

Press release

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FINMA closes investigation in Sulzer case

The Swiss Financial Market Supervisory Authority closed its comprehensive investigation into the Sulzer case, which it began in spring 2007. The investigation was prompted by a notice in April 2007 which disclosed that Everest Beteiligungs GmbH held a stake of more than 31% in Sulzer AG. In its declaratory ruling in January 2009, FINMA decided that the investors behind Everest, infringed their legal disclosure obligations. FINMA then rebuked the Zürcher Kantonalbank, the Zurich branch of Deutsche Bank AG and the NZB Neue Zürcher Bank for their involvement in this hidden stake building. In one case FINMA ordered that personnel measures be taken. FINMA furthermore filed a criminal complaint with the Federal Department of Finance against the investors who infringed their legal disclosure obligations.

On 30 October 2009, the Swiss Financial Market Supervisory Authority (FINMA) closed its investigation of the Sulzer case, the largest enquiry ever conducted by FINMA and its predecessor authority, the SFBC, in the area of market supervision.

Review of the investigation into the Sulzer case

On 26 April 2007, Everest Beteiligungs GmbH, Vienna, reported that it held more than 31% in Sulzer as at 20 April 2007. This stake comprised almost 18% in equity and about 14% in options. The beneficial owners of Everest at that time were Victor F. Vekselberg, the RPR private foundation, Vienna (beneficial owner: Ronny Pecik), and the Millennium private foundation, Vienna (beneficial owner: Georg Stumpf). None of these investors has ever disclosed any holdings in Sulzer.

After conducting a comprehensive and very detailed investigation, FINMA issued an initial declaratory ruling on 22 January 2009 in which it decided that the investors Ronny Pecik Sr. and his associate Georg Stumpf misused formal cash settlement options to obtain potential control over voting rights attached to shares or physically settled options. For this reason, these positions were attributable to Ronny Pecik Sr. and Georg Stumpf. Such a strategy corresponds to an indirect acquisition according to stock exchange legislation and is therefore subject to disclosure obligations. Both investors appealed against the FINMA ruling; the proceedings are pending before the Federal Administrative Court.

Subsequent to this ruling and based on information received through international assistance, FINMA filed a criminal complaint with the Federal Department of Finance against the three investors for breach of their disclosure obligations.

The role of the banks

Along with the proceedings against the investors, FINMA and previously the SFBC examined the role played by the banks which were involved in the Sulzer stake building. In rulings dated 22 January 2009, 13 July 2009 and 19 October 2009, FINMA decided that the Zürcher Kantonalbank (ZKB), the Zurich branch (DBZ) of Deutsche Bank AG and the NZB Neue Zürcher Bank (NZB) in part seriously breached their legal duties while issuing and trading Sulzer AG securities. All three banks aided and abetted the investors in secretly building their stake in Sulzer AG, even if they did so to a different extent and at different times. FINMA discovered some grave organizational deficiencies at all three banks although none of them breached the disclosure rules. Those deficiencies were in the meantime resolved.

The individuals at ZKB and DBZ responsible for the Sulzer stake-building had already left the banks at the end of the proceedings, making consideration of personnel measures unnecessary. This was not the case at NZB, which is why FINMA ordered personnel measures vis-à-vis the bank .

General conclusion for banks and securities dealers in Switzerland

Under current practice, the economic background of an intended transaction on behalf of clients must be clarified if there are indications that the transaction may be part of an illegal or immoral scheme or if the transaction is complex, unusual or significant. The management of banks or securities dealers must notably compile all documentation related to risky transactions which is necessary for decision making and supervision. This documentation must enable a specialist third-party (e.g. an auditor) to come to a reliable conclusion about the transaction. The amount of the transaction, unusual dealings and not least the willingness of a client to offer a bank considerable compensation for its services are at any rate signs which should prompt banks to further clarify the situation. A clarification of the economic background is also substantially necessary for risk assessment (e.g. reputation risk) from a material perspective. If banks neglect to perform this clarification and review, they assume the risk of becoming involved in or financing business with an objectionable purpose. Banks may carry out unusual transactions, provided they exercise due diligence and ensure the proper conduct of business. However, they must first clarify the situation and compile the documentation required in such a case, develop an informed opinion about the intended transaction and, based on this, also abstain from conducting a transaction which has been deemed to be potentially illegal.

General conclusion for investors

FINMA makes it clear through its investigation into the Sulzer case that it is serious in enforcing the disclosure rules. FINMA will not shrink from handling significant investigations and, after completion, take the necessary measures.

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