Supervision – Impact of the New Financial Market Regulation

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- **FINMA's, SNB's and auditors' function**
- **Supervisory instruments**

1. Introduction

The supervision of market participants or institutions, such as banks and stock exchanges, is conducted by FINMA. The supervisory activities carried out by FINMA are divided into three areas, notably issuing licenses to operate in the regulated financial market, supervising market participants and enforcing the supervisory provisions.

Additionally, the SNB oversees systems for the clearing and settlement of payments and of transactions with financial instruments, in particular securities, payment systems and securities settlement systems.

As of 1 January 2020, under the Financial Market Infrastructure Act (FMIA), the Banking Act, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), FINMA is responsible for supervising, inter alia, banks, insurers, central counterparties, central securities depositories, stock exchanges and alternative trading venues, i.e., the prudential supervision. Specifically, the supervisory instruments that FINMA may employ are governed by FMIA as well as the Financial Market Supervision Act (FINMASA) and by FinIA and FinSA.

In addition, the SNB's supervisory tasks are centered on overseeing systemically important central counterparties, central securities depositories and payment processing systems, i.e., the systemic supervision.

2. Overview of Supervision under the New Financial Market Regulation

COMPETENCE OF SUPERVISORY AUTHORITY

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

In general, FINMA is responsible for the prudential supervision of market participants or institutions, which have the intention to operate businesses and provide financial services in or from Switzerland and are thus required to obtain a FINMA authorization. As a principle, FINMA pursues a risk-based supervisory approach.

FMIA sets forth that financial market infrastructures, such as stock exchanges, multilateral trading systems, central counterparties, central securities depositories and trade repositories need to be authorized by FINMA prior to commencing their business. A paying processing system, however, is only required to obtain an authorization to run its business unless the system will be operated by a bank and only if the safe operation of the financial market or the protection of the market participants requires such an authorization.

In addition, to protect the stability of the financial system, the SNB oversees systemically important central counterparties, depositories and payment processing systems pursuant to FMIA.

Financial market infrastructures supervised by the SNB are not subject to FINMA's authorization and supervision in relation to the activities monitored by the SNB. Systemically important financial market infrastructures that are domiciled in countries other than Switzerland will also be supervised by the SNB if such foreign financial market infrastructures have substantial operating parts or significant financial market participants in Switzerland or significant transaction volumes executed in Swiss francs.

FinIA sets forth that financial institutions, such as managers of collective assets, securities firms (formerly: securities dealers) and fund management companies need to be authorized by FINMA prior to commencing their business. Portfolio managers and trustees need to be authorized by FINMA and are supervised by a supervisory authority licensed by FINMA.

Furthermore, financial institutions and financial market infrastructures, irrespective of whether they may qualify as systemically important, must provide statistical information on their activities to the SNB.

COMPETENCE OF REGULATORY AUDITORS

Regulatory auditors, i.e., private audit firms, serve as an extension in relation to FINMA's supervisory competence by regularly assessing, on FINMA's behalf, the market participants' compliance with both the regulatory framework and the supervisory requirements.

The audit firms are mandated to establish regulatory audit reports and risk analyses on all market participants or institutions subject to FINMA's prudential supervision.

The regulatory audit report is to be submitted to FINMA on a regular basis.

Further, FINMA may appoint an auditor or additional mandatories in the event of case-related audits, for which FINMA requires, inter alia, an independent opinion.

SUPERVISORY INSTRUMENTS

FINMA has the power to decide, on a case-by-case basis and depending on the market participants' characteristics, about the type of supervisory instruments to be employed in order to pursue its supervisory mandate.

The regulatory and supervisory laws include, without limitation, the following supervisory instruments:

- on-site inspections or supervisory reviews;
- assessment letters;
- stress tests;
- recovery and resolution planning; and
- information and notification duties of market participants.

3. Key Points for Market Participants

Market participants or institutions intending to operate in or from Switzerland are subject to supervision in Switzerland.

Additionally, systemically important financial market infrastructures, having their domicile abroad, may be subject to the SNB's supervision.

Market participants or institutions should be aware of the supervisory instruments that FINMA may employ and the possible legal consequences related thereto.

Oliver Widmer

Partner
Attorney at law
Head Financial Services

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 42
oliver.widmer@pestalozzilaw.com



Robert Furter



Senior Counsel
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 91 55
robert.furter@pestalozzilaw.com