NKF Client News

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Financial Market Infrastructure Act: Implications for Listed Companies, their Managers, and Investors

On 19 June 2024, the Federal Department of Finance (**FDF**) opened the consultation on the proposed amendments to the Swiss Financial Market Infrastructure Act (**FinMIA**) (**VE-FinfraG**). The consultation will run until 11 October 2024.

The VE-FinfraG contains a number of changes and, it is fair to say, some surprises at the level of financial market infrastructures. The **key implications from the perspective of issuers, their managers and investors** are outlined below[1].

I. Issuer Obligations transferred to FinMIA

The VE-FinfraG provides for the issuer obligations of ad hoc publicity and publication of management transactions to be **transferred from self-regulation of the stock exchanges to the FinMIA and thus placed under the supervision of the Swiss Financial Market Supervisory Authority FINMA (FINMA).** For other areas such as Corporate Governance and Financial Reporting, regulation and supervision remain with the stock exchanges. As a result of the transfer:

- **issuers** (and managers of issuers, see below) have **a supervisory relationship with FINMA**. This is new, as to date issuers only have a point of contact with FINMA in limited areas (mainly insider trading and market manipulation, rarely in disclosure of large shareholdings), unless they are subject to FINMA as supervised institutions.
- the **supervisory instruments** listed in the Financial Market Supervision Act (**FINMASA**) apply to all issuers; and thus, issuers may be subject to **enforcement proceedings**, and, in principle, **confiscation of profits**.
- issuers (and managers of issuers, see below) are obliged to provide FINMA with all information and documents required.

II. Ad hoc publicity (art. 37b VE-FinfraG)

1. Price-sensitive fact becomes insider information pursuant to art. 2 lit. j FinMIA

The new wording no longer refers to price-sensitive facts, but to **insider information that** has become known **in the issuer's sphere of activity** (art. 37b para. 1 VE-FinfraG). However:

- the quality of a price-sensitive fact under ad-hoc-publicity is not identical with the one of insider information under insider trading law. The implementing provisions in the amended

[1] This newsletter does not deal with the changes in the areas of (i) trade reporting obligations, (ii) market surveillance at trading venues, (iii) the amendments for financial market infrastructures, in particular regarding their financial and operational stability as well as settlement plans, and (iv) reporting obligations in derivatives.

Financial Market Infrastructure Ordinance (FinMIO) will thus need to define the quality and intensity of disclosable information under art. 37b VE-FinfraG.

2. New criminal offence

Along with the transfer of the regulatory framework to the FinMIA, a **new criminal offence** will be introduced in art. 149a VE-FinfraG.

- As mentioned, **FINMA** can conduct, inter alia, **enforcement proceedings** in the event of a breach (art. 145 VE-FinfraG).
- Against the background of these supervisory instruments, the draft bill proposes that the amount of the **fines be significantly reduced** compared to the previous regulation (under the current Listing Rules of SIX Swiss Exchange up to CHF 10 Mio) **to a maximum of CHF 500k for intentional offences and CHF 100k for negligent offences.**
- Prosecution and fines **may be waived in minor cases of negligence (**art. 149a para. 2 VE-FinfraG).

While the latter is welcomed, it is currently difficult to assess the scope of this rightly proposed simplification relating to "minor cases of negligence" in the view of the FDF.

III. Insider lists (art. 37b VE-FinfraG)

To date, there is a best practice for maintaining insider lists (i.e., lists that record the time at which insider information was created and provide information on who became aware of it and when). The Explanatory Report (*Erläuterungsbericht*) states that in practice insider lists are often incorrect or incomplete in the case of non-supervised issuers (Explanatory Report, p. 19). Against this background:

- **issuers and authorized representatives** are required to maintain insider lists essentially based on FINMA's previous watch list requirements for supervised institutions (see margin nos. 56 and 57 of FINMA Circular 2013/8); the obligation also applies to bond issuers.
- insider lists must be kept in such a form that they can be made available to FINMA immediately upon request and stored for at least 15 years. In contrast to the regulations in the EU, however, there are no specific formal requirements for the format of the list.

IV. Management Transactions (art. 37c VE-FinfraG)

1. New concept regarding supervised persons

Art. 37c VE-FinfraG is **targeted at the persons who are subject to reporting obligation**. To date, the stock exchange supervisory authorities could only take action against issuers; there was no direct relationship between the stock exchanges and the persons subject to reporting obligation, let alone their related parties. As a result of the new rule:

- **managers and related parties with reporting duties are directly subject to supervision of FINMA and criminal liability** (art. 149a VE-FinfraG). The concept would thus be comparable to that of insider trading and market manipulation.
- In addition, pursuant to the current wording, the obligation **also applies to companies with listed bonds or derivatives** (see for the legal definition of listed securities, art. 2 lit. b FinMIA). Under the current rules of SIX Swiss Exchange, management transactions are only reported

by issuers of listed *shares*. The question of whether this **might be a legislative oversight** should be raised, since the Explanatory Report does not comment further on this notable extension to bond and derivatives issuers.

2. Name and function are published

— As a further amendment and harmonization with EU law management transactions are **published** with **name and function of the person reporting**. It can be assumed that the name and function of the manager is published in the case of related party transactions (and not the name of the related party).

— Even though known in other jurisdictions, this is news for members of board of directors and executive committee of Swiss listed companies.

3. Statutory black-out periods

— FinMIO will stipulate trading black-out periods for management transactions, as is customary under EU law.

— Worth noting: **Trading during black-out periods** is subject to criminal law, i.e., regardless of whether it is an actual insider trading transaction, and is **penalized in the same way as other issuer obligations** under art. 149a VE-FinfraG.

4. New criminal offence

— Analogous to the sanction concept for ad hoc publicity (see section B.2 above), a criminal law provision will be introduced for the obligation to report and publish management transactions.

V. Simplified rules for disclosure of significant shareholdings

In an international comparison, Swiss disclosure law pursuant to art. 120 et seqq. leads to a high number of disclosure notifications. As a result, and in combination with the fact that certain reporting requirements are subject to legal uncertainty, there are many minor negligent violations, all of which are punishable under administrative criminal law (see also assessment of the FDF, Explanatory Report, p. 18). Against this background:

— The **threshold of three per cent of voting rights is deleted**. This raises the lowest reportable threshold **to five per cent of voting rights** (equivalent to other jurisdictions).

— There is a slight elimination of criminal liability (art. 151 VE-FinfraG): Violations of art. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24 of the Financial Market Infrastructure Ordinance-FINMA (**FinMIO-FINMA**) remain punishable. But violations of art. 22 and 23 FinMIO-FINMA are no longer punishable for the most part. **Violations of subsequent reporting obligations due to changed information are therefore no longer punishable** but are apparently still reportable. The amendment is undoubtedly welcomed by parties and authorities involved, even though the FDF Evaluation Report of September 2022 seemed to suggest a greater elimination of criminal liability.

— In comparison with the criminal liability of issuer's obligations described above, the criminal liability under art. 151 does not provide for a de minimis exemption for minor offences.

— Existing legal uncertainties, in particular in connection with the reporting obligation for **collective investment schemes** (art. 18 FinMIO-FINMA) shall be **clarified** in the implementing provisions.

— In terms of procedure, the legal obligation to submit disclosure notifications via electronic platform (such as the OLSDigital platform of SIX, which went live in March 2024) has not (yet) been introduced. As long as there is no legal basis for such obligation, reports can still be submitted in pdf form.

VI. Slight adjustments for insider trading and market manipulation

— The criminal offence of price manipulation currently only covers *fictitious* transactions. Therefore, in line with EU regulation, ***actual* transactions** of a price-manipulative nature are now also covered by criminal law (art. 155 VE-FinfraG).

— The **categories of offenders** (primary, secondary and tertiary insiders) in the insider offence are **abolished** (art. 154 para. 1, 3 and 4 VE-FinfraG). There is therefore no longer a gradation according to proximity to the company.

— Furthermore, the penalty for qualified offences is reduced from CHF 1 Mio to CHF 500k (art. 154 and 155 VE-FinfraG).

VII. To conclude

The proposed amendments to the FinMIA entail a shift in self-regulation and enhance state oversight of certain issuer obligations, like ad-hoc-publicity and management transactions. A breach may result in FINMA supervisory measures and criminal liability. Managers and their related parties are thereby targeted directly for the reporting of management transactions. The amendments will also have an impact on the interactions between issuers, the stock exchange supervisory authorities and FINMA. The challenge, which remains uncertain for now, is how the provisions will be detailed in the implementing provisions, FinMIO. In this context, the Explanatory Report indicates in several places that the existing regulations and practice of SIX Exchange Regulation are to be adopted.

It remains to be seen whether the draft will come into force **tel quel** in 2028 (as planned). For instance, the draft may encounter resistance from issuers who may not entirely support the shift from self-regulation to extended FINMA competences and criminal liability.

If you have any further questions on this topic, please reach out to your regular NKF contact.

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