THE GUIDE TO INTERNATIONAL ENFORCEMENT OF THE SECURITIES LAWS

THIRD EDITION

Editors
John D Buretta, Jennifer S Leete and Lindsay J Timlin

Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.globalinvestigationsreview.com

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at November 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to: insight@globalinvestigationsreview.com. Enquiries concerning editorial content should be directed to the Publisher – david.samuels@lbresearch.com

ISBN 978-1-80449-272-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Bougartchev Moyne Associés AARPI

Cravath, Swaine & Moore LLP

DLA Piper

Fangda Partners

Forensic Risk Alliance

Gleiss Lutz

Herbert Smith Freehills New York LLP

Kirkland & Ellis LLP

Lenz & Staehelin

Miller & Chevalier Chartered

Shardul Amarchand Mangaldas & Co

Publisher's Note

Global Investigations Review (GIR) is delighted to publish the third edition of *The Guide to International Enforcement of the Securities Laws*. For newcomers, GIR is the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters in their chosen professional niche.

GIR is famous for its daily news, but we also create various types of in-depth content. This allows us to go deeper into important matters than the exigencies of journalism allow. On the GIR website you will also find a technical library (the guides); reports from our lively worldwide conference series, GIR Live (motto: 'less talk, more conversation'); regional reviews; and unique data sets and related workflow tools to make daily life easier.

Being at the heart of the corporate investigations world, we often become aware of gaps in the literature first – topics that are ripe for an in-depth, practical treatment. Recently, the enforcement of securities laws emerged as one such area. Capital these days knows no borders; on the other hand, securities law enforcement regimes very much do. That mismatch can give rise to various questions, to which the guide aims to provide some answers. It is a practical, know-how text for investigations whose consequences may be in breach of national securities law. Part I addresses overarching themes and Part II tackles specifics.

If you find it helpful, you may also enjoy some of the other titles in our series. *The Practitioner's Guide to Global Investigations* walks the reader through what to do, and consider, at every stage in the life cycle of a corporate investigation, from discovery of a possible problem to its resolution. Its success has inspired a series of companion volumes that address monitorships, sanctions, cyber-related investigations, compliance and, now, securities laws.

We would like to thank the editors of *The Guide to International Enforcement of the Securities Laws* for helping us to shape the idea. It is always a privilege to work with Cravath, Swaine & Moore. We would also like to thank our authors and our colleagues for the elan with which they have brought the vision to life.

We hope you find it an enjoyable and useful book. If you have comments or suggestions please write to us at insight@globalinvestigationsreview.com. We are always keen to hear how we could make the guides series better.

Global Investigations Review
London
November 2023

CHAPTER 11

Switzerland: Key Securities Enforcement Statutes and Provisions

Shelby R du Pasquier and Vincent Huynh Dac[1]

What are the relevant statutes and which government authorities are responsible for investigating and enforcing them?

Securities enforcement under Swiss law is principally covered by the financial market acts (FMA), as defined in the Financial Market Supervision Act (FINMASA). The most important provisions of the FMA are generally relevant for both administrative and criminal enforcement. Five different authorities have powers relevant to securities enforcement under the FMA: the States Attorneys General (State AGs), the Federal Attorney General (Federal AG), the Federal Finance Department (FDF), the Financial Market Supervisory Authority (FINMA) and the Swiss Takeover Board (TOB).

The implementation of international sanctions falls outside the scope of this chapter. That being said, given the topicality of the issue, we note that the sanctions recently adopted in relation to the war in Ukraine include specific measures targeting, inter alia, the issuance and trading of securities in relation to Russian banks, corporations, individuals or the Russian state.[2] Violations of these sanctions are mainly enforced by the State Secretariat for Economic Affairs. Enforcement proceedings may be transmitted to the Federal AG in serious cases. This chapter will not cover further this very specific issue.

---

1 Shelby R du Pasquier is a partner and Vincent Huynh Dac is an associate at Lenz & Staehelin. The authors would like to thank Téo Genecand, formerly at Lenz & Staehelin, for his work on this chapter.

2 Articles 18, 22 and 23 of the 'Ordinance instituting measures in relation to the situation in Ukraine', dated 4 March 2022, as of 16 August 2023.

FINMA is the central regulator in Switzerland with respect to supervision of the financial markets. Its activity and powers are mainly governed by the FINMASA. FINMA's extensive responsibilities include taking action in the event of violations of securities market laws, based on information received from trading venues – responsible for monitoring securities markets and disclosing information – or based on its own suspicions. Also relevant to securities enforcement is FINMA's monitoring of licence holders' compliance with financial market laws. In the event of a suspected breach, the Swiss regulator may take appropriate action. FINMA is also responsible for taking action against companies and individuals engaged in financial market activities without the required licence. The Swiss regulator does not proactively monitor compliance by market participants with the relevant licence requirements. Instead, it relies upon notifications by the auditors of the relevant entities, as well as reports from individual investors, criminal prosecution authorities and foreign supervisory authorities, or information published in the media in connection with alleged misbehaviour.

The TOB monitors compliance with the statutory and regulatory provisions in the context of public takeovers and publicly announced share buyback programmes. Its activity and powers are mainly governed by the Financial Market Infrastructure Act (FMIA) and the Takeover Ordinance. Upon becoming aware of violations of provisions on public takeovers, the TOB ensures that an orderly situation is restored and that irregularities are corrected. The enforcement authority of the TOB is limited to ordering administrative measures.

Should administrative violations also amount to criminal offences, FINMA and the TOB must report those violations to one of the three authorities sharing responsibility for prosecuting criminal violations of the FMA. The FDF is primarily responsible for investigating violations of criminal provisions of the FMA. The FDF also has jurisdiction over the offences it has the power to prosecute, to the extent that no custodial sentence is ordered. In derogation to the general prosecution power of the FDF, the Federal AG and the various State AGs have the authority to prosecute some specific offences listed in the FMA. They also have the authority to prosecute general offences, which may also be relevant in relation to securities enforcement, particularly concerning fraudulent schemes.

This chapter discusses the most important statutes and provisions with respect to securities enforcement. Unless specified otherwise, FINMA is responsible for the administrative enforcement of those provisions and the FDF is responsible for criminal prosecution.

The FMIA governs the organisation and operation of financial market infrastructures and the conduct of financial market participants in securities and derivatives trading. The FMIA has the purpose of ensuring the proper functioning

and transparency of securities and derivatives markets as well as equal treatment of participants. It is a key statute for securities enforcement, as it includes provisions related to insider trading, market and price manipulation and the disclosure of large shareholdings.

Insider trading covers the disclosure of inside information or the use of inside information to acquire or dispose of (or to recommend to a third party to acquire or dispose of) securities or derivatives of securities admitted to trading on a trading venue or, since 2021, a trading facility based on distributed ledger technology (DLT) registered in Switzerland.[3] Insider trading with the intent to make a profit may be subject to criminal prosecution as well as administrative enforcement. Primary insiders (with direct access to inside information due to their position) face a custodial sentence not exceeding three years (five years if a financial gain of more than 1 million Swiss francs is involved) or a monetary penalty. Secondary insiders (with access to inside information through a primary insider or through a criminal offence) face a custodial sentence not exceeding one year or a monetary penalty. Other insiders (who accessed the inside information by chance or through an undetermined source) may be subject to a fine. The Federal AG is responsible for the prosecution of insider trading.

Market manipulation relates to the undue influence of the price of securities admitted to trading on a trading venue or a DLT trading facility registered in Switzerland, either through the public dissemination of false or misleading information regarding the supply, demand or price of securities or through acquisitions and sales of these securities directly or indirectly for the benefit of the same person or persons connected for this purpose. Similarly to insider trading, a violation may constitute a criminal offence when market manipulation is carried out with the intent of making a profit. This criminal offence carries a custodial sentence not exceeding three years (five years if a financial gain of more than 1 million Swiss francs is involved) or a monetary penalty. The Federal AG is responsible for the prosecution of market manipulation.

Pursuant to the FMIA, anyone who crosses or reaches certain shareholding thresholds – either directly, indirectly or acting in concert with third parties – in a company listed in Switzerland must notify both the company and the relevant exchange. The deadline for the disclosure is four trading days in a normal

3 See, for example, FINMA press release dated 10 September 2021 regarding financial market infrastructures based on distributed ledger technology, www.finma.ch/en/news/2021/09/finma-issues-first-ever-approval-for-a-stock-exchange-and-a-central-securities-depository-for-the-trading-of-tokens/.

situation and one trading day in the context of a takeover. Failure to comply with the shareholder disclosure regime provided for in the FMIA and its ordinances is a criminal offence and may result in a fine of up to 10 million Swiss francs (for intentional breaches) and up to 100,000 Swiss francs (in the case of negligence).

The FMIA includes other provisions relevant to securities enforcement, particularly:

- obligations to keep a record of the orders and transactions carried out on a trading venue and to report all the information necessary for transparent securities trading;
- various duties regarding derivatives trading, such as specific clearing and reporting requirements, and the requirement for counterparties to mitigate operating risks;
- the duty to make a tender offer after having exceeded directly or indirectly, or by acting in concert with third parties, the threshold of 33.33 per cent of the voting rights in a listed target company; and
- various duties by the target company in a takeover context, such as the obligation of the target company to publish a report in which its board of directors takes a position on the offer.

A violation of these obligations may lead to both administrative and criminal enforcement, with fines ranging from 100,000 Swiss francs to 10 million Swiss francs.

The Banking Act (BA) governs the activity of banks. Relevant to securities enforcement, this statute prohibits the acceptance of deposits from the public without the proper licence. This is both an administrative offence and a criminal offence carrying a custodial sentence not exceeding three years or a monetary penalty (negligence is subject to a fine not exceeding 250,000 Swiss francs). The acceptance of public deposits is broadly construed by Swiss authorities and includes the issuance of bonds or other taking of capital without complying with the relevant financial market provisions (such as regarding the content of the prospectus). As evidenced by the statistics discussed in the following section, this statute plays an important role in the context of securities enforcement in Switzerland.

The Financial Services Act (FinSA) seeks to protect clients of financial service providers and to establish comparable conditions for the provision of financial services by financial service providers, and thus contributes to enhancing the reputation and competitiveness of Switzerland's financial centre. It lays out the requirements for honesty, diligence and transparency in the provision of financial services and governs the offering of financial instruments. This statute, in force

since 2020, has raised what was historically purely private law obligations to the rank of administrative and criminal duties. It will undoubtedly become key in terms of securities enforcement in the coming years.

The FinSA provisions relevant to securities enforcement include the obligation to:

- provide true and complete information, without withholding any material facts, when providing information on financial services or in a prospectus;
- assess the appropriateness and suitability of financial products;
- disclose compensation paid to third parties;
- publish a prospectus or a key information document in various situations; and
- make a key information document available prior to subscription or conclusion of the relevant contract.

Violations are relevant from an administrative standpoint for licensed entities or their employees and amount to criminal violations for unlicensed entities and individuals. The criminal offences carry maximum fines of either 100,000 Swiss francs or 500,000 Swiss francs.

The Financial Institutions Act (FinIA), in force since 2020, lays down the requirements applicable to the activities of financial institutions, such as portfolio managers, trustees, collective assets managers, fund management companies and securities firms. Its purpose is to protect investors and customers of financial institutions and to ensure the proper functioning of the financial markets. It contains several important provisions regarding the organisation and licensing of the relevant market actors.

The FinIA provides for securities firms' obligations to keep records of orders and transactions for the purpose of traceability and to report on all information necessary for transparent securities trading. Violations of those obligations may lead to administrative and criminal enforcement, with fines not exceeding 500,000 Swiss francs for the latter.

The FinIA, the FinSA, the FMIA and the BA all include provisions related to professional confidentiality and banking secrecy. Those provisions prevent directors, officers, employees, agents or liquidators of a financial institution or bank from disclosing confidential information, as well as the inducement of disclosures or further dissemination. The obligations regarding securities enforcement are relevant for the disclosure of inside information related to over-the-counter products and private equities, as the FMIA obligations related to insider trading are limited to listed securities. The State AGs are in charge of prosecuting criminal violations of those confidentiality duties. Perpetrators face a custodial sentence

not exceeding three years (five years if the perpetrator is seeking a financial gain) or a monetary penalty and, in the case of negligence, a fine not exceeding 250,000 Swiss francs.

The Collective Investment Schemes Act sets out the organisational requirements and obligations of collective investment schemes. Of relevance to securities enforcement are the provisions related to the prohibition to establish a collective investment scheme without the proper approval or authorisation, as well as the prohibition to offer to non-qualified investors unapproved domestic and foreign collective investment schemes. Perpetrators face a custodial sentence not exceeding three years or a monetary penalty (or a fine not exceeding 250,000 Swiss francs in the case of negligence) in addition to administrative measures and sanctions.

Aside from the FMA, a few provisions of the Swiss Criminal Code are relevant for securities enforcement in the context of fraudulent activities, such as the offences of fraud, forgery or false statements about commercial business.

'Fraud' covers the inducement of an erroneous belief in another person by false pretences or concealment of the truth, with a view to securing an unlawful gain, causing that person to act to the prejudice of their or another's financial interests. It carries a custodial sentence not exceeding five years (10 years in aggravated cases) or a monetary penalty.

'Forgery' covers the production of false documents or the use of false documents to deceive, with a view to cause prejudice or to obtain an unlawful advantage. It carries a custodial sentence not exceeding five years (three years in cases of minor importance) or a monetary penalty.

'False statements about commercial business' prevents directors, officers and owners of businesses from making or causing to be made false or incomplete public statements of substantial significance that could cause prejudice. It carries a custodial sentence not exceeding three years or a monetary penalty.

What conduct is most commonly the subject of securities enforcement?

Investigations conducted in Switzerland in connection with securities enforcement relate mostly to the offering of financial services by unauthorised persons, market surveillance and violations of the disclosure duty in connection with Swiss listed shareholdings.

Investigations into the offering of financial services by unauthorised persons represent approximately a third of all investigations conducted by FINMA and are the subject of between a quarter and a half of all administrative enforcement proceedings eventually opened. Most of those investigations relate to the offering of financial services without the proper licence and, in particular, the acceptance

of public deposits without the proper banking or Fintech licence. As mentioned above, this is due, in part, to the broad interpretation of this provision, which comes into play when companies issue bonds or otherwise raise capital without complying with the relevant financial market provisions (such as regarding the content of the prospectus). The surge of fintech companies has led to an increase of cases in recent years, such as in the context of fraudulent initial coin offerings.[4] The unauthorised offering of financial services covers both fraudulent activities and negligent behaviour of financial services firms and individuals. Most of these administrative investigations target entities rather than individuals, but enforcement proceedings that are eventually opened are directed at both individuals and entities roughly evenly. In parallel, the State AGs regularly prosecute fraudulent schemes related to securities offering. They generally do so based on criminal complaints filed by victims, rather than reporting by FINMA.

Market surveillance investigations relate mostly to potential insider trading and, to a lesser extent, to market manipulation. While investigations are quite frequent, they seldom lead to actual enforcement proceedings and are generally not reported to the Federal AG. These investigations mostly target individuals. FINMA actively collaborates with the Federal AG to investigate and reprehend criminal violations of insider dealing and price manipulation. In 2022, FINMA conducted approximately 250 investigations into insider trading and market manipulation, which led to a single enforcement procedure.

Investigations into the potential violation of the rules of the disclosure of large shareholdings are frequent. These investigations are mostly directed at investors rather than financial services firms – hence, they are rarely followed by administrative enforcement proceedings. Instead, reporting of the case to the FDF for criminal enforcement against the relevant individuals is common. According to FINMA's statistics, the majority of cases relating to potential violations of financial market laws that have been deferred to the FDF in recent years targeted individuals.

In addition to these enforcement actions, FINMA takes actions against regulated entities for organisational failures and against individuals working for regulated entities and involved in fraud. FINMA's statistics are not detailed enough regarding the kind of violations leading to enforcement proceedings to fully assess those relating to securities enforcement rather than to other violations, such as money laundering or other regulatory failures.

---

4 See, for example, FINMA press release dated 27 March 2019 regarding Envion AG, www.finma.ch/en/news/2019/03/20190327---mm---envion/.

What legal issues commonly arise in enforcement investigations?

Supervised entities and individuals have a duty to provide FINMA with all information relevant for their supervision. They have to cooperate with audits and investigations ordered by FINMA. In this context, supervised entities must inform FINMA of violations of supervisory law that they have uncovered and provide FINMA with internal investigation reports, potentially including minutes of employees' declarations with incriminating data for both the entity and its employees. One issue that regularly arises in this context is whether the documents provided to FINMA may be seized and used by criminal authorities against these entities in view of the right not to self-incriminate, without violating the *nemo tenetur* principle. The Swiss Supreme Court has ruled that internal investigation reports voluntarily remitted to FINMA[5] and enforcement reports[6] could be seized and used in related criminal proceedings without violation of the right not to self-incriminate. That said, the Supreme Court left open the question of whether information obtained by FINMA specifically under the threat of sanction could be used as admissible evidence. This is a very significant concern for regulated entities, which may be inclined in their relationship with FINMA to recognise errors of the past and remediate them, but in doing so expose themselves to having these admissions used against them (or their employees) in criminal proceedings.

Under Swiss criminal law, any criminal investigation primarily aims to find and punish the individuals (e.g., the employees of a legal entity) who have breached the law. This principle applies in the context of securities laws as well. When investigating a suspected breach of securities laws, the authority entrusted with the responsibility to prosecute criminal violations of the FMA (the FDF, State AGs or the Federal AG) must first find the individuals who have committed a breach, even if the breach is minor and has taken place in a corporate context. Recent case law[7] has confirmed that the authority may only act against the legal entity in which a breach of law or fraud has occurred if the investigation has not established the identity of the responsible individuals, owing to a lack of proper organisation inside the legal entity or because the investigation that would be necessary to identify an individual would be disproportionate in view

5 Supreme Court, ATF 142 IV 207.

6 Supreme Court, 1B_59/2020.

7 Federal Criminal Court, SK.2018.47.

of the relevant breach. Coordination of the defence strategy of the entity and the relevant individuals is therefore a critical issue in securities enforcement, as an employee may be inclined to point to organisational deficiencies to escape personal liability.

Swiss attorney–client privilege does not protect in-house counsels, contrary to what applies in a number of other jurisdictions. This means that internal group communications between legal departments are not privileged. While communications with external lawyers are generally privileged, in 2018 the Swiss Supreme Court introduced restrictions to this protection regarding investigations. It held that the attorney–client privilege of external lawyers could not be used to shield internal investigations that the supervised entities were legally compelled to carry out.[8] As a result, privilege in connection with internal investigations is always a delicate issue.

The issue of the calculation of proceeds related to violations of the FMA for confiscation purposes often raises questions. In a case in 2016, the Swiss Administrative Court held that FINMA had to calculate as precisely as possible the profits subject to disgorgement and could not simply make an overall estimate of the profits, and must also take into consideration factors unrelated to the breach under investigation.[9] In relation to insider trading and according to case law from the past few years,[10] the proceeds should generally be determined by taking the difference between the amount paid and received and the first market price after the release of the inside information (i.e., the closing price or the opening price of the next trading day). This calculation is therefore based on a theoretical profit.

What remedies and sanctions are available to government authorities?

The remedies and sanctions available depend on the type of procedure, namely administrative or criminal enforcement.

In the context of administrative enforcement proceedings, FINMA has a vast array of instruments at its disposal pursuant to the FINMASA, as well as the specific provisions of the FMA.

8 Supreme Court, 1B_85/2016; 1B_437/2018.
9 Federal Administrative Court, B-3930/2016.
10 Federal Criminal Court, SK.2018.26; Federal Administrative Court, B-4763/2017.

It may, in particular:

- order measures that it deems necessary to restore compliance with the law, such as amendments to internal procedures and practices and specific organisational measures;
- impose (temporary) restrictions on the activity;
- issue declaratory rulings, in case the investigation reveals past violations of supervisory provisions that no longer need remediation;
- confiscate profits generated through violations of the supervisory provisions;
- publish supervisory rulings;
- suspend voting rights;
- prohibit a person from acting in a management capacity for supervised entities;
- prohibit a person from trading financial instruments;
- prohibit a person from acting as client adviser; and
- revoke a licence, withdraw recognition or order the liquidation of the company, therefore barring the supervised person or entity from carrying out its activity.

FINMA does not have the authority to impose fines on supervised entities or individuals, although it may order the disgorgement of illicit profits. If an administrative violation would also amount to a criminal violation subject to a fine, FINMA must report the case to the relevant criminal authorities.

Outside enforcement proceedings and in the context of its ordinary supervision, FINMA may order an audit of supervised entities. While not an enforcement remedy per se, FINMA will often order an audit of supervised entities at the end of enforcement proceedings to ensure the implementation of the measures ordered and their effectiveness. FINMA has wide discretion on the scope and length of the audit; in practice, such audits may represent a significant financial burden on supervised entities. The remedies and sanctions most commonly used by FINMA are the liquidation of the company (mostly for unlicensed financial firms), the implementation of remediation measures or restrictions and the appointment of an auditor to ensure correct implementation. FINMA often issues a press release when closing an enforcement procedure related to an issue covered by the press, especially in international matters.

The most common sanction affecting individuals is a ban on activities and the publication of the enforcement decision or its operative part.

As the administrative authority monitoring compliance of the provisions relating to a public takeover by market participants, the TOB has the power to ensure that an orderly situation is restored and that any irregularities are corrected. When investigating takeover-related cases (e.g., when there is suspicion of undisclosed agreements between the bidder and third parties), the TOB may request

from persons and companies subject to a reporting obligation under the FMIA all information and documents it considers useful to fulfil its task. Furthermore, the TOB may instruct external auditors to conduct special audits and to submit a report. If there are sufficient indications that a person is not complying with its obligation to make a mandatory tender offer, the TOB may suspend the voting rights and related rights of the relevant person until the obligation to make an offer has been clarified and, when applicable, fulfilled. The TOB may also prohibit that person from acquiring further shares in the target company. The TOB is not authorised to conduct investigations at banks, securities dealers or other financial intermediaries that are not involved in a takeover; it requires the support of FINMA to do so.

The remedies and sanctions available to the FDF, the Federal AG and the State AGs in the context of criminal enforcement depend on the relevant provisions listed in the first section of this chapter. Available sanctions include a custodial sentence, a monetary penalty or a fine. Both the monetary penalty and the fine may be converted into custodial sentences if the relevant person is unable to pay. The authorities may also order the forfeiture of assets acquired through the relevant violations or uphold a claim for compensation in respect of a sum of equivalent value if the assets are no longer available.