VQF

Sample Contractual Clauses for an Asset Management Agreement

by the

Industry Organisation for Asset Management

of the

VQF Financial Services Standards Association

regarding the

Practice of Asset Management

Legend for the present document:

Black = Sample contractual clauses.

Red = Introductory remarks and explanations on the sample contractual clauses.

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Introductory Remarks

A. The present **document** (VQF doc. no. 400.04) of the Industry Organisation for Asset Management (hereinafter: "IOAM") of the VQF Financial Services Standards Association (hereinafter: "VQF") is a service to IOAM members which contains **sample contractual clauses** by means of which IOAM members can, in general, ensure that agreements are compiled in accordance with the **VQF rules of conduct regarding the practice of asset management** (VQF doc. no. 500.02; hereinafter: "rules of conduct"), which are officially recognised by the Federal Financial Market Supervisory Authority (hereinafter: "FINMA"). In the final analysis, in the context of self-regulation, the formulation of the asset management agreement continues to be the asset manager's own responsibility.

B. VQF IOAM members may also use other contractual clauses at variance from this document. However, members must ensure that individually composed contractual clauses satisfy the minimum requirements of the VQF IOAM rules of conduct. The **minimum requirements for an asset management agreement** are as follows:

- Art. 2 of the rules of conduct: The agreement must be made in writing.

- Art. 3 of the rules of conduct: Minimum information in the agreement (or in its appendices as integral parts thereof).

C. The **minimum scope of the audits to be carried out by the VQF on VQF IOAM members** results from question no. 14 of the FAQ[1] to FINMA Circular[2] 2009/1 Guidelines on Asset Management.

Asset Management Agreement

The parties[3]

Sample Asset Management Co., Sample Street 1, 6300 Zug,

hereinafter: "Asset Manager"

and

....., date of birth 1 January 1950, of ..... (home town; for foreigners: home country), ... (address),

hereinafter: "Client"

hereby conclude the following asset management agreement (hereinafter: "agreement"):

I. Preamble

1. The asset manager is an IOAM member (member no. .....) of the VQF Financial Services Standards Association (hereinafter: "VQF") in its function as an Industry Organisation for Asset Management (hereinafter: "IOAM"). As a VQF IOAM member, the asset manager is subject, among other regulations, to the "Rules of Conduct of the VQF IOAM for the Practice of Asset Management" (hereinafter: "Rules of Conduct") as recognised by the Federal Financial Market Supervisory Authority (hereinafter: "FINMA"). These rules of conduct form an integral part of this agreement. The client was explicitly informed that the current rules of conduct are available for consultation on the VQF website (www.vqf.ch).[4]

II. Agreement (principles): Managed assets (including mandates), reference currency, investment goals and limitations

2. The client herewith awards the order to the asset manager for the independent management of the following assets in the client's name and for his account (in the context of this agreement including its integral components):[5]

Financial institution(s):	Account / Deposit No(s):	Description (optional)

The client grants to the authorised representative all mandates and signatory rights in respect of accounts and deposits etc. as are necessary for the execution of this order. The corresponding mandates and signatory rights can be found in the appendices to this agreement. This agreement also applies to:

- Investments subsequently transacted with the client's capital on the above mentioned accounts or deposits;
- Activities associated with mandates given to the asset manager which are allocated at a later date to accounts or deposits held by the client other than those mentioned in this agreement.

3. Taking account of the information clarified prior to signing the agreement, the asset manager directs his activity towards the following:[6]

   a. The **reference currency** is: .....

   b. **Investment goals**, investment policy and investment structure: .....

   c. **Investment restrictions**: [7] .....

   d. **Fully discretionary asset management**: In general the asset manager manages the client's assets in line with this agreement and the provisions of the law and in accordance with the VQF rules of conduct (integral part of the agreement) at his own full discretion, in the name of the client, for the client's account and at the client's risk.

III. Provisions for executing the client's order

A. Duties of trust

4. **Principle**:[8] While exercising his activity, the asset manager always protects his client's interests to the best of his knowledge and ability.

5. **Prevention of conflicts of interest:**[9] The asset manager has taken expedient organisational measures in order to prevent conflicts of interest from arising between him or his employees and the client and in order to exclude the possibility of client disadvantage due to such conflicts of interest.

6. **Duty of confidentiality:**[10] The asset manager maintains confidentiality on all information of a confidential nature that comes into his possession within the context of the exercising of his asset management activity. This duty of confidentiality also continues to apply after the agreement has ended.

7. **Duty of investigation, clarification and information:**

   a. **Duty of investigation**:[11] The asset manager has obtained sufficient information (and documented this in an appropriate manner), which allows him to be in a position to recommend and implement the appropriate investment of assets in accordance with the client's needs.[12] This includes, in particular, information concerning the client's experience relating to the management of assets, his income and asset circumstances, investment purpose and horizon, readiness and capacity to assume risk (risk profile) and the reference currency.

   b. **Duty of clarification and information concerning risks**:[13] After obtaining the above mentioned information, the asset manager must – unsolicited and in suitable manner in accordance with the client's level of expertise in asset management affairs - clarify for the client the risks associated with the agreed investment goals and restrictions as well as their implementation and the risks of the actual investments.[14]

   c. **Client's confirmation**:[15] By signing this agreement, the client confirms that the asset manager has fully and accurately performed the above mentioned actions in relation to investigation, clarification and information (especially as regards the client's individual knowledge), and that the client has understood this information.

   d. **Other**:[16] The asset manager informs his client of important changes in personnel, organisation or ownership circumstances, provided that such information directly concerns the client and is not public knowledge. In the event of significant market movements leading to a permanent change in the investment strategy at variance from the agreed investment goals, the asset manager informs the client and discusses with him an adjustment of the investment strategy within the scope of the available options.

8. **Duty of accountability / reporting**:[17]

   a. At the client's request, but at least once per .....[18], the asset manager renders suitable account to his client of his activity as asset manager. In the context of his duty to render due account, the asset manager observes the standards prevalent in the asset management industry.

   b. The calculation method used and the selected reporting period must be compatible. In the context of his duty to render due account, the asset manager can also make use of client-related performance reports from the client's respective (deposit) bank.

   c. ....[19]

B. Duties of due diligence

9. **Duties of due diligence of an organisational nature**: [20] The asset manager (or client adviser) has ensured that his deputy or representative is in place and the client has been informed of this fact.

10. **Duties of due diligence in the execution of the agreement**: [21]

    a. The asset manager selects the investments to be included in the client's investment portfolio with due diligence.

    b. The asset manager ensures an adequate distribution of risk on the managed assets (adequate diversification principle), provided that the investment strategies or goals allow this.

    c. The asset manager regularly monitors the investment deposit assigned to him for management. He ensures that the investments are in accordance with the asset management agreement and risk profile.

    d. The client's risk profile and the investment strategies employed are reviewed periodically, i.e. at least .... [e.g. annually].

11. **Options for the delegation of responsibilities to third parties**:[22] [Variant 1: If delegation is to be excluded] The asset manager is not permitted to delegate asset management responsibilities to third parties. [Variant 2: If delegation is to be permitted] The asset manager is permitted to delegate asset management responsibilities to third parties.

C. Asset manager's compensation

12. **Types, modalities and elements of compensation**: In compensation for his asset management activity in the context of the present agreement (including its integral components), the asset manager receives the following compensation from the client:[23]

    a. A **management fee** in the amount of .... [number] % (plus VAT, where applicable) per .... [variants e.g.: quarter, half-year, year], calculated on the basis of the sum of the assets managed by the asset manager in the context of this agreement (deposit and account balances) at the close of the last bank working day of the .... [variants e.g.: quarter, half-year, year]. On cancellation of this agreement the management fee shall be calculated and levied on a pro rata temporis basis. The asset manager shall arrange for the management fee for the lapsed ... [variants e.g.: quarter, half-year, year] to be charged direct to the client's account no. … at … [**financial institution**] in the respective following ... [variants e.g.: quarter, half-year, year].

    b. In addition, a **performance-related fee** of .... [number] % (plus VAT, where applicable) is due to the asset manager, calculated on the basis of the annual performance increase of the total assets managed under this agreement (deposit and account balances).[24] The performance fee for the lapsed financial year is charged direct to the client's account no. … at … [**financial institution**] in ... [e.g. January of the following year]. [Additional variant, optional]. In the event of negative performance, this performance fee is not levied again until the value of the asset has returned to the level it exhibited prior to the first negative annual performance.

    c. With regard to **third party benefits,** reference is made to numeral 13 of this agreement.

    d. The above mentioned compensation **does not include** deposit fees, stock exchange commissions, stock exchange fees, stamp duties or any other fees, costs and expenses levied by third parties and charged directly or separately to the client's account. [25]

13. **Third party benefits**:[26]

a. **Introduction**:

Clarification about third party benefits in general: The client is aware of and accepts the fact that, in the context of his asset management activity or while executing orders, the asset manager receives or could receive benefits (e.g. retrocessions, kick-backs, finder's fees etc.) from third parties (banks, investment companies, issuers etc.). These third party benefits may differ by investment product or provider. By issuing the fact sheet "Third Party Benefits", which forms an integral part of this agreement, the asset manager has, with due diligence, informed the client about the calculation parameters or margins of the afore mentioned benefits, which the asset manager receives or could receive from third parties. By signing this agreement, the client confirms that he has received and understood this information. [27]

Clarification about third party benefits actually received with regard to the present business relationship: Provided that it is possible at reasonable cost to allocate the above mentioned benefits received from third parties (such as retrocessions on brokerage fees or deposit commissions) to individual client relationships (this is not always possible), the asset manager discloses the amount of these benefits at the client's request.[28]

Clarification about (possible/actual) conflicts of interest: In accordance with the rules of conduct which the asset manager must observe, the asset manager must inform the client if the acceptance of third party benefits leads to or could lead to a conflict of interest.[29]

b. **Legal allocation of third party benefits**:

[Basic principle variant 1: If the third party benefits are to be assigned to the client] If in the context of his asset management activity or while executing orders, the asset manager receives benefits (e.g. retrocessions, kick-backs, finder's fees etc.) from third parties (banks, investment companies, issuers etc.), subject to conflicting regulatory provisions (for example, in the case of investment companies such transfer is generally prohibited for regulatory reasons) and provided that it is possible to allocate such third party benefits to the present client relationship at reasonable cost (which is not always the case) - he will pass these benefits on to the client. Hence (subject to the two restrictions mentioned in the previous sentence) the asset manager's remuneration consists exclusively of the compensation paid directly to him by the client (see numeral 12 of this agreement regarding compensation).

[Basic principle variant 1: If the third party benefits are to be assigned to the asset manager] The client is aware of and accepts the fact that, in the context of his asset management activity or while executing orders, the asset manager receives or could receive benefits (e.g. retrocessions, kick-backs, finder's fees etc.) from third parties (banks, investment companies, issuers etc.) (see numeral 13 letter a of this agreement). If the asset manager receives such third party benefits which in accordance with respective applicable legal practice or the provisions of the law he is obliged to pass on to the client, the client expressly agrees that the asset manager shall receive these benefits as additional compensation for his asset management activity. By signing this agreement, the client expressly waives his right to these third party benefits (transfer to the client).[30]

IV. Other provisions / final provisions[31]

14. **Liability**: .....[32]

15. **Applicable law**: .....[33]

16. **Place of jurisdiction**: .....[34]

17. Two copies of this agreement were made and signed by the parties, whereby each party retains one copy.

The Asset Manager:	**The Client:**
Sample Asset Management Co.	**.....**
.....	.....
Name	Name

<u>Enclosures:</u>
- ....
- ....

Footnotes:

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[1] See http://www.finma.ch/e/faq/beaufsichtigte/Documents/faq-vermoegensverwaltung-e.pdf

[2] See http://www.finma.ch/e/regulierung/Documents/finma-rs-2009-01-e.pdf

[3] Pursuant to Art. 3 Para. 1 letter a of the rules of conduct, it is **compulsory** for the agreement to name the parties.

[4] Pursuant to Art. 8 Para. 1 of the rules of conduct, it is **compulsory** for the asset manager to refer the client to the rules of conduct (in the agreement or otherwise) (by issuing a copy of the rules of conduct to the client, or at least informing him where they can be found) and to be able to **prove** that suitable reference to the rules of conduct was made to the client. It is therefore **advisable** to add this reference to the rules of conduct to the agreement which is signed by the client (thus proving that the information was provided). In accordance with FINMA directives, the VQF is obliged to verify the asset manager's compliance with his duty of information towards the client (see "Introductory Remarks" on page 2, letter C).

[5] It is necessary and **obligatory** to clearly describe the assets to be managed, among other items, in the asset management agreement (sub-section on the scope of the asset manager's authority; see Art. 3 Para. 1 letter b of the Rules of Conduct). This includes, among other details, information about the financial institution with which the asset(s) is (are) deposited and details of the accounts and deposits covered by the asset management agreement. As a client can have several accounts with a financial institution, the complete numbers of the accounts and deposits covered by the asset management agreement must be specified. In addition, in order to execute the order, the client must grant the required mandates to the asset manager.

[6] Art. 3 Para. 1 letters b - d of the rules of conduct mention, among other items, that the **asset management agreement (or its appendices as integral components thereof) must** contain details of the scope of the asset manager's authority and the investment goals and restrictions as well as the reference currency. Art. 3 Para. 3 of the rules of conduct defines the principles of fully discretionary asset management, which belong to the topic "Scope of Asset Manager's Authority" and hence must also be regulated by the agreement (or in its appendices as declared integral components thereof). If the information detailed in numeral 3 is regulated in a **separate document** and not in the agreement itself, this document must be declared to be an appendix to the agreement and integral component thereof.

[7] The rules of conduct cite examples of categories of investment restrictions in Art. 3 Para. 2.

[8] It is **not obligatory** to mention this general principle, which is referred to in Art. 5 of the rules of conduct, in the agreement (see Art. 3 of the rules of conduct).

[9] Pursuant to Art. 6 of the rules of conduct the asset manager **must** point out any conflict of interest to the client and in the event of such conflict he must be able to **prove** that the appropriate information was given to the client. **In the case of specific conflict situations** arising during the business relationship entered into, the act of informing the client must be documented by way of a memorandum (or e-mail, letter to the client etc.). In accordance with FINMA directives, the VQF is obliged to verify the asset manager's compliance with his duty of information towards the client (see "Introductory Remarks" on page 2, letter C).

[10] Duty of confidentiality **must** be mentioned in the agreement (or in its appendices as declared integral components thereof) (Art. 3 Para. 1 Letter h and Art. 7 of the rules of conduct).

[11] Pursuant to Art. 8 Para. 2 of the rules of conduct, the asset manager **must** obtain information from the client which allows him to recommend and implement a client-oriented asset investment solution. However, it is **not compulsory to mention this duty of investigation in the agreement**. Nonetheless, it is **advisable,** on entering into the business relationship, to have the client confirm (initial) compliance with this duty by signing this agreement. This is also advisable due to the fact that the asset manager must be in a position to provide **proof** of compliance with the duty of investigation and the VQF is obliged, in accordance with FINMA directives, to verify the asset manager's compliance with his duty of investigation towards the client (see "Introductory Remarks" on page 2, letter C).

[12] Pursuant to Art. 8 Para. 2 of the rules of conduct, the asset manager must also periodically verify the client information obtained on entering into the business relationship. The mere mention in the agreement of this duty incumbent upon the asset manager does not suffice as proof of compliance with the duty. This **periodic verification** of the information obtained on entering into the business relationship must be **documented in an appropriate manner** (e.g. issue of a memorandum at the time of the respective periodic verification etc.).

[13] Pursuant to Art. 8 Para. 3 of the rules of conduct, the asset manager **must** inform the client about the contemplated risks. It is not compulsory to mention this duty of clarification and information in the agreement. However, it is **advisable,** on entering into the business relationship, to have the client confirm compliance with this duty by signing this agreement, due to the fact that the asset manager must be in a position to provide **proof** of compliance with the duty of investigation and the VQF is obliged, in accordance with FINMA directives, to verify the asset manager's compliance with his duty of clarification and information towards the client (see "Introductory Remarks" on page 2, letter C).

[14] For example, reference can also be made in the agreement to the fact that **clarification of risk took place** in a **standardised** way, for which the following sample formulation could be used:

"Clarification of risk basically took place in a standardised way by issuing the following information document(s): .... These standardised information documents as well as the risks of the agreed investment strategy and the permissible investment products as defined by the agreement were discussed with the client in detail in accordance with the latter's experience and any previous knowledge."

Note: The brochure "Special Risks in Securities Trading" by the Swiss Bankers Association (see http://www.swissbanking.org/113_e.pdf) can be used as an information document, for example.

[15] It is **not compulsory** to mention this sample contract clause in the agreement; however it may be advisable to include this confirmation in the agreement nonetheless (see footnotes 11 and 13).

[16] See Art. 8 Para. 4 and 5 of the rules of conduct. It is **not compulsory to mention this sample contract clause in the agreement**. The mere mention in the agreement of these duties incumbent upon the asset manager does not suffice as proof of compliance with these duties. Whenever the asset manager passes information to the client in a situation that triggers duty of information (e.g. strong market fluctuation), this **information must be documented in a suitable way** (e.g. information letter to the client, telephone memorandum etc.). The VQF is obliged, in accordance with FINMA directives, to verify the asset manager's compliance with the duties of information in question towards his client (see "Introductory Remarks" on page 2, letter C).

[17] It is **compulsory** to mention **duty of accountability in the agreement (or its appendices)** (see Art. 3 Para. 1 Letter e and Art. 9 of the rules of conduct).

[18] Year, half-year, quarter, month etc. Reporting must take place at least once annually. A longer time period can be chosen if the client expressly agrees.

[19] It is **advisable** to include a regulation in the contract concerning the **delivery of account, deposit and securities statements**. By the end of each year, at the latest, the relevant documents must be obtained for the client (unless he regularly receives the documents in question direct from the bank), in order that he can prepare the necessary tax returns.

[20] Pursuant to Art. 14 Para. 3 of the rules of conduct, the asset manager **must** inform the client about the actions in question. However, it is not **compulsory to include this sample contract clause in the agreement**. Nonetheless, in this regard it is **advisable** to have the client confirm compliance with duty of information by signing this agreement. This is also due to the fact that the asset manager must be in a position to **prove** compliance with the respective duty of information and because the VQF is obliged, in accordance with FINMA directives, to verify the asset manager's compliance with his duty of information towards the client (see "Introductory Remarks" on page 2, letter C).

[21] Although it is **not obligatory to refer explicitly in the asset management agreement** to the duties of due diligence to be observed pursuant to Art. 15 of the rules of conduct (see Art. 3 of the rules of conduct), nonetheless it may be **advisable** – e.g. for the purpose of limiting liability or, where appropriate, due to the restricted diversification options of the agreed investment goals/strategy – to refer to these duties in an appropriate manner in the agreement. It may also be **advisable** to stipulate, in addition, the client's duty of information towards the asset manager with regard to his financial and personal situation. However, such duty of information incumbent upon the client does not exempt the asset manager from periodically verifying the client's risk profile.

[22] The options for the delegation of responsibilities to third parties **must** be regulated in the asset management agreement (Art. 3 Para. 1 letter g and Art. 17 of the rules of conduct).

[23] All types, modalities and elements of compensation **must** be regulated in the asset management agreement and moreover with regard to third party benefits (see numeral 12 letter c and numeral 13 of this document) the stipulations of Art. 19 of the rules of conduct must be observed (see Art. 3 Para. 1 letter f and Art. 18 - 19 of the rules of conduct). **Other formulations** and **other types, modalities or elements of compensation** are possible in accordance with the rules of conduct, e.g. a minimum or flat-rate management fee may also be agreed, or a management fee on a time and expenditure basis. It is always necessary to regulate the respective compensation terms fully and with sufficient clarity.

[24] It is also possible to agree additional targets for the performance-related fee such that a performance fee does not become due on each positive performance, e.g.: "The performance fee is .... [number] % (plus VAT, where applicable) calculated on the basis of the amount by which annual performance increases by more than 10% in relation to the total assets managed under this agreement (deposit and account balances)."

[25] Optional, for the purpose of clarity/legal certainty.

[26] The agreement **must** (see Art. 3 Para. 1 letter f and Art. 19 of the rules of conduct) regulate the legal allocation of the third party benefits which the asset manager receives in the context of his asset management activity or when executing the contract (see **basic principle variants 1 and 2** in numeral 13 letter b of this document). If

these benefits are to remain with the asset manager, a declaration of waiver by the client is **compulsory** and the asset manager **must** also observe the duties of clarification and information referred to in Art. 19 of the rules of conduct. As not all third party benefits are/may be passed on to the client (see numeral 13 letter b of this document, basic principle variant 1), a suitable **introduction** (concerning duties of clarification and information) was written for both basic principle variants.

[27] See Art. 19 Para. 4 of the rules of conduct. This information can be presented in a standardised format, e.g. by issuing a fact sheet (to be declared an integral part of the agreement). This fact sheet must disclose details of the third party benefits (calculation parameters or margin), also broken down by product type if possible. Additional differentiation by product type is not possible in the case of third party benefits that are not associated with a specific product type, such as those which are based solely on a deposit value.

[28] See Art. 19 Para. 5 of the rules of conduct.

[29] See Art. 11 Para. 2 and Art. 19 Para. 3 of the rules of conduct. For example, the following formulation is possible as part of an information sheet (to be declared an integral part of the agreement) or direct in the contractual text:

"It is not always possible to completely prevent conflicts of interest in asset management. In particular, third party benefits to the asset manager can create incentives to make transactions in securities or to select investment products which produce higher third party benefits for the asset manager, even though this may not represent the best choice in regard to the client's interests. Conflicts may also arise from the asset manager's own transactions in relation to his duty of trust towards the client. In accordance with the rules of conduct which the asset manager is obliged to observe (see numeral 1 of the asset management agreement), the asset manager when making investments and transactions must comply with appropriate duties of trust and, in particular, may not undertake unreasonably frequent regrouping of his client's deposits for the purpose of maximising third party benefits. In like manner, in relation to his own transactions, the asset manager must observe the duties of trust incumbent upon him in accordance with the rules of conduct."

[30] In addition, the following **optional variant** can be added to basic principle variant 2 (justification for the retention of third party benefits):

"The asset manager strives to offer the client a good (personal, time-related and qualitative) cost-benefit ratio: in doing so, among other factors he is guided by the total costs to the client. As marketing costs are generally included in the price of almost all investment products, the asset manager attempts to obtain a part of these marketing costs. This income serves, in particular, to improve service quality (e.g. financial analysis, information systems), and to cover operating costs etc.

[31] Other important agreement clauses not associated with the rules of conduct can be regulated in this section. The following are non-binding, **sample formulations** and **sample lists** of important topics (i.e. **other topics** can also be regulated) which may not be appropriate to your individual case. Please consult your lawyer for the correct formulation of these and other clauses not associated with the rules of conduct.

[32] It is advisable, although **not compulsory** on the basis of the rules of conduct, to also include a provision about the liability of the asset manager. For example, the following formulation is possible:

"The asset manager is liable to the client for wilful and grossly negligent conduct. Any further liability, especially liability for slight negligence, is excluded."

[33] It is advisable, although **not compulsory** on the basis of the rules of conduct, to also include a provision about the applicable rule of law. For example, the following formulation is possible:

"The present agreement is subject to Swiss law. Unless otherwise specified in this agreement, the stipulations of the simple mandate pursuant to Art. 394 et seq. of the Swiss Code of Obligations (OR) shall apply. The agreement can be cancelled or terminated at any time (Art. 404 OR)."

[34] It is advisable, although **not compulsory** on the basis of the rules of conduct, to also include a provision about the place of jurisdiction. For example, the following formulation is possible (not suitable for foreign clients, however):

"The exclusive place of jurisdiction for all legal disputes arising from or associated with this agreement is .... (Switzerland)."