



## Changes for Swiss SICAV, KGK (LP), and SICAF 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 the Rules of Conduct

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The new Rules of Conduct SFAMA for Swiss open-ended funds (SICAV), limited partnerships (LP) (KGK), and closed-end funds (SICAF) ("Funds") have entered into force on January 1, 2015. The Rules of Conduct SFAMA replace the rules of conduct as of March 30, 2009 for the Swiss fund industry ("Rules of Conduct March 30, 2009").

## March 30, 2009?

The Rules of Conduct SFAMA are in addition to open-ended investment companies (SICAV) explicitly also applicable to limited partnerships (LP) (KGK) in the sense of Art. 98 et seq. Swiss Collective Investment Schemes Act (CISA) and closed-ended partnerships (SICAF) in the sense of art. 110 et seq. CISA (N 6 et seq.)

They are however according to the wording of the Rules of Conduct SFAMA not applicable to foreign collective investment schemes distributed in Switzerland.

This gap-analysis between the Rules of Conduct March 30, 2009 and the as of January 1, 2015 applicable provisions with the Rules of Conduct SFAMA in the form of FAQ inform Swiss SICAV, KGK (LP), and SICAF 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 Funds and their agents will have to finalize the implementation of the contracts to be amended (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 to Funds beginning January 1, 2015?

## **Preserving and promoting the integrity of the market**

Funds may now even not engage in any investment transactions and activities that just might result in manipulation of prices (N 28). The Rules of Conduct March 30, 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 Fund is dealing in securities. Slightly negligent behavior is sufficient.

**New solely for LP (KGK) and SICAF:** It is now clearly stated that LP (KGK) and SICAF must refrain from any action that might impair transparent and fair price formation on the investment markets (N 27).

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

The Funds 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 Systems” 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 Funds must ensure that requests for information concerning the basis of the calculation of the net asset value, and the exercising of membership and creditors’ rights, as well as risk management and complaints, are dealt with quickly and professionally (N 81).

The Rules of Conduct SFAMA do now clarify that in publishing performance data for the collective investment schemes, Funds must now comply with the SFAMA Guidelines on the Publication of Performance Data of Collective Investment Schemes (N 88). Funds must also ensure appropriate transparency with regards to costs, must comply with the SFAMA Guidelines on the Calculation and Disclosure of the TER of Collective Investment Schemes, and must disclose all fees and incidental costs incurred on the issue and redemption of units of collective investment schemes (N 89).

**New solely for LP (KGK) and SICAF:** SICAF and LP (KGK) must now ensure a consistent information policy that takes appropriate account of risk potential and risk complexity, and enables the investor to gain an objective picture of the performance of the collective investment scheme and its units (N 80).

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

## **Policy on equal treatment of investors in particular by means of an allocation policy**

Now must all Funds (LP (KGK) and SICAV for the first time) set down in a written internal policy all organizational measures necessary to prevent the preferential treatment of certain investors. An internal policy on allocations must now govern (i) the allocation of securities trades and similar transactions, if the Fund 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 29 et seq.).

## **Policy regarding conflicts of interests**

The Rules of Conduct SFAMA foresee now explicitly 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).

## **New solely for LP (KGK) and SICAF: Policy on “Best Execution”**

LP (KGK) and SICAF must now explicitly govern their “Best Execution”-Policy for the settlement of transactions on the securities, foreign exchange, and other markets at terms in line with the market in an internal policy while ensuring best execution (N 36).

## **New solely for LP (KGK) and SICAF: Policy on the exercise of membership and creditors’ rights**

LP (KGK) and SICAF must now issue internal policies governing transparently not only the exercise of membership and creditors’ rights, but also cases in which such rights may be waived. In the case of scheduled routine transactions can the exercise of the membership and creditors’ rights be delegated or such rights may be waived, subject however to cases that might have a lasting impact on the interests of the investors (N 51 et seq.).

## **New solely for LP (KGK) and SICAF: Policy on the participation in class actions**

In case LP (KGK) and SICAF participate in class actions relating to investments they manage, an internal policy must govern the process (N 54).

## **New solely for LP (KGK) and SICAF: Policy on commission-sharing agreements or soft-commissions**

LP (KGK) and SICAF must now define a clear written policy on the use of “commission-sharing agreements” or “soft-commissions” on exchange transactions conducted for the collective investment scheme’s account (N 38).

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

## **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 38). The existence of “commission sharing agreements” and “soft commissions” must be disclosed transparently to the investor. The Funds must also provide regular reports to the board of directors and the controlling unit (N 40).

## **Policy on the conflicts of interests between the Funds 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).

## **New solely for LP (KGK) and SICAF: Policy on personal account dealing**

LP (KGK) and SICAF must now like SICAV have a suitable policy to prevent personal account dealing by their employees to prevent employees from improperly achieving pecuniary gain (e.g. by means of “front running”, “parallel running” or “after running”), improper use of insider information, manipulation of allocations in the case of new issues or IPOs, impairment by employees trading on their personal account, and shifts in clients’ portfolios without any economic reason in the clients’ interests (N 46 et seq.).

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

The Funds must now 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**

When delegating tasks, all Funds must properly select only those agents that are adequately qualified to execute those tasks (N 61). The provisions of the rev-CISO-FINMA must now be considered when tasks are being delegated from a SICAV to third parties. The delegation of material tasks from the SICAV to a third party changing the underlyings of the license requires a written agreement according to Art. 66 para. 2 rev-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 SICAV. Art. 66 para. 1 to 4 rev-CISO-FINMA are applicable since January 1, 2015. There is no transition period. The rev-CISO-FINMA supersedes in my opinion the Rules of Conduct SFAMA. That is why SICAV must comply with the provisions in the rev-CISO-FINMA about the delegation of tasks beginning January 1, 2015 and not beginning 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:

- Adequate risk management in accordance with the applicable provisions and regular information to the responsible body (N 69). Art. 67 to 71 rev-CISO-FINMA that have 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 Fund must develop a BCM that is appropriate to its size and business activity. The Fund 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;
- **New solely for LP (KGK) and SICAF:** Rules of conduct and competences for extraordinary circumstances (N 67);
- **New solely for LP (KGK) and SICAF:** Regulations governing access to the software used for valuation, recording deals, and controlling (N 68);
- **New solely for LP (KGK) and SICAF:** The valuation of collective investment scheme's assets (N 71).

**New solely for LP (KGK) and SICAF:** LP (KGK) and SICAF are now explicitly obliged to have internal regulations and an appropriate organization to ensure compliance with their statutory and other duties, as set forth in an internal policy. They must set down the delegated activities in written contracts and must include appropriate and specific provisions on contact persons, responsibility, areas of competence, and liability issues. Funds must select only those agents that are adequately qualified to execute the tasks in question properly (N 60 et seq.).

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

### **Written provisions about “commission sharing agreements” or “soft commissions”**

There must be a written agreement with potential other asset managers of collective investment schemes 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 (N 39).

# What kind of new rights will the Fund have beginning 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, but not anymore under consideration of the investors' "exclusive" interests (N 35). That is why the Funds do now have more discretion to consider also their 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 January 1, 2015?

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

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

## **For SICAV only: Provisions about the delegation of tasks according to rev-CISO-FINMA**

The corresponding provisions of the rev-CISO-FINMA must now be considered in the context of the delegation of tasks by a SICAV to third parties. The delegation of material tasks changing the underlyings of the license by the SICAV to a third party requires according to Art. 66 para. 2 rev-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 must not be treated absolutely equal. There is however a duty to relative equal treatment, meaning that investors can be treated differently depending upon the type of investor (N 26). The treatment may however only be different where appropriate. No different treatment is permitted where inappropriate. The criteria for deciding whether a relative equal treatment applies are generally the financial situation, the knowledge of financial markets, and the need for protection of the specific group of investors.

## **Does the obligation to settle transactions ensuring “best execution” only apply to transactions 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 March 30, 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 for Swiss SICAV, KGK (LP), and SICAF of the implementation of



# the new respectively amended Rules of Conduct SFAMA

## Implementation beginning January 1, 2015

No.	Designation		Control
<b>A New provisions applicable beginning January 1, 2015</b>			
1	Provisions about preserving and promoting the integrity of the market <ul style="list-style-type: none"> <li>No activities that might result in manipulation of prices</li> <li>New only for LP (KGK) and SICAV: Promotion of the integrity of the market</li> </ul>		
2	Provisions about the salary and remuneration policy		
3	Provisions about the information of investors <ul style="list-style-type: none"> <li>Requests for information concerning the calculation of the NAV</li> <li>Publishing performance data</li> <li>Disclosure of fees and internal costs</li> <li>New solely for KGK and SICAV: Consistent information policy</li> </ul>		
<b>B New written policies to be applied beginning January 1, 2015</b>			
4	Policy on equal treatment and allocations <ul style="list-style-type: none"> <li>New solely for LP (KGK) and SICAF: Equal treatment of investors</li> <li>Written policy on allocation</li> </ul>		
5	Policy regarding conflicts of interests		
6	New solely for LP (KGK) and SICAF: <ul style="list-style-type: none"> <li>Internal policy on "Best Execution"</li> <li>Internal policy on the exercise of membership and creditors' rights</li> <li>Internal policy on participation in class actions</li> <li>Internal policy on "commission sharing" and "soft commissions"</li> </ul>		
<b>C Documents to be amended beginning January 1, 2015</b>			
7	Policy on "commission sharing agreements" and "soft commissions" reflected in the file		
8	Policy on the conflicts of interests between the Funds and the investors		
9	New solely for LP (KGK) and SICAF: Policy on personal account dealing		
10	Receipt and granting of discounts and other benefits		
11	Provisions about the delegation of tasks		
12	Written definition of the organizational structures and processes and internal control systems <ul style="list-style-type: none"> <li>Adequate risk management</li> <li>Appropriate business continuity management</li> <li>New solely for LP (KGK) and SICAF:               <ul style="list-style-type: none"> <li>Rules of conduct and competences for extraordinary circumstances</li> <li>Access to software</li> <li>Valuation of collective investment schemes</li> <li>Internal regulations and appropriate organization</li> </ul> </li> </ul>		
13	New solely for LP (KGK) and SICAF: Internal policy on personal account dealing		

## Implementation until December 31, 2015

No.	Designation		Control
1	Written provisions about "commission sharing agreements" or "soft commissions"		

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