

Protocol requirements under Article 24 para. 3 CISA (effective as from 1 January 2014): FINMA recognises SBA-Guidelines as a minimum standard

The Swiss Financial Market Supervisory Authority (FINMA) has communicated today that it has recognised the Guidelines of the Swiss Bankers Association (“SBA”) on protocol requirements under Article 24 para. 3 of the Federal Act on Collective Investment Schemes (“CISA”) of 12 November 2013 (“SBA-Guidelines”) as minimum standard.

Article 24 para. 3 CISA imposes on FINMA-licensees (as well as their delegates) engaging in any distribution activity (as defined under the CISA) a new duty to keep minutes in writing regarding the result of their assessment of the needs of the client and the reasons for recommendations of collective investment schemes and to hand out such minutes to the client. According to Article 34a para. 2 of the Swiss Collective Investment Schemes Ordinance form and content of the minutes must comply with self-regulatory rules of conduct recognised as minimum standard by the FINMA. The respective self-regulatory rules of conduct now recognised as minimum standard in this area are the SBA-Guidelines.

Key Points:

The SBA Guidelines do not provide any template for the required minutes but set out in a principle based manner that:

- the requirement to keep minutes is triggered in case of a distribution activity (as defined under the CISA) and:
 - applies to individual recommendations to acquire one or more collective investment schemes;
 - does not apply in case of recommendation to hold or sell existing holdings of collective investment schemes;
- the minutes shall contain information regarding the investment objective and the risk profile of the client and the reasons for an individual recommendation;
- the minutes shall be kept on appropriate media which allows the production of an identical hardcopy document at any time. Signing by FINMA-licensee (or delegate respectively) and/or client is not required;
- the client must be informed about the content of the minutes by way of delivery of a written document by letter, fax, e-mail or by web-based delivery, except in cases of an explicit waiver by the client of the right to be handed out the minutes which is to be clearly recorded;
- if advice is given in written correspondence and all elements of the required minutes are contained in such correspondence, the handing out of minutes would become obsolete in such case.

Our view: The principle based approach taken in the SBA-Guidelines still leaves certain room for interpretation regarding the required content of the minutes. As no transition period will be applicable after the effective date on 1 January 2014 only little time is available to market participants for the implementation of the requirements. However, the requirement to keep minutes may not yet apply in certain cases of distribution to qualified investors, if a distributor can benefit from a transition period with regard to the requirement to enter into a distribution agreement with a Swiss representative.

For more information feel free to contact any of our investment fund specialists (www.nastra.ch)

Note: None of the information contained herein is to be regarded as legal advice.