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To the Members of the
VQF Financial Services
Standards Association

Zug, 18 September 2009
PR/RU

Communication concerning the recognition and implementation of the code of professional conduct of the VQF Industry Organisation for Asset Management

Dear Sir or Madam
Dear Members

As we previously informed you in April 2009, FINMA recognised the VQF "Rules of Conduct regarding the Practice of Asset Management" as a minimum standard based on the legislation on collective capital investment schemes. In addition, the VQF assumes the function of an industry organisation for asset management (hereinafter: "VQF IOAM") and hence is responsible for supervising compliance throughout Switzerland with the said minimum standard in this industry.

Consequently, the present communication is aimed, in particular, at all VQF members active in the field of asset management and investment consulting. The duty of subjection associated with membership of the VQF IOAM is explained in Section II. below.

We are pleased to send you the relevant basic documents on our Association as well as related information:

I. VQF IOAM regulations and basic documents

1. The following IOAM regulations and basic documents are enclosed:

- Rules of Conduct of the Industry Organisation for Asset Management (VQF doc. no. 500.02).
- Regulations of the Industry Organisation for Asset Management (VQF doc. no. 500.01).
- Audit Concept of the Industry Organisation for Asset Management (VQF doc. no. 500.20).

- Declaration of Change (VQF doc. no. 500.10).
2. We ask you to kindly read through these documents carefully and, in particular, to check whether you require VQM IOAM membership (see Section II. below).
 3. **Change or admission procedure:**
 - **VQF SRO members** (AMLA supervision) can also become subject to supervision by the VQF in its new IOAM function with simplified conditions of admission: in this regard it is only necessary to submit the enclosed Declaration of Change (VQF doc. no. 500.10) to the VQF; by doing so you can apply for IOAM supervision by the VQF in addition to AMLA supervision.
 - **Non-members of the VQF** can find the appropriate application form (including guide to completion) on our website (www.vqf.ch). Non-members can be admitted to the VQF as SRO and/or IOAM members.
 4. **Aid to implementation of the rules of professional conduct for new IOAM members:** We will compile a suitable **commentary on the rules of conduct** for new IOAM members of the VQF for the purpose of their improved comprehension and application. Likewise we are currently drawing up a **sample asset management contract** (see numeral 15 below). By means of these services we hope to provide additional support to our IOAM members with regard to compliance with their regulatory duties in relation to the implementation of our rules of professional conduct. The VQF will publish the additional basic documents referred to above on our website (www.vqf.ch) (and inform members of their publication) as soon as they have been completed.
 5. Naturally, you can also find all documents relating to the IOAM on our **website** (www.vqf.ch). These also include the general Regulation on Fees, thereby demonstrating the transparency of the **costs** associated with VQF IOAM membership (which are very competitive compared to other providers).

II. Duty of subjection

A. Introduction and summary of duty of subjection

6. **Introduction:** As an independent centre of competence for compliance, in addition to its existing role as a self-regulatory organisation (SRO) pursuant to the AMLA the VQF now also assumes the function of an industry organisation for independent asset managers (IOAM). To this end, on the basis of FINMA Circular 2009/1 the VQF has issued the above mentioned benchmarks for asset management and rules of professional conduct, officially recognised by FINMA. These VQF rules of professional conduct regulate the content of asset management contracts and how they must be implemented (the asset manager's duties of trust, information and due diligence towards his customer and regulation of the asset manager's compensation). In this way due account is taken of **investor protection**.

7. **Summary of duty of subjection:**

- a. **Voluntary subjection:** "Independent" asset managers (e.g. financial intermediaries pursuant to Art. 2 Para. 3 AMLA) who do not offer collective capital investment schemes to their customers can voluntarily become subject to the rules of conduct of an industry organisation (e.g. VQF IOAM) which are recognised by FINMA.

Such voluntary subjection makes sense because, as a necessary prerequisite for the granting of mandates relating to customer accounts, an increasing number of **banks** require their external asset managers to be members of an industry organisation for asset management in addition to holding membership of a self-regulatory organisation (SRO) pursuant to the AMLA, thus ensuring that investor protection is also supervised (compliance with rules of professional conduct for asset managers). By doing so, banks aim to prevent any threats to their reputation and risks of liability. An increasing number of **customers** likewise desire that asset managers independent of banks should also be supervised with regard to investor protection.

- b. **Compulsory subjection:** Insofar as in the context of their asset management or other activities independent asset managers offer collective capital investment schemes to non-qualified investors, in view of FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes (see detailed explanation under the following numerals 8 - 19) such subjection to officially recognised rules of conduct (e.g. VQF IOAM membership) is indeed **compulsory** with effect from

30 September 2009.

B. Concept of the qualified investor / concept of the qualified, independent asset manager

8. **Under the terms of collective capital investment legislation, (among other categories of qualified investor¹) investors are classified as "qualified" if they have concluded a written asset management contract with an independent asset manager who is subject to the Anti-Money Laundering Act (AMLA) and to rules of conduct which are recognised by FINMA as minimum standards. The contract must also conform to the recognised rules of conduct (Art. 10 Para. 4 of the Collective Capital Investment Act, hereinafter: "KAG"; Art. 6 Para. 2 of the Collective Capital Investment Ordinance, hereinafter: "KKV"; recital 12 FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes).**
9. **Similarly, independent asset managers are classified as "qualified" under the terms of collective capital investment legislation if they have concluded written asset management contracts with their customers, are subject to the Anti-Money Laundering Act (AMLA) and to rules of conduct which are recognised by FINMA as minimum standards. The contracts must also conform to the recognised rules of conduct (Art. 10 Para. 4 of the Collective Capital Investment Act, hereinafter: "KAG"; Art. 6 Para. 2 of the Collective Capital Investment Ordinance, hereinafter: "KKV"; recital 12 FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes).**

C. Concept of public advertising of collective capital investment schemes

10. Anyone who offers or distributes collective capital investment schemes requires FINMA approval (Art. 19 Para. 1 KAG). According to recital 6 et seq. of FINMA Circular 2008/8, public advertising of collective capital investment schemes involves the following activities, in particular:

*"Advertising within the context of this Circular is considered to be the utilisation of any type of advertising media that serves the purpose of directly or indirectly offering or distributing specific collective capital investment schemes. It is not considered advertising if a customer requests subscription for units of the collective capital investment scheme on his own initiative or requests information about a specific collective capital 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 letter a KAG or an independent asset manager according to Art. 6 Para. 2 KKV.***

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

¹ See Art. 10 Para. 3 KAG for other categories of qualified investor

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 capital investment schemes (e.g. security number, issuing office), press conferences, telemarketing, cold calling, road shows, financial trade shows, sponsored reports about collective capital investment schemes, house calls of financial intermediaries of any kind, internet sites and other forms of e-commerce, subscription forms and online subscription possibilities as well as e-mails.

Alternatively, the publication in the media of prices, rates, and asset values of foreign collective capital investment schemes from financial intermediaries subject to supervision (including banks, securities dealers, fund management companies, representatives of foreign collective capital investment schemes as well as asset managers of collective capital 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 KAG and Art. 3 Para. 2 KKV). 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.."

11. In connection with Art. 3 and 10 KAG and Art. 3 and 6 KKV, FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes, which deals with the public advertising and offering of collective capital investment schemes, states that it is **not** considered to be **public advertising**:

- 11.1 "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 [...] an **independent asset manager pursuant to Art. 6 Para. 2 KKV**". Art. 6 Para. 2 KKV reads as follows:

¹² *Investors who have entered into a written asset management agreement with an independent asset manager are considered to be qualified investors to the extent that:*

- a. *The asset manager as financial intermediary is subject to the Anti-Money Laundering Act (AMLA) of October 10, 1997 (Art. 2 Para. 3 letter e AMLA);*
- b. *The asset manager is subject to a code of professional conduct of an industry organisation which is recognised as a minimum standard by FINMA; and*
- c. *The asset management contract complies with the recognised guidelines of an industry organisation."*

or

- 11.2 If the customer is a **high net-worth individual** (Art. 10 Para. 3 letter e KAG in connection with Art. 6 Para. 1 KKV). Art. 6 Para. 1 KKV reads as follows:

"A high net-worth individual is someone who can confirm in writing to a financial intermediary who is supervised in accordance with Article 10 Paragraph 3 letters a and b of the Act or to an independent asset manager in accordance with Paragraph 2 that they directly or indirectly have financial assets of at least 2 million Swiss francs at the time of the acquisition."

FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes specifies the above mentioned concept of the high net-worth individual in recital 13 as follows:

- *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.*
- *Financial assets are bank assets (sight or time deposits), fiduciary assets, securities (including collective capital investments and structured products), derivatives, precious metals as well as life insurances with a repurchase value.*
- *Direct investments in real estate and claims from social insurances (including claims from the second and third pillar) are specifically not considered financial assets.*
- *The confirmation of financial assets must be submitted no later than the time the collective capital investment scheme is offered or distributed.*
- *The advertiser or provider of the collective capital 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.*
- *A written confirmation is not necessary if the required financial assets are deposited at the bank or with the securities dealer who is also offering or distributing the collective capital investment scheme.*
- *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.*

D. Entry into force of the rules of conduct, transitional regulations and sample asset management contract

12. As a **summary** of the explanations contained in numerals 8 - 11 above, it can be stated that independent asset managers must fulfil the requirements of numeral 11.1 when entering into agreements with customers who are not high net-worth individuals, i.e.:

- There must be a written asset management agreement which corresponds to the VQF IOAM rules of conduct as recognised as a minimum standard by FINMA; **and**
- Independent asset managers must hold membership of the VQF IOAM (or membership of any other industry organisation with rules of conduct for asset managers approved by FINMA by **30 September 2009**).

Illegal public advertising exists if an asset management customer is not a high net-worth individual (or other qualified investor) and the above mentioned requirements are not met.

13. **Entry into force:** The rules of professional conduct of the VQF IOAM enter into force on 30 September 2009.
14. Apart from the above mentioned deadline of 30 September 2009 concerning subjection to supervision by the VQF IOAM, the following additional **transitional regulations** apply with regard to compliance with the provisions on public advertising contained in the KAG:
 - In Art. 22 Para. 2 of its rules of conduct the VQF provides for a transitional period of grace until **31 December 2010** with regard to the formal adjustment of already existing asset management contracts entered into prior to 30 September 2009 (however, compliance with the material duties contained in the rules of conduct in accordance with Art. 22 Part. 3 thereof is required with effect from 30 September 2009 for contracts entered into prior to this date).
 - New asset management contracts entered into from 30 September 2009 must be structured in accordance with the VQF rules of conduct with immediate effect (see numeral 15 below).
15. For the purpose of supporting members when entering into contracts with new customers as from 30 September 2009 (see numeral 14 above), the VQF IOAM will provide members with a **sample asset management contract** with examples for the formulation of contract clauses in accordance with the rules of professional conduct of the VQF IOAM (see numeral 4 above). Members can use this sample asset management contract or adjust this in line with their individual needs – provided that they maintain compliance with the rules of professional conduct.
16. **Further aids to the application and interpretation of the rules of conduct:** As already mentioned in numeral 4 above, a commentary on the rules of conduct is being prepared for members of the VQF. This will express how the rules of conduct should be interpreted and aims to help you to apply them. You can also contact the VQF at any time should you have any further questions or if anything is unclear.

E. What are the benefits if the independent asset manager is also a qualified investor?

17. In numeral 9 above, reference was made to the fact that if an independent asset manager is a VQF IOAM member, not only are his customers considered to be qualified investors but the asset manager is too (Art. 6 Para. 2 KKV in conjunction with Art. 10 Para. 4 KAG; see also recital 12 of FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes). This is particularly relevant due to the fact that the independent asset manager's partners (e.g. banks, investment companies etc.) can also offer their investment products to the independent asset manager without this being considered to be public advertising under the terms of the KAG.

F. Are investment advisers subject to duties?

18. According to the clear formulation of Art. 6 Para. 2 KKV, **advisory agreements** are not subject to FINMA Circular 2009/1 Guidelines on Asset Management; therefore they are also not subject to the rules of conduct of the VQF IOAM. It follows from this that an advisory agreement cannot cause the customer to be considered "qualified" under the terms of the above mentioned Article. However, if due to a suitable **special mandate** (the asset manager otherwise has a general mandate), the investment adviser **also executes investments**, account must be taken of the above mentioned requirements of collective capital investment legislation (see numeral 6 et seq. above) when offering or distributing collective capital investment schemes.

G. What applies to structured products?

19. The interpretation of the concept of "public advertising" according to FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes also applies to **structured products** (Art. 5 KAG and Art. 3 Para. 3 and 4 KKV), although in general these products are not subject to the legislation on collective capital investment schemes (see recital 5 of FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes). With regard to duty of subjection, this means that the offering and distribution of structured products by independent asset managers continues to be allowed under the provisions of Art. 5 KAG and Art. 4 KKV and membership of an industry organisation with recognised rules of conduct is not necessary for this purpose.

III. Object of audits on compliance with the rules of conduct

20. According to FAQ No. 14 to FINMA Circular 2009/1 Guidelines on Asset Management, **FINMA** basically considers a control system to be adequate if it guarantees compliance with contracts – including contracts with high net-worth individuals – and conformity of the information supplied to customers with the rules of conduct as well as compulsory intervention in the event of notification.
21. **Is it sufficient only to control contracts with customers who are not high net-worth individuals?** Separation of subjection and control is not permissible according to FINMA. Although it might be conceivable to restrict subjection (and control) to contract relationships with customers who are not high net-worth individuals, the asset manager would not then be considered to be a qualified investor (see numerals 9 and 17 above). According to Art. 6 KKV, an asset manager must comply with a minimum standard recognised by FINMA in all of his contractual relationships in order to be considered to be a qualified investor in his own right (see also recital 12 of FINMA Circular 2008/8 Public Advertising of Collective Capital Investment Schemes).

IV. Duty of the VQF IOAM to provide information to FINMA

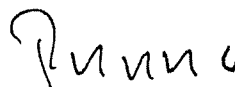
22. FINMA expressly states that Art. 27 Para. 2 letters c and d AMLA, the object of which is the duty of the VQF IOAM to provide information to FINMA, also applies to the violation of the VQF IOAM rules of conduct and leads to the asset manager's exclusion from the VQF.

Prior to issuing this letter, the VQF discussed its content with the person responsible at FINMA. FINMA confirmed its approval with regard to the correctness and up-to-dateness of the explanations regarding duty of subjection (Section II.), the object of audits (Section III.) and the duty of information of the VQF (Section IV.).

Please do not hesitate to contact the signatory below right or our Legal & Compliance Desk if you have any questions or require further clarification.

Yours sincerely

VQF
Financial Services
Standards Association



Peter Rupper
Chairman



Patrick Rutishauser
Managing Director