Update

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The New Swiss Market Abuse Regime

In September 2012, the Swiss Parliament overhauled the Swiss market abuse law, by amending the Swiss Criminal Code and the Federal Act on Stock Exchanges and Securities Trading (SESTA). On 10 April 2013, the Federal Council adopted the regulations implementing the new law, which will enter into force on 1 May 2013.

The new rules significantly change the current Swiss market abuse regime. The main changes are outlined below.

Revision of the criminal offences of insider trading and market manipulation

Under the new regime, the criminal provisions prohibiting insider trading and market manipulation are transferred from the Criminal Code to SESTA. The scope of the prohibition of insider trading is also broadened. Any person who trades on the basis of inside information in order to obtain a financial advantage is guilty of an offence. It is no longer required that the perpetrator be an insider (*i.e.* a person who has access to inside information as part of her or his professional activity) or a tippee (*i.e.* a person who has received inside information from an insider). The capacity in which inside information is obtained only impacts the nature of the prohibitions to which the possessor of the inside information is subject and the level of the sanction that can be imposed upon her or him in the event of a breach. "Primary insiders" are prohibited from trading, tipping and making trading recommendations to third parties on the basis of inside information. In the event of a breach, a jail term of up to five years may be imposed, as well as a fine of up to CHF 1'080'000. "Secondary insiders" (*i.e.* tippees and persons who have obtained inside information as a result of a criminal activity) as well as persons who obtain inside information by accident are prohibited from trading on the basis of the inside information that they have received, but not from tipping or making recommendations to third parties. Secondary insiders can, in the event of a breach, face a jail term of up to one year and a fine of up to CHF 1'080'000. Other holders of inside information (*i.e.* those who receive an inside information by accident) can, in the event of a breach, be subject to a fine of up to CHF 10'000.

The offence of market manipulation does not materially change under the revised SESTA. As is currently the case, trade-based manipulations are only punishable if they involve fictitious transactions (*e.g.* so-called "wash sales" or "matched orders"). Manipulations carried out by means of "genuine" trades cannot give rise to criminal sanctions, unless they may be characterized as a common law fraud.

Serious instances of market manipulation or insider trading by primary insiders (*i.e.* instances where the financial profit sought exceeds CHF 1 million) are classified as crimes under the new regime, and may consequently give rise to charges of money laundering, along the lines of the FATF/GAFI recommendations. In case of suspicion of breach, financial intermediaries such as banks and securities dealers will be required to take the measures contemplated by the Swiss anti-money laundering regulations, *e.g.* to clarify the economic background of suspicious activities and, where required, report the matter to the authorities and freeze the assets of the relevant client.

Jurisdiction over the offences of insider trading and market manipulation has been transferred to the Federal courts. As

from 1 May 2013, these offences will no longer be prosecuted by the cantons, but by the Federal Attorney General.

New powers of FINMA

The key element of the revised SESTA is that it strengthens FINMA's power to initiate administrative enforcement proceedings to combat insider dealings and market manipulation. The jurisdiction of FINMA with respect to market abuse is no longer limited to regulated firms such as banks or securities dealers. Under the new regime, FINMA has the power to take enforcement actions, such as public reprimand or disgorgement of illicit profits, against anyone who engages in insider trading or market manipulation, irrespective of whether such activities are punishable under the criminal provisions of SESTA. FINMA intends to further specify the legal framework by issuing a new Circular *Market Conduct Rules* which will, at least partly, apply to all market participants. The final version is expected to be published in the course of the next few months.

Insider dealings and market manipulations are defined more broadly in this context than they are under the criminal provisions of the law. Proof of an intention to obtain a financial advantage is not required. Also, the offence of market manipulation is not limited to fictitious trades (*e.g.* "wash sales" or "matched orders"), as is the case under the criminal provisions of SESTA. Genuine trades can also give rise to enforcement measures if they induce an "inadequate or misleading signal" with respect to the supply, demand or market price of securities admitted to trading on a Swiss securities exchange or assimilated institution.

To balance the over-inclusive character of the definition of market abuse, the new regulations list a number of activities, which – although potentially covered by the definition – are nonetheless permitted. These "safe harbours" include:

> share buybacks that satisfy certain requirements (and in particular that are being carried out as part of a publicly announced buyback programme);
> certain forms of price stabilisations carried out in connection with a public offering of securities;
> transactions carried out in implementation of an investment decision (*e.g.* the acquisition of shares of a target company in anticipation of a takeover);
> trades carried out by public bodies (*e.g.* the Swiss National Bank) as part of their public mandate;
> disclosure of inside information to persons who need to know such information to carry out their legal or contractual duties; and
> disclosure of inside information where such disclosure is necessary to allow the conclusion of a transaction, provided that the person to whom the information is communicated is made aware (in a documented manner) of the fact that the information cannot be acted upon.

According to a guidance note published by the Federal Department of Finance (FDF), the presumption of legality created by the safe harbours is not rebuttable. FINMA consequently cannot claim that a particular activity – although covered by one of the safe harbours – is abusive under the circumstances of a particular case.

The guidance note further specifies that there is no market abuse if a transaction is carried out while one of the parties thereto is in possession of inside information, but the relevant information has not been acted upon (*e.g.* under circumstances where the terms of the relevant trade were agreed upon before the inside information was obtained). It also specifies that, under the new regime, market-making as well as "price management activities" (so-called "*Kurspflege*") remain permitted. The nature of the activities falling into the category of permitted "price management" is not entirely clear.

According to the guidance note of the FDF, transactions between insiders are illegal.

It is still unclear how the criminal and administrative proceedings will be coordinated in practice. Also, it remains to be seen whether evidence gathered as part of administrative market abuse proceedings will be admissible in criminal proceedings, and whether the principle *ne bis in idem* will apply in this context.

Transitional regime

On-going share buyback programmes that have been authorized by the Swiss Takeover Board are grandfathered under the revised SESTA. They can be continued after 1 May 2013, even if they do not meet all the requirements of the new safe harbour provision regarding share buybacks. However, as from 1 May 2013, buybacks will have to be carried out in compliance with the new rules, which impose specific limits as to the volume of the shares that can be repurchased on any particular day as well as the price and moment upon which such acquisitions can be made.

The new rules also impose certain reporting and disclosure obligations for share buybacks, which will have to be complied with as from 1 May 2013.

Actions needed

The revised SESTA imposes obligations on all market participants for the prevention of market abuses, and not only on regulated firms. To guarantee that inside information is being treated in a manner consistent with the new law, preventive measures can be taken for persons who, although not regulated, nonetheless process inside information on a regular basis as part of their professional activities (*e.g.* listed companies, external advisers or public authorities). Such measures may involve, in particular, the adoption of policies relating to the access and treatment of inside information.

Also, under the new rules, the safe harbour for share buybacks only applies where a buyback programme has been *publicly announced*. Since there is no safe harbour for undisclosed share buy-backs, issuers will only be in a position to carry out such transactions if they do not generate an "inadequate or misleading signal" with respect to the supply, demand or market price of their securities and do not involve the use of inside information.

Please do not hesitate to contact us in case of any questions.

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