Eidgenössische Finanzmarktaufsicht FINMA
Autorité fédérale de surveillance des marchés financiers FINMA
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Mark Branson, CEO

Enforcement

Ladies and Gentlemen

I am very pleased to hold the opening speech of this year's journée de droit bancaire.

Yesterday, we announced that Bank Coop has been guilty of repeatedly and significantly manipulating the price of its own shares in the Swiss market over a period of many years. Not only did we take corrective measures against the bank, we also banned its former CEO from the industry for a period of three years.

Why is this case interesting?

Not only because the bank advertises itself under the claim "fair banking". Not only because it sends a clear message that manipulating the price of shares in the Swiss market will not be tolerated.

Not only because it shows that those who manipulate get caught.

But also because it shows that we will seek out those who are personally responsible for manipulation or other misconduct and we will remove them from the industry, however senior they are.

Why do I mention this today? Because I want to focus my remarks on one particular aspect of our work at FINMA - on enforcement. What is it, why do we do it, and what can the industry and its employees expect from us?

How and when we enforce and who we target is one of the most controversial aspects of our work. The expectations are high – not only should we find those responsible for misconduct and sanction them –we should also send clear messages as to what is allowed and what not. Simply put, we should also deter.

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We have around 80 staff members who work only in enforcement, who we can define as the strong arm of FINMA. The team who steps in when polite enquiry, moral suasion or consensual dialogue is not enough to solve a problem. They are few. And like those in other walks of life who have to enforce sometimes unpopular rules they are those among my employees who are most regularly criticized, pressured, or even threatened.

So first of all, I would like to pay tribute to their work, which is never easy. The case of Bank Coop is a great example of how enforcement can work. Our team *themselves* took the initiative to investigate the market in banks' own shares, after manipulation was proven at Valiant Bank. They *themselves* identified the suspicious outliers where share prices seemed not to move in a logical manner and started investigating the data. They trawled through e-mails and telephone tapes. And in the end they brought a shocking but convincing picture of deliberate market manipulation into the public domain.

And by communicating the successful conclusion of their case, we can do our utmost to make sure that those who think about manipulating markets here think again. Our message is: if you try, you will be caught; and if you are caught, your career will not be the same afterwards.

These words may seem oversimplified and harsh. But the extent of misconduct we have seen around the world in recent years, from rates benchmarks like LIBOR to sanction-busting to possible manipulation of the FX market leaves us as supervisor no option. Markets and indeed banking itself are based on trust. The financial system depends on that trust. Misconduct erodes trust. It is our job to give trust a chance to return.

That is the simple reason why I would like to devote today's speech to enforcement. To the way we establish violations of supervisory law, how we restore compliance with the law, and how we have a deterrent effect.

It is also the reason why we have published today some simple principles as to how we conduct enforcement, how we prioritize enforcement, and how we communicate enforcement.

Traditionally, the role of the financial industry supervisor has been primarily about the stability and security of institutions. About capital and liquidity, the so-called prudential measures. My argument is that stability depends also on whether the industry can be trusted and that how we incentivize better conduct is therefore also central to long-term stability.

In a first part, I will focus on our enforcement philosophy and strategy. In a second part, I will concentrate on how we sanction. I will conclude with a look at the upcoming challenges for our enforcement team.

Enforcement as the extended arm of supervision

By the term “enforcement” we mean our activities to establish violations of law and restore compliance with the law. Enforcement is a means for us to fulfil our mandate: The protection of creditors, investors, insured persons and the proper functioning of the financial market.

We use enforcement as a visible (note, visible) means of achieving these objectives. Enforcement as such is not an end in itself. It is the last stage of the supervisory process, when the normal supervisory dialogue reaches its limits. It is also our toll to keep unwanted actors and fraudsters out of the market in the first place.

In normal cases, the boundaries between supervision and enforcement are clear-cut. Supervision consists of an ongoing exchange with the supervised institution. This exchange can take various forms and involve different themes.

Enforcement, on the other hand, works on one case at a time. On average, only ten percent of our enforcement investigations lead to a formal procedure. The rest are either resolved via the normal supervisory channel or the initial suspicion is not substantiated.

The more important however the enforcement issue, the more likely the spillover to supervision. If the violation of law is so grave as to threaten the survival of an institution for instance, we can no longer supervise the institution in a “business as usual” mode. In extreme cases, such as a liquidation, supervision comes to an end.

As a consequence, we have established a firm governance separation between enforcement and supervision. Supervision and enforcement are conducted by different FINMA employees. And formal decisions on all important cases are taken by a committee of my Executive Board, not by the case managers themselves.

These decisions can alter careers and can alter the future of financial institutions. They belong at the top table.

Restore and prevent

Financial market supervision in Switzerland in general has a preventive goal, not a punitive one. As stated in the law, “FINMA shall ensure the restoration of compliance with the law”.

We are not a prosecution authority. We do not have the competence to fine. Our main goals remain good order and prevention.

We want to send clear signals to market participants about what is permissible and what is not. When we get it right, the effect is undoubted.

Our enforcement activities for instance have helped sensitize market participants to the risks associated with violations of foreign sanctions. We have clearly signalled through enforcement cases the need for banks to take extreme care in handling politically exposed persons as clients. And we have repeatedly signalled that manipulating share prices in the Swiss market cannot be tolerated.

Growing importance

Enforcement has grown in importance in recent years. The number of investigations has tripled to over 750 per year since 2009. In 2013, we issued 110 formal enforcement rulings, more than ever before in the history of FINMA.

Between January and October 2014 we issued eleven rulings against supervised institutions, covering various themes. For example, four cases were in connection with money laundering.

We have also stepped up our efforts against individuals found to be clearly responsible for serious breaches of supervisory law. We have initiated 33 procedures against individuals since 2013. Most of them related to market manipulation or illegal activities in cross-border wealth management. In 2014 alone, we issued 23 rulings against individuals.

There are a number of reasons for this development:

First, the environment is more challenging than it used to be: new paradigms in wealth management, low interest rates, shrinking margins, lower client activity. The pressure to nevertheless achieve results increases the danger of more aggressive business practices that test the legal boundaries.

Second, and most importantly, the growing number of enforcement cases is a direct result of the repeated conduct problems in the financial industry.

Third, we cooperate better across borders, and technology gives us better tools. We are in the midst of investigations into the global foreign exchange markets of unprecedented scale and depth. The cooperation between regulators across the globe is seamless as never before. There is simply no hiding place.

Fourth, as a deliberate strategic decision, we have become more proactive. We have shifted internal resources to our enforcement department, increasing the amount of employees by almost 50 percent. Overall, around fifteen percent of our workforce works on enforcement. And as part of this shift, and I quote from the principles we have published today: “FINMA takes targeted action against individuals responsible for serious breaches of supervisory law.”

Why the increased focus on individuals? Firstly, because individuals drive misconduct, not institutions. And individuals need to know that they have something to lose. And secondly, because deterrence by sanctioning institutions does not seem to have been having the desired effect. We have seen a massive inflation in financial penalties against financial institutions around the world. We have not seen a corresponding improvement in conduct.

Industry ban

Turning to our sanctions. As I said earlier we do not have the competence to fine institutions and individuals. However, we have made increasing use of enforcement instruments that were added to our arsenal with the creation of FINMA in 2009: the prohibition from practising and the possibility to confiscate profits. These instruments do not apply retroactively to misconduct dating from before 2009, which explains why their use has only slowly been building up.

We have the ability to ban people from the industry for a period of up to five years. The primary goal of this measure is to protect the public and institutions themselves from individuals that do not play by the rules. We choose the cases where we use this measure carefully. However, if we establish a serious breach of supervisory law, we will not shy away from it. Since 2010, we have issued sixteen industry bans, the last one yesterday.

Six of these cases involved market manipulation. We have also banned individuals who deliberately took disproportionately aggressive business decisions in cross-border wealth management or grossly neglected their duty of care as board members.

It is important that we establish either direct involvement or gross negligence. For example, it is not for us to decide whether the most senior management of a bank with problems in the US cross-border business deserve to stay at their posts or not, if we have no evidence that they did nothing other than operate a private bank with a business model that was broadly accepted in Switzerland at the time.

We will not go beyond our mandate to seek out and sanction misconduct, and enter into political or commercial value judgments.

Disgorgement of profits

The second new instrument is the capacity to order the disgorgement of profits not for the benefit of our budget, but that of the federal government. This applies to profits that a supervised entity or a responsible person in a management position has made through a serious violation of the law. It is not always easy to ascertain the exact amount. If this is not possible, then we are permitted to make an estimate.

In 2013, we ordered the disgorgement of profits amounting to several million francs generated through market manipulation by both Basler Kantonalbank and Incore Bank. And the most prominent example of confiscation to date is obviously the LIBOR case, where UBS disgorged 59 million francs. We have also recently confiscated for the first time profits obtained through breaches of money-laundering regulations.

As to the ability to impose punitive fines I am sceptical. As I said earlier, the deterrent effect elsewhere in the world seems not to be proven, despite an inflation that is difficult to understand. And sometimes a fine can seem like the easy way out. We are forced to be more targeted and more specific in the way we restore compliance.

For example, in the well-known Adoboli rogue trader case where we found the control environment in UBS's investment bank to be wholly insufficient we banned that division from any acquisitions until they had remediated the control gaps in question, and had them submit to us for clearance any initiatives which would materially increase the complexity of the bank. Very intrusive, very unpleasant, but very effective. A fine is announced today, paid tomorrow, and in the recycling heap of newspapers the

day after. Sanctions that target exactly the misbehaviour of the business in question can have a lasting effect.

Gatekeeper, cleaner and assistant

Before I conclude there are a couple of additional fields that I would like to quickly touch upon. The first is a role that could be described as a gatekeeper: removing unauthorized players.

We receive several thousand reports of possible unauthorized activities every year. Within this population we focus on cases where large numbers of investors or important sums of money seem to be at stake. In 2013 alone, we sanctioned 111 unauthorized companies and 118 individuals. This is more than twice as many as in 2011.

Second, we are responsible for conducting both resolution and bankruptcy proceedings in relation to financial institutions with the goal of paying out creditors as quickly as possible. As of today, 105 insolvency and 41 liquidation proceedings are ongoing.

Third we are the hotline for official requests for cooperation from foreign supervisory authorities. The main purpose of this cooperation is to exchange information about potential offences such as insider trading, market manipulation, breaches of reporting requirements or illegal solicitation of investors.

As a country, we receive the third largest number of requests for international administrative assistance worldwide. In 2013, we received almost 500 requests, three times as many as in 2009. Here we tread a difficult path between our duty to cooperate in solving such cases as a paid-up member of the international financial community, and the unique provision that we still have here to pre-inform clients that they are under suspicion before providing information, giving them the chance to evade detection. The resolution of this dilemma is currently before parliament.

Credibility as an international financial centre

Let me conclude with a couple of words about what the future holds.

Firstly, our success in deterring misconduct depends on our enforcement activities being known, being visible. While we must by law be selective in how we inform about individual cases, we will increase the transparency over our enforcement practice by publishing an annual report on the types of cases

we have processed and the themes that have concerned us. We want the industry to know how we view conduct issues and how we interpret the law.

Secondly, we increase our focus on individuals clearly responsible for violating law and regulation.

And third, we will continue to improve our forensic capabilities to analyse and prosecute the increasingly complicated and international cases that come to our attention.

Our biggest challenge, in the past as well as in the future, is to find the right balance between “under” enforcement and “over” enforcement. On the one hand, we need to be visible and effective with our enforcement. On the other hand, we will never have the resources to pursue all the potential violations of supervisory law out there.

We have 80 enforcement staff. The better they do their job, the greater the deterrent effect, (and the less they will be needed in the future).

Nobody wants to imagine a world where policing is ever more intrusive and ever more present. The key to avoiding that lies in a better self-discipline of the industry itself. And a return to values that would make “fair banking” a plausible description of our financial industry as a whole.

Thank you very much for your attention.