

**Unofficial translation of the
FINMA-Circular 2008/8 Public Advertising Collective Investment Schemes
by Ghandchi Schmid Partners Ltd.**

**Circular 2008/8
Public advertising collective investment schemes**

Public advertising within the meaning of the legislation on collective investment schemes

Reference: FINMA-Circular 08/8 Public advertising collective investment schemes
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 Effective: January 1, 2009
 Last amendment: November 20, 2008
 Concordance: prior FBC-Circular 03/1 Public advertising/collective investment schemes of May 28, 2003
 Legal basis: FINMAA art. 7 para. 1 subpara. b
 CISA art. 1, 3, 4, 5, 19, 120, 123, 148, 149
 CISO art. 3, 4, 30

Addressees																						
BA			ISA			SEA		CISA							MLA		Others					
Banks	Financial groups and congl.	Other intermediaries	Insurers	Insurance groups and congl.	Brokers	Stock exchanges and participants	Securities dealers	Fund management companies	SICAV	LP for CIS	SICAF	Custodian banks	Asset managers CIS	Distributors	Representative foreign CIS	Other intermediaries	SRO	DSFI	SRO-Institutions	Audit companies	Rating agencies	
X							X	X	X	X	X		X	X	X	X						



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I. Purpose of the Circular

The purpose of this Circular is to specify the term “public advertising” and to determine in which cases the offering and marketing of collective investment schemes in or from Switzerland is considered to be public advertising. 1

This Circular addresses banks, securities dealers, fund management companies, SICAV, limited partnerships for collective investment schemes, SICAF, asset managers of collective investment schemes, representatives of foreign collective investment schemes, distributors as well as all other persons offering or marketing collective investment schemes. 2

The term “public advertising” is used in various provisions in the legislation on collective investment schemes (in different wordings), in particular in articles 3, 4 para. 1 subpara. c, 5 para. 1, 19 para. 1, 120 para. 1, 123 para. 1, 148 para. 1 subpara. d, and 149 para. 1 subpara. c and e of the Federal Act on Collective Investment Schemes of June 23, 2006 (CISA; SR 951.31) as well as in articles 3, 4, and 30 of the Ordinance on Collective Investment Schemes of November 22, 2006 (CISO; SR 951.331). Any advertising that addresses the public shall be considered to be public advertising within the meaning of article 3 CISA. 3

Requirements for public advertising are, on the one hand, an approval from the FINMA (article 120 CISA) for foreign collective investment schemes that are marketed in or from Switzerland and, on the other hand, an authorization (article 19 CISA) for the start of business activities as a distributor of collective investment schemes. However, the term public advertising is irrelevant for collective investment schemes under Swiss law since these are without exception required to obtain an approval regardless of whether the respective investment scheme is publicly advertised or not. 4

The interpretation of the term public advertising according to this Circular also applies to in-house funds (article 4 CISA) as well as to structured products (article 5 CISA and article 3 para. 3 as well as article 4 CISO although they are for the rest not governed by the legislation on collective investment schemes in all other respects. 5

II. Principles

A. Definition of the term "advertising"

The use of advertising material of any kind that serves to directly or indirectly offer or market specific collective investment schemes shall be considered to be public advertising within the meaning of this Circular. It is not considered to be advertising if a client places an order to subscribe for units of collective investment schemes on his/her/its own initiative or requests information on specific collective investment schemes on his/her/its own. Further, it is not considered to be advertising if a subscription order is placed for the account of a client based on a written asset management agreement provided such agreement was concluded with a 6



supervised financial intermediary according to article 10 para. 3 subpara. a CISA or with an independent asset manager according to article 6 para. 2 CISO.

Type and form of the advertising material are basically irrelevant. As such are to be considered in particular: print and electronic media of any kind, such as newspapers and magazines, direct mail, prospectuses, fact sheets, recommendation lists and information letters to the customers of a bank or of another financial intermediary, offers to those to forward to their customers, information on the possibilities to subscribe for collective investment schemes (e.g. securities number, subscription agent), press conferences, telephone marketing, cold calling, road-shows, finance fairs, sponsored reports on collective investment schemes, house calls by financial intermediaries of any kind, internet websites and other forms of e-commerce, subscription forms and online subscription possibilities as well as e-mails. 7

However, the publication in the media of prices, quotes and net asset values of foreign collective investment schemes by supervised financial intermediaries (among other banks, securities dealers, fund management companies, representatives of foreign collective investment schemes, as well as asset managers of collective investment schemes) as well as the publication of their tax data do not qualify as advertising if these publications do not contain any contact information (article 3 CISA and article 3 para. 2 CISO). The publication of such data on electronic information systems (e.g. Bloomberg, Reuters) shall not qualify as advertising regardless of whether such publication contains any contact information, provided it is ensured that only qualified investors are addressed. 8

Regarding the electronic medium internet see para. 24 et seq.

B. Definition of the term "public"

Every kind of advertising (see para. 6 et seq.) that does not exclusively address qualified investors according to article 10 para. 3 and 4 CISA as well as article 6 para. 2 CISO shall be considered to be public. 9

a) No public advertising vis-à-vis qualified investors

It shall not be considered to be public advertising if it is exclusively 10

- a. addressed to qualified investors and
- b. only the advertising means common in this market are used (e.g. personal contacting, road-shows).

According to article 10 para. 3 CISA qualified investors are: 11

- a. supervised financial intermediaries such as banks, securities dealers, fund management



companies as well as asset managers of collective investment schemes,

- b. supervised insurance institutions,
- c. corporate entities under public law and employee welfare institutions (pension funds) with a professional treasury department,
- d. enterprises with a professional treasury department,
- e. high net worth individuals,
- f. investors that have concluded a written asset management agreement with a supervised financial intermediary (such as banks, securities dealers, fund management companies and asset managers of collective investment schemes).

According to article 6 para. 2 CISO in connection with article 10 para. 4 CISA qualified investors are also: 12

Independent asset managers and investors that have concluded a written asset management agreement provided:

- a. the asset manager as financial intermediary is governed by the Money Laundering Act of October 10, 1997 (MLA) (article 2 para. 3 subpara. e MLA);
- b. the asset manager is subject to the codes of conduct of a representative industry association recognized by the FINMA as minimum standards; and
- c. the asset management agreement complies with the recognized guidelines of a representative industry association.

b) Term "high net worth individual"

Anybody who confirms in writing to directly or indirectly dispose of financial assets of at least 2 million Swiss Francs net shall be considered to be a high net worth individual. 13

In particular bank deposits (at sight and at time), trust assets, securities (including collective investments and structured products), derivatives, precious metals and life insurances with redemption value shall be considered to be financial assets. 14

In particular direct investments in real estate and claims against social security institutions (including deposits at the second and third pillar) shall not be considered to be financial assets. 15

The confirmation regarding the existing financial assets has to be available no later than the 16



offer or the distribution of the collective investment scheme.

The existence of the required financial assets has to be verified by the advertiser or offeror of the collective investment scheme if there are doubts whether the requirements for being considered a high net worth individual are still met. 17

A written confirmation is not required if the required financial assets are deposited at the bank or with the securities dealer who also offers or markets the collective investment schemes. 18

Private investment vehicles established for high net worth individuals can be treated like high net worth individuals if they dispose of financial assets in a net amount of 2 million Swiss Francs. 19

III. Duty to obtain an approval for foreign collective investment schemes

If a foreign collective investment scheme is publicly advertised in or from Switzerland, its relevant documents such as sales prospectus, articles of association, or fund contract have to be approved by the supervisory authority (article 120 para. 1 CISA). 20

IV. In-house funds

According to article 4 para. 1 subpara. c CISA in-house funds of banks and securities dealers must not be publicly advertised. For this reason banks and securities dealers are prohibited from any form of "public advertising" for in-house funds (see para. 6 et seq.). They let clients participate in an in-house fund only based on a written asset management agreement (article 4 para. 1 subpara. a CISA). 21

V. Duty to obtain authorization as a distributor

The duty to obtain authorization as a distributor within the meaning of article 19 CISA is also caused by an indirect public offering or marketing of collective investment schemes. Therefore in particular the offering or marketing of "managed fund accounts" is considered to be indirect marketing of collective investment schemes that is subject to the duty to obtain an authorization. "Managed fund accounts" are characterized by the use of collective investment schemes in the context of a defined concept and those being comparable in their economic effect to a fund of funds or an investment strategy fund. 22

No duty to obtain an authorization for the distributor within the meaning of article 19 CISA arises when 23

- a. unit-linked life insurances,



- b. collective investment schemes to qualified investors within the meaning of article 10 para.3 CISA and article 6 CISO

are marketed.

VI. Internet

A. Public advertising via internet

In Switzerland, the content of a website shall be considered public advertising for a collective investment scheme or for the activity as representative and/or distributor of collective investment schemes if – in addition to the fulfillment of the criteria according to para. 6 et seq. – it is addressed to investors with registered office or domicile in Switzerland. In that connection it is irrelevant whether the units of the collective investment scheme can be subscribed online. 24

In the light of the cross-border effect of the internet any possible relevant foreign provisions have to be considered as well. 25

It is presumed that a website addresses investors with registered office or domicile in Switzerland if indications in their overall effect create a reference to Switzerland. When assessing the overall effect in particular the following indications are considered: 26

- a. the website explicitly addresses investors with registered office or domicile in Switzerland,
- b. information on a Swiss contact address or representatives, distributors, paying agents or other financial intermediaries with registered office or domicile in Switzerland,
- c. publication of net asset values or issue and redemption prices in Swiss Francs,
- d. use of one of the Swiss official languages (only cumulatively in connection with one or more other indications),
- e. information on Swiss or foreign legal provisions which are of interest to persons with registered office or domicile in Switzerland (e.g. presentation of tax advantages of the registered office of the collective investment scheme),
- f. references (hyperlinks) to other websites or to other media (newspapers, radio, TV, etc.) with relation to Switzerland.

A website shall not be considered public advertising in Switzerland if it explicitly excludes ("disclaimer") an offer to investors in Switzerland or if it contains a limitation on access which fulfills the following requirements. 27



B. Disclaimer

It must not be possible for visitors of the website to get around the disclaimer. This can in particular be assured if it automatically appears on the screen and the investor has to confirm to have taken note of it. It must either appear before the visitor has access to the content of the website at all or at the latest when choosing all those sites which contain information on collective investment schemes not approved for marketing in Switzerland. If it is possible to subscribe units of collective investment schemes online, the disclaimer must appear and its notice must be confirmed the moment the investor contacts the offeror of the collective investment scheme online in order to subscribe. 28

If there is no approval for marketing in or from Switzerland, the disclaimer has to indicate explicitly that the respective collective investment schemes must not be offered or marketed in Switzerland. If only particular collective investment schemes are approved in Switzerland, they have to be specified. 29

A general disclaimer whereby the website shall not qualify as public advertising in those countries where there is no approval for distribution is not sufficient. 30

C. Restriction on access to the website

The restriction on access must allow the identification of the registered office or the domicile of the interested investors. If they have their registered office or domicile in Switzerland, they are only to be permitted to access websites which contain information on collective investment schemes authorized in Switzerland and/or offerors of collective investment schemes. 31

In principle, the offerors of collective investment schemes are free to choose the restriction on access (questionnaires, passwords, etc.) that seem suitable to them provided the criteria for the limitation on access are obvious to the visitor. An online questionnaire shall only be considered a sufficient limitation on access if the visitor of the website must indicate his/her/its registered office or domicile. The offerors of collective investment schemes may rely on the information provided by the visitors. 32

If the access to the website is restricted to certain categories of investors (see para. 10 et seq.), the control procedure must ensure that the interested investors have answered all control questions before they are granted access. 33

D. Discussions sites

Signing up at so-called discussion sites (such as newsgroups, bulletin boards, chat rooms, etc.) shall basically be considered one's own initiative within the meaning of para. 6. However, such sites granting public access and being used by advertisers and offerors of collective investment 34



schemes can be considered public advertising within the meaning of para. 24 as soon as indications in their overall effect create a reference to Switzerland (see para. 24 et seq.).

VII. Transitional provisions

The independent asset managers mentioned in para. 6 and 12 above must comply with the requirements of article 6 para. 2 CISO by September 30, 2009 in order to avoid public advertisement.

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