commissions” on exchange transactions conducted for the collective investment schemes’ account must be set down in writing (N 39). The existence of “Commission sharing agreements” and “soft commissions” must be disclosed transparently to the investor. The Asset Manager must also provide regular reports to the board of directors and the controlling unit.

### **Policy on the conflicts-of-interests between the Asset Manager and the investors**

The policy in respect of personal account dealing by employees must now also contain provisions to prevent conflicts of interests arising between the investors and the employees (N 45).

### **Receipt and Granting of discounts and other benefits**

The Asset Manager must issue written regulations on the receipt and granting of discounts and other benefits (such as invitations, etc.) by employees (N 48). The transition period for the implementation of these provisions runs until December 31, 2015 in case these regulations are contained in a contract.

### **Provisions about the delegation of tasks**

The provisions of the CISO-FINMA must now be considered when tasks are being delegated from the Asset Manager to third parties (N 61). The delegation of material duties from an Asset Manager of collective investment schemes to a third party requires a written agreement according to Art. 66 para. 1 CISO-FINMA. This written agreement must describe the delegated

duties, the competences and responsibilities, including any authorization for sub-delegation, the accountability of the agent and the control rights of the Asset Manager. Art. 66 para. 1 to 4 CISO-FINMA are applicable since January 1, 2015. There is no transition period. The CISO-FINMA supersedes in my opinion the Rules of Conduct SFAMA. That is why the provision about the delegation of duties must be complied with beginning as of January 1, 2015 and not beginning as of January 1, 2016 no matter the contractual nature of the delegation agreement.

### **Written definition of the organizational structures and processes and internal control systems**

Internal manuals must now contain explicit provisions about the following topics:

- Rules of conduct and competences for extraordinary circumstances (N 67);
- Regulations governing access to the software used for valuation, recording deals, and controlling (N 68);
- Adequate risk management in accordance with the applicable provisions and regular information to the responsible body (N 69). Art. 67 to 71 CISO-FINMA that have been entered into force on January 1, 2015 must in this context be considered regarding the principles of risk management, the to be enacted internal guidelines, the organization of risk management, the types of risks, processes and systems, the duties, and the responsibilities. There is however a transition period until December 31, 2015 for the implementation of the provisions regarding risk management and risk control;
- Appropriate business continuity management (BCM) (N 70). The Asset Manager must develop a BCM that is appropriate to its size and business activity. The Asset Manager must in my opinion however not apply the recommendations regarding Business Continuity Management (BCM) of the Swiss Bankers' Association by analogy. They can however serve as a guideline for the elaboration of an adequate BCM;
- Valuation of the collective investment schemes' assets (N 71);
- Constant monitoring of compliance with the investment restrictions laid down in
  - the law and the regulations (Compliance) (N 72); and
  - Rules of conduct and competences for cases in which, in addition to engaging in the fund business, the Asset Manager is at the same time active in the area of asset management, investment advice, and/or safekeeping and technical administration of collective investment schemes (N 73).

## **Which documents must be amended until December 31, 2015?**

### **Written agreement with the Asset Manager's client**

The written agreement with the Asset Manager's client must now also contain provisions about reporting obligations (N 110).

### **Written provisions about "commission sharing agreements" or "soft commissions"**

There must be a written agreement with potential other Asset Managers about the usage of

“commission sharing agreements” or “soft commissions” on exchange transactions conducted for the collective investment schemes’ account and this policy must be set down in writing (Z 39).

## What kind of new rights will the Asset Manager have beginning as of January 1, 2015?

### **More flexibility in the selection of counter-parties**

The selection of counter-parties that execute the transactions must be done based on objective criteria, but only under consideration of the investors’ interests (N 35). That is why the Asset Manager does now have more discretion to consider also his interests when deciding on the selection of a counter-party for the execution of transactions.

## Which other acts are now applicable by means of reference beginning as of January 1, 2015?

### **Provisions about the individual management of certain portfolios**

In case the Asset Manager is engaged in the individual management of certain portfolios according to Art. 18a para. 3 lit. b CISA, that means if the Asset Manager is engaged in the management of the assets deposited on certain individual accounts, in particular in the form of “managed accounts”, it must now comply with the FINMA circular 2009/1 “Guidelines on asset management”. These guidelines rule in particular the asset management agreement, the duties of an Asset Manager and the reimbursement of an Asset Manager (N 11).

### **Provisions about the salary and remuneration policy**

The salary and remuneration policy of the Asset Manager must now be in line with the minimal standards set forth in the FINMA-circular 2010/1 “Remuneration Schemes” (N 43).

### **Provisions about the delegation of tasks**



The corresponding provisions of the CISO-FINMA must now be considered in the context of the delegation of tasks by the Asset Manager to third parties (N 61). The delegation of material tasks by the Asset Manager to a third party requires according to Art. 61 para. 1 CISO-FINMA a written agreement in which the delegated tasks, the competences, the responsibilities, any potential right to sub-delegation, the accountability, and control rights of the third party are clearly defined.

## Additional remarks

### **Equal treatment**

The Rules of Conduct SFAMA do now explicitly clarify that there is no duty to absolute equal treatment, meaning that all investor groups and/or funds must be treated absolutely equal. There is however a duty to relative equal treatment, meaning that funds and/or investors can be treated differently depending upon the type of investor, the type of assets, and/or the type of share class (N 26). The treatment may however only be different where appropriate. No different treatment is permitted where inappropriate. The criteria for deciding which treatment applies are generally the financial situation, the knowledge of financial markets, and the need for protection of the specific collective investment schemes' and/or group of investors.

### **Does the obligation to settle transactions ensuring “best execution” only apply to transaction on markets?**

The Rules of Conduct SFAMA do now foresee an obligation to solely settle transactions ensuring “best execution” if entered into on the securities, foreign exchange, and other markets at terms in line with the market (N 36). The Rules of Conduct as of March 31, 2009 imposed the obligation to execute the transaction on each counter-party who had to be sufficiently liquid. It is thus at least questionable whether the duty to ensure “best execution” in OTC-transactions is not applicable, because they are not concluded on a market, but solely bilaterally. The duty to ensure “best execution” regarding the execution of OTC-transactions does according to Art. 22 para. 1 CISA however also apply to OTC-transactions.

You are kindly invited to address further questions to:

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# Checklist about the deadlines and scope of the implementation of the new respectively amended Rules of Conduct SFAMA

## Implementation beginning as of January 1, 2015

No.	Designation	Reference	Control
<b>A</b>	<b>New provisions applicable beginning as of January 1, 2015</b>		
1	Provisions about distribution activities	3 a)	
2	Provisions about any investment transactions and activities that might result in manipulation of prices	3 b)	
3	Duties to monitor compliance of the provisions about "commission sharing agreements" and "soft commissions"	3 c)	
4	Provisions about the salary and remuneration policy	3 d)	
5	Provisions about the information of investors	3 e)	
<b>B</b>	<b>New written policies to be applied beginning as of January 1, 2015</b>		
6	Policy on allocations	4 a)	
7	Internal policy on the execution of securities trades and other transactions	4 b)	
8	Policy regarding conflicts of interests	4 c)	
9	Policy on the exercise of membership and creditors' rights	4 d)	
10	Policy about the participation in class actions	4 e)	
<b>C</b>	<b>Documents to be amended beginning as of January 1, 2015</b>		
11	Written power-of-attorney	5 a)	
12	Policy on "commission sharing agreements" and "soft commissions" reflected in the file	5 b)	
13	Policy on the conflicts-of-interests between the Asset Manager and the investors	5 c)	
14	Granting of discounts and other benefits	5 d)	
15	Provisions about the delegation of tasks	5 e)	
16	Written definition of the organizational structures and processes and internal control systems	5 f)	

## Implementation until December 31, 2015

No.	Designation	Reference	Control
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1	Written agreement with the client of the Asset Manager	6 a)
2	Written provisions about “commission sharing agreements” or “soft commissions”	6 b)

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