

FINMA Circular 08/8

Public advertising collective investment schemes

Circular 08/8 describes the term "public advertising" as relates to collective investment schemes and determines approval requirements for collective investment schemes as well as authorization criteria for distributors

Related German Version: FINMA-RS 08/8 Öffentliche Werbung kollektive Kapitalanlagen vom 01. Januar 2009

Related French Version: Circ.-FINMA 08/8 Appel au public / Placements collectifs du 01 janvier 2009

Unofficial translation issued in January 2009



Financial Market Supervisory Authority (FINMA)

Circular 2008/8 Public advertising collective investment schemes

Public advertising within the meaning of the collective investment schemes legislation

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 Legal bases: FINMASA Art. 7 Para. 1 lit. b
 CISA Art. 1, 3, 4, 5, 19, 120, 123, 148, 149
 CISO Art. 3, 4, 30

Addressees																						
BankA			ISA			SESTA		CISA						MLA		Other						
Banks	Fin. groups & conglomerates	Other intermediaries	Insurers	Ins. groups & conglomerates	Intermediaries	Stock exchanges & participants	Securities Dealers	Fund management company	SICAV	Limited partnerships for CIS	SICAF	Custodian banks	Managers domestic CIS	Distributors	Representative of foreign CIS	Other intermediaries	SRO	DUFI	SRO Supervised	Audit companies	Rating agencies	
X							X	X	X	X	X		X	X	X	X						

Unofficial Translation

Table of content

I.	Object of the circular	margin nos.	1-5
II.	Principles	margin nos.	6-19
A.	Definition of the term "advertising"	margin nos.	6-8
B.	Definition of the term "public"	margin nos.	9-19
a)	No public advertising to qualified investor	margin nos.	10-12
b)	Definition of a "high-net-worth individual"	margin nos.	13-19
III.	Approval requirements for foreign collective investment schemes	margin no.	20
IV.	In-house funds	margin no.	21
V.	Authorization requirements for distributors	margin nos.	22-23
VI.	Internet	margin nos.	24-34
A.	Public advertising on the internet	margin nos.	24-27
B.	Disclaimer (exemption clause)	margin nos.	28-30
C.	Access restriction to the website	margin nos.	31-33
D.	Discussion sites	margin no.	34
VII.	Transitional provisions	margin no.	35

I. Object of the circular

The object of this Circular is to define the term "public advertising" and to determine what qualifies as public advertising when offering or distributing collective investment schemes in or from Switzerland. **1**

This Circular is addressed to 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 and all other persons who offer or distribute collective investment schemes. **2**

The term "public advertising" is used in various provisions of the legislation for collective investment schemes (in various linguistic versions), in particular in Art. 3, 4 Para. 1 lit. c, 5 Para. 1, 19 Para. 1, 120 Para. 1, 123 Para. 1, 148 Para. 1 lit. d and 149 Para. 1 lit. c and e of the Federal Collective Investment Scheme Act of 23 June 2006 (CISA; SR 951.31) as well as in Art. 3, 4 and 30 of the Collective Investment Schemes Ordinance of 22 November 2006 (CISO; SR 951.311). Within the context of Art. 3 CISA, any advertising addressed to the public is considered public advertising. **3**

It is understood that publicly advertised foreign collective investment schemes that are distributed in or from Switzerland have the approval of FINMA (Art. 120 CISA) as well as an authorization (Art. 19 CISA) for conducting business as a distributor of collective investment schemes. For collective investment schemes under Swiss law, the concept of public advertising has no significance since these schemes must always obtain an approval regardless of whether the respective collective investment schemes publicly advertise or not. **4**

The interpretation of the concept public advertising according to this circular also applies to special in-house funds (Art. 4 CISA) as well as to structured products (Art. 5 CISA and Art. 3 Para. 3 as well as 4 CISO), even though these are not subject to the legislation on collective investment schemes. **5**

II. Principles

A. Definition of the term "advertising"

Advertising within the context of this Circular is considered to be the utilization of any type of advertising media that serves the purpose of directly or indirectly offering or distributing specific collective investment schemes. It is not considered advertising if a customer requests subscription for units of the collective investment scheme on his own initiative or requests information about a specific collective investment scheme. Furthermore, it is not considered advertising if a subscription order is placed which will be charged to the customer based upon a written asset management agreement, as long as this contract was entered into with a financial intermediary subject to supervision according to Art. 10 Para. 3 lit. a CISA or an independent asset manager according to Art. 6 Para. 2 CISO. **6**

The type and form of advertisement are basically irrelevant. This is considered to be print- and electronic media of any kind, such as newspapers and magazines, direct mail, prospectuses, fact sheets, recommendation lists and client information handouts addressed to clients of a bank or a financial intermediary or offers to these institutions intended to be forwarded to their clients, information about the subscription possibilities of collective investment schemes (e.g. security number, issuing office), press conferences, telemarketing, cold calling, road shows, financial trade shows, sponsored reports about collective investment schemes, house calls of financial intermediaries of any kind, internet sites and other forms of e-commerce, subscription form and online subscription possibilities as well as e-mails. **7**

Alternatively, the publication in the media of prices, rates, and asset values of foreign collective investment schemes from financial intermediaries subject to supervision (including banks, securities dealers, fund management companies, representatives of foreign collective investment schemes as well as asset managers of collective investment schemes) as well as publication of the corresponding tax information does not constitute advertising as long as these publications do not contain any names of people to contact (Art. 3 CISA and Art. 3 Para. 2 CISO). The publication of such data on electronic information systems (e.g. Bloomberg, Reuters) is not considered public advertising regardless of whether the publication contains the names of people to contact as long as it is only addressed to qualified investors. **8**

The internet as an electronic medium is described in margin no. 24 et seq. below.

B. Definition of the term "public"

Advertising of any kind (cf. margin no. 6 et seq.) not exclusively addressed to qualified investors in accordance with Art. 10 Para. 3 and 4 CISA as well as Art. 6 Para. 2 CISO, is considered public. **9**

a) No public advertising to qualified investor

Public advertising is not considered such if it is exclusively: **10**

- a Addressed to qualified investors and
- b Advertising media commonly used for only this market segment is used (e.g. personal contact, road shows).

According to Art. 10 Para. 3 CISA, qualified investors are considered: **11**

- a regulated financial intermediaries such as banks, securities dealers, fund management companies as well as asset managers of collective investment schemes,
- b supervised insurance companies,
- c public entities and retire benefit institutions with professional treasury operations,
- d companies with professional treasury departments,
- e high-net-worth individuals,
- f Investors who have entered into a written asset management agreement with a supervised financial intermediary (such as banks, securities dealers, fund management companies as well as asset managers of collective investment schemes).

According to Art. 6 Para. 2 CISO, in particular Art. 10 Para. 4 CISA, qualified investors are also considered: **12**

Independent asset managers and investors who have entered into a written asset management agreement with independent asset managers to the extent that:

- a the asset manager as financial intermediary is subject to the Money Laundering Act (MLA) of October 10, 1997 (Art. 2 Para. 3 lit. e MLA);
- b The asset manager is subject to a professional code of conduct which is recognized as a minimum standard by FINMA; and
- c The asset management contract contains the recognized guidelines of a professional organization.

b) Definition of a "high-net-worth individual"

A high-net-worth individual is someone who can confirm in writing that they directly or indirectly have net financial assets of at least 2 million Swiss francs. **13**

Financial assets are bank assets (sight or time deposits), fiduciary assets, securities (including collective investment schemes and structured products), derivatives, precious metals as well as life insurances with a repurchase value. **14**

Direct investments in real estate and claims from social insurances (including claims from the second and third pillar), are specifically not considered financial assets. **15**

The confirmation of financial assets must be submitted no later than the time the collective investment scheme is offered or distributed. **16**

The advertiser or provider of the collective investment scheme must review the existence of the required financial assets if there are doubts as to whether the person qualifies as a high-net-worth individual. **17**

A written confirmation is not necessary if the required financial assets are deposited at the bank or the securities dealer who is also offering or distributing the collective investment scheme. **18**

Private investment vehicles which have been set up for private persons can be treated like high-net-worth individuals as long as they hold net assets of over 2 million Swiss francs. **19**

III. Approval requirements for foreign collective investment schemes

If a foreign collective investment scheme is publicly advertised in or from Switzerland, the relevant documents such as sales prospectus, articles of association or fund contract need to be approved by FINMA (Art. 120 Para. 1 CISA). **20**

IV. In-house funds

According to Art. 4 Para. 1 lit. c CISA, it is not permitted to publicly advertise for in house funds of banks or securities dealers. Consequently, banks and securities dealers are prohibited from publicly advertising (cf. margin no. 6 et seq.) for in-house funds. Customers can participate in an in-house fund exclusively on the basis of a written asset management agreement (Art. 4 Para. 1 lit. a CISA). **21**

V. Authorization requirements for distributors

Within the context of Art. 19 CISA, a distributor requires authorization when indirectly publicly offering or distributing collective investment schemes. Therefore, offering or distributing managed fund accounts is considered indirect distribution of collective investment schemes which requires authorization. Administered fund accounts characteristically use a collective investment scheme within the framework of a defined concept and their economic effect is comparable to a fund of funds or an investment strategy fund. **22**

Art. 19 CISA does not require a license for distributors when distributing **23**

- a fund based life insurances,
- b collective investment schemes to qualified investors within the meaning of Art. 10 Para. 3 CISA and Art. 6 CISO.

VI. Internet

A. Public advertising on the internet

The content of a website is considered to be public advertising in Switzerland for collective investment schemes or for acting as a representative and/or distributor of collective investment schemes, if in addition to fulfilling the criteria in margin no. 6 et seq., it is addressed to investors with a registered office or domicile in Switzerland. Whether or not fund shares can be subscribed online is irrelevant. **24**

In light of the cross border effect of the internet, possible relevant foreign regulations should also be taken into account. **25**

If the overall effect of indicators demonstrates a relationship to Switzerland, then it is assumed that a website addresses investors in Switzerland. When assessing this overall effect, specifically the following points should be considered: **26**

- a the website explicitly addresses investors with a registered office or domicile in Switzerland,
- b reference is made to a Swiss contact address or to representatives, distributors, paying agents or other financial intermediaries with a registered office or domicile in Switzerland,
- c publication of net asset values or issue and redemption prices denominated in Swiss francs,
- d use of one of the Swiss national languages (only to be considered in connection with one or more other indicators),
- e reference to Swiss or foreign legal provisions which are of interest to persons with a registered office or domicile in Switzerland (e.g. presenting the tax advantages of the domicile of the collective investment scheme),
- f cross-references (hyperlinks) to other websites or other media (newspapers, radio, TV etc.) related to Switzerland.

A website is not considered to be public advertising in Switzerland if it explicitly excludes an offer to **27**

investors in Switzerland ("disclaimer") or if it contains an access limitation which meets the following requirements.

B. Disclaimer (exemption clause)

The disclaimer may not be bypassed by the visitor of a website. Specifically, this can be ensured by having the disclaimer automatically displayed on the screen and requiring the investor to confirm his/her awareness thereof. Either it has to appear before the visitor gains access to the content of the website, or before the visitor clicks on to the links that contain information about collective investment schemes which are not authorized for distribution in Switzerland. As soon as it is possible to subscribe online to units of the collective investment schemes, the disclaimer must also appear and be confirmed by the investor at the time the investor contacts the fund provider online in order to subscribe. **28**

If no approval exists for distribution in or from Switzerland, the disclaimer must explicitly mention that the corresponding collective investment scheme may not be offered or publicly distributed in Switzerland. If only some individual collective capital investments are approved in Switzerland, then these have to be specified. **29**

A general disclaimer which states that the website is not considered public advertising in those countries in which no authorization for distribution exists is not sufficient. **30**

C. Access restrictions to the website

The access restrictions must grant information about the registered office or domicile of the interested investors. Should they have a registered office or domicile in Switzerland, access is only to be granted to websites that contain information about collective investment schemes and/or fund providers that are authorized in Switzerland. **31**

Basically, the providers of collective investment schemes are free to choose access restrictions they deem to be appropriate (questionnaires, passwords etc.), as long as the criteria for the access rights are clearly understandable to the visitor. An online questionnaire is only considered to be adequate if the visitor to a website is required to confirm his registered office or domicile. The providers of collective investment schemes are permitted to rely on the declarations of the visitors. **32**

If the access to the website is limited to certain categories of investors (cf. margin no. 10 et seq.), the control procedures must ascertain that the interested investors answer all control questions before they are granted access. **33**

D. Discussion sites

Registration at a so-called "discussion site" (such as news groups, bulletin boards, chat rooms etc.) is generally considered the person's own initiative within the context of margin no. 6. However, such sites may, if publicly accessible and used by providers of collective investment schemes, represent public advertising within the context of margin no. 24 as soon as the overall effect of the indicators suggest a relation to Switzerland (cf. margin no. 24 et seq.). **34**

VII. Transitional provisions

By 30 September 2009, the independent asset managers mentioned in margin nos. 6 and 12 must adhere to the requirements of Art. 6 Para. 2 CISO in order to ensure that public advertising is not taking place. **35**

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