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New Unified Supervision of Financial Institutions and Financial Intermediaries in Switzerland



By Evan M. Spangler
Counsel, J.D., LL.M
+41 44 498 95 81; espangler@wwp.ch

The Federal Law concerning Federal Financial Market Supervision (FINMAG), which created the Financial Market Supervisory Authority (FINMA), enters into full force at the beginning of 2009 and will then place the enforcement of seven federal laws central to the supervision of the financial services industry under FINMA's unified regulatory roof. This NewsLetter outlines the major features of FINMAG and FINMA.

With the entry into full force of FINMAG, the Federal Office for Private Insurance, along with the Federal Banking Commission and the Control Office for the Prevention of Money Laundering, will be consolidated into FINMA. FINMAG places the enforcement of seven federal laws central to the supervision of the financial services industry (Financial Market Laws) under FINMA's unified regulatory roof:

- the Pfandbrief Law of 25 June 1930;
- the Federal Law concerning the Insurance Contract of 2 April 1908;
- the Federal Law concerning Collective Capital Investments of 23 June 2006;
- the Federal Law of 8 November 1934 concerning the Banks and Savings Institutions;
- the Federal Law concerning Securities Exchanges and Securities Transactions of 24 March 1995;
- the Federal Law concerning the Prevention of Money Laundering in the Finance Sector of 10 October 1997; and
- the Federal Law concerning the Supervision of Insurance Businesses of 17 December 2004.

The creation of FINMA follows a trend toward the integrated supervision of financial institutions and regulated financial intermediaries, as exemplified by the Financial Services Authority in the United Kingdom, the Federal Institution for the Supervision of Financial Services (BaFin) in Germany and similar institutions for consolidated prudential oversight in Austria, Canada, Denmark, Finland, Iceland, Japan, Korea, Sweden and the Principality of Liechtenstein and by recent proposals in the United States for the merger of the Securities and Exchange Commission and the Commodity Futures Trading Commission. FINMAG does not, however, make radical changes in existing supervisory laws. Indeed, it specifies that the provisions of the Financial Markets Laws take precedence over the provisions of FINMAG.

A modernised regulatory body

FINMA is an independent, public law institution, supervised by an nine-member board of directors, with its operational authority vested in an executive management body. It also has an internal audit function. FINMA is subject to political oversight by Switzerland's executive branch of government, the Federal Council.

The consolidation of the supervision of financial institutions and regulated financial intermediaries in a single, independent body is expected to modernise and optimise prudential supervision of important participants in the financial system, in particular through costs savings and synergies and through greater regulatory independence. FINMAG imposes cost of supervision on the supervised, making FINMA financially independent from the federal budget. It also aims to place Swiss financial market regulators on an equal footing with regulators in consolidated supervisory bodies in other countries and to enhance public confidence in Swiss financial markets. For the first time, regulators are explicitly required to regulate "only to the extent needed in view of the regulatory goal" and to take into account the costs imposed by regulation on the supervised entities and persons and its effect on the innovative capacity and international competitiveness of the financial market place.

The instruments of supervision under FINMAG

Beyond the creation of FINMA, FINMAG sets out a system of supervisory instruments that are applicable to all supervised entities and persons:

- FINMA is charged with issuing regulations and circular letters that interpret the application of the Financial Market Laws and FINMA's regulations.
- FINMA is responsible for regulatory examinations of supervised institutions.

- Supervised institutions are required to notify to FINMA, without delay, any events which have regulatory significance.
- FINMA is authorised to enjoin breaches of FINMAG by supervised institutions.
- FINMA may prohibit a person responsible for a significant breach of supervisory law from holding a management position with a supervised institution for up to five years.
- If licence requirements are no longer met or if a severe violation of supervisory law occurs, FINMA may withdraw the licence, registration or recognition of the relevant supervised person or entity.
- FINMA may appoint an independent professional to perform investigations or to implement regulatory measures ordered by FINMA.
- FINMA may order the forfeiture of any gains obtained by a supervised entity or any responsible person in a management position as a result of a violation of a Financial Market Law or regulation.

credit and bank guarantees provided by banks, or yet by credit default swaps written by banks and insurers. The misfortune of one financial services industry can quickly become the fate of the others, requiring a coordinated response from regulators. FINMAG establishes a formal framework for Switzerland's financial services industry regulators to do that.

Most of these supervisory instruments are available to regulators, at least to some extent, under current law, but the authority to order the forfeiture of ill-gotten gains is a new and a significant extension of regulatory power.

Punitive measures

FINMAG also provides for imprisonment or fines of up to CHF 1,000,000 for, among other things, intentionally (a) engaging in a regulated activity without a licence or (b) giving false information to FINMA, a *Prüfungsgesellschaft* (a firm with responsibility for financial auditing and verifying compliance with supervisory laws and regulations) or a relevant self-regulatory organisation. The same acts, committed negligently, are subject to fines of up to CHF 250,000. A person or entity which intentionally fails to comply with an order issued by FINMA under the threat of the criminal penalties under FINMAG or with a court or other administrative decision is subject to a fine of up to CHF 100,000.

Old wine in a new bottle?

At first glance, one may be inclined to regard the consolidation of the enforcement of the Financial Market Laws under FINMA as a reversal of the biblical metaphor: merely pouring the old wine of the Financial Market Laws into a new bottle. That inclination is belied by the credit crisis of 2008 that has shaken markets around the world and shown that the industries of the financial services sector are more tightly integrated than regulators may have expected. Credit losses may be covered by credit or financial guarantee insurance policies written by insurers, or letters of

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**Walder Wyss & Partners
Attorneys at Law**

Walder Wyss & Partners Ltd.
Seefeldstrasse 123
P.O. Box 1236
CH-8034 Zurich
Phone +41 44 498 98 98
Fax +41 44 498 98 99
www.wwp.ch