

Insurance & Reinsurance - Switzerland

The Unified Financial Market Supervisory Authority: the first year

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Federal Act on Federal Financial Market Supervision Comment

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On January 1 2009 the Federal Office for Private Insurance, the Federal Banking Commission and the Control Office for the Prevention of Money Laundering were consolidated into a single regulatory body - the Financial Market Supervisory Authority (FINMA). This consolidation was effected by the Federal Act on Federal Financial Market Supervision. The act charges FINMA with the enforcement of seven federal laws which are central to the supervision of the financial services industry:

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

This development follows a trend towards the integrated supervision of financial institutions and regulated financial intermediaries. However, no radical changes have been made to existing supervisory laws. Indeed, Article 2 of the act makes the aforementioned seven financial markets laws pre-eminent.

The act 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 the Swiss financial markets. In addition, the act establishes FINMA as an independent, public law institution, supervised by a nine-member board of directors, with its operational authority vested in an executive management body. FINMA also has an internal audit function and is subject to political oversight by Switzerland's executive branch of government, the Federal Council. The act requires FINMA to:

- regulate "only to the extent needed in view of the regulatory goal";
- take into account the costs imposed by regulation on supervised entities and persons; and
- take into account the effect of regulations on the innovative capacity and international competitiveness of the financial marketplace.

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

- FINMA is charged with issuing regulations and circulars that interpret the application of the seven financial market laws and FINMA regulations.
- FINMA is responsible for regulatory examinations of supervised institutions.
- Supervised institutions are required to notify FINMA, without delay, of any events which have regulatory significance.
- FINMA is authorized to enjoin breaches of the Federal Law on Federal Financial Market Supervision by supervised institutions.
- FINMA may prohibit a person who is 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

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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 through a violation of one of the seven financial market laws or through a violation of regulation.

FINMA's authority to confiscate ill-gotten gains is a new and significant extension of regulatory power.

The act also provides that intentionally engaging in a regulated activity without a licence, or intentionally 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 organization, is punishable by a fine of up to Sfr1 million or imprisonment. The same acts, if committed negligently, are subject to fines of up to Sfr250,000. A party that intentionally fails to comply with an FINMA order under threat of the criminal penalties under the Federal Law on Federal Financial Market Supervision, or with a court or other administrative decision, is subject to a fine of up to Sfr100,000.

Comment

FINMA has had a running start against the backdrop of the financial crisis which has required it to concentrate on the banking sector with administrative guidance on, among other things, leverage ratio, liquidity requirements, stress tests and the like. With respect to insurance and reinsurance carriers, FINMA has underscored that it will continue to follow the integrated supervision approach initiated by the Federal Office of Private Insurance with a certain focus on the Swiss Solvency Test (SST), a quantitative, risk-based tool applicable on a single-entity and, as the case may be, on a group level. For purposes of FINMA's consolidated group supervision, the SST does not consider a group to be one economic entity; rather, it considers all group members (ie, legal entities) individually while fully allowing and accruing for mutual interactions. Insurance and reinsurance carriers must submit an SST report to FINMA each calendar year subject to additional guidelines issued by FINMA, the most recent of which were issued on January 21 2010.

Since January 1 2010 FINMA has promulgated a circular on remuneration schemes that applies to all institutions in the financial sector, including insurance and reinsurance companies. The principles contained within the circular essentially comply with the Implementation Standards issued by the Financial Stability Board in September 2009. With respect to insurance and reinsurance carriers, the circular's scope of application essentially comprises larger institutions, since it is triggered by a minimum solvency margin requirement of Sfr2 billion. However, FINMA reserves the right to impose the terms of the circular on individual institutions regardless of their respective threshold values. In addition, FINMA intends to integrate the remuneration issue into its risk-based supervisory process. The circular includes a requirement for institutions to implement a remuneration policy, to have their remuneration scheme reviewed by independent bodies (eg, internal audit), and to provide shareholders and FINMA with an annual remuneration report. Generally, the circular supports remuneration schemes that will strengthen risk awareness and incentives for sustainable business conduct. In this context, FINMA also welcomes 'clawback' or 'malus' arrangements. Institutions must comply with the circular by January 1 2011.

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