

### **h) No Simplified Exemption in Case of Programs for more than 20% of the Free float (DraftCirc 1, No. 49)**

If the size of the buy-back program exceeds 20% of the free-float, the notification procedure will, according to DraftCirc 1, no longer be available. Pursuant to the TOB Report (No. 49), the rationale for this new rule is the danger of material effects on the liquidity of the shares. It seems, however, unclear what the Takeover Board would or could do in case of such danger, as it is not its task to ensure market liquidity. A restriction of a share buy-back for market liquidity reasons would certainly not be within the powers of the Takeover Board. Given that this concern needs to be dealt with by FINMA and the stock exchanges as the competent authorities, it should not be addressed by the Takeover Board.

### **3) Outlook**

Generally speaking, despite its questionable legal basis and nature, Comm 1 has been well respected by the legal community and by listed companies as a necessary and adequate regulation of share buy-backs which was sensibly applied by the Takeover Board. DraftCirc 1 will likely be received with the same acceptance, with some exceptions such as indicated above. However, the practice introduced with the Takeover Board's order re Partners Group Holding AG relating to buy-backs in excess of 10% share ownership (see 2 d above), and the proposed hard-wiring and general application of this practice as envisaged by DraftCirc 1, as well as certain other proposals (see 2 b and h above) go too far. In the absence of effective judicial control (cf. *Gericke, op. cit.*, 369s), it is to be hoped that the Takeover Board will reconsider those proposals that go beyond the needs of its supervision—not so much because the relevant proposals may be inadequate, but, as a matter of principle, in order to safeguard the division of powers and the rule of law.

*Dieter Gericke (dieter.gericke@homburger.ch)*

---

## Minimum Standards for Self-regulatory Provisions in the Asset Management Industry

Reference: CapLaw-2009-42

Effective as of 1 January 2009, FINMA has adopted a new circular 'Benchmarks for Asset Managers'. The circular sets benchmarks regarding minimum standards for self-regulation in the asset management industry. The circular also provides for procedural provisions pursuant to which a self-regulatory regime may be recognized by FINMA. By publishing the circular, FINMA has addressed a long-standing market request to achieve a certain degree of equivalence in the industry, and FINMA has already recognized several self-regulatory regimes of different SROs under the circular.

### 1) Existing Framework

By way of introduction, it is important to note that under Swiss law independent asset management services are not subject to the supervision by the Financial Market Supervisory Authority FINMA (FINMA). For instance, the self-regulatory provisions in the asset management industry, such as the 'Code of Ethics and Professional Conduct of Independent Asset Managers' promulgated by the Swiss Association of Asset Managers (SAAM) as of 26 March 1999, are only binding to members who have voluntarily joined the respective self-regulatory organization (SRO). SAAM is one of several SROs in the asset management industry which all use different approaches providing for varying code of conduct standards.

Conversely, asset managers that are entrusted with the management of Swiss collective investment schemes pursuant to the Collective Investment Schemes Act (CISA) are subject to supervision by FINMA and must adhere to a comprehensive statutory code of conduct. If asset managers only manage foreign collective investment schemes, the CISA provides them with a right to choose whether or not they would like to submit to FINMA supervision.

Based on article 7 (3) of the FINMA Act, FINMA has discretion to recognize industry codes of conduct as minimum standards which need to be complied with for purposes of proper conduct by market participants. It has done so by FINMA Circular 08/10 (<http://www.finma.ch/d/regulierung/Documents/finma-rs-2008-10.pdf>) as of 1 January 2009 with respect to the self-regulatory provisions issued by the Swiss Fund Association (SFA), and in particular the 'Code of Conduct for Asset Managers of Collective Investment Schemes' and the 'Code of Conduct for the Swiss Fund Industry'. Furthermore, self-regulatory standards may also be relevant in connection with certain exemptions and safe-harbor rules under CISA. For instance, investors are deemed 'qualified' under CISA if they have concluded a written contract with an independent asset manager being subject to the Anti-Money Laundering Act (AMLA) and a code of conduct that has been recognized by FINMA as a minimum standard. An offering of foreign collective investment schemes exclusively to 'qualified investors' is deemed to be a private placement and, therefore, exempt from licensing or approval requirements otherwise applicable under CISA with respect to public offerings of foreign collective investment schemes.

Asset managers operating as banks or securities dealers are and remain supervised by FINMA as a consequence of their existing bank or securities dealer license. The Swiss Bankers Association has issued Portfolio Management Guidelines in 2005 (being currently under revision) which codify a code of conduct for *licensed banks and securities dealers conducting asset management services*. The Portfolio Management Guidelines have also been recognized as minimum standard by FINMA (FINMA Circular 08/10) as of 1 January 2009.

## 2) New FINMA Circular: 'Benchmarks for Minimum Standards'

Effective as of 1 January 2009, FINMA has adopted the circular 'Benchmarks for Asset Managers' (Circular) which sets minimum standards for the asset management industry organizations. The Circular can be downloaded from the website of FINMA under <http://www.finma.ch/d/regulierung/Documents/finma-rs-2009-01.pdf>. The minimum standards are designed as guidelines for market participants to draft their own self-regulatory provisions. The Circular also provides for procedural provisions pursuant to which a self-regulatory regime may be recognized by FINMA. The Circular applies to banks, securities dealers, licensed institutions and their agents under the CISA, such as fund management companies, SICAVs, partnerships, SICAFs, custodian banks, asset managers, etc. It defines minimum requirements, in particular with respect to form and content of asset management agreements, duties of loyalty, due diligence and information provision obligations, in addition to remuneration criteria of asset managers.

The new FINMA standards are intended to form a benchmark, *i.e.* minimum standards, with the aim to eventually improve the degree of equivalence in these standards. Industry organizations will have to adhere to these new benchmarks in order to have their self-regulatory asset management standards recognized by FINMA. Accordingly, the FINMA standards are said to be a 'minimum standard for minimum standards'. The respective SROs remain in charge to monitor compliance of their codes of conduct as well as to sanction any breaches by their members. To the extent that the Stock Exchange Act (SESTA) and CISA and their implementing ordinances provide for stricter rules, these rules will prevail.

Finally, the Circular requires a change in the regulation of the Swiss Bankers Association which will have to amend its provisions on the remuneration of asset managers.

## 3) Recognition of Particular Self-regulatory Provisions

Based on the Circular, FINMA has already recognized seven self-regulatory codes of industry organizations representing **independent assets managers**, including the 'Code of Ethics and Professional Conduct of Independent Asset Managers' issued by SAAM dated 26 March 1999 (for further recognitions, see <http://www.finma.ch/e/aktuell/Pages/aktuell-selbstregulierungen-20090518.aspx> and <http://www.finma.ch/e/aktuell/Pages/aktuell-selbstregulierungen-20090427.aspx>).

With regard to the management of collective investment schemes, FINMA has recognized the SFA's 'Code of Conduct for Asset Managers of Collective Investment Schemes' dated 31 March 2009 and 'Code of Conduct for the Swiss Fund Industry' dated 30 March 2009. Consequently, these rules are binding for all licensed asset managers of collective investment schemes and compliance is examined by audit firms. The same applies to asset managers organized as banks and securities dealers.