

# NewsLetter

No. 49 May 2004

## Recent Developments in Financial Market Supervision in Switzerland

**Against the background of the ongoing harmonisation of the financial markets in the European Union which seeks to improve market integrity and stability, Swiss financial laws are currently undergoing comprehensive revisions and amendments. In the course of general efforts to improve the international competitiveness of Swiss financial markets, the Swiss Federal Banking Commission ("FBC") in December 2003 published for comment draft circulars on the duty to report stock exchange transactions (*Meldepflicht von Börsentransaktionen*) ("Notification Circular") and supervisory rules for the avoidance of market abuse (*Marktmissbrauch*) ("Market Abuse Circular"). The comments received have recently been published.**

### Duty to Report Stock Exchange Transactions

With the objective of clarifying open questions of interpretation concerning the proper reporting of stock exchange transactions in accordance with Article 15



by Rahel Gimmel  
+41 1 265 75 67  
rgimmel@wvp.ch

paragraph 2 of the Federal Act on Securities Exchanges and Securities Trading, the Notification Circular specifies for each type of exchange transaction whether a reporting obligation exists. No distinction is made in respect of the scope of participants with reporting obligations. All securities dealers

trading in securities listed on a Swiss exchange are subject to the reporting obligations, irrespective of whether they are exchange members or not.

Contrary to its actual purpose as interpretive guidance, the Notification Circular introduces a general reporting requirement with respect to the exercise of options, the conversion of convertible debt securities as well as the exercise of warrants, structured products and OTC options which are settled physically. The proposal by the FBC is legislative in character and led to strong criticism during the comment period. It would, in effect, amend

rather than merely interpret the related provision in the Ordinance on Stock Exchanges and Trading in Securities of the FBC (*Börsenverordnung EBK*).

The general tenor of the comments expressed the view that the Notification Circular over-regulates and, as a result, was unnecessarily burdensome for securities dealers. Commentators also pointed out the risk of double-reporting, specifically in connection with securities transactions effected outside Switzerland.

### Market Abuse

The Market Abuse Circular is said to summarise the previous case-by-case practice of the FBC and sets out requirements for the proper conduct of business activities by financial intermediaries under FBC supervision. The following behaviour and procedures of regulated market participants are sanctioned by the Market Abuse Circular: (a) the use of confidential and price-sensitive information for one's own advantage, (b) distortion or manipulation of the market, as well as (c) providing false, misleading or incomplete information to the market. Other conduct not falling under the mentioned categories of market abuse is covered by a "catch-all" category. Further, financial intermediaries must observe certain organisational obligations, in particular in respect of the management and disclosure of conflicts of interest.

Some commentators criticised the FBC for failing to achieve an appropriate balance between a flexible definition of market abuse which would cover future abusive practices and clear rules of conduct for market participants. In particular, the "catch-all" regulation of "other abusive market behaviours" is vague and does not serve the practical needs of the market for unambiguous guidance concerning permissible and non-permissible behaviour.

The Market Abuse Circular is based on the regime prevailing in the EU under the Directive on Insider

Dealing and Market Manipulation 2003/6/EG ("Directive"). There are nevertheless some differences to be noted: The Directive refers in its definition of market-manipulating behaviour only to the activities of the market participant and not to such participant's intent. The Directive thereby avoids subjective elements of conduct. The European regulation is generally considered to be more developed than the Swiss regulation because the European Commission as of January 2004 had already issued three implementation measures in respect of the Directive.

### Market Supervision Sanction Regime

In accordance with the currently applicable market supervisory and sanction regulations, the FBC can impose measures on market participants to secure compliance with legal requirements. It can, in particular, issue reprimands, prescribe organisational measures and, in case of serious violations, consider the withdrawal of the relevant license. The FBC is not authorised under the current regime to impose financial sanctions.

The FBC considers the current sanction system ineffective. According to the sanction report of the FBC issued in April 2003, the penal provisions in the applicable administrative law should be completely replaced by comprehensive administrative proceedings. On the basis of the draft for a new Federal Act on Financial Market Supervision (*Entwurf Finanzmarkt-aufsichtsgesetz, E-FINMAG*), only the FBC (in the absence of a criminal offence), as the market supervisory authority, should be able to impose punitive sanctions against market participants which have behaved abusively. Such punitive sanctions could be fines, withdrawal of licenses, or prohibitions on engaging in certain activities. Only if in the opinion of the FBC a serious violation of insider trading or market price manipulation (Articles 161, 161bis Swiss Criminal Code) has occurred should the penal consequences be left to the courts to decide. With the proposed introduction of administrative provisions having a penal effect, the E-FINMAG enters nearly untested territory in Switzerland. The expansion of the authority of the FBC as an administrative agency was particularly criticised. Also, it seems questionable whether the new regime is compatible with the requirements for criminal prosecutions under the Convention for the Protection of Human Rights and Fundamental Freedom (*EMRK*). Those supporting the proposed sanction regime hope that a specialized regulator will issue sanctions more appropriate to the facts of a market abuse than a criminal court might.

### Outlook

The above-mentioned reforms fulfil, at least partially, requirements listed in the Financial Sector Country Evaluation Report which was published in June 2002 by the International Monetary Fund ("IMF"). The IMF had, among other things, called for an improvement in the ability of the FBC to deal with market abuse and the establishment of a supervisory authority with its own resources and operational independence.

The reporting duty and market abuse rules proposed by the FBC should be harmonized, in both timing and content, with the current legislative proposals for the revision of the Swiss Criminal Code in regard of insider trading and the new organisation of financial market supervision. It would also be helpful to take these issues into account in the current revision of the procedures for administrative assistance under the Federal Act on Securities Exchanges and Securities Trading. Effective instruments against market abuse and the integrity of the Swiss financial market require efficient collaboration between the FBC and foreign market supervisory authorities. It will be interesting to see whether the Swiss legislative bodies can succeed in fulfilling the expectations for financial market regulation reform by implementing consistent and effective rules.

### NewsLetter

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

© Walder Wyss & Partners, Zurich, 2004



**Walder Wyss & Partners**  
**Attorneys at Law**

Münstergasse 2  
P.O. Box 2990  
CH-8022 Zurich  
Phone +41 1 265 75 11  
Fax +41 1 265 75 50  
reception@wwp.ch  
www.wwp.ch

London Representative Office  
9 Gray's Inn Square  
London WC1R 5JQ  
Phone +44 20 7405 2043  
Fax +44 20 7405 0605