GIR KNOW-HOW SECURITIES & RELATED INVESTIGATIONS

# Switzerland

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GIR INSIGHT

# Regulatory environment

## 1 What are your country's primary securities or related law enforcement authorities?

Unlike some other jurisdictions, there is no regulatory authority entrusted with the overall supervision of securities transactions in Switzerland.

In the area of financial markets in Switzerland, the regulatory authority is the Swiss Financial Market Supervisory Authority (FINMA). Its main task is to supervise the compliance of banks, insurance companies, stock exchanges, securities dealers and collective investment schemes with acts and ordinances passed by the federal legislative bodies. In addition to its supervisory function, FINMA also issues – when entitled to do so by Swiss law – regulations in the form of ordinances and circulars.

SIX Exchange Regulation AG, an autonomous department within the SIX Group (of which SIX Swiss Exchange – the main Swiss stock exchange – is a member), is responsible for the supervision and enforcement, as a private organisation, of applicable stock exchange legislation.

The Federal Department of Finance (FDF) may prosecute and fine businesses and individuals that violate the criminal provisions of the financial market regulations in administrative criminal proceedings.

Criminal prosecution authorities are responsible for criminal proceedings whenever a criminal offence under the Swiss Criminal Code of 21 December 1937 (SCC) has been committed or if other acts provide for their jurisdiction. At the federal level, the Office of the Attorney General (OAG) is responsible, whereas cantonal public prosecutors have jurisdiction at the cantonal level.

In November 2015, the Swiss Federal Council adopted the draft of a new Federal Act on Financial Services (FinSA), along with a new Federal Act on Financial Institutions (FinIA). Upon reviewing and amending these drafts, the bills were passed by the two Chambers of the Swiss parliament in June 2018. The FinSA and FinIA will align Swiss financial market laws in some respects with EU laws (eg, MiFID II and PRIIPS). The FinSA will also introduce into Swiss law an independent authority in charge of an ex ante review and approval of securities prospectuses. This independent authority will be regulated and approved by FINMA.

The FinSA also provides for the establishing of mediation bodies, especially those in charge of disputes between clients and financial services providers. These mediation bodies will need to be recognised by the FDF.

The consultation process for the ordinances to the FinSA, the Financial Services Ordinance (FinSO), and the FinIA, the Financial Institutions Ordinance (FinIO), ended in February 2019.

The new legislation is expected to come into force on 1 January 2020.

## 2 What are the principal violations or legal issues that the securities or related law enforcement authorities investigate?

The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, FMIA) is the general act governing the supervision of financial market infrastructures and derivatives trading. The FMIA is supplemented by the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (Financial Market Infrastructure Ordinance, FMIO) and the FINMA Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 3 December 2015 (FINMA-FMIO).

The legal basis for FINMA's authority as the financial market supervisor is the Swiss Financial Market Supervisory Authority Act of 22 June 2007 (FINMASA).

There are three main sources of legislation that list violations and are the basis for investigations related to securities matters:

- with regard to public securities law: the main provisions may be found in the FMIA, the FINMASA, the Federal Act on Collective Investment Schemes of 23 June 2006 (CISA) and the Federal Stock Exchange and Securities Trading Act of 24 March 1995 (SESTA);
- with regard to companies listed on SIX Swiss Exchange: various regulations, such as the Listing Rules; and
- with regard to general criminal liability: the SCC.

Following the entry into force of the FinSA and FinIA, the current SESTA will be repealed. The FinSA will introduce three new criminal offences that could be the basis for investigations related to securities matters. One criminal offence concerns the violation of conduct rules by the financial services providers. Two criminal offences relate to incorrect securities offerings. Further offences will be introduced by the FinIA.

## 3 If there is more than one authority involved in a securities or related investigation, how is jurisdiction allocated? What is the interplay between the securities regulator and the public prosecutor?

Article 50(1) FINMASA provides, as a general rule, that the authority responsible for the prosecution and judgment in case of violation of the criminal provisions of the FINMASA or other financial market acts is the FDF. If, however, judgment before a court is requested or if the FDF is of the view that the requirements for a prison sentence or custodial measure are met, the offence is subject to federal jurisdiction (article 50(2) FINMASA). In such a case, the FDF is required to refer the matter to the OAG who will hand it to the Federal Criminal Court for judgment. Certain specific offences are, ab initio, prosecuted by the OAG or the cantonal prosecutors.

As a general principle, FINMA and the prosecution authorities of the Swiss Confederation (OAG) and the cantons shall provide each other with mutual and administrative assistance (article 38(1) FINMASA). The information received by an authority shall be used exclusively to fulfil its own tasks. They coordinate their investigations, as far as is practicable and required (article 38(2) FINMASA). Whenever FINMA becomes aware of behaviour that may constitute a violation of criminal provisions, it is required to notify the competent prosecution authorities (article 38(3) FINMASA). Thus, parallel administrative and criminal proceedings are possible.

## 4 Do the securities or related law enforcement authorities have investigatory powers? Can they bring administrative, civil or criminal proceedings?

Administrative procedures are conducted by FINMA. To investigate the financial providers' compliance with applicable provisions, FINMA may, inter alia (Chapter 3, section 2 FINMASA):

- open formal proceedings against supervised individuals and entities;
- order the provision of information and evidence;
- conduct interviews;
- appoint an independent and suitably qualified person (investigating agent) to investigate circumstances relevant for the supervision; and
- if it has knowledge of the breach of a criminal provision, notify the criminal prosecution authorities.

The competent public prosecutor has a wide range of powers at his or her disposal for gathering information, including the power to:

- order the production of evidence such as objects, documents, reports and written and audio or video information;
- interview accused persons, potential witnesses and other informants;
- appoint experts; and
- conduct inspections.

He or she also has coercive measures at his or her disposal, including the power to:

- order the attendance of persons for questioning and summon them if they do not voluntarily appear;
- search for suspects, detain them and keep them in pretrial custody if the prerequisites are met;
- issue search warrants; and
- seize objects and assets, conduct secret surveillance (including the interception and monitoring of mail or telecommunications), monitor bank accounts and conduct dawn raids.

In certain cases, these measures must be approved by the competent courts. Coercive measures can, in principle, be appealed to competent courts.

Public prosecutors may also cooperate with foreign authorities in the ambit of mutual legal assistance as well as with other domestic authorities.

## 5 Are regulatory or criminal securities and related investigations public? Under what circumstances?

In principle, public authorities have a duty to treat information gathered in the course of their investigation as confidential. They also have a duty to insure personal privacy and guarantee the presumption of innocence.

Usually, FINMA does not inform the public about individual proceedings, unless it is necessary in order to protect market participants or supervised individuals and entities, to correct false or misleading information or to safeguard the reputation of Switzerland's financial centre (article 22(2) FINMASA). It nevertheless informs the general public at least once each year about its

supervisory activity and supervisory practices (article 22(1) FINMASA). Any publication must, however, respect privacy rights and data protection laws.

Public prosecutors may exceptionally inform the public about pending proceedings if this is required so that the public may assist in enquiries into offences or in locating suspects, to warn or reassure the public, to correct false or misleading information or due to the special importance of a case (article 74(1) of the Swiss Criminal Procedure Code of 5 October 2007 (SCP)).

Specific information policies apply for judgments, summary penalty and closing orders, etc.

### 6 Are regulatory or criminal securities and related investigations targeted at the company or the individuals involved, or both?

Regulatory or criminal investigations can target both companies and individuals. However, criminal charges can only be brought against a company provided certain conditions are met (see question 40).

## Investigation procedure

### 7 How do the securities and related law enforcement authorities typically begin an investigation?

Before initiating enforcement proceedings, FINMA conducts a preliminary investigation. FINMA will establish whether there are reasonable grounds to believe that financial market provisions have been infringed, including violations of the SCC. FINMA may also consider alternative ways of restoring compliance and usually engages in a dialogue before opening formal enforcement proceedings.

The FDF will open criminal proceedings if it becomes aware of violations of Swiss administrative criminal laws, notably following a denouncement (article 19(1) and (2) of the Federal Act on Administrative Criminal Law of 22 March 1974, ACL). The FDF then has authority to conduct an investigation (articles 20 ACL and 50(1) FINMSA).

As for the criminal prosecution authorities (OAG or cantonal prosecutors), they open an investigation if there is reasonable suspicion that an offence has been committed based on the information and reports from the police, a complaint or its own findings (article 309(1) SCP). If police reports and criminal complaints do not contain clear indications that an offence has been committed, the prosecution authorities may order additional enquiries (article 309(2) SCP). The competent public prosecutor will issue a formal order naming the suspect and indicating the suspected offence (article 309(3) SCP).

### 8 What level of suspicion of wrongdoing is required for the securities or related law enforcement authorities to begin an investigation?

FINMA will initiate an investigation if "there are indications of violations of supervisory provisions" (article 30 FINMASA). It thus has a certain leeway. These suspicions may rely on information received from individuals or from the public (for instance, whistleblowers) or from other domestic or foreign authorities. Supervised individuals and entities also have a self-reporting duty in case of an incident "that is of substantial importance to the supervision". The same applies to audit companies (article 29(2) FINMASA).

Public prosecution authorities will open an investigation if there is "a reasonable suspicion" that an offence has been committed (article 309(1)(a) SCP). This is the case where there is material suspicion of infringements. Such suspicion must be based on relevant facts. According to the principle in dubio pro duriore, the public prosecutor can only decide to refrain from starting proceedings if it is obvious that the facts are not punishable or that the prerequisites for prosecution are not met (article 310 SCP).

### 9 May the securities or related law enforcement authorities conduct dawn raids? Does this depend on the nature and seriousness of the allegations?

FINMA may not order any coercive measures, such as searches of premises or seizure of evidence, during the course of its investigations.

However, the public prosecutors have coercive measures at their disposal and may, for instance, issue search warrants, seize objects and assets, conduct secret surveillances (including the interception of mail and telecommunications), monitor bank accounts and conduct dawn raids (see question 4). Some of these measures nevertheless require approval by the competent courts. Dawn raids and other coercive measures may also be ordered by the FDF.

Coercive measures have to respect the principle of proportionality. In principle, dawn raids are only permissible where there are serious allegations and other measures, such as a request for the production of documents, would not suffice, or where a surprise effect is required to gather evidence.

## 10 Must the findings of a company's internal review be reported to the securities or related law enforcement authorities? When and under what circumstances?

The supervised individuals and entities, their audit companies and auditors as well as individuals or companies that are qualified investors or that have a substantial participation in the supervised individuals and entities must provide FINMA with all information and documents that it requires to carry out its tasks (article 29(1) FINMASA). The supervised individuals and entities and the audit companies that conduct audits of them must also immediately report to FINMA any incident that is of substantial importance to the supervision (article 29(2) FINMASA).

The right against self-incrimination prevails in criminal proceedings and provides a ground for refusing to report or cooperate with the prosecution authorities.

It is also generally accepted, in administrative proceedings, that a person or entity may refuse to report or cooperate if they would, in doing so, expose themselves to criminal liability.

## 11 Are whistleblowers a frequent source of information for securities and related investigations?

Although the importance of whistleblowing has been recognised by Swiss authorities, notably with respect to corruption, it remains a limited practice in Switzerland. There is relatively little protection for whistleblowers in Swiss law owing to the duty of loyalty to the employer that is provided for in employment law. Draft legislation adopted by the Swiss Federal Council in November 2013 was rejected by the Swiss parliament in September 2015. The project notably sought to establish the conditions for legal whistleblowing. While protection against reprisals appeared as one of the new legislation's aims, many commentators regretted that the adopted project did not offer increased protection to whistleblowers and did, therefore, not encourage whistleblowing in Switzerland. The Swiss Federal Council introduced new draft legislation in September 2018, which was rejected again in June 2019 by the lower chamber of the Swiss parliament, the National Council. The bill is now pending before the upper chamber of the Swiss parliament.

## 12 Describe the typical phases of a securities or related investigation in your country.

Before initiating enforcement proceedings, FINMA will conduct a preliminary investigation in order to establish whether there are reasonable grounds to believe that financial market provisions have been infringed. FINMA may also consider alternative ways of restoring compliance and may engage in a dialogue before opening formal proceedings. If there are indications of violations of supervisory provisions, FINMA will open formal proceedings and will notify the parties thereof. FINMA may also appoint an independent and suitably qualified person (investigating agent) to investigate circumstances relevant for supervisory purposes. As in all types of proceedings, the target will have the right to be heard. Once the investigation is completed, FINMA will issue a ruling.

Once a public prosecutor (or the FDF) has opened a formal investigation, he will start gathering evidence. He may also instruct police forces to carry out additional enquiries and delegate part of the evidence gathering process to them. The public prosecutor will bring charges in the competent court if, based on the results of his investigation, he deems that the grounds for suspicion are sufficient (and provided he is not competent to issue a summary penalty order).

If, based on the investigations, the FDF deems that a criminal provision of the financial market regulations was infringed, it will issue a sentencing decision (which can be appealed within the FDF). If the person or entity targeted by the decision requests judgment before a court or if the FDF is of the view that the requirements for a prison sentence or custodial measure are met, the matter is referred to the OAG who will bring proceedings before the Federal Criminal Court (article 50(2) FINMASA).

## 13 What are the mechanisms by which a securities or related law enforcement authority may cooperate and coordinate with authorities outside your jurisdiction?

Securities or related law enforcement authorities may cooperate and coordinate with authorities outside Swiss jurisdiction through the channels of international mutual legal or administrative assistance.

Administrative assistance consists of cooperation between administrative authorities. Administrative assistance has increased significantly in recent years in a number of areas, including cooperation on stock market regulation (notably through the International Organization of Securities Commissions' Multilateral Memorandum of Understanding).

International mutual legal assistance in criminal matters is governed by the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 (IMAC). It namely sets the rules for the extradition of persons, assistance aimed at supporting criminal proceedings abroad, the delegation of criminal proceedings to/from foreign states and the execution of foreign criminal judgments.

The IMAC is applicable when there is no overriding bilateral treaty or multilateral convention. On the European level, the most important instrument is the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters.

### 14 Will a securities or related law enforcement authority take into account findings by a law enforcement authority outside your jurisdiction in the course of its investigation?

The information provided by foreign law enforcement authorities through the mutual legal or administrative assistance channels may be used in the course of the Swiss authorities' investigation.

## Document production

### 15 What can the securities and related law enforcement authorities require to be produced as part of an investigation? Do the powers of a regulator differ from those of the public prosecutor?

Administrative procedures under FINMASA are conducted by FINMA. The Administrative Procedure Act of 20 December 1968 (APA) sets out the procedure that FINMA must follow. Pursuant to articles 12 et seq, APA, FINMA can obtain evidence from the parties and request the production of documents necessary for its investigation.

In criminal proceedings, the prosecution authorities may order the production of documentation or conduct dawn raids. Seized documents may be sealed (for instance if covered by attorney–client privilege) and, if so, a judicial authority must rule on their admissibility (article 248 SCP).

### 16 Will a litigation hold or will other instruction to preserve documentation need to be issued? When?

Under Swiss law, there is a legal duty for companies to retain documentation for a specific time (generally 10 years).

Knowing that an investigation has been opened, the destruction of documents and other information could constitute a criminal offence.

### 17 Can the securities and related law enforcement authorities request the production of materials protected by attorney-client privilege or work-product doctrine? Can the securities and related law enforcement authorities use protected materials if it obtains them from third parties?

Pursuant to article 321 SCC, lawyers, including their respective auxiliary personnel, are prohibited from disclosing information obtained in the course of their professional activity. This duty of confidentiality is also provided for in article 13 of the Federal Act on the Freedom of Movement for Attorneys of 23 June 2000 (FAFMA). Therefore, attorneys may not be compelled by courts or any investigation authority to produce privileged materials. This principle applies both in criminal and administrative proceedings. It is noteworthy that the attorney–client privilege protected by the above-mentioned articles is limited to "typical activities" of the attorney (ie, legal representation and legal advice). It does not extend to "non-typical" activities of the attorney, such as portfolio management, trusteeship, membership on a board of directors, etc.

The same applies to individuals and entities that can, in general, not be compelled to provide documents protected by legal professional privilege.

It is noteworthy that the protection available under the Swiss concept of legal professional privilege is narrow compared with other jurisdictions. In-house attorneys still cannot avail themselves of this privilege. This situation could end in the near future as the proposed revision of the Swiss Code of Civil Procedure envisages to introduce an in-house counsel privilege. This privilege would be limited to civil proceedings and would be subject to some pre-requirements. Comparatively, legal privilege relating to external counsel has a broader scope and is not limited to civil proceedings. It applies irrespective of the location of a legal document or information, that is, also to certain pertinent documents in the hands of the client or company, or even of other third parties. There has been criticism that recently published draft legislation concerning a revision of the SCP does not include a similar in-house counsel privilege in criminal proceedings.

## 18 How is confidential information or commercially sensitive information treated by the securities and related law enforcement authorities?

In administrative proceedings, the authority may refuse the right to inspect the file if essential private interests require that the secrecy has to be preserved (article 27(1) APA).

In the framework of criminal proceedings, prosecution authorities, their employees and all experts appointed by them, have the duty to treat as confidential the information which comes to their knowledge (article 73(1) SCP). The authorities may also require other persons involved in the proceedings to maintain confidentiality with regard to the proceedings and the persons concerned, if it is required by the object of the proceedings or by a private interest (article 73(2) SCP). In addition, prosecution authorities may temporarily restrict access to the case files if this is required to safeguard public or private interests for preserving confidentiality (articles 101 and 108(1) (b) SCP).

## 19 Can the target of a document request exercise a right not to produce?

The right not to produce in the framework of administrative proceedings is specifically provided for by article 13 (1 bis) APA pursuant to which the obligation to cooperate with the investigating authority does not extend to the handover of items and documents used in communications between a party and his or her lawyer provided the lawyer is entitled to represent clients before the Swiss courts in accordance with FAFMA. Additionally, it is generally accepted that the subjects of the proceedings may also refuse to disclose documents if they would, in doing so, expose themselves to criminal liability (right against self-incrimination).

Unlike in administrative proceedings, the person targeted by criminal proceedings is not under any obligation to cooperate with the prosecution (nemo tenetur). Accordingly, the production of evidence can be refused for any reason and irrespective of the existence of a legal privilege. However, refusing cooperation may prompt the criminal prosecution authorities to take coercive measures (eg, a dawn raid).

It is noteworthy that legal professional privilege does not extend, in Switzerland, to in-house counsel (see also question 17).

## 20 Do any data privacy or bank secrecy laws restrict the production of materials to a securities or related law enforcement authority in your jurisdiction? An authority outside your jurisdiction? May the company under investigation provide personal or bank customer data on a voluntary basis?

Bank-client confidentiality (bank secrecy) is protected pursuant to article 47 of the Federal Act on Banks and Saving Banks of 8 November 1934 (BA), strictly limiting any information shared with third parties. However, bank secrecy is not absolute and does not apply in the context of criminal proceedings (domestic or foreign). Prosecution authorities have a very wide discretion to conduct their investigations and can order the production of information or materials otherwise protected by bank secrecy. The same applies in the context of administrative proceedings conducted by FINMA.

However, the providing of such information or materials on a voluntary basis, ie, without compulsion, would infringe bank secrecy.

Information protected by bank secrecy cannot be produced to a foreign authority on a voluntary basis and outside official channels but might be available on the basis of a request for administrative or mutual legal assistance. The voluntary production of personal data, such as names of employees, to a foreign authority might also be restricted by data protection legislation.

Further professional secrecy obligations similar to bank secrecy are contained in other financial market acts (eg, the FMIA).

## 21 Are there any data privacy, bank secrecy or other laws that restrict where documents or other communications may be stored or reviewed for the investigation?

Regarding administrative proceedings, article 26 et seq APA provide that parties can inspect files pertaining to them at the offices of the authority, except under special circumstances as set forth at article 27 APA. This includes restricting the access to documents or communications in order to preserve secrecy. The same rules apply in administrative criminal proceedings conducted by the FDF (article 36 ACL).

As far as criminal proceedings by public prosecutors are concerned, the file management is governed by articles 99 and 100 SCP. For each criminal matter, the public prosecutor shall keep a file containing all documentary evidence. Concerned parties generally have a right to consult the file upon request. However, prosecution authorities may restrict the right to inspect

the file, in particular, if this is required to safeguard public or private interests for preserving confidentiality (articles 101 and 108(1) (b) SCP).

### 22 Are the securities and related law enforcement authorities able to obtain documents from outside the country?

In order to enforce the financial market acts, FINMA may request foreign authorities responsible for financial market supervision to provide information and documents (article 42 (1) FINMASA).

Swiss prosecution authorities may request legal assistance from foreign jurisdictions and thus obtain documents and other evidence in the context of pending criminal proceedings. Other than the IMAC, Switzerland has also adhered to a wide range of bilateral and multilateral treaties in matters of mutual legal assistance in criminal matters (see question 13).

## Witness interviews

### 23 Will the securities and related law enforcement authorities conduct witness interviews? If so, will the interviews be on the record? Will the interviews be made public?

In administrative proceedings, the authority may order the interview of witnesses if it is not possible to establish the facts of the case sufficiently in any other way (article 14 APA). Pursuant to Swiss case law, the hearing of witnesses in the context of administrative proceedings is thus subsidiary to other investigative measures. The interviews are not public. Minutes of the interviews are drawn up. These minutes are not made public.

In criminal proceedings, the competent authority may conduct witness interviews. Interviews are recorded as they are made in official minutes (article 78 SCP), which are not made public. The interviews are not public (see question 5). The FDF may also conduct witness interviews (article 41 ACL). The interviews are recorded in official minutes (article 38(2) ACL).

### 24 Can witnesses exercise a right not to testify? Will any adverse inference be drawn if they do so?

Article 16(1) APA provides that the right to refuse to testify is governed by article 42(1) and (3) of the Federal Civil Procedure Act of 4 December 1947 (FCP). Pursuant to this provision, the following persons may refuse to testify: persons interviewed on facts the disclosure of which would expose them or their spouse, registered partner or the person with whom they live as a couple, or persons who are related to them by birth or marriage in direct line or collaterally up to the second degree, to criminal prosecution, to a serious disgrace or to a certain pecuniary damage. Persons bound by a professional duty of confidentiality as well as journalists (for the protection of their sources) also have a right to refuse to testify. Further rights not to testify may apply pursuant to article 16(1bis) and (2) APA.

In criminal proceedings, article 168 SCP provides a list of persons who have an "absolute" right to refuse to testify, in particular any person who is or was married to or cohabits with an accused person or any person who is related to the accused by birth or marriage in direct line or collaterally. The foster parents, foster children and foster siblings of the accused person, as well as the person appointed guardian or deputy for the accused person also have a right to refuse to testify. All witnesses may refuse to testify based on the intangible right against self-incrimination (article 169(1) (a) SCP). In addition, any witness may refuse to testify:

- if he or she could be held liable under civil law and if the interest in protection outweighs the interest in prosecution (article 169 (1) (b) SCP);
- owing to an official secrecy duty (article 170 SCP);
- owing to professional duty of confidentiality (article 171 SCP);
- owing to other duties of confidentiality (article 173 SCP); or
- to protect journalists' sources (article 172 SCP).

A person who refuses to testify in criminal proceedings without having the right to do so may be liable to criminal prosecution and may be required to pay the costs and damages incurred as a result of such refusal (article 176 SCP). These rules also apply in administrative criminal proceedings conducted by the FDF (article 41(2) ACL).

Refusing to testify in the above-mentioned circumstances is a legal right. Accordingly, no adverse inference must be drawn thereof.

Finally, individuals and entities may refuse to testify by claiming legal professional privilege. The protection available under the Swiss concept of legal professional privilege is narrow compared with other jurisdictions. In-house attorneys can, at present, not avail themselves of this privilege (see question 17).

### 25 Do witnesses receive separate counsel? Who provides counsel for witnesses?

Nothing prevents a witness from obtaining legal advice from a lawyer of his choice. At least in criminal proceedings, a witness may be assisted by counsel at a hearing.

## Advocacy

### 26 Can the target of a securities or related investigation challenge the investigation in court while the investigation is ongoing?

Save for exceptional circumstances (eg, objection on the basis of ne bis in idem), the initiation of a criminal investigation itself cannot be challenged in court. However, the distinct procedural acts with which the investigation is conducted and advanced, for example a disclosure or search and seizure order, or a decision on the access to the investigation file, can be challenged with the competent court by any person affected by such act or procedural decision. A complaint can be filed for violation of the law, incorrect or incomplete establishment of the relevant facts, abuse of discretion, violation of the rule of proportionality and undue delay in the investigation.

With regard to FINMA investigations (see questions 7 and 8), any person claiming damage following an act by FINMA or another legitimate interest can request FINMA to issue a declaratory order stating that the act is unlawful. Said declaratory order is then subject to appeal to the Federal Administrative Court. Procedural orders issued by FINMA during the ordinary investigation are also subject to appeal to the Federal Administrative Court.

In addition, in case of serious misconduct by the official in charge of the investigation, there may be room for an administrative complaint to the authority supervising that official.

### 27 What opportunity will there be to respond to a securities or related law enforcement authority's theories or allegations prior to the authority bringing charges?

Prior to a law enforcement authority bringing charges, the right to be heard will have to be granted in an appropriate manner.

In criminal investigations, the person under investigation (as well as any other formal party to the proceeding, such as a victim of the crime duly constituted) will be given an opportunity to comment on the completeness of the investigation before its formal closure. If he or she is of the opinion that the file is not complete, he or she may formally request that specific further evidence be taken. In addition, the target of a criminal investigation and any other affected party may comment on an authority's theories and allegations spontaneously at any time during the investigation. A formal invitation is not required, as the respective authorities are bound to investigate and establish the facts of a case ex officio.

In administrative proceedings, such as investigations conducted by FINMA, a party to the proceedings will be formally invited to submit its comments on the results of the investigation, including its completeness, in writing within a deadline set by the authority. If deemed necessary, the authority in charge may then complete the investigation or else proceed with taking a decision right away.

### 28 What form does the advocacy with a securities or related law enforcement authority typically take?

Investigation proceedings conducted in Switzerland are predominantly written proceedings (apart from interrogations of accused persons, witnesses, etc). Therefore, advocacy typically takes the form of either correspondence or formal written submissions. In specific proceedings, such as preliminary investigations conducted by FINMA, oral presentations supplementing written submissions are also common.

### 29 Are statements or advocacy positions taken by an investigated party during the investigation process deemed admissions and binding in future proceedings? Would such statements be made public?

Statements or advocacy positions taken by an investigated party during the investigation process are, as a rule, not considered admissions and not formally binding in future proceedings. Therefore, such positions may be revoked or amended in the later course of the investigation or a subsequent adjudication or separate proceeding. However, it goes without saying that such behaviour may seriously harm the credibility of the person at issue or his or her defence, and should thus be avoided.

Following the basic principle of confidentiality of investigations in Switzerland, statements made by the parties during the investigation are confidential and may not be made public, save for the exceptional situation of an overriding public interest in publicity.

## Timing

### 30 What is the limitation period for charges for securities and related violations?

Depending on the violation of the financial market laws under investigation, the limitation period relating to criminal prosecution generally ranges from seven to 15 years (for contraventions sanctioned by a fine, see article 52 FINMASA).

If a decision of a court of first instance has not been forthcoming within the respective time frame, the violation is time-barred and can no longer be prosecuted by the public prosecutor. Pending proceedings are terminated by a termination order. By contrast, if the time limit is met by a timely adjudication in the court of first instance, appeal proceedings are not subject to any limitation period and thus not time critical. Slightly different rules apply for proceedings conducted by the FDF.

### 31 When does the limitation period begin to run?

The limitation period relating to criminal prosecution begins to run on the day on which the alleged misconduct took place. If the misconduct consisted of a series of acts carried out at different times or continued over a period of time, the limitation period typically begins on the day on which the final act was carried out or on the day on which the misconduct ceased. If an omission is at stake, the limitation period starts to run on the day when the duty to act ends.

### 32 What can suspend the running of the limitation period? Can the securities and related law enforcement authorities request a tolling agreement?

There is no mechanism such as, for example, a tolling agreement with the competent authority, that could validly suspend the running of the limitation period.

### 33 How long does a securities or related investigation typically take?

A securities or related criminal investigation will regularly take more than one year, and may take several years in fact intensive and legally complex cases. Due to the interest and legal obligation of a regulated individual or entity to cooperate with its supervisor, administrative proceedings are usually less time consuming than criminal investigations, where the accused party is not under any obligation to cooperate (nemo tenetur).

## Resolution

### 34 What is the process for closing an investigation if the investigation does not reveal a violation of securities or related laws? Will the securities or related law enforcement authorities provide written confirmation that the investigation is closed without action?

If the investigation does not reveal sufficient suspicion of a violation, the competent authority will close the investigation and terminate the proceedings without further action by written order. In administrative proceedings, the investigated party may have to formally request a confirmation that the proceedings were closed without action.

### 35 How will the resolution or settlement process be initiated?

The initiation of the resolution or settlement process varies depending on the circumstances and the applicable rules.

If the competent authority intends to close the investigation without action, it will inform the parties accordingly and, in some cases, set a deadline for interested parties with adverse interests to submit applications for the admission of further evidence.

If there is room for a settlement process, such process will usually be initiated informally, be it by the prosecution or the investigated party. If the agreement of an injured party is a prerequisite to any agreed termination of a prosecution, the

public prosecutor may invite the injured party and the investigated party to a hearing with a view to reaching a settlement (article 316 SCP).

## 36 Who decides whether to proceed with charges and what charges to select?

In principle, the decision about whether to proceed with charges and what charges to select is taken by the official or body in charge of the investigation. Depending on the applicable organisational rules, which might be of a purely internal nature, the approval of a supervising official or body within the same authority might be required (eg, the approval of the Attorney General in cases brought by a prosecutor of his or her office).

In investigations by FINMA, a committee of the Executive Board decides on the initiation and conclusion of enforcement proceedings, unless that power falls to the board of directors in very important cases. The Enforcement Committee can delegate rulings in less important cases to the head of Enforcement.

In investigations by SIX, the competent investigative body or the Sanctions Commission will decide what charges to select.

## 37 What factors would a securities or related law enforcement authority consider in selecting charges and the severity of any penalty or fine?

The factors to be considered by the competent authority will typically include the following:

- sanctions set out in the abstract for the relevant offence;
- degree of culpability (intent, recklessness, negligence);
- damage caused or risks created to legally protected interests;
- personal gain;
- pre-existing criminal record;
- conduct during the investigation (in particular, level of cooperation);
- reparation efforts;
- financial situation and personal circumstances of the offender;
- public interest and interest of the injured private person;
- principle of proportionality; and
- case law precedent.

## 38 What remedies can the securities or related law enforcement authorities consider? How are penalties calculated?

In criminal investigations, depending on the charge, the competent authority may consider imposing the following main remedies (various of which may be combined):

- a fine of up to 10,000 Swiss francs (considerably more in specific cases) for individuals and up to 5 million Swiss francs for companies; breaches of stock exchange reporting requirements may be punished with a fine up to 10 million Swiss francs;
- a monetary penalty of up to 360 daily penalty units (more in certain specific cases; a daily penalty unit is determined on the basis of the personal and economic circumstances of the offender and is capped at 3,000 Swiss francs);
- a custodial sentence (in principle, from six months to 20 years; however, the maximum sentence for violations of financial market laws is usually three or five years);
- confiscation or restitution to victims of the instruments and proceeds of a crime as well as substituting assets;
- prohibition from exercising professional activities;
- expulsion of foreign nationals from Switzerland; and
- publication of the decision.

Penalties are calculated considering the factors outlined under question 37.

As opposed to many of its equivalents in other countries, FINMA is not empowered to impose fines. However, FINMA has discretion to choose from a wide range of administrative measures (various of which may be combined), in particular:

- precautionary measures, eg, appointment of an (external) investigating agent;
- declaratory rulings (reprimands);
- ordering action to restore compliance with the law (eg, by temporarily or permanently restricting regulated business activities);
- withdrawal of the licence to exercise regulated business activities;

- industry ban (ban of individuals responsible for serious violations of supervisory law from acting in a senior function at a supervised institution for up to five years);
- cease and desist orders, and a ban on trading;
- publication of final rulings;
- confiscation or disgorgement order of profits generated or losses avoided; and
- entering of relevant information into a database known as the watch list.

## 39 Do illegal profits have to be disgorged, and if so, how are they determined?

As a rule, illegal profits have to be disgorged. If the amount cannot be determined exactly, the competent authority is entitled to estimate the amount to be disgorged.

As an example, in December 2012, FINMA disgorged 59 million Swiss francs in illegal profits (estimate) in an investigation into price fixing brought against a large international bank.

## 40 Can criminal charges be brought against companies in your jurisdiction for violations of securities and related laws?

Swiss criminal law rests on the concept of individual responsibility. However, criminal charges may also be brought against corporations in some circumstances. There are two models of corporate criminal liability: a subsidiary liability and a primary liability. In the first case, criminal charges may be brought against a company, provided that the following conditions are met cumulatively:

- a felony (ie, a crime carrying a threat of punishment of more than three years of custodial sentence) or misdemeanour (ie, a crime carrying a threat of punishment up to three years of custodial sentence) was committed in the exercise of a company's commercial activities, which were in line with the statutory business purpose of that company; and
- the offence committed cannot be attributed to a specific individual because of organisational shortfalls in the responsibility of the company.

In the second case, if certain specific offences are committed (in particular money laundering, corruption in the private or public sectors, criminal organisation, etc), charges can be brought against the company irrespective of the criminal liability of any individual, provided the corporation failed to take all reasonable organisational measures that were required in order to prevent such an offence.

In some cases of minor misconduct, the company may be punished instead of the responsible individual, provided that, cumulatively:

- a fine not exceeding 5,000 Swiss francs in general administrative criminal proceedings (article 7 ACL) or 50,000 Swiss francs in investigations subject to the FINMSA (article 49 FINMSA) shall be imposed; and
- it would be disproportionate to identify the responsible individual.

## 41 Will the securities and related law enforcement authorities provide a reduced penalty for cooperation? What standard will the authorities use when taking into account any cooperation?

In general, the degree of cooperation with the investigation will be taken into account when selecting the charge and determining the severity of penalties. Cooperation will thus typically lead to reduced sanctions (see question 42).

Competent authorities have broad discretion in the determination of appropriate sanctions, and sentencing guidelines as known in other jurisdictions are not generally available in Switzerland. Therefore, the sanctioning process and the applicable standards are not fully transparent and predictable. While difficult to quantify in advance, the positive effect that a cooperative approach may have on sanctions should not be underestimated.

## 42 Are deferred prosecution agreements or non-prosecution agreements permitted?

Under Swiss law, there is currently no exact equivalent to deferred prosecution agreements or non-prosecution agreements as known in the United States. However, the OAG recently proposed amendments to the SCP that would enable prosecutors to enter into deferred prosecution agreements with companies. Such agreements would only be available for companies fully cooperating in the investigation and would need to address, inter alia, the facts statement (as acknowledged by the company), the amount of the fine, forfeited or released funds, the settlement of damages (if any), specific action to restore compliance

within the company, the appointment of a compliance monitor and the deferral period. However, the Swiss Federal Council decided not to include the OAG's proposal in the draft bill submitted to the Swiss parliament. It remains to be seen whether the Swiss parliament adheres to the Federal Council's decision or re-introduces any provisions on deferred prosecution agreements.

At present, there are a number of procedures available that allow, under certain conditions, for settlements with the prosecution or other ways to avoid further prosecution and criminal sanctions, or adjudication by a criminal court in a public hearing.

For example, article 53 SCC, which has recently been amended, provides that if (i) the offender has repaired the damage or injury done (or at least has made every reasonable effort to compensate for the injustice caused), (ii) a suspended custodial sentence not exceeding one year or a suspended monetary penalty or a fine are suitable as a penalty, (iii) the interest in prosecution of the general public and of the persons harmed are negligible, and (iv) the offender has admitted the incriminating facts, the prosecutor or court may terminate the prosecution without imposing sanctions. It is of note that non-prosecution decisions due to reparation payments are highly controversial in Switzerland.

The offender who admits the relevant facts and also accepts, at least in principle, the civil claims brought (if any) may apply for "accelerated proceedings" within the meaning of article 358 et seq SCP. Accelerated proceedings may lead to resolution through a "sentence bargaining" between the prosecutor and the offender, provided that the injured party does not object, and further provided that the expected punishment does not exceed five years of custodial sentence.

Finally, the following is of note: in cases where criminal sanctions of a relative lesser importance (custodial sentence of up to six months or a monetary penalty of up to 180 daily penalty units) are at stake, and the facts under investigation were either admitted by the offender or otherwise well established, the prosecutor may issue a summary penalty order without referring the matter to court adjudication. A summary penalty order will become final and binding unless challenged by the offender or others affected by the order in court. In corporate criminal proceedings, prosecutors may be amenable to negotiate the content of such summary penalty order.

## 43 Will a court need to approve the settlement agreement with a securities or related law enforcement authority?

A decision by a prosecutor to abandon the investigation, which is based on the fact that the damage has been repaired and compensated for, does not need to be approved by any court.

In contrast thereto, the result of a "sentence bargaining" in accelerated proceedings will have to be approved in summary court hearings.

In FINMA and SIX proceedings, no court approval is required to close an investigation.

## 44 If a settlement occurs, will an admission to certain facts or wrongdoing be required?

If a criminal investigation is closed based on a reparation payment, the offender is required to acknowledge the facts relevant to the offence (without any admission of guilt). In accelerated proceedings, the offender is required to accept the indictment filed with the court for approval.

## 45 Can the findings or decisions of the securities or related law enforcement authorities be administratively appealed? Appealed to a court?

Decisions in criminal investigations can, as a rule, be appealed to the competent court (depending on the prosecutor in charge, the Federal Criminal Court or a cantonal court). Decisions of FINMA can, as a rule, be appealed to the Federal Administrative Court. Final decisions of the SIX Sanctions Commission can be appealed to an independent appeals body or to a special arbitral tribunal, depending on the violation at stake.

## 46 If a decision can be administratively or judicially appealed, what are the consequences of an adverse decision on appeal? What are the consequences of a positive decision on appeal?

If the decision on appeal is adverse, the unsuccessful party will typically have to bear the costs of the proceedings. The decision can, as a rule, be appealed to the Federal Supreme Court (the highest court in Switzerland).

Depending on the nature of the appealed decision and the competence of the authority ruling on the appeal, the case may be either remanded for further proceedings, dismissed or reviewed de novo.

## Collateral consequences

### 47 What are some of the collateral consequences of a resolution or settlement with a securities or related law enforcement authority?

Following its supervisory powers, FINMA may impose a range of measures that could be regarded as collateral consequences (see question 38), for example, a temporary or permanent ban of individuals from engaging in securities trading.

### 48 What are some of the collateral consequences of a conviction or the imposition of liability by a court?

A convicted person will, as a rule, be ordered to pay the costs of the investigation and the court proceedings. Further, in some cases, a criminal court may also rule on aspects of civil liability if civil claims were raised by private plaintiffs during the proceedings. Further, most convictions will be entered in the criminal record. In Switzerland, the criminal record is not public and there is no official record for companies.

### 49 Can private securities or related legal claims proceed parallel to investigations by securities and related law enforcement authorities?

In principle, private claims may proceed parallel to investigations by authorities. Injured civil claimants may participate in criminal proceedings proceedings (but generally not in administrative criminal proceedings) as private plaintiffs and exercise party rights (such as the right to access to the file of the investigation, etc). However, it is not permissible to bring the same private claim in parallel criminal and civil proceedings.

### 50 What effect will findings by an authority in another jurisdiction have in private proceedings?

Findings by an authority in another jurisdiction may be introduced in the domestic proceedings as a piece of evidence. If a foreign court decision is to be formally recognised and enforced in Switzerland, a court decision to that effect is required.

### 51 Can private plaintiffs obtain access to the files or documents the securities or related law enforcement authorities collected during the investigation?

The right to access the file of the investigation is, as a matter of principle, reserved to the parties of the proceedings. To be recognised as a party in criminal proceedings, a private plaintiff must demonstrate that he or she has been directly harmed by the offences under investigation. In contrast, a private plaintiff cannot participate in administrative proceedings (eg, conducted by FINMA) and is not granted access to files or documents collected in such proceedings. The same generally applies to administrative criminal proceedings (see question 49).


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George Ayoub is a senior associate in Schellenberg Wittmer's dispute resolution, white-collar crime and compliance, and internal corporate investigations groups in Geneva.

His key areas of expertise and practice focus on white-collar crime, international mutual legal assistance, extradition, asset tracing and recovery, and internal corporate investigations. George is also specialised in regulatory and compliance issues.

George has acted as counsel for both individuals and corporate entities in criminal and administrative proceedings before cantonal and federal authorities and courts, including the Swiss Supreme Court.

George's recent expertise in white-collar crime matters include:

- representation of and assistance to a prominent businessman and his group of companies in relation to Swiss criminal investigations in the context of an alleged corruption scheme;
- representation of a major digital vendor in the context of Swiss criminal proceedings;
- representation of a foreign sovereign fund and affiliated companies in Swiss criminal investigations targeting one of its former senior officers;
- representation of a foreign state that had fallen victim to major fraud in the context of the privatisation of a state-owned company.

George is a member of the International Bar Association's anti-corruption, business crime and criminal law committees.

After graduating from the University of Lausanne, School of Law, in 2007 George worked at the Office of the Attorney General of Switzerland. He was admitted to the Geneva Bar in 2011. Prior to joining Schellenberg Wittmer in 2012, he worked at another renowned Swiss business law firm as a contract and corporate lawyer.

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Dr Roland Ryser is a counsel in Schellenberg Wittmer's white-collar crime and internal corporate investigations teams. Roland has extensive experience in contentious matters, advising and representing both individuals and corporate clients as defence counsel in a broad range of regulatory and business crime investigations (including in administrative criminal proceedings). Roland's practice also covers international mutual legal and administrative assistance proceedings, asset recovery and anti-money laundering, anti-bribery and trade compliance. In addition, he frequently conducts internal investigations.

Some recent examples of Roland's expertise in white-collar crime include:

- defending high-profile clients in administrative criminal proceedings for tax evasion;
- advising and defending a major Swiss bank in an investigation into allegations of corruption-related money laundering in a cross-border context;
- acting as defence counsel to a Swiss bank in criminal proceedings for fraud, money laundering, insufficient diligence in financial transactions and violation of AML reporting obligations.

Roland is a member of various professional associations including the Zurich and Swiss Bar Associations, the International Bar Association (IBA), the Defence Counsel's Section of the Zurich Bar and the Swiss Society of Criminal Law. He regularly publishes in his fields of specialisation and lectures on business criminal law in AML compliance officer trainings.

Roland graduated with a law master's from the University of Zurich in 2004 and received a PhD degree in corporate criminal law in 2006. Before joining Schellenberg Wittmer, Roland worked as a research and teaching assistant at Zurich Law School's chair of criminal law and criminal procedure. In 2011, Roland was on secondment with a major law firm in Sydney, Australia, where he served as a consultant in a corporate and commercial litigation team.

Schellenberg Wittmer's white-collar crime group has considerable experience in providing advice and court representation for a wide variety of business crime matters and fields related to it. They include, inter alia, compliance programmes arising under regulations related to anti-money laundering, insider dealing, market conduct, anti-corruption, etc; data protection legislation and disclosure requirements; corporate and directors' criminal liability; regulatory proceedings; international assistance in criminal and regulatory matters (including exchange of tax information); Actions and proceedings to locate, freeze and recover the proceeds of national and cross-border fraud and other financial crime; Representation of victims of fraud and other business-related offenses in domestic criminal proceedings and white-collar crime defence work.

Furthermore, Schellenberg Wittmer's internal corporate investigations group has extensive experience in the investigation of a broad range of legal and regulatory matters, including, for example, violation of banking and capital market rules or disclosure and accounting issues.

Schellenberg Wittmer is one of the leading business law firms in Switzerland. Over 140 lawyers in Zurich and Geneva advise domestic and international clients on all aspects of business law. The firm's areas of expertise include banking and finance, competition and antitrust, dispute resolution and international arbitration, intellectual property and information technology, mergers and acquisitions, private equity and venture capital, private clients, trusts and estates, foundations, real estate and construction, restructuring and insolvency, taxation, white-collar crime and compliance. Our clients' Asia-related needs are catered to through our Singapore affiliate Schellenberg Wittmer Pte Ltd.


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