

Frequently asked questions (FAQ)

Asset management

(status: 24 June 2010)

Questions relating to the regulatory requirements on asset management (in the broadest sense of the term) are answered from the point of view of the financial market players and products offered in this market segment. First, an outline of supervisory law along the value creation chain (A) is provided, followed by answers to the most frequently asked questions relating specifically to independent asset management (B) and to FINMA-Circ. 09/1 “Guidelines on asset management” (C).

There are separate FAQ publications for questions relating to market behaviour¹ and combating money laundering². Also make sure to consult the FAQs on licensing and authorisation requirements³ and on the scope of regulatory supervision⁴.

A. Value creation chain

1. Who and what does supervisory law govern?

Financial market legislation in terms of Art. 1 of the Financial Market Supervision Act⁵ (FINMASA; SR 956.1) subjects various financial service providers along the value creation chain to requirements on licensing, rules of conduct, marketing and sales regulations, and other requirements on proper business conduct. Supervisory law may also include provisions on individual products. The regulatory requirements are outlined below. Separate FAQs are available for structured products⁶ which are covered only in part by Art. 5 of the Collective Investment Schemes Act⁷ (CISA; SR 951.31) and Art. 4 of the Collective Investment Schemes Ordinance⁸ (CISO; SR 951.311).

2. Which producers are governed by supervisory law and how is this done?

¹ www.finma.ch/e/faq/beaufsichtigte/pages/faq-marktverhalten.aspx

² www.finma.ch/e/faq/privaten/pages/faq-geldwaescherei.aspx

³ www.finma.ch/e/faq/beaufsichtigte/pages/faq-bewilligungspflicht.aspx

⁴ www.finma.ch/e/faq/privaten/pages/faq-umfang-aufsicht.aspx

⁵ www.admin.ch/ch/e/rs/c956_1.html

⁶ www.finma.ch/e/faq/beaufsichtigte/pages/faq-strukturierte-produkte.aspx

⁷ www.admin.ch/ch/d/sr/c951_31.html

⁸ www.admin.ch/ch/d/sr/c951_311.html

Generally speaking, the FAQs on licensing and authorisation requirements⁹ and on the scope of regulatory supervision¹⁰ are relevant in this case. The Banking Act¹¹ (BA; SR 952.0) and the Banking Ordinance¹² (BO; SR 952.02) govern banks; the Stock Exchange Act¹³ (SESTA; SR 954.1) and the Stock Exchange Ordinance¹⁴ (SESTO; SR 954.11) govern derivatives houses; CISA and CISO govern fund management companies, SICAVs, limited partnerships for collective investment schemes and SICAFs; and the Insurance Supervision Act¹⁵ (ISA; SR 961.01) and the Insurance Supervision Ordinance¹⁶ (ISO; SR 961.011) govern insurance companies.

The aforementioned producers are subject to FINMA licensing and its prudential supervision. They must comply with various requirements on organisation, capital, etc. Explicit rules of conduct are set out in Art. 11 SESTA, Art. 20 et seq. CISA and Art. 31 et seq. CISO that are implemented in part by way of self-regulatory codes.¹⁷ Individual rules of conduct have been established for banks and insurance companies based on the practical exigency pertaining to the guarantee of proper business conduct.

3. Who is also governed by supervisory law in terms of production or immediately downstream of it?

CISA and CISO provide for additional licensing requirements. Where the management of a collective investment scheme is delegated to a third party, the delegatee asset manager must also be licensed if Swiss collective investment schemes are concerned; as to foreign collective investment schemes, subjecting oneself to regulatory supervision is voluntary (Art. 13 para. 2 lett. f and para. 4 and Art. 18 CISA). Asset managers of (open and closed) collective investment schemes domiciled in Switzerland that are licensed must comply with the Code of Conduct for Asset Managers of Collective Investment Schemes¹⁸ of 31 March 2009 issued by the Swiss Funds Association (SFA) and recognised by FINMA. In the case of foreign collective investment schemes publicly offered in or from Switzerland, a licensed representative in Switzerland must be additionally designated (Art. 13 para. 2 lett. h and Art. 123 et seq. CISA). The representative must comply with the FINMA-approved Code of Conduct for the Swiss Fund Industry¹⁹ of 30 March 2009 issued by the SFA to the extent that it affects the representative's business with regard to investment funds. Finally, as to investment funds and SICAVs, the custodian bank holding the fund assets in safekeeping is subject to licensing (Art. 13 para. 2 lett. e and Art. 72 et seq. CISA).

⁹ www.finma.ch/e/faq/beaufsichtigte/pages/faq-bewilligungspflicht.aspx

¹⁰ www.finma.ch/e/faq/privaten/pages/faq-umfang-aufsicht.aspx

¹¹ www.admin.ch/ch/d/sr/c952_0.html

¹² www.admin.ch/ch/d/sr/c952_02.html

¹³ www.admin.ch/ch/d/sr/c954_1.html

¹⁴ www.admin.ch/ch/d/sr/c954_11.html

¹⁵ www.admin.ch/ch/d/sr/c961_01.html

¹⁶ www.admin.ch/ch/d/sr/c961_011.html

¹⁷ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

¹⁸ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

¹⁹ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

4. What requirements must be satisfied *before* engaging in the marketing and sale of individual products?

The listing rules²⁰ applicable to the SIX Swiss Exchange, Scoach Switzerland and Eurex set out, for example, what information the prospectuses for listed securities must contain.

In addition, CISA and CISO govern the prospectuses of collective investment schemes in general, and investment funds in particular. Otherwise, the following documents of collective investment schemes are subject to approval²¹ by FINMA: the fund contract of contractual investment funds; the articles of association, bylaws and regulations of SICAVs and SICAFs; and the partnership agreement of limited partnerships for collective investment schemes (Art. 15 CISA). Where foreign collective investment schemes are involved, the relevant documents are subject to approval as soon as there is an intent to publicly offer these products in or from Switzerland (Art. 120 CISA).

CISA and CISO also govern the prospectuses for structured products²² (although they are generally not subject to collective investment scheme legislation). The simplified prospectuses of structured products are additionally covered by the FINMA-approved guidelines on informing investors about structured products²³ of July 2007 issued by the Swiss Bankers' Association (SBA).

In the insurance sector, premium rates and general insurance terms and conditions are subject to approval, as are subsequent changes to policies of occupational pension funds and of supplementary insurance in social health insurance schemes (Art. 4 para. 2 lett. r and Art. 5 CISA). Art. 33 para. 3 and Art. 38 ISA also provide for premium rate audits.

5. What must producers bear in mind *when* engaging in direct marketing?

Producers²⁴ that offer financial products directly (i.e. by way of their own staff at customer service desks, by phone, via the internet, etc.) must take every precaution required to ensure legitimate acquisition and objective advising of clients. This is explicitly defined in Art. 24 para. 1 CISA for licence holders pursuant to CISA and also applies to other licence holders by virtue of the respective applicable organisational requirements and requirements pertaining to guaranteeing ethical business conduct.

Those engaging in the direct marketing of collective investment schemes must also comply with the specifications in the appendix of the FINMA-approved guidelines on the distribution of collective investment schemes²⁵ of 29 May 2008 issued by the SFA. In the insurance sector, other requirements, including precontractual obligations, are established by virtue of the Insurance Contract Act²⁶ (ICA; SR

²⁰ www.six-exchange-regulation.com/regulation/listing_rules_en.html

²¹ www.finma.ch/e/beaufsichtigte/pages/bewilligungstraeger.aspx

²² www.finma.ch/e/faq/beaufsichtigte/pages/faq-strukturierte-produkte.aspx

²³ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

²⁴ 2

²⁵ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

²⁶ www.admin.ch/ch/d/sr/c221_229_1.html

221.229.1). Here, FINMA explicitly has the option of intervening in the event of contractual abuse (Art. 117 ISO).

6. What must producers bear in mind *when* engaging in third-party marketing?

Those engaging third parties for the public offering of units in collective investment schemes must conclude distribution agreements with these third parties (Art. 24 para. 2 CISA). Pursuant to the FINMA-recognised Code of Conduct for the Swiss Fund Industry²⁷ of 30 March 2009 issued by the SFA, fund management companies and SICAVs may market their funds exclusively via such distributors²⁸ that provide for a guarantee of proper business conduct (in particular when it comes to professional and reputable sales and distribution practices, and the provision of information). The remuneration system applicable is to promote proper client advice and the fostering of long-term relationships. Fund management companies and SICAVs may conclude distribution agreements exclusively on the basis of the FINMA-approved guidelines on the distribution of collective investment schemes²⁹ of 29 May 2008 issued by the SFA including its appendix. This appendix contains various provisions applicable to distributors. Compliance with these provisions has to be verified and is to be monitored by the respective producers. As a result, the latter are also made subject to the provisions.

7. Which sales intermediaries are governed by supervisory law and how is this done?

Producers³⁰ frequently commission third parties with marketing and sales. These sales intermediaries are remunerated by the producers for their marketing and sales services and as such are affiliated with (one or more) producers.

In (push-side) sales intermediary arrangements, Art. 3 para. 2 SESTO addresses issuing companies that commercially engage in the underwriting of securities issued by third parties on a commission basis and publicly offer them on the primary market, to the extent that they operate mainly in the financial sector (Art. 2 para. 1 SESTO). As securities dealers subject to licensing, they must comply with the rules of conduct pursuant to Art. 11 SESTA and the SBA's Code of Conduct for Securities Dealers Governing Securities Transactions³¹ of 22 October 2008 recognised by FINMA.

Those publicly offering or seeking to offer units in a collective investment scheme authorised in Switzerland must be licensed by FINMA as a distributor (Art. 13 para. 2 lett. g and Art. 19 CISA). In this context, it is immaterial whether offering or sale takes place directly or indirectly (cf. margin no. 22 of FINMA-Circ. 08/8 "Public advertising under the collective investment schemes legislation"³²). Distributors, including those that, as an exception, are exempt from the licensing requirement, must comply with the rules of conduct of Art. 20 et seq. CISA and Art. 31 et seq. CISO and the specifications in the

²⁷ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

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²⁹ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

³⁰ 2

³¹ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

³² www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

appendix of the FINMA-approved guidelines on the distribution of collective investment schemes³³ of 29 May 2008 issued by the SFA, and undergo auditing for compliance. Additionally, in going about their operations, they may only utilise the advertising media commonly employed for this market segment (Art. 3 para. 1 CISO) and must provide evidence of the admissibility of the sales and distribution methods employed by them (Art. 30 para. 1 lett. b CISO).

As to structured products³⁴, the reader is referred to the relevant FAQs.

Art. 45 ISA sets out special information disclosure obligations applicable to affiliated insurance intermediaries. They, too, may not allow themselves to be commissioned by insurance companies engaging in unlawful practices (Art. 41 ISA).

8. What applies to procurement or buy-side intermediaries that act strictly in an advisory capacity?

In contrast to sales intermediaries³⁵ procurement or buy-side intermediaries, by their own understanding, do not act in the service of producers³⁶ but rather are “unaffiliated” and “independent” in the service of their clients. Nevertheless they, too, are occasionally not (only) remunerated by clients but (also) by producers (as well).

Collective investment scheme law not only establishes licensing requirements but also sets out restrictions in some cases. In (pull-side) procurement or buy-side intermediary arrangements, this primarily affects investment advisors (incl. entities subject to prudential supervision). Like distributors³⁷ they are prohibited from engaging in public advertising of (domestic or foreign) collective investment schemes (Art. 148 para. 1 lett. d CISA), any such violation being subject to legal prosecution. They may act in an advisory capacity only, as follows from their designation (however, they are not restricted with regard to the collective investment schemes covered by them). For more details, see question 25.

Like affiliated³⁸ insurance intermediaries, unaffiliated (independent) insurance intermediaries are also subject to information disclosure obligations pursuant to Art. 45 ISA and by the same token may not conclude collaborative or other types of agreements with insurance companies acting in an unlawful capacity (Art. 41 ISA). In contrast to affiliated insurance intermediaries, unaffiliated insurance interne

diaries must have themselves entered in a register³⁹ (Art. 43 para. 1 ISA; Art. 183 ISO).

9. What applies to procurement or buy-side intermediaries offering additional services?

³³ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

³⁴ www.finma.ch/e/faq/beaufsichtigte/pages/faq-strukturierte-produkte.aspx

³⁵ 7

³⁶ 2

³⁷ 7

³⁸ 7

³⁹ www.vermittleraufsicht.ch

In asset management⁴⁰ in the narrow sense of the word, assets are managed and invested on the basis of a power of attorney. Here, account management and custodial services, i.e. the acceptance of funds, safekeeping of securities, etc. is reserved to licensed banks and securities dealers (Art. 1 para. 2 BA; margin nos. 50 and 52 of FINMA-Circ. 08/5 “Securities dealers”⁴¹). Entities subject to prudential supervision that also engage in asset management services for individuals must comply with the FINMA-recognised Portfolio Management Guidelines⁴² of 16 April 2010 issued by the SBA or a comparable self-regulation. As for fiduciary investments (exclusively) by banks, the FINMA-recognised Directives on Fiduciary Investments⁴³ of 22 June 2009 issued by the SBA additionally apply. For information on independent asset managers, the reader is referred to section B.

For details on unaffiliated insurance intermediaries engaging, on the basis of a power of attorney, in the long-term management of entire insurance portfolios (i.e. monitoring, adjusting insurance coverage, etc.), see question 8.

10. What additionally applies to trade in specific financial products?

Those who engage in commercial securities trading for the account of clients but in their own name and maintain settlement accounts and/or custodian accounts for this purpose are subject to licensing as a securities dealer (Art. 10 SESTA; Art. 3 para. 5 SESTO). These client dealers are subject to the rules of conduct pursuant to Art. 11 SESTA, the rules of conduct⁴⁴ pursuant to FINMA-Circ. 08/38 “Market behaviour rules”⁴⁵ and the SBA’s Code of Conduct for Securities Dealers Governing Securities Transactions⁴⁶ of 22 October 2008 recognised by FINMA. Stock exchanges, stock exchange-like organisations and securities settlement systems are also subject to a licensing requirement (Art. 3 and 10^{bis} SESTA; cf. Art. 1^{bis} BA).

Rules of conduct are also established in Art. 20 et seq. CISA and Art. 31 et seq. CISO and the SFA’s Guidelines on the Distribution of Collective Investment Schemes⁴⁷ of 29 May 2008 and Code of Conduct for the Swiss Fund Industry⁴⁸ of 30 March 2009, both recognised by FINMA.

11. What applies to safekeeping (safe custody accounts)?

As mentioned above⁴⁹, custodians engaging in the safekeeping of securities are subject to licensing as securities dealers. This has implications for independent asset managers in particular (for detailed

⁴⁰ www.finma.ch/e/faq/privaten/pages/faq-vermoegensverwaltung.aspx

⁴¹ www.finma.ch/d/regulierung/Documents/finma-rs-2008-05.pdf

⁴² www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁴³ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁴⁴ www.finma.ch/e/FAQ/BEAUF SICHTIGTE/pages/faq-marktverhalten.aspx

⁴⁵ www.finma.ch/d/regulierung/Documents/finma-rs-2008-38.pdf

⁴⁶ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁴⁷ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁴⁸ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁴⁹ 10

information, see section 6 of the report⁵⁰ of August 2008 issued by the Swiss Federal Banking Commission covering incentive systems and conflicts of interest in the sale and distribution of financial products). The requirements defined in the securities accounting law⁵¹ (SR 957.1) must also be adhered to. If maintenance in a custody account also includes collecting payable interest and dividends, etc., this is sometimes referred to as “technical” asset management as opposed to “commercial”⁵² asset management.

12. Are there rules and regulations applicable to clients that purchase, hold and resell financial products?

In collective investment schemes, investors can be restricted to qualified investors and the collective investment schemes can be exempted in whole or in part from individual legal provisions (Art. 10 para. 2 and 5 CISA). Qualified investors also retain the right to engage as limited partners in a limited partnership for collective investment schemes (Art. 98, para. 3 CISA). This also applies to unsecured securities lending and borrowing (margin number 10 of FINMA-Circ. 10/2 “Repo/SLB”⁵³).

Art. 21 para. 1 and Art. 53 et seq. CISA contain specific investment provisions applicable to collective investment schemes. FINMA-Circ. 08/18 “Investment guideline — insurers”⁵⁴ applies to investments in tied assets and the use of derivative financial products in insurance companies. Apart from financial market legislation, other laws also contain investment provisions, i.e. Art. 49 et seq. of the Ordinance on Occupational Retirement, Survivors’ and Disability Pension Plans⁵⁵ (BVV 2; SR 831.441.1).

Individual clients that engage in trading are also covered by stock exchange legislation: issuing companies that underwrite securities as a firm commitment (Art. 2 para. 1 and Art. 3 para. 2 SESTO), principals with an annual gross volume of CHF 5 billion (Art. 2 para. 1 und Art. 3 para. 1 SESTO; margin no. 23 of FINMACirc. 08/5 “Securities dealers”⁵⁶) and those operating as market makers that publicly quote prices (Art. 3 para. 4 SESTO) are also subject to licensing as a stock exchange or stock exchange-like organisation and — depending on their business operations — the associated rules of conduct.

B. Independent asset management

13. What is meant by “independent asset management”?

⁵⁰ www.finma.ch/archiv/ebk/d/regulier/konsultationen/bericht-vertriebsverguetungen-20080904-d.pdf

⁵¹ www.admin.ch/ch/d/sr/9/957.1.de.pdf

⁵² g

⁵³ www.finma.ch/d/regulierung/Documents/finma-rs-2010-02.pdf

⁵⁴ www.finma.ch/d/regulierung/Documents/finma-rs-2008-18.pdf

⁵⁵ www.admin.ch/ch/d/sr/c831_441_1.html

⁵⁶ www.finma.ch/d/regulierung/Documents/finma-rs-2008-05.pdf

In asset management⁵⁷ in the narrow sense of the word, assets are managed and invested on the basis of a power of attorney. Here, account management and custodial services, i.e. the acceptance of funds, safekeeping of securities, etc. is reserved to licensed banks and securities dealers (Art. 1 para. 2 BA; margin nos. 50 and 52 of FINMA-Circ. 08/5 “Securities dealers”⁵⁸). “Independent” means that these asset managers are not affiliated with a bank or securities dealer but rather are independent of them (for detailed information see section 6 of the report⁵⁹ of August 2008 issued by the Swiss Federal Banking Commission covering incentive systems and conflicts of interest in the sale and distribution of financial products). “Independent asset manager” is not a protected professional designation.

14. How are independent asset managers regulated?

Independent asset managers fall under Art. 2 para. 3 lett. e of the Anti-Money Laundering Act⁶⁰ (AMLA; SR 955.0). The aforementioned restrictions⁶¹ set out in banking and stock exchange laws apply to them as well.

Art. 6 para. 2 CISO also applies to independent asset managers that seek to procure units in collective investment schemes for non-qualified investors. According to this provision they are subject to FINMA-recognised rules of conduct of a professional organisation and their asset management contracts must comply with these rules of conduct.

Other legislation than financial market laws also contains requirements that must be satisfied (cf. Art. 48f et seq. BVV 2).

15. Why exactly are independent asset managers even covered by collective investment scheme laws?

As mentioned above⁶², collective investment scheme law not only establishes licensing requirements but also sets out restrictions in some cases. Among other things, no one may engage in public advertising of collective investment schemes without being licensed (as a distributor) or authorised (for individual products) (Art. 148 para. 1 lett. d CISA), any such violation being subject to legal prosecution. In so doing, the legislator has covered all players so as to prevent unauthorised public advertising of collective investment schemes, i.e. first and foremost, distributors⁶³ (have to apply for a license) and investment advisors⁶⁴ (may only provide advisory services) but also asset managers (who, technically speaking, no longer have to engage in advertising if they have been issued an asset management power of attorney).

⁵⁷ www.finma.ch/e/faq/privaten/pages/faq-vermoegensverwaltung.aspx

⁵⁸ www.finma.ch/d/regulierung/Documents/finma-rs-2008-05.pdf

⁵⁹ www.finma.ch/archiv/ebk/d/regulier/konsultationen/bericht-vertriebsverguetungen-20080904-d.pdf

⁶⁰ www.admin.ch/ch/d/sr/c955_0.html

⁶¹ 13

⁶² 8

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⁶⁴ 8

To be sure, by virtue of Art. 3 in conjunction with Art. 10 para. 3 lett. f CISA the legislator established for the benefit of the latter a partial exception to the extent that no inadmissible public advertising is deemed to be present where an asset manager subject to *prudential* supervision has concluded a written asset management contract with each of its asset management clients.

For independent asset managers *not subject to prudential supervision*, Art. 3 and Art. 6 para. 2 CISO then provided for a similar exception as of 1 January 2007. The conditions as mentioned above⁶⁵: compliance with the AMLA, compliance with FINMA-recognised rules of conduct of a professional organisation and asset management contracts complying with the rules of conduct.

In order to give the asset management industry time to establish professional organisations and rules of conduct, the Swiss Federal Banking Commission provided for a transition period of two years in August 2007 so as to “[...] satisfy the requirements of Art. 6 para. 2 CISO so that no public advertising is present” (margin no. 35 of SFBC-Circ. 03/1 “Public Advertising / Collective Capital Investment Schemes” [lifted as of 31 December 2008]; SFBC 2007 annual report⁶⁶, p. 46). This transition period was taken over by FINMA on 1 January 2009 (margin no. 35 of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”⁶⁷). This period lapsed on 30 September 2009.

Since there has been uncertainty in the asset management industry concerning the actual form rules of conduct should take and FINMA did not want to grant a single organisation the exclusive right to issue such rules, FINMA published “guidelines”⁶⁸ in December 2008 pertaining to the recognition of rules of conduct (margin no. 2 of FINMA-Circ. 09/1 “Guidelines on asset management”⁶⁹). They also apply to entities subject to prudential supervision.

16. What is now the implication of this form of regulation in simple terms?

Again In a nutshell: where an asset management client is not a high net-worth individual in terms of margin no. 13 ff. of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”⁷⁰ or is otherwise a qualified investor — irrespective of the asset manager’s AMLA status (directly subordinated financial intermediary [DSFI] or SRO affiliation) —, starting on 1 October 2009 a written asset management contract has to be present that complies with a recognised minimum standard to the extent that units are to be purchased in a collective investment scheme for a client as based on a power of attorney. Otherwise impermissible public advertising of collective investment schemes shall be deemed to be present. (By contrast, existing positions may be held or sold as desired.)

To comply with this requirement, independent asset managers must contact a professional organisation whose rules of conduct are recognised by FINMA. They may choose from among the following:

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⁶⁶ www.finma.ch/archiv/ebk/d/medien/medienkonferenz/JB07_EBK.pdf

⁶⁷ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

⁶⁸ C

⁶⁹ www.finma.ch/e/regulierung/Documents/finma-rs-2009-01-e.pdf

⁷⁰ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

- "Code de déontologie relatif à l'exercice de la profession de gérant de fortune indépendant" issued by the Association Romande des Intermédiaires Financiers (ARIF);
- "Norme di comportamento nell'ambito della gestione patrimoniale (NCGP)" issued by the Organismo di Autodisciplina dei Fiduciari del Cantone Ticino (OAD FCT);
- "Règlement relatif aux règles-cadres pour la gestion de fortune" issued by the OAR-G Organisme d'autorégulation fondé par le GSCGI et GPCGFG;
- "Règles d'Ethique Professionnelle" issued by the Swiss Association of Independent Financial Advisors (SAIFA);
- Schweizerische Standesregeln für die Ausübung der unabhängigen Vermögensverwaltung" issued by the Swiss Association of Asset Managers (SAAM);
- "Standesregeln" issued by the PolyReg General Self-Regulatory Organisation;
- "Verhaltensregeln in Sachen Ausübung der Vermögensverwaltung" issued by the VQF Financial Services Standards Association.

17. What types of collective investment schemes can now be acquired for clients when complying with recognised rules of conduct?

Units in any conceivable collective investment schemes may be acquired. Consequently it makes no difference whether the collective investment schemes are Swiss or non-Swiss, authorised or non-authorised, etc.

18. But doesn't this also pose a hazard for clients if non-high net-worth individuals are now deemed to be qualified investors?

This question is justified. However, the answer is "no" since the asset management contract must contain investment restrictions and objectives (cf. margin no. 9 of FINMA-Circ. 09/1 "Guidelines on asset management"⁷¹ for specifications for the respective rules of conduct). In so doing, the objectives are derived from the client's risk profile so that not all financial products may be considered for non-high net-worth individuals right from the beginning.

19. What is the situation with ETFs, ETSFs and structured products?

Exchange-traded funds (ETFs) and exchange-traded structured funds (ETSFs) are exchange-traded investment funds and as such fall under collective investment scheme laws. By contrast, offering and distributing structured products⁷² continues to be permissible under the (current) conditions of Art. 5 CISA and Art. 4 CISO.

20. There has been some talk of independent asset managers (along with their clients) also becoming qualified investors themselves. What does this mean?

⁷¹ www.finma.ch/e/regulierung/Documents/finma-rs-2009-01-e.pdf

⁷² www.finma.ch/e/faq/beaufsichtigte/pages/faq-strukturierte-produkte.aspx

Many independent asset managers have concluded collaborative or similar agreements with producers⁷³ that promise to provide them with information about potentially interesting financial products. Since in view of the wording of the agreements the respective contractual relationships cannot benefit from the aforementioned exemption⁷⁴ in Art. 10 para. 3 lett. f CISA, margin no. 12 of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”⁷⁵ provides for the option that independent asset managers may also become qualified investors in order to continue to benefit from information about collective investment schemes (SFBC 2007 annual report⁷⁶, p. 46). However, this is subject to the condition that the independent asset manager complies with a minimum standard recognised by FINMA with regard to all its contracts with asset management clients.

21. I don't require the status of a qualified investor myself and my clients are all high net-worth individuals. Despite this, my professional organisation is seeking to make me comply with its rules of conduct. Why is this? And do I really have to become a member in order to be affiliated to a professional organisation?

The professional organisations themselves decide whether they make compliance with their rules of conduct binding on all their members or only on those asset managers for whom compliance is mandatory pursuant to collective investment scheme legislation.

Similarly, the professional organisations themselves decide on the possibilities for affiliation pursuant to Art. 6 para. 2 lett. b CISO.

22. Does this also apply to

a) ... independent asset managers with DSFI status?

Yes. As mentioned above⁷⁷ it makes no difference with regard to compliance with collective investment scheme law whether or not an independent asset manager has DSFI status or is affiliated with an SRO.

b) ... independent asset managers with a distributor's licence?

Yes. Distributors (sales intermediary arrangements: “push-side”) operate differently to asset managers (procurement or buy-side intermediary arrangements: “pull-side”) and are (to some extent) subject to other regulations. Companies operating at both levels must comply with the regulations for distributors and for asset managers. When dealing with clients, these rules must be distinctly divided within the

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⁷⁵ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

⁷⁶ www.finma.ch/archiv/ebk/d/medien/medienkonferenz/JB07_EBK.pdf

⁷⁷ 16

scope of business, i.e. an asset manager may not simultaneously take on the role of a distributor when dealing with the same customer.

C. FINMA-Circ. 09/1 “Guidelines on asset management”

23. What is a “professional organisation” for the purpose of Art. 6 para. 2 lett. b and c CISO? (margin no. 1)

The guidelines apply to professional organisations whose members are active in asset management, i.e. this mainly being in reference to associations of independent asset managers. FINMA also includes self-regulatory organisations for the purpose of the AMLA as professional organisations. The guidelines also apply to entities subject to prudential supervision.

If professional organisations intend to adopt rules of conduct and have them recognised by FINMA, they must accordingly adapt their articles of association, bylaws and regulations and have them approved by FINMA. This can be done at the same time the professional organisation applies with FINMA for recognition of its rules of conduct.

Professional organisations that submit their rules of conduct to FINMA for approval must demonstrate the intent and ability to enforce them, in particular by adapting their rules of conduct to conform to the Circular. They must also have a sufficient background in and knowledge of asset management. FINMA reserves the right to refuse recognition of rules of conduct where it does not deem the organisation in question to be sufficiently reputable.

24. Does this Circular affect me as an asset manager? (margin no. 5)

The Circular is aimed at professional asset management organisations and is therefore not directly applicable to asset managers as such. However, it does have indirect implications for asset managers:

Entities subject to prudential supervision that also engage in asset management services for individuals must comply with the FINMA-recognised Portfolio Management Guidelines⁷⁸ of 16 April 2010 issued by the SBA or a comparable self-regulation. The audit company must be instructed as to which standard is applicable. As for the management of *collective* investment schemes, standards⁷⁹ for fund management companies, SICAVs, asset managers of collective investment schemes and representatives of foreign funds have been so far recognised.

As mentioned above⁸⁰, the following applies to “independent” asset managers (not subject to prudential supervision): where an asset management client is not a high net-worth individual in terms of mar-

⁷⁸ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁷⁹ www.finma.ch/e/regulierung/Documents/finma-rs-2008-10-e.pdf

⁸⁰ 16

gin no. 13 ff. of FINMA Circ. 08/8 “Public advertising – collective investment schemes”⁸¹ or is otherwise a qualified investor, starting on 1 October 2009 a written asset management contract has to be present that complies with a recognised minimum standard to the extent that units are to be purchased in a collective investment scheme for the client as based on a power of attorney.

25. Can a client also become “qualified” for the purpose of Art. 6 para. 2 lett. b and c CISO on the basis of an advisory agreement? (margin no. 8)

No. As is clearly stated in Art. 6 para. 2 CISO, this Circular does not cover advisory agreements. Such an agreement cannot substantiate a client being deemed “qualified” for the purpose of collective investment scheme legislation.

a) What does this mean for investment advisors?

Pure investment advisors are not affected by the Circular. However, they must refrain from any public advertising of individual collective investment schemes when advising clients (see question 8). Under margin no. 6 of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”,⁸² advertising “is considered to be the utilisation of any type of advertising media that serves the purpose of directly or indirectly offering or distributing or selling specific collective investment schemes.” Conversely, it is not considered advertising “[...] if a client [...] independently requests information about a specific collective investment scheme.”

“Specific” collective investment schemes — when unsolicited — are not offered where clients are explained the basic terms and concepts of asset management and are told, for example, what an equity or bond fund or an ETF is. The same applies to abstract references to topics, sectors, countries and the like. By this time a client must have voiced their interest in obtaining information on “specific” collective investment schemes.

b) What is the situation if an investment advisor also occasionally decides on investments to be made on the basis of a special power of attorney?

Such powers of attorney are based on an underlying contractual relationship. As such, these powers of attorneys are based on asset management contracts (in some cases in part), and the provisions of collective investment scheme laws must therefore be adhered to when investing in collective investment schemes (see question 24).

The situation is different, however, if a client decides to purchase units in a collective investment scheme and then delegates the handling of the transaction to a third person. Margin no. 6 of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”⁸³ sets down that no advertising is present “if the client himself takes the initiative to grant a signed order requesting the purchase of units in a collective investment scheme.”

⁸¹ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

⁸² www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

⁸³ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

26. May an asset management contract contain other provisions apart from those mentioned in margin no. 9 of the Circular? (margin no. 9)

Yes. An asset management contract may include other items such as the counterparties under civil law or items requested by a professional organisation (e.g. pertaining to independence).

27. May verbal instructions be issued although an asset management contract has been concluded in writing? (margin no. 9)

Yes. Though the contract must be in writing it falls within the discretion of the professional organisation to provide for the integration of verbal instructions subsequently issued by clients.

28. What is meant by “guarantee of proper business conduct” on the part of the asset manager? (margin no. 10)

A guarantee of this kind is required by Art. 14 AMLA and is also established in other financial market legislation. In principle, the obligation under margin no. 10 does not go any further than this. For information on the implications of breaching the minimum standards recognised by FINMA, see question 36.

29. Which types of products may asset managers work with? (margin no. 15)

Asset managers must work with financial products whose risks they understand. They must adapt their organisational structure as may prove necessary in order to be able to verify that risks conform to the investment strategy agreed with the client.

30. What happens if the investments made no longer meet the investment objectives and restrictions due to pronounced market movements? (margin no. 16) / What happens if the investment objectives and restrictions no longer match the client's risk profile? (margin no. 17)

Asset managers must make provision for the effective monitoring of the investment strategy. Temporary deviations between the investment strategy and the investment objectives defined together with the client due to financial market fluctuations are permissible. If such a discrepancy persists, it must be discussed with the client to the extent that this is possible. In any event, asset managers must act in the best interests of their clients. Asset managers must alert clients and record in writing when specific instructions issued by a client do not conform to the client's investment objective or restrictions. The same applies if the investment objectives or restrictions no longer match the client's risk profile.

31. What significance does margin no. 19 of the Circular have with regard to settlement accounts? (margin no. 19)

Independent asset managers are prohibited from maintaining settlement accounts (and custody accounts) in favour of asset management clients, i.e. they may not use their own bank and custody accounts for the client's account. In dealings with asset management clients, they are to manage assets

lodged in the clients' name with banks and securities dealers strictly on the basis of powers of attorney (and corresponding agreements) with the clients. These specifications may not be circumvented in dealing with asset management clients by way of other contracts (e.g. "fiduciary" contracts in particular). By contrast, where an independent asset managers renders other services apart from (individual) asset management services (e.g. executor services), it is conceivable that settlement accounts are maintained for this purpose.

32. How are clients to be informed of the existence of rules of conduct? (margin no. 22)

Asset managers must provide their clients with a copy of the rules of conduct or make them aware of the existence of these rules in another manner. They may also provide a web link where clients can consult the rules of conduct by which the asset managers are bound.

33. What reporting standards are used within the industry? (margin no. 26)

FINMA recognises standards such as GIPS (Global Investment Performance Standards), even if they are not specifically tailored for reporting. .

34. How must asset managers report inducements received from third parties? (margin nos. 28–30)

Asset management contracts must define the ultimate destination of all inducements that asset managers may receive from third parties in the course of their management activities, whether intrinsically linked to the mandate or arising from services from which these third parties benefit directly or indirectly. While the latter may not be subject to reimbursement, it can sometimes be difficult in practice to distinguish them from those intrinsically linked to the mandate.

Asset managers must without being prompted provide their clients with information enabling the latter to distinguish between the amount of inducements received according to product or service type. In particular, a distinction can be drawn between different categories of collective investment schemes and structured products. The principle of keeping clients informed also applies to inducements not directly attributable to a specific product type, such as those linked only to the value of custody holdings. Clients may be provided with information in standardised formats, e.g. by means of fact sheets. It is for the professional organisations to decide for themselves how the product types are to be defined that they seek to distinguish.

35. What must asset managers do when clients request detailed information? (margin no. 31)

Asset managers must put in place a suitable structure enabling them to respond to client requests for additional information — to the extent that the inducements received from third parties can be attributed to individuals. Asset managers are expected to provide for a suitable structure to this end. Professional organisations, or where necessary the asset managers themselves, are to organise the details of financial reporting, particularly in respect of the term or basis for reporting.

36. May the monitoring and disciplinary action concerning rules of conduct be outsourced? (margin no. 32)

Professional organisations must put in place a system for monitoring and imposing disciplinary action for institutions not subject to prudential supervision by FINMA. They may also outsource monitoring and disciplinary action to third parties, such as self-regulatory organisations for the purpose of compliance with the AMLA. Outsourcing is even desirable where an organisation lacks an adequate structure to carry out monitoring and disciplinary action itself.

The Circular requires that compliance with the rules of conduct and any disciplinary action in the case of a violation of rules is monitored. FINMA will generally regard as adequate a system of monitoring that verifies the compliance of agreements — including those with high net-worth individuals — and of the information provided to clients with the rules of conduct, and that involves mandatory intervention in the event of negative reports. If a system of monitoring is to cover more than that set out above, FINMA may, for example, require that audit experts with relevant experience be consulted as provided for in Art. 4 of the Audit Supervision Act⁸⁴ (ASA; SR 221.302). Self-regulatory organisations for the purpose of the AMLA may impose audits pursuant to AMLA in line with their provisions.

a) What does “the compliance of agreements — including those with high net-worth individuals — [...] with the rules of conduct mean? Is it not sufficient to only check contracts with non-high net worth individuals?”

Asset management agreements must be present in written form. Such an agreement and its appendices must include details on the points specified under margin no. 9, 27, and 28 of the Circular (as well as mentioning any mandatory points specified by the professional organisation). As prescribed in Art. 6 para. 2 lett. c CISO, the asset management agreement must comply with the rules of conduct recognised by a professional organisation.

To answer the second question: subordination to monitoring and monitoring itself cannot be separated. Although it would be conceivable to restrict subordination (and monitoring) to contractual relationships with non-high net worth individuals, asset managers themselves would then not be considered qualified investors. Under Art. 6 CISO and margin no. 12 of FINMA-Circ. 08/8 “Public advertising – collective investment schemes”⁸⁵, asset managers must comply with a minimum standard recognised by FINMA in respect of all their contractual relationships in order to be considered qualified investors themselves (see question 20).

b) What does “compliance [...] of the information provided to clients with the rules of conduct” mean?

FINMA-Circ. 09/1 “Guidelines on asset management” requires the following information to be passed on to the clients:

⁸⁴ www.admin.ch/ch/d/sr/c221_302.html

⁸⁵ www.finma.ch/d/regulierung/Documents/finma-rs-2008-08.pdf

- margins no. 12 and 29 (reference to conflict of interests)
- margin no. 22 (reference to rules of conduct)
- margin no. 23 (information on risks)
- margin no. 24 (information on organisation, etc.)
- margin no. 25 and 26 (reporting standards)
- margin no. 30 and 31 (information on inducements received from third parties)

Compliance with the duty to inform clients about the aforementioned items (as well as any other information requirements imposed by a professional organisation) must also be documented in the client files.

c) How is one to proceed? Are spot checks and multi-year monitoring cycles feasible?

Professional organisations may proceed in a risk-oriented manner. In doing so, self-regulatory organisations under AMLA must bear in mind that this does not concern money laundering issues and risks, but rather those pertaining to investor protection. If a professional organisation, however, prefers spot checks, all client relations of asset managers with a client base of 10 or less clients are to be monitored. Conducting spot checks on a client base of 11 clients upwards is feasible, although at least 10 client relations have to be checked for a client base of up to and including 100 clients, while, as a rule of thumb, 10% of client relations is applicable once the number of client relations exceeds 100. Any new client relations and client relations that have not yet been checked must also be included.

Asset managers will first be monitored at the latest in 2011 (“entry audit”). If investor protection, money laundering and the financing of terrorism are overall a low risk factor and both these inspections have not resulted in any disciplinary action, a multi-year inspection rhythm (maximum of 3 years), which is to be reviewed at every inspection, may, upon request, be approved for both areas. Asset managers whose compliance with the rules of conduct will only be checked starting in 2011 may only request an extension of the inspection rhythm for the rules of conduct at the earliest following the inspection scheduled to be conducted in 2012, if they have meet all the requirements.

d) What does “mandatory intervention in the event of negative reports” mean?

Negative reports (particularly concerning clients) are to be dealt with. Professional organisations must consider how to clarify the reasons for a negative report and if it is necessary to undertake disciplinary action.

e) What disciplinary action is to be undertaken in the case of a violation? What are the implications of violating the minimum standards recognised by FINMA?

The state of affairs as it was prior to the violation is to be duly restored. This in itself does not, however, constitute a disciplinary action.

If it is a first-time small offence, a reprimand is appropriate. In all other cases, conventional penalties or exclusion are to be foreseen. If an asset manager objects to the monitoring and disciplinary actions, this is on par with a breach against the rules of conduct.

Depending on the violation involved, an infringement of the financial market laws or criminal law may be present for entities under prudential supervision and independent asset managers. This would raise doubts about the guarantee of proper business conduct.

37. How will FINMA check the monitoring systems and controls of professional organisations?

Analogue Art. 27, para. 3 AMLA, the professional organisations have to report to FINMA once a year. This report should cover the following points:

- the professional organisation's operations in respect of applying and implementing the rules of conduct;
- number of affiliated institutions
- number of inspections coconducted/important findings (also in the case of minimal violations);
- number and an outline of disciplinary actions conducted or those that are still pending / overview of disciplinary actions pronounced and the reasons therefor / important findings
- number and an outline of communications effected (see question 38);
- number and an outline of negative reports received, client complaints, etc., and how they have been dealt with;
- difficulties in applying and implementing the rules of conduct;
- cost and financial coverage required to apply and implement the rules of conduct.

Submission of the report is to be discussed with FINMA. Self-regulatory organisations may submit their report concurrently with the report required under AMLA.

For reasons pertaining to the report submission and, in general, if the application and implementation of the rules of conduct do not seem to be professionally conducted by the professional organisation concerned, FINMA reserves the right to carry out on-site inspections which incur charges. Similarly, FINMA may conduct such inspections for asset managers or request them to be conducted.

38. How is the information flow between professional organisations, SROs and FINMA regulated for independent asset managers?)

Based on the different regulations in CISA and in AMLA, various possibilities are feasible for independent asset managers. For instance, an independent asset manager may be a member of an AMLA-SRO which is also a CISA professional organisation, or he/she has been affiliated to a AMLA-SRO, yet fulfils his/her CISA obligations at another professional organisation that is not identical to the SRO (but does have an SRO status, although it may not do so). It may also be the case that the independent asset manager with DUFI status may have been affiliated to a CISA professional organisation.

As mentioned above, depending on the violation in question, an infringement of the financial market laws or criminal law may be present for entities under prudential supervision and independent asset managers which then raises doubts about the guarantee of proper business conduct. If disciplinary action is to be taken by a professional organisation which is to conclude with exclusion, the organisation is obliged to immediately inform FINMA. This is also applicable to decisions regarding exclusion and the reasons therefor. Art. 27 para. 2 AMLA is also applicable for such cases – also for professional organisations that do not have SRO status. If it does not concern a DUFI and, in a given case, the professional organisation is not responsible for any AMLA issues that may arise, the organisation in question must, apart from informing FINMA, also inform the SRO concerned. This is also applicable to a reverse situation. If the independent asset manager is a DUFI, FINMA will inform the responsible professional organisation about the measures it has taken.

39. How quickly must asset managers adopt the rules of conduct by which they are bound? (margin no. 33)

The rules of conduct of professional organisations may include transitional provisions enabling the supervised entities to adopt the rules of conduct within a reasonable timeframe. 31 December 2010 is considered to provide for a reasonable timeframe by which the adaptation of existing asset management contracts must be completed. New asset management contracts must be structured in line with the provisions of the selected minimum standard from the outset.

D. Further information

40. Where can I obtain more information?

Professional organisations provide information on interpretation issues relating to their self-regulatory codes, supervision options, etc.

41. Who can I contact at FINMA if I have further questions?

policy@finma.ch or tel. +41 31 327 94 40