

Enforcement – Impact of the New Financial Market Regulation

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- Basically no substantial changes
- FINMA's function
- Enforcement instruments

1. Introduction

Prior to 1 January 2016, the financial market laws, such as the Banking Act (BA), the Stock Exchange Act (SESTA), the Collective Investment Schemes Act (CISA) and the Federal Anti-Money Laundering Act (AMLA) in connection with the Financial Market Supervision Act (FINMASA), provided the instruments that the Swiss Financial Market Supervisory Authority (FINMA) was authorized to use to enforce the supervisory law in each area of the financial sector, if necessary.

Additionally, the Administrative Procedure Act (APA) set out the procedural provisions and requirements FINMA must follow while employing the enforcement instruments against noncompliant market participants. FINMA's enforcement activities comprised all acts ranging from investigating, taking coercive measures and initiating proceedings in relation to market participants' violations of supervisory law.

Upon the implementation of the Financial Market Infrastructure Act (FinfraG), the Financial Services Act (FIDLEG) and the Financial Institutions Act (FINIG), these new acts have provided and will provide, in addition to the AMLA and the FINMASA, for the enforcement instruments that FINMA can use on a case-by-case basis against noncompliant market participants.

2. Overview of Enforcement under the New Financial Market Regulation

As regards the enforcement proceedings and instruments, no substantial change has occurred under the new regulatory regime in comparison to the current enforcement regime.

In general, as soon as FINMA is informed about the non-compliance of supervisory law by regulated or unregulated market participants, their management, staff or owners, it will investigate the factual matters and, if necessary, will take adequate actions to restore compliance, or it will formally initiate enforcement proceedings in line with the new rules of the financial market law.

In case FINMA recognizes a violation of criminal law, it may also involve the competent prosecution authorities in the enforcement proceedings, such as the Office of the Attorney General and the cantonal prosecutors.

In particular, if deemed necessary and appropriate, FINMA has the power to formally initiate insolvency measures and bankruptcy proceedings against a non-compliant market participant. As part of the enforcement, however, external liquidators appointed by FINMA may conduct any insolvency proceeding.

More specifically, the new regulatory law has also provided, inter alia, the following enforcement instruments that FINMA may employ according to the individual case:

- precautionary measures;
- declaratory rules;
- cease and desist orders and bans on trading;
- publication of rulings;
- confiscation / ordering the disgorgement of profits;
- monetary fines;
- watch list;
- business conduct letter;
- withdrawal of authorization; and
- initiation of liquidation and bankruptcy proceedings.

FINMA has the power to decide, on a case-by-case basis and depending on the specific type of the market participants, about the kind of enforcement instrument to be employed in order to protect creditors and investors and to ensure the stability of the financial system.

3. Key Points for Market Participants

Market participants should be aware that FINMA can initiate enforcement proceedings against a company or an individual and that FINMA will decide on a case-by-case basis what kind of enforcement instruments it may use.

However, FINMA must treat the market participants, subject to FINMA's enforcement activities, fairly. Such market participants can invoke several rights in the enforcement proceeding. For example, they have the right to legal representations, to be heard by FINMA, to request evidence and documents from FINMA as well as to challenge FINMA's orders or activities before the Federal Administrative Court. Nevertheless, the market participants should also be aware that they have some obligations to fulfill in enforcement proceedings. For example, the market participants may be obliged to provide information and documents, or grant access to FINMA's employees or investigating agents.

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