

2016

Directives on fiduciary investments

Preamble

The Board of Directors of the Swiss Bankers Association has adopted these Directives in order to maintain and enhance the reputation and high quality of the Swiss banking industry in Switzerland as well as on an international level. Assets entrusted to Swiss banks must be managed professionally and in the customers' best interest.

The Directives are deemed to represent a code of conduct. They have no direct impact on the underlying contractual relationship between banks and their customers. Such relationships are governed by the legal provisions (in particular by Art. 394 et seqq. of the Code of Obligations) and by the relevant agreements between banks and customers (e.g. fiduciary agreements, asset management agreements, the banks' general terms and conditions, etc.).

I Scope

The present Directives apply exclusively to fiduciary investments.

They do not apply to other types of fiduciary business such as loans and equity interests which the bank effects or grants in its own name but for the account of and at the risk of customers on the basis of a written agreement.

II Fiduciary investments

1. Fiduciary agreement

A fiduciary investment is the placement of fixed deposits (in domestic and foreign currencies) with usually foreign banks or other financial institutions (hereinafter referred to as “financial intermediaries”) for investment purposes in exchange for a commission. For tax reasons, the customer must sign a written fiduciary agreement as of the time the fiduciary business relationship is first established. This fiduciary agreement stipulates that the customer shall bear all currency and transfer risks as well as the risk of default on the part of the financial intermediary (del credere risk). The bank is thus excluded from any risks arising from the fiduciary investment. The bank receives a commission for its services.

Examples of the two types of fiduciary agreement outlined below are included as an appendix to these Directives:

a) Model fiduciary agreement for multiple investments

The customer may conclude a framework agreement authorising the bank to invest fixed deposits in a fiduciary capacity. This releases the bank to choose a financial intermediary at its own discretion. If the bank chooses one of its own foreign branches as the financial intermediary, it must notify the customer of this fact and explain to them in written form the risks involved should the bank default (del credere risk). The customer must be informed in writing that they are entitled to issue the bank with individual instructions relating to an investment or to the financial intermediary with whom said investment is to be placed. As part of a management mandate (see portfolio management guidelines), the bank is free to act at its own discretion, bearing in mind any investment goals agreed with the customer and any special instructions issued.

b) Model fiduciary agreement for a single investment

The second alternative is for the customer to conclude a separate fiduciary agreement for each individual fiduciary investment. In this case, the customer designates the investment or the financial intermediary with whom the investment is to be placed themselves (see III.1.f).

If the customer chooses one of the bank’s foreign branches as the financial intermediary, the bank must explain to them in writing the risks involved should

the bank default (del credere risk). If the model fiduciary agreement for a single investment is used, a new duly signed fiduciary agreement must be obtained from the customer for each subsequent new investment.

2. Risks and costs

The bank acts in its own name in its dealings with the financial intermediary. It is obligated solely to pay to its customer such amounts as it has received from the financial intermediary as a result of the fiduciary investment, or if necessary to assign any claims it has acquired provided these claims have not already been transferred to the customer in some other way. In particular, the customer shall bear all currency and transfer risks as well as the risk of default on the part of the financial intermediary. No such risks shall accrue to the bank from the investment, management and disposal of the fiduciary assets. This risk distribution agreed within the scope of the fiduciary investment would not apply if the bank were to guarantee the customer's claims. While guarantees and commitments of this kind are permitted under civil law, they would exclude recognition of the tax exempt status of the fiduciary investment and would lead to the bank being required to record the fiduciary investment in its balance sheet.

III Measures governing correct processing

The following provisions apply to all types of fiduciary investments, in particular also to investments that are made at a foreign branch of the bank that is making the placement.

1. Placing fiduciary investments

The bank places fiduciary investments exclusively through the staff responsible and in accordance with these directives.

a) Choosing the financial intermediary

The bank maintains a binding list of financial intermediaries which have a good credit rating and may be used for fiduciary investments (subject to the provisions of Section III (1) f). The bank informs the client in writing that he can at any time request the current list of chosen financial intermediaries as well as the bank's guidelines for establishing credit ratings.

The bank sets out the review process in internal directives. In particular, the directives establish the basis upon which credit ratings are determined, when a credit rating is deemed to be good, and with which frequency (minimum of once per year) the rating is reassessed. In addition to a financial intermediary's rating, its reputation and the reputation of the country of domicile in particular are also taken into consideration. The bank cannot give a financial intermediary a better credit rating for fiduciary investments than the rating it enjoys for lending on the interbank market.

b) Limits

The bank sets limits (subject to Section III (1) f) at its own dutiful judgement regarding the placement of fiduciary investments for the financial intermediaries it has chosen at least once a year (with the exception of extraordinary circumstances). In addition to the financial intermediary's credit rating, the country and currency risks as well as risks arising from financial relationships (particularly offsetting transactions) with financial intermediaries should be taken into account and the maximum maturity per fiduciary investment should be determined accordingly when setting these limits.

c) Avoiding risks associated with offsetting assets

The bank strives to reduce the risk of offsetting fiduciary investments with counterclaims of the financial intermediary (subject to Section III (1) f). Specifically, this is achieved by obtaining an express waiver of the right to offset assets from the financial intermediary in respect of the fiduciary investment. If no waiver of the right to offset assets has been obtained, the bank must inform the customer of this fact.

In any event, the bank must inform the financial intermediaries in question in an appropriate manner as part of day-to-day business that such transactions are customer fiduciary investments.

d) Avoiding conflicts of interest

The bank avoids conflicts of interest between itself and its customers. In the event that these cannot be ruled out, they are to be disclosed to the client. Conflicts of interest may arise e.g. if fiduciary investments become directly dependent on debts the bank owes to the financial intermediary, or if the financial intermediary is subject to fees for the fiduciary investments. Considered a particular breach of duty is if a financial intermediary grants the bank a loan only if the bank places its customers' fiduciary investments with said financial intermediary in return.

e) Monitoring and control

The bank must monitor the measures set out in Section III (1) a-d on an ongoing basis and appoint persons and departments within the bank that are specifically responsible for this task. The internal directives set out the monitoring and control process. The measures should be updated as and when necessary.

The executive board develops the appropriate processes and structures for the investment of fiduciary deposits and for issuing the relevant directives, as well as the monitoring and revision thereof.

f) Special customer instructions

If the customer designates the investment or the financial intermediary with whom the investment is to be placed themselves, the bank may request a statement from the client indicating that the decision was reached by the client and with knowledge of the associated risks (del credere, currency and country risks). The measures set out under Section III (1) a-c do not apply.

2. Booking fiduciary investments

The bank must book the fiduciary investments in line with the applicable accounting regulations.

IV Inkrafttreten

These Directives will enter into force on 1 January 2017, and replace the directives on fiduciary investments dated 1 August 2009. Fiduciary agreements drawn up according to these recommendations do not need to be updated.

Model fiduciary agreement

(for multiple investments)

between

(hereinafter referred to as the "Customer")

and

(hereinafter referred to as the "Bank")

1. The Customer hereby instructs the Bank to place investments with other banks or financial institutions or with a foreign branch of the Bank (hereinafter referred to as "financial intermediary") in the Bank's own name but for the account of and at the risk of the Customer.
2. The Bank may choose the financial intermediary, the amount, the currency, the term and the other conditions of the investments at its own discretion. The Customer shall be entitled to issue the Bank with specific instructions relating to an investment or to the financial intermediary with whom said investment is to be placed. The Bank shall only be bound to take account of any specific instructions relating to the reinvestment of investments due for repayment if these are received at least days before the investments in question mature.
3. The bank maintains an up-to-date list of the chosen financial intermediaries with a good credit rating with which it makes fiduciary investments. The client has the right to at any time request the current list of chosen financial intermediaries as well as the bank's guidelines for establishing credit ratings.
4. The investments shall be placed within the limits of the Customer's available assets.

5. The Bank has the sole obligation of paying to the Customer such amounts as have been credited to it, at its free disposal, in the form of repayment of the principal and of interest, at its domicile specified in Section 10.
6. The Bank shall charge the Customer a commission of % per annum in addition to the costs associated with the investment.
7. The Customer has been informed and agrees that they shall bear the risk of default on the part of the financial intermediary (del credere risk). In the event that an investment is placed with one of the Bank's foreign branches, the risk of default shall also cover the risk of default of the Bank itself.
8. If the financial intermediary does not fulfil its commitments or fulfils them only partially (for example due to transfer restrictions and foreign exchange controls imposed in its own country of domicile or in the country of the investment currency), the Bank shall be obligated solely to assign to the Customer the claims against the financial intermediary that have not already been transferred to the Customer in any other way. The Bank shall not be bound by any other obligations.
9. This fiduciary agreement may be revoked by the Bank or the Customer at any time. The revocation shall have no impact on any ongoing investments. Neither the death, incapacity to act nor bankruptcy of the Customer shall trigger the revocation of the fiduciary agreement.
10. All legal aspects of the relationship between the Customer and the Bank shall be governed exclusively by Swiss law. The place of performance, exclusive place of jurisdiction for all legal proceedings and place of debt collection – the latter, however, only for customers domiciled outside Switzerland – shall be The Bank also reserves the right to take legal action against the Customer before any competent court at the latter's domicile or any other court having jurisdiction.

Place/Date

Bank

Customer

Model fiduciary agreement

(for a single investment)

between

(hereinafter referred to as the "Customer")

and

(hereinafter referred to as the "Bank")

1. The Customer hereby instructs the Bank to place an investment with another bank or financial institution or with a foreign branch of the Bank (hereinafter referred to as "financial intermediary") pursuant to the conditions set out under Section 2 in the Bank's own name but for the account of and at the risk of the Customer.
2. The conditions of this investment are as follows:
 - Investment amount and currency:
 - Financial intermediary:
 - Term:
3. The Customer shall provide the Bank with the investment amount before the Bank enters into a commitment with the financial intermediary.
4. The Bank has the sole obligation of paying to the Customer such amounts as have been credited to it, at its free disposal, in the form of repayment of the principal and of interest, at its domicile specified in Section 8.

5. The Bank shall charge the Customer a commission of % % per annum in addition to the costs associated with the investment.
6. The Customer has been informed and agrees that they shall bear the risk of default on the part of the financial intermediary (del credere risk). In the event that an investment is placed with one of the Bank's foreign branches, the risk of default shall also cover the risk of default of the Bank itself.
7. If a financial intermediary does not fulfil its commitments or fulfils them only partially (for example due to transfer restrictions and foreign exchange controls imposed in its own country or in the country of the investment currency), the Bank shall be obligated solely to assign to the Customer the claims against the financial intermediary that have not already been transferred to the Customer in any other way. The Bank shall not be bound by any other obligations.
8. All legal aspects of the relationship between the Customer and the Bank shall be governed exclusively by Swiss law. The place of performance, exclusive place of jurisdiction for all legal proceedings and place of debt collection – the latter, however, only for customers domiciled outside Switzerland – shall be The Bank also reserves the right to take legal action against the Customer before any competent court at the latter's domicile or any other court having jurisdiction.

Place/Date

Bank

Customer

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