

Update

Newsflash June 2017

Market abuses – FINMA uses its new powers

- › **FINMA announced having disciplined individuals and a company in two separate cases of market abuse (insider trading and market manipulation).**
 - › **FINMA is making use for the first time of the broad powers that it acquired in 2013, and which give it the ability to initiate enforcement proceedings against persons who are not subject to its supervision.**
 - › **FINMA's stepped up enforcement activity in the field of market abuse raises questions about the manner in which the right of defence can be preserved in subsequent criminal proceedings.**
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On 23 June 2017, FINMA announced that it had disciplined individuals and one company in two separate enforcement proceedings for alleged market abuse.

The matters are landmark cases for FINMA, which publicly discloses for the first time making use of the broad powers that it was granted in 2013 to sanction market abuses. The legislation that became effective in 2013 makes it possible for FINMA to initiate administrative proceedings not only against regulated firms or persons, but against anyone. FINMA's enforcement measures do not preclude the criminal authorities from bringing charges if appropriate, and market abuses can consequently give rise to parallel administrative and criminal proceedings.

The first case disclosed by FINMA is a high profile insider trading case involving a board member of several well-known Swiss listed companies. According to FINMA, the relevant director systematically traded derivatives to exploit expected share price movements, did not

report management transactions and violated black-out periods imposed by one of the companies of which he was a board member. In addition, FINMA notes that the board member also traded on inside information provided by tippers relating to companies of which he was not a board member. FINMA ordered disgorgement of profits amounting to CHF 1.4 million.

The second case involves a proprietary company operating without a license found by FINMA to have repeatedly manipulated shares listed on SIX Swiss Exchange. The firm and traders operating on its behalf were submitting orders to the market, thus triggering price changes, before deleting the orders. The firm made profits which amounted to "a high seven-digit sum" from this scheme by trading derivatives whose underlying instrument was manipulated using the cancelled orders. Both the firm and the traders were disciplined. The firm is now being liquidated, as it operated without a license, and any amount resulting from its liquidation will be disgorged.

Comments

FINMA was expected to step up its enforcement actions against market abuse after it received broad powers to do so in 2013. The announcement of 23 June 2017 is a sign of FINMA's readiness to make use of its newly acquired powers in this context, including against individuals who are not employed by FINMA regulated institutions.

The new legislation remains, however, untested in many respects. In particular, the manner in which FINMA's enforcement proceedings are to be coordinated with parallel criminal proceedings remains unclear. FINMA's press release stresses the fact that it coordinated its actions with the Office of the Attorney General of Switzerland and shared "valuable information to the extent permitted with the law". Uncertainties stem in particular from the fact that FINMA's administrative proceedings are subject to procedural standards that are different from

those that apply in criminal proceedings.

The persons investigated by FINMA do not benefit from the presumption of innocence, are in principle obliged to cooperate with the enquiry and can have their decision to remain silent held against them. The standards of evidence are also different in the administrative and criminal proceedings. Consequently, it remains unclear to what extent the evidence gathered by FINMA will be held admissible in a subsequent criminal proceeding, and whether the publicity surrounding FINMA's decisions may jeopardize the defendant's procedural rights in a criminal procedure.

FINMA's announcement also raises the question about the extent to which brokers may be faulted for having failed to spot and ultimately prevent their clients from engaging in market abuse.

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

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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