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August 10, 2021

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Substituted Compliance Application for Swiss Bank Security-Based Swap Dealers from Certain Requirements under Exchange Act Section 15F and Regulations Thereunder

Dear Ms. Countryman:

We are submitting this application on behalf of UBS AG and Credit Suisse AG to request that the Securities and Exchange Commission (“Commission” or “SEC”) make a determination with respect to the risk control, recordkeeping and reporting, and internal supervision and compliance requirements under Swiss law specified herein that compliance with these Swiss law requirements by systemically important banks organized in Switzerland and subject to the oversight of the Swiss Financial Market Supervisory Authority (“FINMA”) satisfies the analogous requirements applicable to a security-based swap dealer (“SBSD”) that has a Prudential Regulator under Sections 15F of the Securities Exchange Act of 1934 (“Exchange Act”) and regulations thereunder.

While the substance of the enclosed application would be relevant for all Swiss firms meeting the above criteria, it is tailored to the activities of UBS AG and Credit Suisse AG. We would note in this regard that we are not requesting substituted compliance for certain SBSB obligations owing to the fact that both UBS AG and Credit Suisse AG have a Prudential Regulator as defined by the Exchange Act.

The enclosed application proceeds in four sections, with each section responsive to one or more of the elements of a substituted compliance application described in the Commission staff's guidance, *Elements of an Application for Substituted Compliance for Foreign Security-Based Swap Dealers and Major Security-Based Swap Participants*:¹

- Section I responds to element one of the staff's guidance by describing the scope of this substituted compliance request.
- Section II addresses elements two and three of the staff's guidance together by describing the Exchange Act requirements and relevant Swiss law requirements, as well as analyzing the comparability between the two.
- Section III addresses element four of the staff's guidance by including information compiled by UBS AG and Credit Suisse AG as well as further information from FINMA, in each case relating to FINMA's supervisory compliance program and enforcement authority.
- Section IV addresses element five of the staff's guidance, containing the certifications by UBS AG and Credit Suisse AG and opinion of Swiss counsel described in Exchange Act Rule 3a71-6(c)(2)(ii). UBS AG and Credit Suisse AG recognize that these certifications and the opinion of counsel are limited in scope to matters relevant to this substituted compliance application, whereas the certifications and opinions that UBS AG and Credit Suisse AG will be required to provide pursuant to Exchange Act Rule 15Fb2-4(c) as part of their applications for registration will not be so limited. UBS AG and Credit Suisse AG each represent that, on and after November 1, 2021 for so long as each is registered as a security-based swap dealer, the assumptions set forth in the opinion of counsel set forth in Section IV (other than assumptions 5.6, 5.8, 5.9, and 5.14, which pertain to matters regarding the SEC and FINMA) will be true and accurate in all material respects.

With regards to the remaining elements of the staff's guidance, it is our understanding that Commission staff and FINMA have been separately engaged in discussions to address supervisory and enforcement arrangements between the Commission and FINMA addressing matters arising under the requested substituted compliance determination (element six of the staff's guidance).

¹ The enclosed application also includes an Annex setting forth certain defined terms and citations.

We welcome the opportunity to discuss the application and its contents with Commission staff in further detail. Please do not hesitate to reach out with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Colin D. Lloyd', with a stylized, flowing script.

Colin D. Lloyd

I. Element One: Scope of this Substituted Compliance Request

We are submitting this substituted compliance application with regards to UBS AG and Credit Suisse AG, which for the purpose of this application includes any foreign branches of both entities (collectively, “Swiss banks”). Under Swiss law, the Swiss National Bank (“SNB”) is empowered to define whether a bank is systemically important, and such banks are subject to enhanced requirements regarding capital, liquidity, risk, and organization.¹ In 2012, SNB issued decrees designating UBS and Credit Suisse as financial groups of systemic importance.²

Swiss banks are subject to comprehensive supervision and examination by their home country regulator, FINMA. The BA provides that a bank requires a banking license from FINMA in order to conduct banking activities and to register as a bank in the Swiss Commercial Register. As pre-requisites for obtaining and maintaining a banking license, a Swiss bank has to comply with comprehensive capital, liquidity, risk, risk management and risk control, organizational as well as governance requirements.

As laid out in detail in the substantive sections below, this application seeks comparability determinations by the Commission between requirements under Swiss law applicable to a Swiss bank on an entity-wide basis and certain parallel provisions of the Exchange Act and Commission regulations thereunder eligible for substituted compliance under Exchange Act Rule 3a71-6(d). We note in this regard that we are *not* requesting substituted compliance for certain SBSB obligations, including (1) margin, capital and other SEC rules not applicable to SBSBs with a Prudential Regulator,³ and (2) SBSB external business conduct requirements.⁴ We note in this regard that both Credit Suisse AG and UBS AG only conduct SBS transactions facing U.S. customers through branches located outside of Switzerland (and UBS AG only conducts such transactions through its London branch, in particular). Accordingly, Swiss law provisions parallel to the SBSB external business conduct requirements are not applicable to such transactions and are therefore outside the scope of this application.

¹ See BA Articles 8(3) and 9.

² See SNB Press Release, Decrees issued by the Swiss National Bank concerning systemic importance (Dec. 20, 2012), available at https://www.snb.ch/en/mmr/reference/pre_20121220/source/pre_20121220.en.pdf. See also FINMA Resolution Report 2020 at 6 (Feb. 25, 2020), available at <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/resolution-bericht/20200225-resolution-bericht-2020.pdf?la=en> (identifying UBS and Credit Suisse as the only two globally systemically important Swiss banks). Note also that pursuant to Article 2 and Appendix 3 of the BO, FINMA assigns its supervised banks and securities firms to one of five categories, with Category 1 including large institutions that could potentially destabilize the Swiss financial system. UBS AG and Credit Suisse AG have been designated as a Category 1 institution.

³ Specifically, the following rules are eligible for substituted compliance but do not apply to prudentially regulated SBSBs:

- (1) capital requirements: Exchange Act Rules 18a-1;
- (2) margin requirements: Exchange Act Rule 18a-3;
- (3) certain recordkeeping requirements: Exchange Act Rules 18a-5(a)(2), (8), (9) and (12), 18a-6(b)(1)(ii), (iii), (v), (viii) (except for requirements regarding preserving the segregation-related possession or control information), (ix), and (x); and
- (4) certain recording requirements: Exchange Act Rules 18a-7(b)(1) and (2) and (c), 18a-8(a)(1) and (e), and 18a-9.

⁴ Specifically, Exchange Act Rules 15Fh-3(b) through (g) are eligible for substituted compliance but generally apply only to a non-U.S. SBSB’s activities involving U.S. counterparties (unless the transaction is arranged, negotiated or executed in the United States).

II. Elements Two and Three: U.S. Requirements for Which UBS AG and Credit Suisse AG Request Substituted Compliance, Swiss Requirements that are Comparable to Such U.S. Requirements, and How They are Comparable

This section describes relevant Exchange Act requirements applicable to SBSDs, and for which we request substituted compliance, as well as analogous Swiss law obligations, and further explains how those requirements are comparable.

We note that Swiss law and regulation are in general issued in principle-based form. Therefore, certain requirements and obligations are not explicitly worded in the legal text, but are implemented in practice. FINMA has the authority to issue circulars through which statutory provisions are further detailed and implemented in practice. Although in a strictly legal sense these circulars merely represent FINMA's standard interpretation of how the law should be understood and implemented in the banking practice, such circulars are binding for the supervised entities as well as FINMA itself. FINMA also uses "newsletters" to communicate important information to supervised institutions, providing them with guidance on regulatory matters (supervisory guidance). Such newsletters are binding for FINMA in their supervision activity and FINMA may only deviate from statements in such newsletters in exceptional circumstances. Courts in practice honor FINMA circulars as expressions of FINMA's discretion as specialized expert authority and would not deviate from a rule expressed in such a circular. Courts also rely on "explanatory reports" as an official source for interpreting the relevant rules for the supervisory authority and for interpreting the meaning of a legislative provision.⁵ In addition, further specifications may be added through court practice as well as the legal literature, as specified as a general principle in Swiss law (Article 1(3) SCC). Therefore, in certain areas, references to standard Swiss legal literature are included in the absence of court practice.

We also note that the relevant Swiss laws cited below, *i.e.*, BA (and the ordinances and regulations thereunder), FinMIA, FINMASA, the referenced circulars issued by FINMA, AMLA, corporate obligations arising from the CO, all apply to the Swiss banks, including their foreign branches. FINMA is responsible for enforcing and supervising the application of relevant Swiss law to the foreign branches of Swiss banks. Further, the provisions of the FinMIA apply to derivatives transactions of a Swiss bank with both Swiss and foreign counterparties (*e.g.*, as regards risk mitigation, Article 107 FinMIA in connection with

⁵ See, *e.g.*, Decision of the Federal Tribunal 123 V 310, Cons. 4; 116 II 525 Cons. 2b. "Die Gesetzesmaterialien im besonderen können namentlich dann, wenn eine Bestimmung unklar ist oder verschiedene, einander widersprechende Auslegungen zulässt, ein wertvolles Hilfsmittel sein, um den Sinn der Norm zu erkennen und damit falsche Auslegungen zu vermeiden. Wo die Materialien keine klare Antwort geben, sind sie als Auslegungshilfe nicht dienlich. Insbesondere bei verhältnismässig jungen Gesetzen darf der Wille des historischen Gesetzgebers nicht übergangen werden. Hat dieser Wille jedoch im Gesetzestext keinen Niederschlag gefunden, so ist er für die Auslegung nicht entscheidend." (Working translation: "The legislative materials can specifically then, when a provision is unclear or when it allows for different or contradictory interpretations, be a valuable tool to interpret the sense of a norm and to discard false interpretations. Where the materials do not contain a clear response, they are not helpful for the interpretation. Particularly in the case of relatively young laws, the will of the historic legislator cannot be bypassed. However, if the will of the legislator has not found its resonance in the wording of the legislative text, it is not decisive for the interpretation.") Swiss Federal Tribunal is the Swiss equivalent to the United States Supreme Court.

Article 106 FMIO).

Where relevant, the Swiss law and FINMA requirements have been excerpted from official (non-binding) translations. Where such official translations do not exist, we relied on publicly available working translations by KPMG. The comparison in this document is based on the law, rules and regulations currently in force. References to anticipated changes to laws and regulations, if any, have been included where considered appropriate.

In making its substituted comparability determination under Exchange Act Rule 3a71-6, the Commission noted that it shall consider the overall comparability of the U.S. and foreign regulatory regime based on “factors as the Commission determines are appropriate,” such as “the scope and objectives of the relevant foreign regulatory requirements.” Importantly, the Commission has stated that it will “take a holistic approach” when comparing the two regimes, and “will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.”⁶ In their guidance, Commission staff request that applications for substituted compliance address the general comparability of the foreign regulatory regime’s requirements and analogous requirements under the Exchange Act, including any general differences between the two sets of requirements and the consistency of the two sets’ objectives, as well as certain specific questions relating to particular rule areas. The Commission has further acknowledged that different regulatory systems may be able to achieve similar regulatory outcomes with fewer specific requirements than the Commission, and that the Commission would consider the foreign business and market practices that inform the foreign regulatory system.⁷ In light of this more holistic approach, the Commission’s assessment considers whether the foreign regulatory requirements adequately reflect the interests and protections of the Exchange Act and Commission rules.⁸ Accordingly, while we have set out the respective requirements under the Exchange Act and Swiss law at a granular level in the charts below, we also highlight how the principles-based approach under Swiss law leads to similar regulatory outcomes as the relevant Exchange Act requirements.

We would also like to highlight that Swiss law was determined by the Commodity Futures Trading Commission (“CFTC”) in 2013 to be comparable with certain provisions of Title VII of the Dodd-Frank Act and CFTC regulations. Since the substituted compliance determination by the CFTC, Switzerland’s regulatory framework with respect to trading of OTC derivatives has been substantially enhanced in accordance with the G20 commitments to reform global OTC derivatives markets.

In response to the staff guidance, this section is organized as follows. Subsections one through three address, in turn, the comparability of (1) risk control requirements, (2) recordkeeping and reporting requirements, and (3) internal supervision and compliance requirements. For each category we provide (a) a short narrative analysis of the general comparability between the two sets of requirements, including any general differences between the two, (b) a description of the consistency of the two sets’ objectives, and (c) responses to the specific questions set forth in the staff guidance and a requirement-by-requirement comparison between the two sets of

⁶ 81 Fed. Reg. at 30078.

⁷ Id.

⁸ Id.

requirements.

1. Risk Control Requirements

Below we address those aspects of Swiss law corresponding to Commission requirements relating to: (a) internal risk management; (b) trade acknowledgment and verification; and (c) portfolio reconciliation, portfolio compression, and trading relationship documentation. Because each of UBS AG and Credit Suisse AG has a Prudential Regulator (as defined by Exchange Act Section 3(a)(74)) and accordingly will not be subject to the Commission's capital or margin requirements, this application does not address those requirements, nor does it address those Commission internal risk management requirements not applicable to an SBSB that has a Prudential Regulator.

a. Internal Risk Management Requirements

The risk management framework in Swiss financial market law requires a Swiss bank to implement a comprehensive risk monitoring and mitigating framework for all of its business units, including the derivatives business. As demonstrated in the table below, this framework meets the standards and goals of the applicable Exchange Act and Commission requirements for an SBSB to establish robust and professional risk management systems adequate for managing its day-to-day business (including policies and procedures reasonably designed to comply with the duty to establish such systems) by establishing a series of high-level principles and detailed requirements relating to risk management. Accordingly, Swiss law is comparable to these Exchange Act and Commission requirements.

We further note that the CFTC has determined that Article 12 of the BO, FINMA Circular 2008/24, and the Liquidity Ordinance are largely comparable to the risk management requirements applicable to swap dealers under CFTC Rule 23.600.⁹ CFTC Rule 23.600 was adopted by the CFTC pursuant to CEA Section 4s(j)(2), which is identical to Exchange Act Section 15F(j)(2).

⁹ 78 Fed. Reg. at 78,904. We note that Article 9 of the BO referenced in the CFTC comparability determination has since been renumbered as Article 12.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
1. To what extent are firms required to implement internal risk management controls?	Under SEC Rule 15Fh-3(h)(2)(iii)(I), a prudentially regulated SBSB is required to maintain and enforce written policies and procedures sufficient to comply with the requirements of Exchange Act Section 15F(j)(2). Exchange Act Section 15F(j)(2) requires that SBSBs “establish robust and professional risk management systems adequate for managing [their] day-to-day business.”	<p><i>In General.</i> Swiss banks have the obligation to establish a comprehensive risk management framework, including up-to-date, written directives, policies and manuals. Article 12(2) BO; Marg. 52 ff. FINMA Circular 2017/1.</p> <p><i>Governance.</i> The BoD is ultimately responsible for enacting a Swiss bank’s risk management policies. Marg. 10 FINMA Circular 2017/1. The chief risk officer (“CRO”) for systemically important institutions must be a member of the executive board. Marg. 68 FINMA Circular 2017/1. Systemically important banks must at least appoint a CRO who is a member of the executive board, and the CRO may also serve as the head of the Compliance function as the chief compliance officer (“CCO”). Marg. 67, 68 FINMA Circular 2017/1. The executive board must develop and maintain effective internal processes, an appropriate management information system and an internal control system. Marg. 50 FINMA Circular 2017/1. Regular reporting to the BoD, Internal Audit, and a regulatory (external) audit firm is required every six months. Marg. 75 FINMA Circular 2017/1. Material incidents must be reported promptly to the BoD. Marg. 76 FINMA Circular 2017/1. The risk committee of the BoD must review the reports and present recommendations to the entire board. Marg. 41 FINMA Circular 2017/1.</p> <p><i>Three Lines of Defense.</i> FINMA Circular 2017/1 separately defines revenue-generating units, independent control bodies (which always include the risk control and compliance functions), and Internal Audit. Thus, the Swiss risk control framework is based on:</p> <ul style="list-style-type: none"> (1) the first line of defense: a control function within the revenue-generating units; (2) the second line of defense: independent control bodies supervising the revenue-generating units on a more holistic level 	Like the Exchange Act, Swiss law imposes requirements on a Swiss bank to control and manage risks relating to its day-to-day SBS business. While Swiss requirements are far more prescriptive than the general obligation under Exchange Act Section 15F(j)(2) – indeed, in many respects similar to the requirements that the Commission applies to non-bank SBSBs – the regulatory goals and policies underlying Swiss requirements are the same as the Commission’s requirements, and ultimately, the rules achieve similar outcomes.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>(risk control and compliance),¹⁰ with the risk control unit responsible for developing and applying systems for risk analysis and assessment, monitoring whether the bank’s profile is in line with the bank-wide risk framework, and defining risk limits and ensuring that risk limits are consistent with the defined risk tolerance;¹¹ and (3) the third line of defense: an independent internal audit function that reports directly to the BoD, and does not report to the executive branch of the firm (such as the CCO or CRO).¹² Marg. 60 ff. & Marg. 82 ff. FINMA Circular 2017/1.</p> <p>Risk Management Systems. A Swiss bank’s risk management system needs to take into account:</p> <ul style="list-style-type: none"> • standardized categorization of key risks (including legal risks) to ensure consistency with risk management; • specification of potential losses from these key risk categories; • definition and application of the tools and organizational structures required to identify, analyze, evaluate, manage and monitor the key categories and for reporting purposes; • development of documentation which enables appropriate verification of the definition of risk tolerance and the corresponding risk limits; and • provisions relating to risk data aggregation and reporting. In the case of systemically important institutions, including 	

¹⁰ There must be a person responsible for independent control bodies, risk control and compliance units must be independent from revenue generating units, and incentives for the employees of the risk control unit must not lead to conflict of interests. Marg. 63 and Marg. 64 FINMA Circular 2017/1. Annual reports from risk control and compliance are required for review by regulatory audit. Marg. 75 and Marg. 80 FINMA Circular 2017/1; Article 24 FINMASA.

¹¹ Institutions must ensure that the risk control unit has the necessary resources and powers. Marg. 64 FINMA Circular 2017/1.

¹² Internal Audit, which is organizationally separate from the independent control bodies, must perform reviews of the control functions and report at least annually to the BoD, the Management Executive Board and the regulatory audit firm. Marg. 91 and Marg. 96 FINMA Circular 2017/1.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>UBS AG and Credit Suisse AG, these provisions must include information about data architecture and IT infrastructure, which enable an aggregated and timely risk analysis/assessment and risk data aggregation/reporting across all of the institution’s key risk categories both under normal circumstances and in periods of stress. Marg. 54 ff. FINMA Circular 2017/1.</p> <p>The risk management system has to be adapted for each specific business unit, including monitoring of individual risk positions. Marg. 69 FINMA Circular 2017/1.</p>	
<p>2. What types of risks are those internal controls required to address?</p>	<p>A prudentially regulated SBSB is required to maintain and enforce written policies and procedures sufficient to comply with the requirements of Exchange Act Section 15F(j)(2). 17 CFR 240.15Fh-3(h)(2)(iii)(I). Exchange Act Section 15F(j)(2) requires that SBSBs “establish robust and professional risk management systems adequate for managing [their] day-to-day business.”</p>	<p>The risk framework outlined above is designed to address the following risks, among others:</p> <ul style="list-style-type: none"> • Market risk, • Credit risk, • Default risk, • Settlement risks, • Liquidity risks, • Reputational risks, • Operational risks, and • Legal risks. <p>The risk framework shall be documented in regulations or internal directives. Article 12(2) BO.</p> <p>The framework should also be designed to cover all the businesses of the bank, including the derivatives business.</p>	<p>The specific risks required to be addressed by Swiss law through the risk framework described above are comprehensive and are comparable to the Exchange Act’s requirement to establish robust and professional risk management systems to manage the risks of a Swiss bank’s day-to-day SBSB business.</p>

b. Trade Acknowledgment and Verification Requirements

Swiss law includes an obligation on all counterparties trading OTC derivatives to issue and exchange reciprocal trade confirmations and a rule to agree on procedures for eliminating potential mismatches and discrepancies. Although the Swiss system (reciprocal confirmation) differs from the Commission's requirements (acknowledgement and verification), both rule sets share a common goal and provide for an effective way to achieve that goal. More specifically, both the Swiss and Commission confirmation requirements provide for the preparation, transmission, review and agreement to written documentation of SBS requirements, which is intended to address concerns regarding the documentation of derivatives "to reduce the risk a court may have to supply contract terms upon which there was no previous agreement," as well as to avoid a situation where unconfirmed trades could allow errors to go undetected that might subsequently lead to losses and other problems, such as firms inaccurately measuring and managing their risk exposures, which may contribute to broader market disruptions.¹³

Ultimately, the information that is required to be provided pursuant to Swiss law, and the manner by which that information must be provided, are comparable to those required pursuant to the applicable Exchange Act provisions and underlying rules and achieve a similar regulatory outcome. Therefore, we assess the Swiss scheme on transaction confirmation to meet the substituted compliance standard established by the Commission.

We would also note that Swiss law in this regard is closely aligned with EU confirmation requirements under EMIR,¹⁴ and FINMA has recognized EMIR confirmation requirements as equivalent to the FinMIA confirmation requirements discussed below.¹⁵ EMIR confirmation requirements, in turn, have been found comparable to parallel CFTC confirmation requirements,¹⁶ which are largely similar to the Commission's requirements in this area.

¹³ 81 Fed. Reg. at 39,809.

¹⁴ EMIR Article 11(1)(a)

¹⁵ FINMA Guidance 01/2016, Section 2.2.

¹⁶ 78 Fed. Reg. at 78,886.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>1. To what extent are transactions subject to trade acknowledgment, confirmation, or similar requirements that provide for the creation of definitive written records of the transaction?</p>	<p>The trade acknowledgement and verification requirements under SEC Rule 15Fi-2 apply to any transaction in which an SBSB “purchases from or sells to any counterparty a security-based swap.”</p>	<p>Swiss law generally requires both parties to an OTC derivatives transaction to provide a trade confirmation to their respective counterparties. Article 108 FinMIA; Article 95 FMIO. The trade confirmation requirement only applies to undertakings with a commercial purpose, and accordingly does not apply to transactions with counterparties that are neither financial counterparties nor non-financial counterparties (mainly natural persons). Article 77, 94(1) FMIO. The trade confirmation requirement is also subject to counterparty- and product- based exceptions. Specifically, trade confirmation requirement does not apply if:</p> <p>(1) At least one counterparty is an entity excluded under Article 93(4) FinMIA (<i>i.e.</i>, multilateral development banks and organizations owned or guaranteed by the Swiss confederation, cantons or communes), Article 94(1) FinMIA (<i>i.e.</i>, the Swiss confederation, cantons or communes, the Swiss National Bank and the Bank for International Settlements) and Article 94(2) FinMIA in connection with Article 79 FMIO (<i>i.e.</i>, foreign central banks, the European Central Bank, the European Financial Stability Facility, the European Stability Mechanism, official bodies or state departments that are responsible for or</p>	<p>Similar to the Commission rules, Swiss law requires trade confirmation. In contrast to Commission rules, which requires one counterparty to deliver a trade acknowledgement and the other counterparty to verify the trade acknowledgement, Swiss law’s trade confirmation mechanism generally requires each party to send a confirmation to the other.</p> <p>The exceptions to the trade confirmation under Swiss law are similar to those under EMIR and under the Commission Rules. Specifically: (1) the exception based on counterparty identity is analogous to the exception from the “swap” and “security-based swap” definitions in 7 U.S.C. 1a(47)(B)(ix) and from the “U.S. person” definition in SEC Rule 3a71-3(a)(4)(iii); (2) the exception based on product type is similar to exclusions laid out in Title VII of the Dodd-Frank Act.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>involved in administering the national debt and financial institutions set up by a central government or by the government of a subordinate regional body in order to grant promotional loans on the state's behalf on a non-competitive, non-profit-oriented basis); or</p> <p>(2) If the relevant products are (i) products that do not qualify as derivatives within the meaning of FinMIA as a whole (cf. Article 2(c) FinMIA in connection with Article 2(3) FMIO), (ii) products that do not qualify as derivatives within the meaning of the Title 3, Chapter 1 of FinMIA (cf. Article 94(3) FinMIA) and (iii) transactions exempted from the risk mitigation requirements (cf. Article 107(2) FinMIA), including (a) derivative transactions with counterparties within the meaning of Article 93(4) FinMIA and Article 94(1) FinMIA (as described above), (b) physically settled currency swaps and physically settled currency forwards, and (c) derivative transactions voluntarily cleared via a central counterparty authorized or recognized by FINMA (as opposed to derivative transactions subject to the Article 97 FinMIA mandatory clearing obligation, which are exempted from Article 108 FinMIA obligations by virtue of Article 107(1) FinMIA).</p>	
2. To what extent are transactions further	SEC Rule 15Fi-2(d) requires an SBSD to (1) establish, maintain, and enforce written	As noted above, Swiss law generally requires two-way confirmation. Although the two-way	Under Swiss law, any disagreement would generally be identified through the bilateral

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>subject to verification or similar requirements intended to identify disagreements regarding transaction terms?</p>	<p>policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment that it sends to and (2) promptly verify the accuracy of, or dispute with its counterparty, the terms of a trade acknowledgment it receives.</p> <p>The Commission noted in adopting SEC Rule 15Fi-2 that an SBSB may also engage in unilateral confirmation through negative consent of the counterparty to the terms of a trade acknowledgment, provided the counterparty agrees to be bound by negative consent and that there is adequate time after the counterparty receives the trade acknowledgment to dispute its terms or otherwise respond to the trade acknowledgment. <i>See</i> 81 Fed. Reg. at 39,820.</p>	<p>confirmation requirement does not explicitly stipulate an obligation to verify any confirmations received from counterparties, the dispute resolution obligation pursuant to Article 108(c) FinMIA, in connection with Article 97 FMIO, requires counterparties to agree on procedures aimed at the “identification . . . of disputes in connection with the recognition . . . of the transaction.”¹⁷ The requirement that the counterparties agree to a dispute resolution mechanism at inception when an OTC derivative trading relationship is established implicitly contains an obligation for the them to verify any confirmations received, because agreeing on a dispute resolution process without having to identify disputes would not achieve the regulatory purpose to “record, observe and mitigate operating risks and counterparty risks associated with derivatives transactions,” as stated by Article 108 FinMIA.</p> <p>An exception from the general two-way confirmation requirement is that counterparties may agree that an OTC derivative transaction is deemed confirmed by one counterparty, if it does not object to a unilateral confirmation by the other counterparty within the timeframe specified by Article 95 FMIO. The party receiving the unilateral confirmation must</p>	<p>confirmation process, which requires matching of trade confirmations by both parties. This would enable the verification of agreed-upon terms without the specific verification procedure as required under SEC Rule 15Fi-2(d). Further, both Swiss law and Commission rules allow the parties to agree to engage in unilateral confirmation of swap transactions.</p> <p>The regulatory goal behind the Commission’s requirement – prompt verification of a trade acknowledgement’s accuracy and identification of any dispute – would be achieved by the Swiss law under either bilateral or unilateral confirmation of OTC derivatives transactions due to the combination of confirmation and dispute resolution requirements.</p>

¹⁷ We note that, in this context, “recognition” refers to situations where one counterparty would dispute the existence of a binding contract/transaction or the terms as set out in a confirmation.

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		exercise due diligence with respect to the confirmation to ensure the timely resolution of any disagreements. Article 108(c) FinMIA; Article 97(2)(a) FMIO.	
3. What requirements govern the persons responsible for providing trade acknowledgments, confirmations or equivalent records? What requirements govern their contents, delivery and timing?	<p>Persons responsible for trade acknowledgement: For transactions between an SBS and an MSBS, the SBS will provide the trade acknowledgment. For transactions in which only one counterparty is an SBS or an MSBS, the SBS or MSBS will provide the trade acknowledgment. For all other transactions in which an SBS or an MSBS purchases or sells an SBS, the counterparties will agree as to who provides the trade acknowledgment. 17 CFR 240.15Fi-2(a).</p> <p>Content: The required trade acknowledgment comprises a written or electronic record of an SBS transaction sent by one counterparty to the other that discloses all the terms of the transaction. 17 CFR 240.15Fi-2(c).</p>	<p>According to Swiss law, both counterparties to an OTC derivatives transaction are generally required to issue a trade confirmation to the other party, although the parties may agree to engage in unilateral confirmation, in which case the parties would agree as to which party would receive the other’s confirmation. Article 108 FinMIA; Article 95 FMIO.</p> <p>The confirmation must include all material and essential terms (“<i>essentialia negotii</i>”) of the transaction, including, among other things, the definition of the underlying transaction, settlement date, payment and transaction dates and forum. Article 95 FMIO. The confirmation should also refer to applicable master agreements such as the applicable ISDA Master Agreement or other local master agreements.¹⁸</p>	<p>Under Swiss law, the mutual confirmation mechanism renders any rule governing the party responsible for providing trade confirmation unnecessary. The unilateral confirmation exception for OTC derivative transactions provides for a procedure allowing one party to accept the other’s confirmation, which is consistent with parties agreeing to rely on negative consent under Commission guidance as discussed above.</p> <p>Swiss law does not enumerate all the details required in a confirmation’s substance, but requires essential terms to be included. The Commission rule, on the other hand, requires disclosure of “all the terms.” Although the Commission rule is technically broader, confirmations under Swiss law in practice would not exclude terms that would ordinarily be included in a transaction, especially given the</p>

¹⁸ FMIO Explanatory Report, at 44 (“Die Bestätigung soll die wesentlichen Vertragsbedingungen enthalten und gegebenenfalls den Rahmenvertrag bezeichnen, unter dem das Geschäft abgeschlossen worden ist. Nachträglich zwischen den Gegenparteien vereinbarte Änderungen der wesentlichen Vertragsbedingungen sind dem Sinne dieser Bestimmung nach ebenfalls zu bestätigen, ausser wenn eine Vertragsbedingung automatisch aufgrund der ursprünglich vereinbarten Bedingungen angepasst wird oder angepasst werden muss.”) (working translation: “The confirmation shall contain the material contractual terms and, where applicable, reference the master agreement under which the transaction has been entered into. Changes to the material contractual elements agreed between the counterparties thereafter shall in accordance with this provision also be confirmed, except where a contractual term will be automatically amended or has to be amended pursuant to the original agreement.”) As noted above, the FMIO Explanatory Report is an official

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		Which conditions are essential depends on the character of the specific transaction. A non-essential provision would be any contractual detail that is not necessary for a binding agreement for a transaction or which is already stipulated by the underlying master agreement. Where the transaction is concluded under a master agreement, all non-transaction specific elements should already be covered by the master agreement, <i>e.g.</i> , provisions on governing law, amendments and terminations, margin, etc.	common usage of standardized master agreements. In addition, for an SBS subject to the ISDA Master Agreement, the same industry-developed templates for annexes and confirmations will be used irrespective of the regulatory regimes it is subject to, and accordingly, the same confirmation template with identical forms will be used to comply with obligations under SEC Rule 15Fi-2 as well as Article 108(a) FinMIA.
	Delivery: Trade acknowledgments must be provided through electronic means that provide reasonable assurance of delivery and a record of transmittal. 17 CFR 240.15Fi-2(c).	Swiss law does not provide for a specific means or format to be used for transmission of trade confirmations. In practice, however, confirmations are generally delivered through electronic means and are recorded, consistent with required processes and procedures which ensure compliance, <i>inter alia</i> , with the risk mitigation obligations. Article 113(1)(d) FMIO.	Both Swiss law and the Commission rule, in effect, require parties to have adequate procedures in place to ensure delivery and retention of acknowledgements or confirmations.
	Timing: Trade acknowledgments “must be provided promptly, but in any event by the end of the first business day following the day of execution.” 17 CFR 240.15Fi-2(b).	A trade has to be confirmed reciprocally at the latest within 2 business days following the conclusion of the transaction. If trades are concluded after 4 pm, parties will have one more business day to complete the confirmation. Deadlines for complex transactions and small counterparties are extended by one business day. Article 108(a) FinMIA; Article 95 FMIO.	Swiss law provides for a slightly longer timeframe for confirmations in certain instances than the Commission’s requirement. However, as no verification is needed for bilateral confirmations, the general 2-day timeline is comparable to the Commission’s requirements (1 day for acknowledgement, followed by “prompt” verification). In practice, the process of confirmation and verification under Swiss law

source of interpretation and used for interpreting how an FMIO provision applies to any entity subject to FMIO.

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		<p>Although Swiss law does not set out specific deadlines for unilateral confirmations, Swiss market practice is to apply the same timeline, generally requiring objections to be raised within the applicable confirmation deadline. Section 5.1, FMIA Agreement.</p>	<p>should generally be completed within the same timelines as under Commission rules.</p>
<p>4. What requirements govern the substance, policies and procedures, and timing associated with trade verifications?</p>	<p>“Trade verification” means “the process by which a trade acknowledgment has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.” 17 CFR 240.15Fi-1(i).</p> <p>An SBSB must “promptly” verify the accuracy of, or dispute with the counterparty, the terms of the trade acknowledgment. 17 CFR 240.15Fi-2(d)(2).</p> <p>SBSBs are required to “establish, maintain, and enforce written policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment.” Those policies and procedures apply regardless of whether the counterparty also is subject to the trade acknowledgment requirement. The policies and procedures may rely on a counterparty’s “negative affirmation” to the terms of a trade acknowledgment. 17 CFR 240.15Fi-2(d)(1); 81 FR at 39820.</p>	<p>As noted above, given that trade confirmations generally must be reciprocal (subject to the unilateral confirmation exception), Swiss law does not include independent requirements for verification. As laid out above, however, the practices of acknowledgment and verification are both in effect encompassed by the Swiss confirmation and dispute resolution requirements.</p>	<p>As noted above, the practices of acknowledgment and verification are both in effect encompassed by the Swiss confirmation and dispute resolution requirements. Specifically, verification of the accuracy of terms or identification of any dispute would be ensured by exchanging bilateral confirmations and resolving any disputes, or, where parties utilized the unilateral confirmation exception, by the receiving party’s due diligence and dispute resolution mechanism.</p> <p>The Commission rule requires SBSBs to have written policies and procedures to ensure prompt acknowledgement and verification, while Swiss law requires parties to agree in writing on the procedures to ensure compliance with the confirmation and dispute resolution requirements. In practice, both jurisdictions’ rules require sufficient policies and procedures to be in place.</p> <p>As noted above, Swiss law’s general two-day timeline for sending confirmations is comparable to Commission rules, which require</p>

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			acknowledgement to be provided within one business day of execution, followed by prompt verification. In practice, the process according to Swiss law would generally be completed within the same timelines as under Commission rules.
5. To what extent are those requirements subject to exceptions with regard to particular types of transactions?	The trade acknowledgment and verification requirements are subject to exceptions regarding transactions with a clearing agency as counterparty, certain transactions on execution facilities, transactions accepted for clearing, and additional provisions for transactions that have not been acknowledged, verified or accepted for clearing. 17 CFR 240.15Fi-1(b), 240.15Fi-1(c), 240.15Fi-2(e), 240.15Fi-2(f)(1), 240.15Fi-2(f)(2) and 240.15Fi-2(f)(3).	The trade confirmation process under Swiss law is subject to certain exemptions for centrally cleared products, consistent with other risk mitigation requirements discussed below, as well as exchange-traded derivatives. Article 107 FinMIA.	Swiss law is consistent with Commission rules in providing exceptions for centrally cleared SBS as well as exchange-traded derivatives from the trade acknowledgement and verification and confirmation requirements, respectively.

c. Risk Mitigation Requirements

Swiss law requires a set of operational risk mitigation measures to be observed when firms trade non-centrally cleared OTC derivatives.¹⁹ Article 107ff. FinMIA; Article 94 ff. FMIO. Swiss operational risk mitigation requirements include:

- portfolio reconciliation (Article 108 lit. b FinMIA; Article 96 FMIO);
- dispute resolution (Article 108 lit. c FinMIA; Article 97 FMIO);
- portfolio compression (Article 108 lit. d FinMIA; Article 98 FMIO); and
- valuation obligation (Article 109 FinMIA; Article 99 FMIO).²⁰

As described more fully below, the duties imposed by the Swiss financial regulatory system are comparable to those required pursuant to the applicable Exchange Act provisions and Commission rules:

- **Portfolio Reconciliation.** Because Swiss law and Commission rules both require reconciliation of portfolios with similar frequency depending on similar portfolio sizes, they share the same regulatory goal and effect, which is to “help to mitigate the possibility of a discrepancy unexpectedly affecting performance under the security-based swap transaction by increasing the likelihood that the parties are and remain in agreement with respect to all material terms,” and to identify valuation discrepancies in order to “identify problems with one or both of the counterparties’ internal valuation systems and models, or possibly even with a firm’s internal controls.”²¹ The key difference between these requirements is the reporting of valuation disputes, which Swiss law does not require to be reported to the Commission. Accordingly, to the extent the Commission finds that the lack of this specific Swiss law requirement prevents Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting the requested substituted compliance determination on the condition that a Swiss bank would comply with the Commission’s reporting requirement for disputes with respect to more than USD\$20 million pursuant to SEC Rule 15Fi-3(c) with respect to U.S. person counterparties.
- **Portfolio Compression.** Swiss requirements regarding portfolio compression align with the goal of parallel Commission requirements to reduce a market participant’s gross exposures to its counterparties, providing “important operational benefits and efficiencies for market participants in that there are fewer open contracts to manage, maintain, and settle, resulting in fewer opportunities for processing errors, failures, or other problems

¹⁹ We note that the definition of “derivatives” in Article 2(c) FinMIA covers, among other instruments, credit default swaps. See Explanatory Dispatch BBl 2014 7514; Stefan Kramer/Olivier Favre, FinMIA Commentary, note 9 on Article 2c FinMIA. We further note that while Article 94(3) FinMIA contains an exclusion for physically delivered derivatives, it generally does not matter whether a derivative is cash or physically settled for the determination of the applicability of the FinMIA. The exclusion in Article 94(3) FinMIA is the same as under EMIR/MiFID and excludes relevant commodity-based derivatives, but not credit default swaps. This follows already from the wording of Article 94(3)(c) FinMIA.

²⁰ We note that trade confirmation (Article 108 lit. a FinMIA, Article 95 FinMIA) is also considered part of the operational risk mitigation requirements under Swiss law.

²¹ 85 Fed. Reg. at 6360-61.

that could develop throughout the lifecycle of a transaction.”²² Swiss requirements regarding portfolio compression are more prescriptive in that they are more specific about when to engage in portfolio compression than the parallel Commission requirements. Although these Swiss requirements only apply when the firm has at least 500 non-centrally cleared OTC derivative transactions outstanding with a particular counterparty, this threshold would in practice align with the Commission’s requirements that an SBS engage in portfolio compression “when appropriate.” Specifically, where a portfolio with a counterparty has fewer than 500 transactions, the benefit from portfolio compression would be much less significant, and accordingly it would likely not be appropriate to engage in portfolio compression.

- **Trading Relationship Documentation.** Rules, regulations and practices under the Swiss financial regulatory system provide for the documentation of transactions and trading relationships, and they share a common goal with the Commission’s trading relationship documentation to “promote sound collateral and risk management practices by enhancing transparency and legal certainty regarding each party’s rights and obligations under the transaction,” which in turn “should help to reduce counterparty credit risk and promote certainty regarding the agreed-upon valuation and other material terms of a security-based swap.”²³ Although Swiss law does not require particularized disclosures regarding the status of a Swiss bank or its counterparty as an insured financial institution or financial company as required under SEC Rule 15Fi-5(b)(5) or regarding the effect of clearing, the Commission could require such disclosures for SBS with U.S. persons as a condition to its substituted compliance determination.

We note the following regarding the general scope of the risk mitigation duties under Swiss law:

- Article 93 FinMIA states that Title 3, Chapter 1 of the FinMIA, governing derivatives trading is applicable to counterparties “who have their registered office in Switzerland.” However, UBS AG and Credit Suisse AG each apply FinMIA’s risk mitigation duties (trade confirmation, portfolio reconciliation, portfolio compression) irrespective of whether their respective counterparty is itself directly subject to FinMIA. This is because, pursuant to Article 106(3) FMIO, “risk mitigation duties [other than the duty to exchange collateral contemplated by Article 106(1)–(2ter) FMIO] that would require the involvement of the counterparty may be fulfilled unilaterally insofar as this corresponds to recognised international standards.” The FMIO Explanatory Report with respect to Article 106(3) states that “as a result, only risk mitigation obligations which can be fulfilled unilaterally (valuation, risk management processes), may be fulfilled unilaterally. With respect to all other risk mitigation obligations, unilateral compliance is only permissible to the extent this complies with international standards.” Since no such international standards have been developed, we do not consider Article 93 FinMIA’s limitation practically relevant.
- Article 94 FMIO states that risk mitigation duties apply only to derivatives transaction between “companies” (as defined in Article 77). The effect and intention of Article 94

²² 85 Fed. Reg. at 6361.

²³ 85 Fed. Reg. at 6361.

FMIO is to exempt transactions between a financial or non-financial counterparty and a natural person not acting in a business capacity from the risk mitigation obligations. This is consistent with EMIR, where “Timely Confirmation, Portfolio Reconciliation, Dispute Resolution and Portfolio Compressions do not apply when one counterparty to the transactions is an entity established in the EU and exempted in accordance with Article 1 of EMIR”.²⁴ As per Article 1(2) EMIR, EMIR applies to “CCPs and their clearing members, to financial counterparties and to trade repositories. It shall apply to non-financial counterparties and trading venues where so provided,” and accordingly, counterparties that are neither CCPs, clearing members, financial counterparties, trade repositories, trading venues nor non-financial counterparties are exempted from EMIR. Article 2(9) EMIR defines “non-financial counterparty” as “an undertaking established in the Union other than the entities referred to in points (1) and (8).” Given that EMIR and FMIO lead to identical results,²⁵ we believe that a limitation of the availability of substituted compliance for Switzerland in connection with risk mitigation rules to transactions between “companies” would lead to an unjustified disadvantage as compared to the Commission’s recent “Order Granting Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the Federal Republic of Germany”, which does not contain such a limitation.

We would also note that Swiss law in this regard is closely aligned with EU risk mitigation requirements under EMIR,²⁶ and FINMA has recognized EMIR risk mitigation requirements as equivalent to the FinMIA risk mitigation requirements discussed below.²⁷ EMIR risk mitigation requirements, in turn, have been found by the CFTC largely to be comparable to parallel CFTC requirements, which largely mirror the Commission’s requirements.²⁸

²⁴ OTC Answer 11 (g) of ESMA’s Questions and Answers Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), available at: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf.

²⁵ The terminological difference between EMIR (using the term “undertaking”) and FMIO (using the term “company”), which pursuant to the FMIO Explanatory Report with respect to Article 77(2) FMIO has to be interpreted in line with EU law) is negligible.

²⁶ Articles 12 ff. of Commission Delegated Regulation (EU) No 149/2013.

²⁷ FINMA Guidance 01/2016, Section 2.2.

²⁸ 78 Fed. Reg. at 78,885, 78,887. We note that the CFTC comparability determination with respect to the trade documentation rules did not cover the CFTC requirements regarding (1) policies and procedures approved in writing by senior management and reasonably designed to ensure that trading relationship documentation is done prior to or contemporaneously with entering into a swap transaction with any counterparty, (2) specified terms and notice the documentation must include, or (3) documentation audit and recordkeeping. 78 Fed. Reg. at 78,887.

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<p>1. To what extent are parties to transactions required to reconcile transaction terms and valuation discrepancies?</p>	<p>Agreement and Frequency: For SBS with an SBSD or MSBSP, an SBSD must (1) agree in writing with each of its counterparties on the terms of the portfolio reconciliation (including any agreement regarding use of third-party service providers) and (2) perform the portfolio reconciliation at least (a) once each business day for each SBS portfolio with 500 or more SBS, (b) once each week for each SBS portfolio that includes 50-500 SBS on any business day during the week, and (c) once each calendar quarter for each SBS portfolio that includes less than 50 security-based swaps at any time during the calendar quarter. 17 CFR 240.15Fi-3(a).</p> <p>For SBS with other counterparties, the SBSD must (1) agree in writing with each counterparty on the terms of the portfolio reconciliation (including any agreement regarding use of third-party service providers) and (2) perform the portfolio reconciliation at least (a) once each calendar quarter for each SBS portfolio that includes more than 100 SBS at any time during the calendar quarter and (b) once annually for</p>	<p>According to Article 108(b) of the FinMIA and Article 96 of the FMIO, counterparties have to agree upon the details of the portfolio reconciliation prior to entering into non-centrally cleared OTC derivative transactions, and such reconciliation must include the key terms of the derivatives transactions and their valuation. Portfolio reconciliation may be performed by the counterparties or by a third party.</p> <p>Portfolio reconciliations must be performed:</p> <ul style="list-style-type: none"> • Every business day if there are 500 or more outstanding transactions between the counterparties; • Once a week if there are between 51 and 499 outstanding transactions at any point during the week; or • Once a quarter if there are 50 or less outstanding transactions at any point during the quarter. <p>The portfolio reconciliation requirement does not apply to trades with “small non-financial</p>	<p>Swiss law is largely consistent with Commission rules with respect to the requirement that parties agree on the terms of portfolio reconciliation, frequency of the practice, permissive use of third-party service providers, and exceptions for cleared SBS.</p> <p>The small non-financial counterparty exception to the portfolio reconciliation requirement does not exist under the Commission rule. However, the regulatory purpose of this exception is to protect small corporate entities from the cost of portfolio reconciliation when the limited risk such entities pose renders the benefit of the measure insignificant.²⁹ Specifically, (i) small Swiss entities’ use of swaps is mainly composed of FX derivatives in small volumes, (ii) these entities mostly are not in a position to undertake portfolio reconciliation due to the operational costs, do not have dedicated derivatives back offices, and do not impose systemic risk, and (iii) the benefit of portfolio reconciliation is limited given other risk measures that remain applicable to these entities. This rationale is</p>

²⁹ See FinMIA Explanatory Report, at 7577, regarding Article 107(c) which was then later adopted as Article 108(b) FinMIA (working translation: “Specifically, as concerns the circle of addressees [of this provision], it shall be taken into account that such processes can actually only be handled by professional financial market participants.”) The exemption in Article 108(b) FinMIA was introduced during the debate in the Swiss parliament and thus no secondary materials are available in addition to the general statement in the explanatory report quoted above. In the parliamentary debate, the rationale was that small companies should not be unduly burdened, taking into account that almost all of the derivatives transactions would be undertaken by banks and large companies. Therefore, unnecessary bureaucracy and cost for the work place in Switzerland should be avoided (see statement by National Councilor Thomas Matter, who had proposed the amendment, Swiss Official Bulletin 2015, National Council, p. 537; this minority proposition was thereafter approved by the majority of the house, see id. at p. 545). Thus, it follows from the legislative history that the purpose was to relieve small non-financial counterparties from administrative burden and to apply the principle of proportionality.

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	<p>each SBS portfolio that includes no more than 100 SBS at any time during the calendar year. 17 CFR 240.15Fi-3(b).</p> <p>The portfolio reconciliation requirement does not apply to cleared SBS. 17 CFR 240.15Fi-3(d).</p>	<p>counterparties.” Article 108(b) FinMIA. To qualify for this exception:</p> <ul style="list-style-type: none"> • The counterparty must not be a “financial counterparty” as defined by Article 93(2) FinMIA; and • The counterparty’s rolling gross average positions in relevant outstanding OTC derivatives transactions calculated over 30 working days must not exceed the applicable clearing thresholds. Article 98(1) FinMIA. 	<p>consistent with the regulatory purpose behind the relaxed requirement for transactions with entities other than SBSs or MSBSPs under the Commission rule, which bases “the frequency of the portfolio reconciliation . . . on the number of outstanding transactions with the applicable counterparty” and “represents a reasonable attempt to calibrate the costs to the benefits expected from” portfolio reconciliation. 85 Fed. Reg. at 6365.</p>
	<p>Discrepancy resolution and reporting: For SBS with an SBS or MSBSP, an SBS must (1) resolve immediately any discrepancy in a material term of an SBS; and (2) establish, maintain, and follow written policies and procedures reasonably designed to resolve any discrepancy in a valuation identified within five business days (provided that the SBS establishes, maintains, and follows written policies and procedures to identify how it will comply with any variation margin requirements pending resolution of the discrepancy in valuation). 17 CFR 240.15Fi-3(a).</p> <p>For SBS with other counterparties, an SBS must establish, maintain, and follow written procedures reasonably designed to resolve any discrepancies in the valuation or material terms of each SBS in a timely fashion. 17 CFR</p>	<p>In case of any discrepancies, Swiss law provides for specific rules regarding dispute resolution. Article 108(c) FinMIA; Article 97 FMIO. Pursuant to these rules, parties have to put in place a dispute resolution agreement setting out procedures for the identification, recording and monitoring of disputes in connection with the confirmation or valuation of the transaction and the exchange of collateral between the counterparties. With respect to the dispute records to be maintained, the rules require that these at least include information on the length of the dispute, the counterparty and the disputed amount. The dispute resolution agreement also needs to contain provisions on the place of jurisdiction and the applicable law for any disputes.</p> <p>In addition, the dispute resolution agreement has</p>	<p>Swiss law sets out a clear and detailed procedure for handling valuation discrepancies and other disputes arising in the context of OTC derivative transactions, which leads to a comparable regulatory outcome as the Commission’s rules by requiring resolution of disputes within the same five-day period.</p> <p>As noted above, the key distinction between Commission rules and Swiss law is the lack of a specific requirement for reporting SBS valuation disputes in excess of USD\$20 million. Accordingly, to the extent the Commission finds that the lack of this specific Swiss law requirement prevents Swiss law from achieving comparable outcomes to Commission requirements, the Commission may consider granting the requested substituted compliance determination on the condition that a Swiss</p>

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	<p>240.15Fi-3(b).</p> <p>Each SBSB must promptly notify the Commission and any applicable Prudential Regulator regarding SBS valuation disputes in excess of USD\$20 million (or its equivalent), at either the transaction or portfolio level, if not resolved within three days (with a counterparty that is also an SBSB or MSBSP) or five days (with other counterparties). 17 CFR 240.15Fi-3(c).</p>	<p>to foresee a procedure for the swift resolution of disputes and for a special process for disputes that cannot be resolved within five business days, the same delay as provided in SEC Rule 15Fi-3(a)(5). Article 97(2)(b) FMIO. Such “special process” requires parties to agree on participating in an escalation proceeding to settle disputes, and such agreements may be part of the master agreement or a separate agreement. In practice, this process is generally addressed in section 4 of the FMIA Agreement and Part I. (4) of the Attachment to the ISDA EMIR PRDR Protocol, as applicable.</p> <p>Finally, although Swiss law does not provide for a specific reporting requirement regarding valuation disputes, there is a general reporting requirement according to Article 29(2) FINMASA requiring a Swiss bank to report without delay any incident that is of substantial importance for supervision. There is little guidance on the threshold for substantial importance, and each firm must assess in each individual case whether a dispute warrants notification to FINMA, but any such dispute would ordinarily have to affect the firm’s financial or reputational risks. As the disputes are usually settled, any dispute giving rise to FINMA notification should only arise in exceptional circumstances, e.g., because the dispute could not be settled promptly and</p>	<p>bank would comply directly with the notification requirement in SEC Rule 15Fi-3(c) for disputes with U.S. person counterparties.</p> <p>We note that we propose the above condition to be limited to disputes with U.S. counterparties because (1) the Commission has limited regulatory interest in disputes between a Swiss bank and a non-U.S. counterparty, as such a dispute would be wholly extraterritorial to the U.S. and would affect an SBSB that is subject to U.S. prudential margin and capital requirements (i.e., not subject to capital or margin oversight by the Commission); and (2) requiring notification of disputes with non-U.S. counterparties would require Swiss banks to ensure in the documentation with the counterparties that they waive any confidentiality rights or protections under the Federal Act on Data Protection.</p>

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		provisions have to be incurred. See also our answer to question 4 of section II.2.c below.	
2. To what extent are parties to transactions required to engage in bilateral offset, bilateral or multilateral compression, or similar exercises to reduce offsetting or redundant instruments?	Each SBSB must establish, maintain and follow written policies and procedures addressing bilateral offset, bilateral compression and multilateral compression. Where the counterparty is also an SBSB or MSBSP, the policies and procedures must, when appropriate, address terminating each fully offsetting SBS in a timely fashion and the evaluation of bilateral or multilateral portfolio compression exercises that are initiated, offered, or sponsored by any third party. With respect to other counterparties, the rules require policies and procedures for periodically terminating fully offsetting security-based swaps and for engaging in bilateral or multilateral portfolio compression exercises, when appropriate and to the extent requested by any such counterparty. 17 CFR 240.15Fi-4(a), (b). These policies and procedures are “permitted to take into account the specific risk tolerances of the regulated entity, including with respect to such areas as operational, funding, liquidity, and credit risk, and also reflect the possibility that firms may have legitimate business reasons for maintaining certain offsetting security-based swap positions, even if in theory they could be compressed”. 85 Fed. Reg. at 6370.	Under Article 108(d) of the FinMIA, at least twice a year, a firm must perform portfolio compression with counterparties having more than 500 non-centrally cleared OTC derivatives transactions outstanding, for the purpose of mitigating their counterparty risk. As an exception from this general rule, pursuant to Article 98(1) of the FMIO, counterparties are not required to perform a portfolio compression if it would not lead to any meaningful reduction in counterparty risk. If this exemption is invoked, the respective counterparty needs to document at least every six months the rationale for relying on the respective exemption. Article 98(2) of the FMIO sets out a non-exhaustive list of examples where portfolio compression would not lead to any meaningful reduction in counterparty risk, including where (i) the portfolio does not contain any or only few offsettable OTC derivatives transactions or (ii) the compression would jeopardize the effectiveness of internal risk processes and controls. Furthermore, Article 98(3) of the FMIO stipulates that counterparties do not have to perform a portfolio compression if the related efforts and expenses would be disproportionate to the anticipated reduction in counterparty risk. The obligation to perform portfolio compression	Swiss law, unlike Commission rules, only requires portfolio compressions for counterparties with more than 500 outstanding transactions, and provides a further exclusion where reconciliations would not lead to a meaningful reduction of risk. While the Commission rule on its face would apply more broadly, the Commission rule is also less specific, only requiring compressions and offsets “when appropriate.” In practice, the risk-based parameters under Swiss law are not inconsistent with Commission requirements, given that these requirements permit an SBSB’s policies and procedures to take into account risk tolerances, which generally would not lead an SBSB to compress relatively small portfolios. Accordingly, both sets of rules should lead to comparable regulatory outcomes.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	The portfolio compression rule does not apply to cleared SBS. 17 CFR 240.15Fi-4(c).	pursuant to Article 108(d) of the FinMIA applies to bilateral as well as multilateral compressions.	
3. To what extent are parties to transactions required to document the terms of their trading relationships?	<p>General Trading Relationship Documentation Requirements: Each SBS must establish, maintain and follow policies and procedures reasonably designed to ensure that it executes written SBS trading relationship documentation with each of their counterparties prior to, or contemporaneously with, executing an SBS. The trading relationship documentation must address, in part, payment obligations, netting, termination events, termination obligations, transfer of rights and obligations, governing law, valuation, dispute resolution, trade acknowledgments and verifications, and credit support arrangements. 17 CFR 240.15Fi-5(a)(2) and (b)(1)-(3).</p> <p>The trading relationship documentation rule does not apply to pre-existing SBS, cleared SBS, or to certain SBS executed anonymously on a national securities exchange or SBS execution facility. 17 CFR 240.15Fi-5(a)(1).</p>	<p>Under Swiss law, there is no explicit requirement to agree in writing to all terms governing the trading relationship. However, for evidentiary purposes it is standard Swiss market practice to document OTC derivatives transactions through written agreements.³⁰ Even if OTC derivative transactions were to be initially traded on the basis of a purely verbal agreement, they would still be subject to the statutory requirements to have the key contractual terms confirmed and reconciled. Article 108(a) and 108(b) FinMIA. Further, as mentioned above, the risk control unit has to establish systems to ensure compliance with the law, and it is prudent risk management to ensure proper documentation of trading relationships. Marg. 72 FINMA Circular 2017/1. Separately, Article 110 of the FinMIA and Articles 100 ff. of the FMIO provide detailed rules on the obligation to provide collateral and the documentation of such arrangements.</p> <p>Additionally, Swiss law recordkeeping</p>	Although, unlike Commission rules, Swiss law does not have explicit requirements for trading relationship documentation, the standard market practices in Switzerland – as a result of prudential risk management standards and regulatory requirements relating to confirmation, reconciliation, and internal and regulatory audit– lead to comparable outcomes when viewed on a holistic basis.

³⁰ See Olivier Favre /Juerg Frick, FinMIA Commentary, note 8 on Article 108 FinMIA (“In practice the content of confirmations is usually determined by standard documentation. For transactions concluded under an ISDA Master Agreement, this occurs by way of reference to the ISDA definitions applicable to the respective category of derivatives, e.g. 2006 ISDA Definitions, in the confirmation, which are supplemented by the transaction specific terms set out in the confirmation.”).

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>requirements (discussed in more detail below) require some form of documentation such that the booking of transactions can also be properly evidenced, and there are general documentation requirements resulting from Article 3 BA in connection with Article 12 BO (the proper business organization requirement requires a Swiss bank to be able to demonstrate compliance with the regulatory obligations it is subject to) as well as the transaction documentation requirement in Article 7 AMLA.</p> <p>Finally, Swiss law imposes a variety of more specific documentation requirements, including:</p> <p>(1) To fulfill a bank’s risk mitigation obligations (including statutory and contractual netting in jurisdictions where it is enforceable) pursuant to Article 61 CAO and FINMA Circular 2017/7, Swiss banks are required to document the netting agreement that covers all relevant transactions. See also Marg. 148, FINMA Circular 2017/7, Article 103 FMIO, Article 105(2)(b) FMIO and Article 106(2bis)(a) FMIO. Because a close-out netting provision would not work without the agreement also specifying events of default or other termination events triggering the close-out mechanism, written documentation of these provisions is implicitly required.</p>	

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>(2) Article 108(c) FinMIA in connection with Article 97 FMIO requires a dispute resolution agreement, including place of jurisdiction and governing law, to be agreed on at the latest when an OTC derivative transaction is concluded. In practice, such agreements must be in writing in order to be able to demonstrate compliance with the respective regulatory obligation vis-à-vis FINMA and auditors.</p> <p>(3) Article 108(a) FinMIA requires transactions to be confirmed. The confirmation may be in written or electronic form (see FMIO Explanatory Report on Article 95 FMIO, p. 44). The respective confirmations need to be retained pursuant to Article 106 FinMIA in connection with Article 958f CO.</p> <p>(4) The FinMIA margin requirements (Article 110 FinMIA in connection with Article 100 ff. FMIO) do not explicitly require written credit support arrangements, however, the respective provisions imply the existence of such agreements (Article 100(3) FMIO, Article 102(5) FMIO, Article 105(2)(a) and (b) and Article 106(2bis)(a) FMIO). In practice, UBS AG and Credit Suisse AG mostly document their derivative transactions through ISDA Master Agreements, and, if the transaction is subject to the FinMIA variation margin requirement, an ISDA 2016 Credit Support</p>	

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		Annex for Variation Margin, ³¹ which contains very detailed provisions on valuation for variation margin purposes. The U.S. Prudential Regulators' margin rules also require documentation of margin arrangements, see, <i>e.g.</i> , 12 CFR 237.10.	
	Audit: Each SBSB must have an independent auditor conduct periodic audits sufficient to identify any material weakness in its documentation policies and procedures. 17 CFR 240.15Fi-5(c).	<p>While there is no specific requirement to have an independent auditor conduct periodic audits of documentation policies and procedures, as noted above, Swiss law requires that firms maintain an internal audit function, reporting directly to the BoD, auditing and supervising the risk management framework. Marg 82 ff. FINMA Circular 2017/1.³² As part of the general audit function, a firm must regularly audit its policies, procedures and practices, including the requirements described above related to documentation policies and procedures.</p> <p>Further, any firm supervised by FINMA is subject to regulatory audits by third party, independent auditors or FINMA itself, which would examine, among other things, the firm's compliance with risk control requirements, including the firm's documentation practices.</p>	Reviewing documentation policies and procedures falls within the general internal audit function and is subject to regulatory audits as required under Swiss law. Accordingly, Swiss requirements lead to comparable outcomes to the Commission's requirement.

³¹ Available at <https://www.isda.org/book/2016-credit-support-annex-for-variation-margin-ny-law-pdf/>.

³² This Circular not only applies to banks, but also to securities dealers and financial groups (Article 3c(1) BA) as well as financial conglomerates dominated by banking or a securities trading entity (Article 3c(2) BA). See FINMA Circular 2017/1, n. 1.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		Article 116(2) FinMIA; Article 113 FMIO; Article 24 ff. FINMASA.	
	<p>Valuation Process: In certain instances – where both counterparties are SBSDs, MSBSPs or financial counterparties (as defined in 17 CFR 240.15Fi-1(g)), or upon request by a counterparty – the trading relationship documentation must include written documentation regarding the process for determining the value of SBS for purposes of complying with margin and risk management requirements. 17 CFR 240.15Fi-5(b)(4).</p>	<p>Counterparties are required to perform internal valuations. Article 109 FinMIA; Article 99 FMIO. Such valuations are required to be disclosed to clients as part of portfolio reconciliation (Article 96(2) FMIO), form the basis for calculating variation margin (Article 101a(2) FMIO), and must be reported to trade repositories (Article 104 FinMIA; Article 93 FMIO; Annex 2 to the FMIO). Article 99 of the FMIO requires firms to establish proper documentation of the valuation process for any valuation that is not performed based on market prices, taking into consideration all the factors determining the price. For valuations based on a mark-to-model basis, the valuation process must comply with criteria set out in Article 109(3) of the FinMIA and Article 99(2) of the FMIO.</p> <p>The valuation requirement under Article 109 FinMIA does not apply to small financial counterparties or small non-financial counterparties, for similar policy rationale as laid out in our answer to question 1 in section II.1.c above.</p>	<p>Swiss law requires internal valuations to be disclosed to counterparties, used for calculating variation margin, and reported to trade repositories. While the process for such internal valuations are not strictly required to be disclosed, the calculations must conform to publicly available criteria established under Swiss Law. Further, as noted above, the valuations by both counterparties to a transaction will be reconciled as part of the portfolio reconciliation process as mandated by Swiss law, which also provides for a process for resolving valuation disputes. Taken together, these regulatory requirements provide protections similar to the valuation disclosures required by the Commission. Accordingly, the Swiss requirements lead to comparable outcomes as the Commission’s requirement.</p>
	<p>FDIA/OLA Status: The required trading relationship documentation must address</p>	<p>With respect to the insured deposit institution information, because Swiss law subjects banks</p>	<p>In general, Swiss banks are not themselves subject to FDIA or OLA. Nonetheless, to the</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>information regarding the status of the SBSB, or its counterparty, as an insured financial institution or financial company. 17 CFR 240.15Fi-5(b)(5).</p>	<p>to a depositor protection scheme, documentation of the bank's status as such is not required. Article 37h BA.</p>	<p>extent the Commission finds that the lack of this specific Swiss law requirement related to documentation of FDIA/OLA status prevents Swiss law from achieving comparable outcomes to Commission requirements, the Commission may consider granting the requested substituted compliance determination on the condition that a Swiss bank would provide disclosure that it is not subject to FDIA or OLA to its U.S. person counterparties.</p> <p>We note that we propose the above condition be limited to disclosures to U.S. counterparties because (1) Swiss banks and their non-U.S. counterparties are, by definition, not subject to FDIA or OLA, which only apply to U.S.-organized entities; (2) such disclosure is not customary in non-U.S. markets or required under Swiss law, and would likely confuse non-U.S. counterparties rather than promote legal certainty; and (3) the Commission has a more limited regulatory interest in documentation between a Swiss bank and a non-U.S. counterparty, as such parties' trading relationship would be wholly extraterritorial to the U.S. and would affect an SBSB that is subject to U.S. Prudential Regulator margin and capital requirements (i.e., not subject to capital or margin oversight by the Commission).</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>Clearing Disclosure: The required trading relationship documentation must address information regarding SBS that have been accepted for clearing. 17 CFR 240.15Fi-5(b)(6).</p>	<p>There is also no specific requirement to provide information regarding SBS that have been accepted for clearing.</p>	<p>Although Swiss law does not expressly require clearing-related disclosures, market participants in practice provide standard clearing disclosures to counterparties as a legal/commercial matter. For instance, a list of the documentation disclosed by UBS AG to clearing clients includes clearing disclosures pursuant to EMIR Article 39, available at: https://www.ubs.com/global/en/investment-bank/clearing-and-execution.html. To the extent the Commission finds that the lack of a specific requirement related to clearing disclosures prevents Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting the requested substituted compliance determination on the condition that a Swiss bank would provide clearing-related notifications to its U.S. person counterparties.</p> <p>We note that we propose the above condition be limited to notice to U.S. person counterparties because (1) such notice is not customary in non-U.S. markets or required under Swiss law, and would likely confuse non-U.S. counterparties rather than promote legal certainty; and (2) the Commission has a more limited regulatory interest in documentation between a Swiss bank and a non-U.S. counterparty, as such parties' trading relationship would be wholly extraterritorial to the U.S. and would affect an</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
			SBSD that is subject to U.S. Prudential Regulator margin and capital requirements (i.e., not subject to capital or margin oversight by the Commission).

2. Recordkeeping and Reporting Requirements

Swiss law provides for comprehensive recordkeeping requirements regarding all aspects of securities and derivatives business, including creation, preservation, reporting and production. These requirements – taken as a whole – produce similar outcomes as Exchange Act and Commission requirements with regard to the overall goal of supporting the Commission’s oversight of registrants. In sum, the Swiss foreign financial regulatory system’s recordkeeping and reporting requirements are comparable to the Commission requirements because, as discussed in details below, (1) both jurisdictions require retention of similar records such as trade records, account and customer records, financial records, business conduct records, employee records, and records relating to compliance with swap regulations; (2) applicable record retention periods under Swiss law are generally longer than those required by the Commission; (3) both jurisdictions require similar specifications regarding recordkeeping format; (4) the content of the annual financial report required under Swiss law is similar to Part IIC of the Commission’s FOCUS report; (5) both jurisdictions require notification of capital deficiency or material weakness; and (6) both jurisdictions permit regulatory examination and inspection of compliance with applicable securities laws.

There are certain restrictions on access to information provided to Swiss regulators or stored exclusively within Swiss territory. To the extent the Commission finds that such data restrictions prevent Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting substituted compliance on the condition that relevant records are available for the Commission’s inspection upon its request. We note in this regard that, Exchange Act Sections 15F(j)(3) and (4)(b) are not eligible for substituted compliance³³ and will require UBS AG and Credit Suisse AG to disclose and make available information relevant to its SBS businesses.

Separately, certain specific notifications are required to be delivered to the Commission under Exchange Act Rule 18a-8. While comparable notifications are required under Swiss law, Swiss law does not require copies of such notifications to be delivered to the Commission. To the extent the Commission finds that the lack of a requirement to deliver such notices to the Commission prevents Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting substituted compliance on the condition that notifications required by Swiss law also are delivered to the Commission.

For these reasons, we believe that Swiss law should be granted substituted compliance with regard to the recordkeeping requirements.

We would also point to the fact that Swiss recordkeeping requirements were found to be comparable to analogous CFTC requirements under the Commodity Exchange Act and applicable rules and regulations thereunder.³⁴

³³ 17 CFR 240.3a71-6(d)(1).

³⁴ 78 Fed. Reg. at 78908. We note that the CFTC comparability determination is also subject to the relying firm’s obligation to produce records and to record client communications. While recording of client communications is not required under Commission regulations, the Commission may consider a similar condition regarding production of such records, thereby ensuring that relevant records maintained under Swiss law are

We also note that Exchange Act Section 15F(j)(4)(A), for the duties under which substituted compliance is not available, requires firms to have systems and procedures to obtain necessary information to perform functions required under Section 15F. Because Swiss law generally requires Swiss firms to provide information promptly to FINMA upon request, Swiss firms must have the relevant information-gathering systems and procedures to enable them to comply with such requests. Accordingly, should the Commission agree with this application and determine that the relevant Swiss recordkeeping and reporting requirements are comparable to the Commission requirements covered by the Swiss Application, the applicants will satisfy Exchange Act Section 15F(j)(4)(A)'s requirement by having systems and procedures in place to ensure the gathering and disclosure of information relevant to compliance with Swiss law and any condition the Commission may impose in connection with the comparability determination.

a. Records Required to Be Made

Swiss law provides for comprehensive recordkeeping requirements as regards transactions, client accounts and rendering of account to account clients. In addition, the general requirements on accounting and business records also cover all records of transactions in all areas of the bank's business, including but not limited to its SBS business.³⁵

Whereas the Commission's rules specifically list all items that need to be recorded, Swiss law takes a slightly different approach:

- Participants of Swiss trading venues and securities firms are subject to the obligation to record every order and transaction in securities and derivatives linked to a security admitted to trading on a Swiss trading venue.³⁶ In this regard, we would note that the Bern Exchange provides for extensive admission to trading of securities, including many U.S.-listed securities.³⁷
- Additionally, all data of derivatives transactions that need to be reported to the Swiss trade repository also need to be recorded and kept on the records of the firm, and as discussed below, there is a very detailed list of items that need to be recorded and reported for such transactions.³⁸

Lastly, banks are subject to strict entity-based prudential recordkeeping and reporting rules regarding their financial assets and exposures, capital, and liquidity status.³⁹

These requirements in combination provide for comprehensive recordkeeping requirements for derivatives transaction. And while the structure of such data retention differs from the Commission's rules, the information required to be captured and maintained is in substance the same. Access to this documentation is ensured via Article 29 FINMASA, which allows FINMA

available for the Commission's inspection upon its request consistent with Exchange Act Section 15F(j)(4)(b).

³⁵ Article 957, 958f CO and Articles 1 through 10 AccO.

³⁶ Article 38 FinMIA, Article 36 FMIO and Article 1 FMIO – FINMA; Article 50 FinIA and Article 74 FinIO.

³⁷ A list of all instruments admitted to trading on the Bern Exchange is available at <https://www.bxswiss.com/instruments/download>.

³⁸ Article 106 FinMIA.

³⁹ See Article 3 BA; Article 25 ff., 41, 42 BO; FINMA Circular 2020/1 and relevant appendices; FINMA Circular 2016/1 and relevant appendices.

to request and have unfettered access to all information necessary for the supervision of the bank, but also to all information held at the trade repository, as they are all subject to FINMA supervision. As noted above, the Commission may consider granting substituted compliance on the condition that relevant records will be made available to the Commission upon request, consistent with Exchange Act Sections 15F(j)(3) and (4)(b).

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
<p>1. What records are firms required to make with regard to their transactions and other activities?</p>	<p>Exchange Act Section 15F(g) requires SBSs and MSBSs to maintain daily trading records for each counterparty, as well as all related records (including related cash or forward transactions) and recorded communications, and requires SBSs and MSBSs to maintain an audit trail for trade reconstructions. In implementing this requirement, the Commission promulgated rules requiring that each SBS and MSBS make and keep current the following types of records:</p> <p>Trade blotters, including the information below: 17 CFR 240.18a-5(b)(1)</p>	<p>The following Swiss law recordkeeping requirements are summarized in parallel to the comparable Commission requirements:</p> <p>For orders in securities and derivatives, the underlying of which is admitted to trading on a Swiss trading venue, any participant to a Swiss trading venue or securities firm must record:</p> <p>(1) the name of the securities and derivatives, the time the order was received, the name of the person placing the order, the name of the transaction and order type, the scope of the order; and</p> <p>(2) <i>where such orders have been completed</i>, the time of execution, the scope of the execution, the attained or allocated price, the place of execution, the name of the counterparty, and the value date. Article 1 FMIO-FINMA.</p> <p>Additionally, for all transactions in derivatives, any information that must be reported to a transaction repository must also be recorded and maintained for ten years by the respective</p>	<p>As demonstrated below, the recordkeeping requirements under Swiss law capture criteria relevant to the trade blotter recordkeeping requirement under Commission rules. Because Swiss law requires all information reported to a data repository to be kept and maintained for ten years, all the specific information required under Exchange Act Rule 18a-5(b)(1) will be maintained by UBS AG and Credit Suisse AG. Although this is information that is reported and stored with a (regulated and supervised) trade repository, there is also a requirement that the data and information must be readily available for review by FINMA. As noted above, to the extent the Commission finds that any restrictions under Swiss law on access to such data by the Commission prevents Swiss law from achieving comparable outcomes with Commission requirements, the Commission may</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p><i>Account for which purchase or sale was effected</i></p> <p><i>Name and amount of securities</i></p> <p><i>Unit and aggregate purchase or sale price</i></p> <p><i>Financial terms for the security based swaps</i></p> <p><i>Trade date</i></p> <p><i>Name or other designation of the person from whom such securities were purchased or received or to whom sold or delivered</i></p> <p><i>Type of security based swap</i></p> <p><i>Reference security, index, or obligor</i></p> <p><i>Date and time of execution</i></p> <p><i>Effective date</i></p> <p><i>Scheduled termination date</i></p> <p><i>Notional amounts</i></p>	<p>counterparty. Article 104 FinMIA; Article 106 FinMIA; Article 958f CO. Annex 2 of the FMIO lists all the information required to be reported to the trade repository and thus to be recorded under Swiss law, which is shown below in parallel to the specific records to be maintained under the Commission’s trade blotter recordkeeping rule and includes all information that is required to be recorded under the Commission’s trade blotter rule:</p> <p><i>Field 2: ID of non-reporting counterparty</i></p> <p><i>Field 10: Product taxonomy and Field 28: Amount (of reported contacts)</i></p> <p><i>Field 19: Price per (derivative), Field 20: Price quotation, Field 21: Currency of price and Field 27: Price multiplier</i></p> <p><i>Field 48 – 79: detailed list of terms per swap type</i></p> <p><i>Field 30: Conclusion date</i></p> <p><i>Field 2: ID of non-reporting counterparty</i></p> <p><i>Field 13: Type of Contract</i></p> <p><i>Field 14 and Field 15: Underlying Taxonomy and ID of underlying</i></p> <p><i>Field 30: Conclusion Date (with timestamp)</i></p> <p><i>Field 31: Effective Date</i></p> <p><i>Field 33: Termination Date</i></p> <p><i>Field 22 and 23: Nominal Value 1 and 2</i></p>	<p>consider imposing as a condition to any substituted compliance determination that each of UBS AG and Credit Suisse AG provides access to relevant records to the Commission upon request, consistent with the requirements of Exchange Act Sections 15F(j)(3) and (4)(b).</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p><i>Currencies in which the notional amount is expressed</i></p> <p><i>Unique transaction identifier</i></p> <p><i>Counterparty's unique identification code</i></p> <p>Ledger accounts or other records to itemize separately, as to each account, information such as purchases and sales, receipts and deliveries of securities and commodities, and other debits and credits, along with additional information regarding SBS accounts. 17 CFR 240.18a-5(b)(2).</p>	<p><i>Field 24 and 25: Currency of denomination</i></p> <p><i>Field 16: Trade ID</i></p> <p><i>Field 1: ID of reporting counterparty</i></p> <p>Pursuant to Article 958f of the CO, accounting records and accounting vouchers need to be retained. The accounting records shall comprise a general ledger as well as subsidiary accounts depending on the nature and scope of the business. Article 1(1) of the AccO. The general ledger consists of (1) the accounts (logical breakdown of all transactions booked) and (2) the journal (chronological record of all transactions booked). Article 1(2) of the AccO. As a supplement to the general ledger, the subsidiary accounts shall <i>inter alia</i> contain the information required to determine the claims and liabilities relating to the business operations. Article 1(3) of the AccO. These requirements apply to all transactions, including securities, commodities, and SBS. The required logical breakdown itemizes purchases, sales, receipts, and deliveries by account. Furthermore, the recorded trade reports to the trade repositories are also available in this respect. Article 106 FinMIA.</p>	<p>The recordkeeping requirement for ledger accounts under Swiss law is comparable to Commission rules because both jurisdictions require comprehensive recordkeeping of transaction, settlement, and balance of client accounts on an entity-wide basis.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Securities records or ledgers for non-SBS securities, including information regarding long or short positions, location-related information and account-related information, to the extent of any SBS or securities positions related to the firm’s business as an SBS.</p> <p>Securities records or ledgers for SBS, including information such as the reference security, transaction and counterparty identifiers, whether the position is bought or sold, and clearing-related information, to the extent of any SBS or securities positions related to the firm’s business as an SBS or MSBSP.</p> <p>17 CFR 240.18a-5(b)(3).</p> <p>Memoranda of brokerage orders or instructions associated with the purchase or sale of SBS,</p>	<p>The obligation pursuant to Article 958f of the CO in connection with AccO described immediately above also requires securities ledgers to reflect all long and short positions carried in own accounts or customer accounts to be recorded on an account-by-account basis. These records furthermore also include differences arising from examination, count, verification and comparison, records differences, and monthly valuations of unresolved difference positions.</p> <p>For each SBS transaction, the recorded trade reports to the trade repositories (pursuant to Articles 104 and 106 of the FinMIA) contain information about (1) the underlying reference security, index, or obligor (Fields 14 and 15 of Annex 2 of the FMIO), (2) a unique trade ID (Fields 16 of Annex 2 of the FMIO), (3) ID of the reporting as well as of the non-reporting counterparty (Fields 1, 2, and 7 of Annex 2 of the FMIO), (4) whether the reporting counterparty is the buyer or seller (Field 17 of Annex 2 of the FMIO), (5) whether the transaction is subject to the clearing obligation (Field 44 of Annex 2 of the FMIO), and (6) if the transaction is cleared, the ID of central counterparty (Field 46 of Annex 2 of the FMIO).</p> <p>Article 38 FinMIA, Article 36 FMIO and Article 50 FinIA require the entity receiving an order in</p>	<p>Under Swiss law, information about securities records or ledgers must be both (1) kept with the transaction reporting documentation as required under Article 104 FinMIA and Article 106 FinMIA, and (2) maintained with the account as required according to the CO. This requirement applies on an entity-wide basis. Accordingly, the recordkeeping requirement for security records and ledgers under Swiss law is comparable to the Commission rules.</p> <p>The recordkeeping requirement for memoranda of brokerage orders for SBS is generally less</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>along with additional information (<i>e.g.</i>, information regarding terms and conditions, and regarding responsible associated persons), and designation of orders entered pursuant to the exercise of discretionary authority. 17 CFR 240.18a-5(b)(4).</p> <p>Memoranda of SBS transactions for the firm account showing price, other information related to the SBS, and transaction and counterparty identifiers, and designating orders that are entered pursuant to the exercise of discretionary authority. 17 CFR 240.18a-5(b)(5).</p> <p>Copies of purchase and sale confirmations for non-SBS securities, and copies of trade acknowledgments and verifications for SBS. 17 CFR 240.18a-5(b)(6).</p>	<p>a security or in a derivative, the underlying of which is admitted to trading on a Swiss trading venue, to record each such order and any amendments thereto. Such order records must include the details set out in Article 1(2) FMIO-FINMA, and, if the order is executed, additional details prescribed by Article 1(3) FMIO-FINMA, as discussed above. It is FINMA's view that these requirements apply on an entity-wide basis, including to a Swiss firm's U.S. branches.</p> <p>Transactions for a firm's own account are also subject to the recordkeeping obligation stipulated in Article 38 FinMIA and Article 50 FinIA, as discussed above. Therefore, such transactions need to be recorded, including information about the trade such as price information, product information, transaction and counterparty identifiers.</p> <p>Records of trade confirmations are required to be made and maintained for ten years pursuant to the documentation requirement under Article 106 FinMIA as well as the general recordkeeping rules of Article 958f of the CO.</p>	<p>relevant to UBS AG and Credit Suisse AG (except possibly to their U.S. branches) because their foreign branches cannot accept SBS brokerage orders from U.S. persons except when intermediated by a U.S. broker-dealer under Exchange Act Rule 15a-6. Nonetheless, the Commission's order ticket requirement is generally covered under Swiss law, which requires recording of detailed information regarding all orders.</p> <p>Swiss law's requirement for recording detailed information regarding all transactions encompasses transactions for a firm's own account and includes pricing and counterparty information, which capture the key elements of Commission recordkeeping requirements for memoranda of transactions for firm accounts.</p> <p>Both Swiss law and Commission rules require recording of trade confirmations/acknowledgements. As separately noted above in the analysis of the trade acknowledgement and verification rules, Swiss law provides for reciprocal trade confirmations rather than verification and acknowledgement. Accordingly, there is no need for a verification and acknowledgement recordkeeping obligation (although records of</p>

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	<p>Counterparty information, including the counterparty’s unique identification code, name and address, and of the authorization for each person with authority to transact on behalf of the counterparty. 17 CFR 240.18a-5(b)(7).</p> <p>Records of compliance with the possession or control requirement under the applicable segregation rule, and of the reserve computation required under the segregation rule. 17 CFR 240.18a-5(b)(9), (10).</p> <p>Records of each non-verified SBS, including transaction and counterparty identifiers. 17 CFR 240.18a-5(b)(11).</p>	<p>The recordkeeping obligation pursuant to Article 38 FMIO and Article 50 FinIA <i>inter alia</i> requires the name of the counterparty to be recorded. Article 1(3) FMIO-FINMA. Furthermore, the mandatory content of reports pursuant to Article 104 FinMIA also include the counterparties’ unique identification code to be included, and the reported information is to be kept on record. Annex 2 FMIO; Article 106 FinMIA. Furthermore, the authorization of each person to act on behalf of the counterparty is required not only by the general organizational requirements but more specifically by the Swiss anti-money-laundering laws, and such records of authorization must be kept. Article 3 AMLA; Article 106 FinMIA.</p> <p>See our answers to question 4 below.</p> <p>Under Swiss law, verification is not independently required but completed via the mutual confirmation process. Article 108(a) FinMIA; Article 95 FMIO. However, records of confirmations must be kept for ten years (see our</p>	<p>confirmations are maintained in the ordinary course).</p> <p>Both Swiss law and the Commission rules require recording of detailed counterparty information, including unique identification codes and related authorizations.</p> <p>See our answers to question 4 below.</p> <p>As Swiss law does not provide for trade verification, but rather for reciprocal trade confirmation, “non-verified” SBS cannot occur. However, records of confirmations must be kept for ten years (see our responses regarding trade</p>

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	Records regarding SBS portfolio reconciliations, notices of valuation disputes, and portfolio compression exercises. 17 CFR 240.18a-5(b)(14).	<p>responses regarding trade acknowledgement and verification requirements above).</p> <p>The documentation of the portfolio reconciliation requirements is required under the general recordkeeping rule. Article 106 FinMIA. Notifications of valuation disputes would also need to be recorded pursuant to Article 106 FinMIA (and the general recordkeeping obligation under Article 958f of the CO). Under Swiss law, any offset or portfolio compression would be regarded as an amendment to an existing derivative transaction and would, as a consequence, also trigger a reporting and associated recordkeeping obligation under Article 104 and Article 106 of the FinMIA.</p>	<p>acknowledgement and verification requirements above).</p> <p>Both Swiss law and Commission rules require recording of portfolio reconciliations, notification regarding valuation disputes, and compression practices.</p>
2. What records are firms required to make with regard to their positions and other potential financial liabilities?	Because we understand that this question relates to Exchange Act Rule 18a-5(a)(9), which is inapplicable to UBS AG or Credit Suisse AG because each of UBS AG and Credit Suisse AG has a Prudential Regulator, it is not addressed in this assessment.	N/A	N/A
3. What records are firms required to make with regard to their personnel, including records regarding the background of	Information regarding associated persons, including a questionnaire or employment application for each associated person involved in effecting SBS on the firm's behalf, containing identifying and background information (e.g., information regarding disciplinary actions, and	Under Swiss law, there is no formal requirement to preserve records of employee background checks or to keep a formal unified/consolidated file records associated with each employee. However, the performance of background checks is part of the proper business	As noted, records of employee background checks are required to be maintained for 10 years after the termination of the employee's relationship with the firm and it is standard market practice to maintain a comprehensive file about the firms employees, including a record of

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
individuals?	arrests and indictments). The firm must also make a record that lists the offices associated with each associated person of the firm. The Commission has clarified that those recordkeeping requirements apply only to natural persons, and not to legal entities that may be associated persons, and exceptions apply for certain non-resident associated persons. 17 CFR 240.18a-5(b)(8); 84 Fed. Reg. at 68558.	organization requirement stipulated by Article 3 BA in connection with Article 12 BO and the general obligations of Article 958f of the CO would apply to such records and, accordingly, the requirement to preserve them for 10 years as of the termination of the employment contract. Every Swiss employer is also de facto required to maintain personnel file to fulfill various legal obligations. As an employer (and therefore controller of data) the Swiss firms must be able to inform employees on their request whether and what data is/has been processed (Article 8 FADP). Further, there is an obligation under general employment law to issue reference letters to an employee upon request (referring to nature, duration, quality of work and conduct) pursuant to Article 330a CO. Within this concept, all data collected and processed in compliance with Article 328b CO within the employment relationship builds part of the personnel file, and data protection requirements need to be complied with. In addition, there are public law requirements (regarding the employer's duty to cooperate and provide information) that have to be complied with as well, such as requirements regarding social security in general (Article 28 FSIL) and regarding unemployment in particular (Article 88 FUIA). There are specific employee selection and required due diligence and verification requirements in relation to employees that have	offices associated with each relevant employee. Accordingly, the Swiss law on this issue should be comparable to Commission requirements because they achieve similar regulatory outcomes.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		<p>access to client identifying information. Marg. 30-33, Appendix 3, FINMA Circular 2008/21. The verification in relation to such employees will require keeping adequate records to demonstrate that those employees meet “fit and proper” requirements. Banks not keeping records associated with each employee may not meet the adequate organization requirements of Article 12 BO and would not be able to keep up with the employment law and other legal requirements. It is also standard market practice to make and keep a comprehensive file about the firm’s employees, including information about disciplinary actions and criminal records. Customary business records would also include a record of offices associated with each relevant employee. In both UBS AG’s and Credit Suisse AG’s specific cases, most of each bank’s associated persons will be eligible for the exemption from the employment questionnaire or application recordkeeping requirement by way of SEC Rule 18a-5(b)(8)(iii)(A). For any associated person not so exempted, the person’s personnel file would include records such as resumes, education level, prior employment history, references, background and compliance checks, interview records, home and emergency contact details, account details for payroll, and declarations of marital/partnership status. UBS AG and Credit Suisse AG would retain these records for 10 years as of the end of the person’s</p>	

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		employment.	
4. What records are firms required to make regarding the control of customer funds and securities?	An SBSB must keep records of compliance with the possession or control requirement under the applicable segregation rule, and of the reserve computation required under the segregation rule. 17 CFR 240.18a-5(b)(9), (10).	<p>Swiss law requires banks to record all transactions of funds and securities of clients in a way that is reproducible without modification. Article 958f CO; Article 3 AccO.</p> <p>The clients and account holders, respectively, may at any time request a statement of ownership regarding a security. Article 16 FISA. Clients also have the right to exclude securities from the custodian's estate given the latter is subject to bankruptcy proceedings. Article 17 FISA. Should the custodian hold its own securities and securities of a client in the same account, there is the legal assumption that the securities belong to the client. Article 17(2) FISA. If there should be a shortfall, clients are compensated by securities of the same kind held by the custodian for his own account. Article 19 FISA. Records regarding the status of such accounts are required to be maintained.</p>	Because Swiss law does not have parallel possession or control and reserve account requirements to the Commission's segregation rule, recordkeeping requirements under Swiss law similarly do not specifically require records of compliance with such requirements. However, as noted in the summary, Swiss law generally requires recordkeeping relating to client transactions and portfolios, and such records must reflect the status and control of such securities at all times.
5. What records are firms required to make regarding business conduct practices?	An SBSB must keep records of compliance with the business conduct standards as required under § 240.15Fh-1 through § 240.15Fh-6 (business conduct requirements) and § 240.15Fk-1 (chief compliance officer). 17 CFR 240.18a-5(b)(13).	We are not requesting substituted compliance with Swiss law in connection with Commission business conduct requirements (Exchange Act Rules 15Fh-1 through 15Fh-6 (except for 15Fh-3(h), for which substituted compliance is requested)), as both UBS AG and Credit Suisse AG conduct their SBS business with U.S. person counterparties through branches located outside	Swiss recordkeeping requirements related to obligations of the Chief Compliance Officer are comparable to the Commission requirements because Swiss law requires retention of the CCO's annual report and records related to other CCO activities.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		<p>of Switzerland or in the United States. Accordingly, Swiss law in this regard is not relevant. The U.S. branches as well as any other branches conducting U.S. Business will satisfy Commission rules requiring recordkeeping associated with those requirements, subject to ongoing or future substituted compliance with foreign recordkeeping requirements other than Swiss law (<i>e.g.</i>, UK law).</p> <p>With respect to its Chief Compliance Officer obligations under Exchange Act Rule 15Fk-1, Swiss law requires that Internal Risk Control and Compliance report comprehensively about their measures and actions. Such reports must be recorded according to the general provisions on recordkeeping (10 years). FINMA Circular 2017/1. As a part of the proper business organization requirement in Article 3 of the BA and the general recordkeeping requirement in Article 958f of the CO, records are also required with respect to the CCO's activities in connection with the bank's internal Risk Control and Compliance functions (as discussed in detail in section 3 below), such as resolving conflicts of interests (Article 12 BO; Article 14g BO ; see section 3.d.3.), updating policies and procedures (Marg. 72 FINMA Circular 2017/1; see section 3.b.9.), and remediating inadequate compliance (Marg. 75-81, 97 FINMA Circular 2017/1; see section 3.d.2.).</p>	

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
6. To what extent are firms required to make periodic securities counts or similar records to help ensure the proper care and protection of assets?	This question is not addressed in this assessment because we understand that it relates to Exchange Act Rule 18a-9, which is inapplicable to UBS AG or Credit Suisse AG because each of UBS AG and Credit Suisse AG has a Prudential Regulator.	N/A	N/A
7. Are there potential restrictions or prohibitions on the ability of firms to receive, create, or maintain certain of those types of information, such as information regarding counterparties and associated persons? Are there potentially any restrictions on the ability of the Commission to access particular types of records?	N/A	<p>For personal data containing information associated directly or indirectly to a natural person or legal entity, the Federal Act on Data Protection applies.⁴⁰ However, the pure record creation and retention that has to be done for the purpose of executing a contract does not generally raise any data protection law issue as the data subject would have to expect such data processing and retention when entering the contract.</p> <p>Foreign regulators, on the other hand, would be considered third parties under Swiss data protection regulations. Hence, sharing personal data with foreign regulators would be subject to prior consent by the concerned person, although in practice a client would only be entitled to perform transactions subject to Commission supervision once they have given such consent for purposes of the FADP as well as bank-client</p>	As demonstrated in the summary, there exist some restrictions on information sharing by the firm under the Federal Act on Data Protection and the BA beyond the restrictions noted in section II.2.b.5 below, and FINMA involvement is possible. However, we note that in practice relevant consents in this specific constellation of activity, clients and staff would be obtained with respect to such relevant information such that it could be provided to the Commission under Swiss law. Accordingly, Swiss law should not interfere with UBS AG's or Credit Suisse AG's ability to provide relevant information to the Commission upon request.

⁴⁰ We note that the revised Federal Act on Data Protection, approved by the Swiss Parliament on September 25, 2020, eliminates this protection for legal entities. However, the effective date of this amendment is currently unknown, because the Swiss Federal Government would have to enact the new law.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		confidentiality (secrecy) under the BA. Furthermore, employees would also need to provide such consent prior to being able to work within the relevant area.	

b. Records Required to Be Preserved

Swiss rules on record preservation are in substance comparable with and meet the objectives of the relevant Commission rules on the preservation of records because Swiss law generally provides for a longer retention period (10 years) for records required to be preserved and has similar specifications about electronically stored records. Although Swiss rules are more principles-based than Commission rules in regards to specifying which records are covered by this preservation obligation, these rules have been interpreted to apply very broadly, in a manner which comprehensively covers records relating to a Swiss bank's business as a security-based swap dealer. Accordingly, Swiss law in our view should also qualify for substituted compliance with respect to Commission requirements associated with the preservation of records.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
<p>1. What are the general provisions regarding the preservation period and accessibility?</p>	<p>The Commission rules apply different preservation period and accessibility requirements to different categories of records as described below.</p>	<p>Records must in general be preserved for 10 years in a way that the regulator may easily and quickly access them in their entirety. Article 106 FinMIA and 958f CO; Article 1(4) FMIO-FINMA. The records must be maintained in general on a durable medium. Article 3 AccO; Marg. 16, FINMA Circular 2008/4.</p> <p>Furthermore such records have to be made available and accessible quickly to the regulator for the entire period. Article 6 AccO. Records maintained pursuant to Article 38 FinMIA and Article 50 FinIA have to be made available to FINMA within three business days (FINMA may grant extended deadlines in specific cases). Marg. 9, FINMA Circular 2008/4.</p> <p>The 10-year preservation period in Article 958f of the CO is interpreted broadly and in particular applies to (1) records that constitute “accounting vouchers,” which are broadly defined for the purpose of applying the CO to include all records necessary to substantiate an accounting entry, and (2) “proper business organization records,” which are records necessary to demonstrate a Swiss firm’s compliance with applicable regulations, including foreign regulations, pursuant to Article 3 of the BA and Article 12 of the BO. The records identified in our answer to question 3 below as subject to the 10-year preservation period all constitute</p>	<p>The preservation period under Swiss law exceeds the period required under Exchange Act Rule 18a-6 which is, at a maximum, six years. Additionally, Swiss law requires records to be easily accessible for the entire preservation period, while the Commission in some instance allows for a shorter period of accessibility than period of preservation. Therefore, Swiss law provides for a framework for the preservation of records comparable to the relevant Commission requirements.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		“accounting vouchers” or “proper business organization records.”	
2. To what extent are firms required to preserve the types of records that are the subject of the Exchange Act record preservation requirement (<i>e.g.</i> , bank records, bills, communications, account documents, written agreements, and risk management records)?	Exchange Act Section 15F(g) requires SBSBs and MSBsPs to maintain daily trading records, all related records (including related cash or forward transactions) and recorded communications for such period as may be required by the Commission. Under the Commission Rules, SBSBs and MSBsPs are required to maintain various transaction, account, and financial records for a duration of six years (the first two years in an easily accessible place) or three years (the first two years in an easily accessible place). In particular, as relevant here, an SBSB for which there is a Prudential Regulator must maintain:	Although Article 958f of the CO does not enumerate in every case the types of records required to be preserved, it is understood by the Swiss legislature, FINMA, and market participants that Article 958f broadly requires Swiss firms to keep all important business records, including the relevant records enumerated in Commission Rule 18a-6. See, <i>e.g.</i> , FinMIA Explanatory Report at 7575 (stating that “[Article 106 of the FinMIA] governs the recordkeeping obligations of financial and non-financial counterparties. There is no reason to depart from the rules applicable under [the CO],” which, as described below, apply broadly to business records well beyond accounting records). ⁴¹ Swiss legal literature also illustrates that Article 106 of the FinMIA and Article 958f of the CO together serve to ensure transparency of derivative markets and regulatory compliance, and accordingly firms subject to these rules must retain all business records to demonstrate compliance with the FinMIA. BSK FINMAG/FinfraG, Article 106, Marg. 1. As mentioned, any record subject to 958f of the CO must generally be preserved for 10 years in an easily and quickly accessible	The Swiss law requirements are comparable to (and indeed stricter than) the Commission requirements, because Swiss law (1) requires the keeping of similar records as under the Commission rules, and (2) imposes a longer, 10-year retention period without allowing shorter retention periods for certain records and relaxed accessibility requirement during part of the retention period as the Commission does.

⁴¹ We note that the FinMIA Explanatory Report here refers to Article 105 of the FinMIA, which was later re-designated as Article 106 without any changes in the text.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Records of communication relating to the firm’s business as an SBSB for three years (the first two years in an easily accessible place);</p> <p>17 CFR 18a-6(b)(2)(ii).</p>	<p>manner.</p> <p>Swiss firms are required to keep records of business correspondence for the 10-year preservation period. Article 958f CO. This obligation was explicitly stated in the previous version of this article (old Article 957(2) CO) before it was amended in 2013, but the CO Explanatory Report confirms that the substantive obligation remains unchanged in light of the broad “accounting voucher” definition applicable to the CO. CO Explanatory Report at 1698 (noting that an “accounting voucher” encompasses “any written record on paper or in electronic or comparable form that is required to be able to verify the business transaction or the circumstances behind an accounting entry” and that business correspondence is an accounting voucher to the extent that it is necessary to “substantiate the circumstances behind an accounting entry”). Also, according to Swiss legal authors (BSK OR II, Article 958f OR, Marg. 20), any business correspondence which may be of relevance in the context of the interpretation of an agreement or to assess a litigation risk is to be retained. In light of these considerations, both UBS AG and Credit Suisse AG retain all client and counterparty correspondence. In addition, both UBS AG and Credit Suisse AG are also specifically required, on an entity-wide basis, to preserve at least for</p>	<p>Both Swiss law and Commission requirements require preservation of communication records, and Swiss law imposes a longer retention period.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Account documents, such as guarantees and powers of attorney for three years (the first two years in an easily accessible place);</p> <p>17 CFR 18a-6(b)(2)(iii).</p>	<p>two years records of (1) telephone calls of employees working in securities trading and (2) the electronic correspondence and certain business calls by employees deemed to be especially likely to receive relevant information for market supervision. Marg. 60 and Marg. 61 FINMA Circular 2013/8.</p> <p>Swiss firms are required to keep customer account records for the 10-year preservation period. Article 958f CO. For example, a guarantee of an SBS account would be necessary to substantiate a potential claim against the guarantor and consequently would qualify as an “accounting voucher” within the meaning of Article 958f of the CO. Powers of attorney and similar documents with respect to SBS accounts and resolutions empowering an agent to act on behalf of a corporation would also be necessary to substantiate a potential claim against the principal arising out of an agent’s action, and therefore these documents qualify as “accounting vouchers” within the meaning of Article 958f CO. Furthermore, Article 3 of the AMLA requires Swiss firms, on an entity-wide basis, to identify the agent acting on behalf of the principal and retain such information for ten years as of the conclusion of the transaction or the termination of the business relationship. Article 7(3) AMLA; Article 5(1)(b) AMLO-FINMA.</p>	<p>Both Swiss law and Commission requirements in practice require preservation of account records, and Swiss law imposes a longer retention period.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Written agreements for three years (the first two years in an easily accessible place);</p> <p>17 CFR 18a-6(b)(2)(iv).</p> <p>Information required to be reported under Regulation SBSR for three years (the first two years in an easily accessible place);</p> <p>17 CFR 18a-6(b)(2)(vi).</p>	<p>Swiss firms are required to keep transaction records, including relevant agreements, for the 10-year preservation period. Article 958f CO. Written agreements qualify as “accounting vouchers” within the meaning of Article 958f of the CO because they are documents that are required to be able to verify the business transaction behind an accounting entry.</p> <p>Swiss law requires firms to preserve records necessary to demonstrate compliance with applicable regulations, including foreign regulations such as the Commission rules. Article 3 BA and Article 12 BO. Accordingly, Swiss firms are required to keep regulatory reports, which are subject to the 10-year preservation period. Article 958f CO. Because we are not requesting substituted compliance for Regulation SBSR, both UBS AG and Credit Suisse AG are required under Swiss law to preserve information required to be reported under Regulation SBSR for 10 years. In addition, when a Swiss firm reports SBS transaction information to a recognized foreign (e.g., EU or US) or domestic trade repository pursuant to Article 104(1) FinMIA, the information submitted is subject to the 10-year retention period. Rather than receiving a drop copy from the trade repository, Swiss firms</p>	<p>Both Swiss law and Commission requirements in practice require preservation of written agreements, and Swiss law imposes a longer retention period.</p> <p>Both Swiss law and Commission requirements in practice require preservation of information subject to regulatory reporting obligations, and Swiss law imposes a longer retention period. In addition, both UBS AG and Credit Suisse AG will specifically be required under Swiss law to preserve information required to be reported under Regulation SBSR for 10 years, which would effectively constitute direct compliance with Commission Rule 18a-6(b)(2)(vi).</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Due diligence information relating to special entity determinations for three years (the first two years in an easily accessible place);</p> <p>17 CFR 18a-6(b)(2)(viii).</p> <p>Organization records and registration forms for the life of the enterprise and any successor enterprise;</p> <p>17 CFR 18a-6(c).</p>	<p>maintain copies of any message or report submitted according to the Swiss recordkeeping rules. In the event a Swiss firm receives a drop copy of such submissions (and we note, however, that drop copies received from a European trade repository may contain only a subset of the reported fields), the same 10-year retention requirement applies.</p> <p>As noted above, Swiss law requires firms to preserve records necessary to demonstrate compliance with applicable regulations. Article 3 BA and Article 12 BO. Because we are not requesting substituted compliance for the special entity determination obligations under the Commission’s business conduct rules, both UBS AG and Credit Suisse AG are required under Swiss law to preserve due diligence information relating to special entity determinations consistent with the 10-year preservation period. Article 958f CO.</p> <p>Swiss firms are required to keep organization records, including articles of incorporation, in order to comply with the requirement for a proper business organization. Article 3 BA; Article 12 BO. Such records are subject to the 10-year preservation period. Article 958f CO; see also Article 686 CO (imposing a 10-year preservation period to firms’ stock certificate</p>	<p>Both Swiss law and Commission requirements in practice require preservation of due diligence records, and Swiss law imposes a longer retention period. In addition, both UBS AG and Credit Suisse AG will specifically be required under Swiss law to preserve information relating to special entity determinations for 10 years, which would effectively constitute direct compliance with Commission Rule 18a-6(b)(2)(viii).</p> <p>Both Swiss law and Commission requirements in practice require preservation of organization records, and Swiss law imposes a longer retention period.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Regulatory reports pursuant to an order or settlement for three years after the date of the report;</p> <p>17 CFR 18a-6(d)(2)(ii).</p>	<p>books).</p> <p>As noted above, Swiss law requires firms to preserve records necessary to demonstrate compliance with applicable regulations. Article 3 BA and Article 12 BO. Such records by definition encompass reports required pursuant to an order or settlement issued by a regulator. Specifically, Article 12(2) BO requires the monitoring and supervision of operational and legal risks. “Operational risks” is further defined to include “all legal and compliance risks insofar as these represent a direct financial loss, including regulatory fines imposed by regulatory authorities and out of court settlements.” See Article 89 CAO and Marg. 2 FINMA Circular 2008/21. Circular 2008/21 requires a firm, inter alia, to identify, mitigate and monitor operational risks (Marg. 128) in accordance with a defined classification of the operation risks (Marg. 122 and Appendix 2), and further the creation of respective reports for internal and external reporting thereof (Marg. 131-134; furthermore, on cross-border risks see Marg. 136.2 ff.). To comply with these obligations, a bank will need to maintain the relevant documentation in relation to relevant orders, fines or settlements. These obligations apply in addition to the general requirements on accounting to maintain the books and records, including relevant documentary evidence (art.</p>	<p>Both Swiss law and Commission requirements in practice require preservation of settlement records, and Swiss law imposes a longer retention period.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
	<p>Compliance manual until three years after termination of the use of the manual; and 17 CFR 18a-6(d)(3)(ii).</p> <p>Records relating to the risk mitigation requirements until three years after the termination and conclusion of the relevant documents, transactions, or audits. 17 CFR 18a-6(d)(4), (5).</p>	<p>958f Code of Obligations and Accounts Ordinance cited above). Furthermore, such regulatory reports, as well as the underlying order or settlement, qualify as “accounting vouchers” because they are necessary to substantiate the accounting entry relating to the settlement or order. Accordingly, Swiss firms are required to keep regulatory reports for the 10-year preservation period. Article 958f CO.</p> <p>Compliance manuals are required to be preserved as records necessary to demonstrate compliance with applicable regulations. Article 3 BA; Article 12 BO. Accordingly, Swiss firms are required to keep compliance manuals for the 10-year preservation period. Article 958f CO.</p> <p>Swiss firms are required to keep transaction records, including records relating to risk mitigation requirements, as discussed above, for the 10-year preservation period. Article 958f CO; Article 106 FinMIA.</p>	<p>Both Swiss law and Commission requirements in practice require preservation of compliance manuals, and Swiss law imposes a longer retention period.</p> <p>Both Swiss law and Commission requirements in practice require preservation of risk mitigation records, and Swiss law imposes a longer retention period.</p>
3. To what extent are firms required to preserve specific information regarding associated persons?	SBSDs and MSBSPs are required to preserve information regarding associated persons until at least three years after the termination of the associated person’s connection with the firm. 17 CFR 18a-6(d)(1).	Any information regarding associated persons that are required to be kept (<i>i.e.</i> , to the extent it constitutes important business information as described above) must be preserved for ten years. Article 958f CO. As noted above in section 3.a.3, Swiss firms are required to vet prospective employees, including by conducting	As we have explained above, we believe the Swiss law requirements addressing records relating to employees should be sufficient to achieve the regulatory purpose behind the associated person recordkeeping requirements. Accordingly, the requirements for preserving such records should also be comparable to

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
		background checks. Article 3 BA; Article 12 BO. It is standard business practice, consistent with various legal obligations applicable to employers discussed above, to create and maintain records of such vetting in a personnel file, and at both UBS AG and Credit Suisse AG, such records are kept for 10 years after the termination of an associated person's employment.	relevant Commission rules.
4. What requirements address firms' use of electronic storage systems and third-party contractors in connection with record preservation?	The records required to be maintained and preserved may be produced by means of an electronic storage system, subject to a number of conditions including, <i>inter alia</i> , the capacity to readily download into the readable format, the indexes and records preserved in the system, the use of duplicate records stored separately, and an audit system. 17 CFR 18a-6(e).	Records to be maintained and preserved pursuant to Article 106 FinMIA and Article 958f CO are subject to the digital infrastructure requirements under AccO. The AccO distinguishes between retention in non-modifiable information carriers and modifiable information carriers. Most of the AccO's requirements apply to both retention methods, while some requirements only apply to modifiable information carriers. Among other things, the AccO requires for both retention methods that: <ul style="list-style-type: none"> • A regular review of the integrity and readability of the information carrier is performed to ensure quality and accuracy; • Any information must be systematically inventorized (<i>i.e.</i>, indexed); • Archived and current information must be separated; • Records must be preserved in a manner 	The requirements on the use of electronic storage systems under Swiss law are very similar to Commission requirements in this area, and they achieve similar regulatory objectives because both jurisdictions' rules require (1) systemic indexing of records, (2) records to be readily accessible for inspection, (3) separation of different types of records, (4) maintenance of backup copies of records and (5) an audit system.

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		<p>that allows inspection and audit by an authorized person within a reasonable time;</p> <ul style="list-style-type: none"> • Upon inspection and audit, the personnel, devices and supporting tools must be available; and • Upon request of an authorized person, the accounts must be available in a readable format without supporting tools. 	
	<p>If an SBSB uses a third party to prepare or maintain records, that third party must file an undertaking with the Commission stating, among other things, that the records are the property of the SBSB and will be promptly furnished to the Commission or its designee. 17 CFR 240.18a-6(f).</p>	<p>Use of third parties for record maintenance must not make supervision by FINMA more difficult, and any third-party service provider not supervised by FINMA must enter into a contractual obligation with the bank to ensure availability of all the information and documentation for FINMA’s supervisory activities. Marg. 2 & 3, FINMA Circular 2018/3.</p>	<p>The requirements on the use of third-party contractors under Swiss law are similar to Commission requirements in this area. Although there are differences in the approach taken by the Commission, requiring an undertaking from the relevant third party, and FINMA, requiring a contractual agreement to provide the relevant information, both approaches achieve similar regulatory objectives because both jurisdictions’ rules ensure that outsourcing does not interfere with the ability of the regulator to obtain relevant records.</p>
<p>5. Are there potentially any restrictions or prohibitions on the ability of firms to maintain certain of those types of information? Are</p>	<p>N/A</p>	<p>The key restriction on a Swiss firm’s ability to retain data does not apply in the case in which a regulatory obligation exists to maintain and preserve the relevant personal data. Therefore, with regard to the data and information outlined previously, there is no restriction for the data to be maintained. To the contrary, the firm is generally obliged to preserve the data for 10</p>	<p>As noted in the summary, the restriction on retention of personal data, including staff data and client data, is not applicable with respect to such data that is required to be preserved pursuant to applicable laws and regulations. A Swiss firm’s ability to disclose non-public information is not without restrictions under Swiss law. However, such restrictions are</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
<p>there potentially any restrictions on the ability of the Commission to access particular types of records?</p>		<p>years. Article 958f CO.</p> <p>As a general principle, non-public information held in Switzerland may only be transmitted to a foreign authority by means of formal administrative assistance. Article 42 FINMASA. However, vis-à-vis foreign financial market authorities, financial institutions may also deliver non-public information directly, provided that the foreign authority does not use the information other than for financial market supervision purposes and that it is bound by a professional secrecy rule. Article 42c(1) FINMASA. Information regarding a specific transaction or client may even be provided without the reservation listed above (specialty principle and secrecy). Article 42c(2) FINMASA.</p> <p>FINMA has in principle the right to require Swiss firms to refer the foreign authority to the formal administrative assistant procedure. Article 42c(3) FINMASA. FINMA has for that purpose issued certain guidance in which cases firms would be required to notify FINMA of an</p>	<p>generally waived where a client consent or waiver is required for such information maintenance and sharing pursuant to Article 42c(1) and (2) of the FINMASA, and it is a common practice to have such advance consent or waiver in place.⁴³ These consents or waivers are generally necessary for Swiss banks to comply with foreign reporting or disclosure regimes that apply when a bank executes transactions on non-Swiss trading venues or acts as custodian for foreign securities for its clients. We further note that procedures exist for the sharing of information between FINMA and foreign regulators, and would note in this regard that both the Commission and FINMA are signatories to the IOSCO MMOU.⁴⁴</p>

⁴³ See, e.g., Article 18(b) of Credit Suisse AG’s General Conditions (GC) and Safe Custody Regulations (SCR), available at <https://www.credit-suisse.com/media/assets/legal/cs-ch-ag-general-conditions-gc-and-safe-custody-regulations-scr-610013.pdf>; Clause 13 of UBS AG’s General Terms and Conditions, available at https://www.ubs.com/global/en/legal/country/switzerland/legalnotices/jcr_content/mainpar/toplevelgrid/col1/teaser/linklist/link.1699344078.file/bGluyay9wYXRoPS9jb250ZW50L2RhbS9hc3NldHMvY2MvZ2xvYmFsL2xIZ2FsL2RvYy9nZW5lcmFsLXRlcm1zLWFuZC1jb25kaXRpb25zLWVvLnBkZg==/general-terms-and-conditions-en.pdf.

⁴⁴ See IOSCO, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (May, 2012), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>; Signatories to Appendix A and Appendix B List, <https://www.iosco.org/about/?subSection=mmou&subSection1=signatories>.

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		<p>information transfer. Generally, firms are permitted to directly undertake transaction reporting to foreign trade repositories and exchange other standard information with foreign supervisory and other authorities as long as client waivers are in place, where required.</p> <p>Furthermore, FINMA may permit on-site visits of foreign supervisory authorities and their auxiliaries. Such visits have to be coordinated through FINMA, and FINMA may reserve the right to accompany the foreign authority's staff when undertaking on-site visits at a regulated firm's premises in Switzerland. Article 43 FINMASA. It should be noted that FINMA itself is undertaking on-site visits at Swiss banks' operations abroad (specifically branches) on a regular basis and has relevant supervisory arrangements or understandings in place with a number of foreign regulators.⁴²</p> <p>Foreign regulators may be made subject to certain other requirements (maintenance of secrecy, principle of specialty, reciprocity) to access the records of the trade repository that is authorized according to Swiss law. Article 78 FinMIA.</p>	
6. Are firms required	SBSDs are required to furnish promptly to a	Swiss law requires the supervised firms to	Although as noted above, there is no strict

⁴² A list of FINMA's supervisory agreements with foreign regulators is available at <https://www.finma.ch/en/finma/international-activities/supervisory-cooperation/agreements/>.

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to furnish records promptly to regulators upon request?	representative of the Commission legible, true, complete, and current copies of records preserved pursuant to the Commission rules when requested by a representative of the SEC. 17 CFR 240.18a-6(g).	provide FINMA with all the information that it requires to carry out its tasks. Furthermore, incidents of substantial importance need to be reported immediately to FINMA. Article 29(2) FINMASA. For records on derivatives transactions there is a specific obligation to deliver information fully and swiftly. Article 1(4) FMIO-FINMA.	requirement under Swiss law that information be immediately provided to a foreign regulator, to the extent the Commission finds that the lack of any such requirement would prevent Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting substituted compliance on the condition that each of UBS AG and Credit Suisse AG will agree to provide relevant records promptly to the Commission upon request, consistent with Exchange Act Sections 15F(j)(3) and (4)(b).

c. Reports and Notifications

With regards to reporting and notifications requirements, Swiss law requires banks to file certain annual, semi-annual, and quarterly reports according to FINMA Circular 2016/1, which sets out disclosure rules consistent with standards established by the Basel Committee on Banking Supervision (“**BCBS**”). We also would not see a material deviation from equivalent Commission requirements. Especially for the financial and capital reporting, Swiss law foresees detailed and comprehensive rules for banks and securities firms in order to provide the regulator but also the public with the necessary information that ensures stability of the individual firms, but also protects the stability and integrity of the financial market. Based on the information available to the regulator and to the public, the access to relevant data for effective supervision but also for establishing a solid business relationship with a licensed firm is at any time ensured. Therefore, with regard to the reporting and notification requirement, the relevant Swiss law should qualify for substituted compliance.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Response
<p>1. What reports are firms required to make regarding financial, operational and compliance matters? To what extent is the information associated with those requirements similar to, or different from, the information presented in FOCUS reports and in annual reports required under the Exchange Act?</p>	<p>SBSDs are required to file FOCUS reports to provide the Commission with unaudited reports about their financial and operational condition. 17 CFR 240.18a-7(a)(2). The information required for an SBSB that has a Prudential Regulator under Part IIC of the FOCUS report is generally limited to certain balance sheet, regulatory capital, income statement, segregation compliance, and aggregate position information.</p> <p>The annual reports requirements in Exchange Act Rule 18a-7(c) do not apply to SBSBs that have a Prudential Regulator. 17 CFR 240.18a-7(c)(1)(i).</p>	<p>Banks have to publish their annual report. Article 6a BA and 32 BO. FINMA Circular 2020/1 provides for the accounting rules according to which this report has to be established. FINMA Circular 2020/1. In Annexes 1-4 of this Circular, FINMA provides a comprehensive schedule including all the elements that have to be covered by the financial reports of banks.</p> <p>Finally, banks must adequately inform the public of their risk and their capital adequacy. Article 16 CAO. FINMA has defined specific annual, semi-annual, and quarterly disclosure requirements in detail in its FINMA Circular 2016/1. FINMA Circular 2016/1. These disclosure rules for banks implement and are compliant with the standards and principles, and specifically the various disclosure rules established by the BCBS.</p>	<p>The annual report required under Swiss law would be comparable to Part IIC of the Commission's FOCUS report because both reports contain approximately the same or at least comparable elements (Annex 2 of this application contains the full annual report requirement under Swiss law). Other similar reports are also required under Swiss law on a more frequent basis. In particular, systematically important banks, including UBS AG and Credit Suisse AG, and banks that meet certain minimum capital and credit risk threshold are required to make quarterly reports regarding, <i>inter alia</i>, capital, leverage ratio and liquidity coverage ratio. Marg 14.4 and Marg 14.6, FINMA Circular 2016/1. Furthermore, the requirements for these financial statements comply with the applicable international standards for banks established by the BCBS.</p>
<p>2. To what extent does your jurisdiction require reports that address the use of internal models for purposes of calculating net capital?</p>	<p>Because each of UBS AG and Credit Suisse AG has a Prudential Regulator, each will be subject to capital and margin requirements promulgated by its Prudential Regulator, and accordingly we have not provided a response to this inquiry.</p>	<p>N/A</p>	<p>N/A</p>
<p>3. Does your jurisdiction require firms to make financial and capital</p>	<p>Because each of UBS AG and Credit Suisse AG has a Prudential Regulator, each will be subject to capital and margin requirements promulgated</p>	<p>N/A</p>	<p>N/A</p>

<p>information publicly available online? If so, what are the contents of the required disclosures?</p>	<p>by its Prudential Regulator, and accordingly we have not provided a response to this inquiry.</p>		
<p>4. What notices are firms required to make regarding matters such as capital adequacy and deficiencies, failures to comply with books and records requirements, failures to comply with segregation requirements, and material weaknesses?</p>	<p>SBSDs that have a Prudential Regulator are required to give notice to the Commission when they file an adjustment of reported capital category with its Prudential Regulator. 17 CFR 240.18a-8(c).</p> <p>Every SBSB or MSBSP that fails to make and keep current the required books and records must notify the Commission on the day that the failure arises, and, within forty-eight hours of the original notice, provide a report stating what the firm has done or is doing to correct the situation. 17 CFR 240.18a-8(d).</p> <p>Every SBSB must give notice to the Commission if it fails to make a deposit into its customer reserve account, as required by the segregation rule. 17 CFR 240.18a-8(g).</p>	<p>FINMA-supervised firms are subject to the general requirement to report to FINMA all incidents that are of material importance for supervision without undue delay.⁴⁵ Article 29(2) FINMASA. This requirement broadly applies to all areas of a supervised entity, including incidents of material importance with respect to recordkeeping obligations. It is UBS AG’s and Credit Suisse AG’s practice to generally report any significant failure in recordkeeping consistent with their commitment to openness and transparency with FINMA.</p> <p>Furthermore, with respect to capital, liquidity and large exposures, Swiss securities firms and banks are subject to a variety of specific notification obligations (in addition to the financial and consolidation reporting obligations), including:</p> <ul style="list-style-type: none"> • Shortfall with respect to minimum capital requirements, Article 42(3) CAO; • Specifically for systemically important 	<p>As demonstrated in the summary, the Swiss law, like the Commission rules, requires notification to the regulator of material supervisory failures, including capital deficiencies and recordkeeping incidents. Whether a particular deficiency or failure is material and requires reporting depends on a facts and circumstances determination, considering the scope and impact of the particular incident.</p> <p>In addition, as noted above, while comparable notifications are required under Swiss law, Swiss law does not require copies of such notifications to be delivered to the Commission. To the extent the Commission finds that failure to deliver such notices to the Commission prevent Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting substituted compliance on the condition that the relevant Swiss notifications are delivered to the Commission.</p>

⁴⁵ In this regard, we note that the unofficial English translation of Article 29 of the FINMASA requires such reports be made “immediately.” However, in the original German context, and as is understood by FINMA and market participants, the timing requirement is without undue delay depending on the facts and circumstances.

		<p>banks, shortfall with respect to capital buffer requirements, Article 130(4) CAO;</p> <ul style="list-style-type: none"> • Breach of large exposure limits, Article 101 CAO; • Shortfall with respect to the liquidity coverage ratio, Article 17b Liquidity Ordinance; and • Shortfall (or expected shortfall) with respect to specific liquidity requirements for systemically relevant banks, Article 26(2) Liquidity Ordinance. <p>Furthermore, on capital adequacy the banks must prove on a quarterly basis that they dispose of adequate capital. Article 14 CAO.</p>	
5. To what extent does your jurisdiction require financial reports or other information to be reviewed by an independent accountant?	The independent accountant requirements in Exchange Act Rule 18a-7(e) apply only in connection with the annual requirements under Exchange Act Rule 18a-7(c), and do not apply to SBSDs that have a Prudential Regulator, such as UBS AG and Credit Suisse AG. Accordingly, we have not provided a response to this question.	N/A	N/A
6. Are there potentially any restrictions or prohibitions on the ability of the Commission to access	N/A	According to Article 42c FINMASA, Swiss financial institutions may exchange non-public information with foreign financial market authorities. This applies specifically to the firm's own information and data. However,	As noted in the summary, the retention and availability of information is not without restrictions under Swiss law. However, such restrictions are generally waived where a client consent or waiver is required for such

<p>reports or notices made pursuant to the requirements of your jurisdiction?</p>		<p>data protection rights of concerned individuals and banking secrecy rights of clients are reserved, but may be waived by the relevant individual.</p> <p>FINMA may reserve administrative assistance channels.</p> <p>In case of civil, criminal and tax law proceedings, information exchange needs to be processed through ordinary legal or administrative assistance proceedings. Under limited circumstances, FINMA may invoke a supervisory privilege and prohibit the sharing of certain information. Article 42c(5) FINMASA.</p> <p>Onsite visits are possible upon authorization and in coordination with FINMA. Article 43 FINMASA.</p>	<p>information maintenance and sharing, and it is common practice to have such advance consent or waiver in place. Nonetheless, to the extent the Commission finds that any restrictions on access to such data would prevent Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting the substituted compliance on the condition that each of UBS AG and Credit Suisse AG will agree to provide relevant records promptly to the Commission upon request, consistent with Exchange Act Sections 15F(j)(3) and (4)(b).</p>
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3. Supervision and Chief Compliance Officer Requirements

Below we address those aspects of Swiss law corresponding to Commission requirements relating to (a) supervisory systems, responsible individuals and qualification requirements for supervisors; (b) supervisory system policies and procedures; (c) the CCO and the CCO's reporting authority and job security; (d) CCO policies and procedures; and (e) CCO reports.

a. Supervisory Systems, Responsible Individuals and Qualified Supervisors

Swiss law requires firms to have a comprehensive supervisory system covering all business activities, including a first line of defense encompassing the trading desks and a second line of defense composed of independent control functions. To ensure the effectiveness of the implemented system, Internal Audit, as the third line of defense, regularly examines and assesses the control framework. The responsibility of the control functions is broad and their powers are comprehensive. Direct communication between the control functions and both executive management and the BoD must be guaranteed. Furthermore, there are rules that ensure that the functions are staffed adequately in relation to their tasks.

Against this background, in our view, these requirements under Swiss law – taken as a whole – produce similar outcomes as Exchange Act requirements with regard to the overall goal of ensuring SBSBs have structures and processes reasonably designed to promote compliance with applicable law. Accordingly, we believe that Swiss law on the supervision of SBS business should qualify for substituted compliance.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>1. To what extent are firms required to have systems for the internal supervision of their SBS business and personnel?</p>	<p>Exchange Act Section 15F(h)(1)(B) requires that an SBSB comply with rules that the Commission prescribes with regard to diligent supervision of the firm’s business. SEC Rule 15Fh-3(h)(1) states that each SBSB is required to “establish and maintain a system to supervise, and shall diligently supervise,” its business and the activities of its associated persons relating to SBS.</p>	<p>Article 3 of the BA requires a Swiss bank to have an <i>adequate organization</i> as a condition to receiving a banking license. As part of having an adequate organization, a firm must implement a comprehensive internal control system with at least three lines of defense that supervise the business and personnel. Marg. 60 & 82 FINMA Circular 2017/1. These lines of defense are:</p> <p>First line of defense: The revenue-generating units themselves must establish a comprehensive control system that ensures compliance with applicable law at all times. Marg. 61 FINMA Circular 2017/1. Implicitly, this also includes compliance with applicable foreign law (as described in more detail below in the answer to the next question).</p> <p>Second line of defense: The second line of defense is composed of <i>Internal Risk Control</i> and <i>Compliance</i> functions, which are independent control bodies that define the risk framework and monitor adherence to it. Marg. 62 FINMA Circular 2017/1. Although Swiss law does not have a concept of “associated persons”, the independent control bodies’ obligations to “monitor risks and compliance with statutory, regulatory and internal rules” extend to applicable foreign laws, including supervision of “associated persons” under SEC rules. The requirement for independent control bodies to “monitor . . . compliance” and “define the risk framework” also includes establishing a supervisory system designed to prevent violation of laws and regulations. For the Internal Risk Control function, this is explicitly stated in Marg. 72 FINMA Circular 2017/1, while for the Compliance function, this follows</p>	<p>A Swiss bank is required to implement a comprehensive system of internal controls that covers all of its business activity, including its SBS business, consistent with the requirements of Exchange Act Section 15F(h)(1)(B) and SEC Rule 15Fh-3(h)(1). This supervisory system includes robust compliance and risk oversight of trading desks and other revenue-generating units, which are themselves required to adopt compliance control systems that ensure compliance with applicable law. In addition, the revenue-generating units engaged in SBS activities are paired with a dedicated and independent risk and compliance function with appropriate staffing and resources, further ensuring the proper supervision of the front line revenue-generating units.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>How are those systems required to be reasonably designed to prevent violations of the applicable laws?</p>	<p>SEC Rule 15Fh-3(h)(1) provides that the supervisory system must be reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder relating to the business of the SBSB.</p>	<p>from the definition of “compliance” in Marg. 7 FINMA Circular 2017/1.</p> <p>Third line of defense: The third line of defense is composed of <i>Internal Audit</i>. Marg. 82 FINMA Circular 2017/1. Like Internal Risk Control and Compliance, Internal Audit is independent and reports directly to the BoD. Marg. 87 FINMA Circular 2017/1. Internal Audit monitors not only the revenue-generating units but also the control bodies (<i>i.e.</i>, Internal Risk Control and Compliance). Marg. 91 FINMA Circular 2017/1. Internal Audit, which is subject to the direct oversight of the BoD and the audit committee, ensures the effectiveness of the overall supervisory scheme of the firm.</p> <p>Each line of defense should ensure that revenue-generating units act in compliance with the law and that supervision is effective. This internal supervision covers all business activity, including the SBS business. In addition, each revenue-generating unit must be covered by a dedicated Risk Control and Compliance function and the respective staffing as appropriate and necessary. Marg. 62 & 64 FINMA Circular 2017/1.</p> <p>The corporate governance rules implementing the basic principle for adequate organization under Article 3 of the BA foresee several safeguards that are designed to ensure compliance by the firm with all applicable legal requirements. The provision of Article 3 BA and the requirement to maintain a sound and adequate organizational structure is understood and interpreted very broadly in Switzerland to include the obligation to be organized in a way that ensures compliance with all</p>	<p>A supervisory system that fails reasonably to prevent violations of applicable law, including the U.S. federal securities laws, would be deemed deficient under Swiss law. In addition, a breach of applicable foreign law, such as U.S. federal securities laws, could constitute a breach of Swiss supervisory law in cross-border situations and FINMA has clearly stated that it expects Swiss firms to comply with applicable foreign law. In</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>applicable legal requirements, including compliance with applicable foreign regulations. This is reflected in FINMA’s expectation for banks to comply with foreign law as laid out in Marg. 136.2 of FINMA Circular 2008/21 (note that the Circular refers, <i>inter alia</i>, expressly to Article 3 BA in its ingress). Marg. 136.1 ff. of the FINMA Circular 2008/21 also specifically requires firms to record, monitor and mitigate risks resulting from the application of foreign laws, and FINMA clearly states that it expects banks to comply with such foreign law (in this regard, both the Commission’s entity-level and transaction-level requirements, where applicable, would be covered).⁴⁶ FINMA can also open enforcement proceedings in case of breach of law or in case of “other irregularities.” Article 31 FINMASA. The breach of foreign law could be enforced as an “other irregularity,” if considered material as in the case cited above. Hence, also with respect to the enforcement power, FINMA would appear to have a sufficient legal basis to enforce compliance with applicable foreign law. Furthermore, Article 3 BA is seen as the general legal basis for the banks’ risk framework (which is then also further set out in Article 12 BO, which references Article 3a BA). The risks arising from cross-border servicing (including legal and regulatory risks) also have to be taken into account in the general risk framework as such risks may have a severe impact on the overall risk pattern</p>	<p>fact, during supervisory reviews, FINMA may also ask for assurances that regulated entities have complied with foreign law to the extent it was applicable to their operations. Accordingly, a Swiss bank must adopt supervisory systems that are reasonably designed to address relevant foreign law, including the U.S. federal securities laws applicable to it as an SBSB.</p>

⁴⁶ The relevance of compliance with foreign law for supervision in Switzerland may be illustrated best with an example of a 2009 enforcement case against UBS AG where FINMA (called the Swiss Banking Commission at the time) alleged a breach of the U.S. “Qualified Intermediary” regime and SEC registration requirements. In that case, FINMA treated a breach of U.S. law in cross-border activities as a breach of the Swiss requirements on operational risks and subsequently as a breach of Article 3 of the Swiss Banking Act. As a consequence, UBS AG was banned from undertaking such cross-border business out of its Zurich branch. At the time, FINMA had to base its procedure exclusively on Article 3 of the Swiss Banking Act. However, since then these principles have been further formalized and are now explicitly laid down in FINMA Circular 2008/21.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>How is the effectiveness of those systems assessed?</p>	<p>SEC Rule 15Fk-1(c)(2)(i)(A) requires an SBSB to annually perform a self-assessment of the effectiveness of its policies and procedures related to its business as an SBSB.</p>	<p>of the firm. Therefore, compliance with foreign law is also required within the risk framework required under Article 3 BA, and a breach of applicable foreign law would also lead to a breach of the firm’s organizational obligations and constitute a breach of Swiss law.</p> <p>A Swiss bank’s Compliance function must perform an annual assessment of the firm’s compliance with the law and its compliance policies and procedures. Marg. 78 FINMA Circular 2017/1.</p> <p>Additionally, Internal Audit carries out comprehensive risk assessments on an annual basis in accordance with an annual audit plan. Marg. 92 FINMA Circular 2017/1. Internal audit reports on the assessment to the BoD but also ensures that the executive board and the regulatory audit firm are informed about the risk assessment and the audit objectives.</p> <p>Furthermore, licensed external auditors review the firm’s processes and systems according to very specific and detailed audit schemes. Marg. 64 FINMA Circular 2013/8; FINMA Circular 2013/3.</p>	<p>Similar to the requirements under Commission rules, Swiss banks are required to conduct annual assessments of their compliance policies. In addition, all business activities, including SBS activities, are subject to annual reviews by the Internal Audit function and are supplemented by separate reviews by external auditors, subject to the firm’s audit scheme. These requirements ensure that the effectiveness of the compliance policies and procedures applicable to SBS activities are subject to an internal assessment at least annually by two lines of defense and an external auditor.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
2. What requirements govern the firm’s designation of supervisory personnel and the authority, responsibility and capacity of those personnel?	SEC Rule 15Fh-3(h)(2)(i) requires each SBSB to designate at least one person with authority to carry out supervisory responsibilities for each type of business which would require registration as an SBSB.	According to Article 3 of the BA, a firm must have the appropriate staffing (qualitatively and quantitatively) for each function, including the first line of defense functions. As already discussed, this includes dedicated supervisory personnel for every revenue-generating unit, including the SBSB business units. These supervisors must carry out their control functions by directly monitoring, managing and reporting on risks within the revenue-generating unit. Marg. 61 FINMA Circular 2017/1. Implicitly, this requires that supervisory personnel have sufficient authority to carry out their responsibilities.	FINMA has provided detailed guidance on what the respective responsibilities are for the first, second and third lines of defense as part of a firm’s overall control function. Similar to SEC Rule 15Fh-3(h)(2), this requires a firm have appropriately qualified supervisory personnel with authority within each revenue-generating unit.
3. What requirements govern the qualification of supervisory personnel?	SEC Rule 15Fh-3(h)(2)(ii) requires the SBSB to take reasonable efforts to determine that the supervisor is qualified, either by virtue of experience or training, and also to implement procedures to reasonably investigate the qualifications and experience of any person prior to the person becoming associated with the SBSB.	Article 3 of the BA’s requirement to maintain an adequate organization includes the requirements for supervisory personnel to have appropriate qualifications and for the firm to establish an effective framework to ensure that the qualification of the employees of a firm meets the standard required for the respective function. This is because adequate organization requires an adequate resource allocation, which includes having personnel with the necessary qualifications to perform their task. It is also part of the firm’s risk framework to have the appropriate staffing for the supervisory function. This translates into (i) the requirement in Marg. 57 of FINMA Circular 2017/1, according to which the tools and organizational structures for the risk management framework need to be defined and (ii) the requirement in Marg. 64 of the Circular for firms to have the necessary resources and powers. Resources in that context are understood as a quantitative and qualitative requirement, which also applies to the qualification of the employees. Accordingly, to satisfy its prudential	Prudential banking requirements require that a Swiss bank both select supervisory staff who are properly qualified to supervise its SBS activities and ensure that staff continue to be qualified for their roles. In addition, specific qualification requirements for certain functional senior officers (<i>e.g.</i> , the executive board, other significant staff with material decision-making power within the firm such as the desk heads, branch heads, etc.) set explicit requirements for certain key supervisory personnel. These requirements require a firm to not only investigate the qualifications of its supervisory personnel prior to hiring, but also take steps to ensure they continue to have the required knowledge and skill sets to perform their roles, consistent with the requirements of SEC Rule 15Fh-3(h)(2)(ii).

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>requirements, a firm must ensure that it has appropriate staffing with the relevant qualifications for every specific role within the firm. In addition, certain senior officers (<i>e.g.</i>, the BoD, executive board, other significant staff with material decision-making power within the firm such as the desk heads, branch heads, etc.) of the firm have to comply with the “fit and proper” test according to Article 3(2)(c) & 3f of the BA.</p> <p>Finally, Article 12(2) of the BO requires a firm to monitor operational risks, implemented through internal policies of the firm. Unqualified employees in supervisory functions, as well as in the revenue-generating units, that are also part of the internal control system (cf. Marg. 61 of FINMA Circular 2017/1), may impair the functioning of the entire risk control framework, and subsequently the functioning of the entire firm. Accordingly, employment of unqualified employees would create an operational risk that needs to be mitigated according to Article 12(2) BO. Swiss firms mitigate this risk by ensuring that the relevant staff (in particular within the risk control functions such as risk and compliance, but also in the revenue-generating units) have an appropriate level of qualification to perform their tasks.</p>	

b. Supervisory System Policies and Procedures

As a general principle in Swiss law, rules and regulations are often set forth on a principles-based level. However, this does not mean that detailed requirements do not exist. Rather, it is the supervisory practice that defines the requirements to be implemented for a specific firm, taking into account the particularities of that firm. This flexibility permits the supervisory law to be tailor-made for the respective firm and better adapt to any given risk pattern.

These characteristics of Swiss law should be taken into account when assessing comparability to the Commission's supervision rules. Similar to the Exchange Act, Swiss law provides requirements for a firm to have a comprehensive framework of policies and procedures in place to ensure compliance with the law. The CFTC similarly recognized this framework when it granted substituted compliance for Swiss diligent supervision and conflicts of interest requirements.⁴⁷

Notably, these Swiss law principles and supervisory expectations require a Swiss bank to adopt robust policies and procedures that address all the sensitive activities of the firm. As a result, the firm is generally required to adopt policies and procedures to address the supervisory review of transactions related to its SBS activities, the review of internal and external correspondence, background investigations into employees, the supervision of outside trading by the firm's employees, self-supervision by supervisory personnel, and the prevention and mitigation of conflicts of interest, generally consistent with the requirements of SEC Rule 15Fh-3(h)(2)(iii)(A)-(H). Each of these components, and the comparability between the regimes, is set forth below in response to the Commission staff's specific questions addressing each of these requirements.

Against this background, relevant supervisory practices under Swiss law – taken as a whole – produce similar outcomes as the Exchange Act and Commission rules thereunder. Specifically, requirements to maintain, review and update comprehensive supervisory systems imposed by Swiss law are generally comparable to similar requirements under Exchange Act Section 15F(h)(1)(B) and SEC Rule 15Fh-3(h)(2)(iii).

⁴⁷ 78 Fed. Reg. at 78,906.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>1. In what ways are firms required to establish, maintain and enforce written supervisory policies and procedures?</p>	<p>SEC Rule 15Fh-3(h)(2)(iii) requires an SBS to establish, maintain and enforce written policies and procedures that address the firm’s SBS business, including associated persons, and which are reasonably designed to prevent violations of applicable securities laws and regulations. These written policies and procedures must include certain minimum requirements set forth in SEC Rule 15Fh-3(h)(2)(iii)(A)-(H). The requirements under SEC Rule 15Fh-3(h)(2)(iii)(A)-(E), (G) and (H) are addressed in response to the Commission staff’s specific questions below. We address the requirements of SEC Rule 15Fh-3(h)(2)(iii)(F) and (I) and comparability to Swiss law here since the Swiss law analogues to these requirements are not responsive to the Commission staff’s other specific questions.</p>	<p>Per Article 3 of the BA, a Swiss bank must establish internal policies in order to provide for an adequate organization and supervision. Furthermore, Swiss law requires the firm to adopt policies and procedures as part of the general risk management framework and for any activity associated with identified or potential risks. Article 12(2) BO (“the bank must provide a risk management framework as well as regulations or internal directives describing processes and responsibilities for risk-bearing business undertakings. Specifically, it must detect, mitigate and monitor market, credit, default, settlement, liquidity and reputational risks as well as operational and legal risk.”); Article 12(3) BO (“The bank’s internal documentation of its resolutions and monitoring activities of its risk-bearing business activities must be designed in such a manner that the audit firm may form a reliable opinion on these.”). Article 12(2) BO, as specified in Marg. 62 FINMA Circular 2017/1, also requires supervision of associated persons, since the risk management framework must encompass all factors that might have an impact on the firm’s risk, including third parties acting on behalf of the firm or in cooperation with the firm. Furthermore, Article 12 BO is a general rule applicable to all business activities of the firm, including those governed by securities law. Hence, directly based on Article 3 BA and</p>	<p>Consistent with SEC Rule 15Fh-3(h)(2)(iii), Swiss law requires a Swiss bank to adopt written policies and procedures in order to fulfill its obligations to maintain an adequate organization. The principles and requirements set forth under Swiss law address roughly the same requirements for written policies and procedures as set forth under SEC Rule 15Fh-3(h)(2)(iii). As described in more detail in section 3.b.2-10 below, Swiss law broadly requires firms to adopt policies and procedures to monitor and prevent violations of law, which in practice requires firms adopt similar policies and procedures as those set forth in SEC Rule 15Fh-3(h)(2)(iii)(A)-(H) in order to ensure compliance with Swiss law and, indirectly, with applicable foreign law to the extent that violations of foreign law would be viewed as indicative of a deficient supervisory program.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>SEC Rule 15Fh-3(h)(2)(iii)(F) requires the written policies and procedures to include a description of the supervisory system, including the titles, qualifications and locations of supervisory personnel and the responsibilities of each supervisory person with respect to the types of business in which the SBSB is engaged.</p>	<p>Article 12 BO, a firm must ensure compliance with the applicable securities laws and regulations, including foreign securities law, to the extent applicable.</p> <p>The organizational structure of the firm is defined by the BoD in the respective internal rules and regulations. Marg. 11 FINMA Circular 2017/1. This includes the risk management framework. The BoD is also responsible for ensuring that there is both an appropriate risk and control environment within the firm and an effective independent control scheme. Marg. 14 FINMA Circular 2017/1. Based on these guidelines, firms must establish a comprehensive risk management framework, including the definitions and applications of the tools. Marg. 53 & 57 FINMA Circular 2017/1. As used in Marg. 53 and 57 of the FINMA Circular 2017/1, the term “key risk categories” encompasses legal risk.</p>	<p>While Swiss law does not explicitly require written policies and procedures to include descriptions of the supervisory system that include titles, qualifications, responsibilities and locations of supervisory personnel, firms are required to include relevant definitions and applications of the various tools used in the risk management framework. The principles-based requirement under Swiss law to maintain an effective risk management framework necessitates in practice that a firm include necessary information within its written policies and procedures for the Compliance function staff and other employees to implement and adhere to the framework. In UBS AG’s and Credit Suisse AG’s relevant policies, such “necessary information” includes the roles and responsibilities for supervisory staff. Accordingly, Swiss law requirements result in similar regulatory outcomes as SEC Rule 15Fh-3(h)(2)(iii)(F) by ensuring that supervisory systems and written policies and procedures appropriately delineate</p>

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	<p>SEC Rule 15Fh-3(h)(2)(iii)(I) requires adoption of procedures that address similar obligations to those set forth in Section 15F(j) of the Exchange Act, consistent with the requirements of SEC Rule 15Fh-3(h)(2)(iii)(I). Specifically, SEC Rule 15Fh-3(h)(2)(iii)(I) requires SBSDs to adopt procedures reasonably designed to address the following duties:</p> <ul style="list-style-type: none"> • monitor the firm’s trading in SBS to prevent violations of applicable position limits; • establish robust and professional risk management systems; • disclose certain SBS information to regulators; • obtain any necessary information to conduct the firm’s business as an SBSD 	<p>The Swiss law requirements analogous to the duties contained in Section 15F(j) of the Exchange Act are addressed below, except for position limits, as the SEC has not adopted position limits, and the obligations to disclose and provide certain SBS information to the Commission or Prudential Regulators, as substituted compliance is not available for those obligations.</p> <p>Not applicable.</p> <p>As described in more detail above in section 3.a.1-3, Swiss law requires a firm to implement extensive internal control frameworks to address business and compliance risks across all business functions, including its SBS activities.⁴⁸</p> <p>Not applicable.</p> <p>Not applicable.</p>	<p>responsibilities and functions to ensure effective implementation.</p> <p>The Commission has not adopted position limits. Therefore, we do not address analogous Swiss law requirements.</p> <p>Swiss law requires firms to adopt policies and procedures to establish risk management systems, the comparability of which is discussed in more detail above in section 3.a.1-3.</p> <p>Substituted compliance is not available for this obligation.</p> <p>Substituted compliance is not available for this obligation.</p>

⁴⁸ These Swiss law requirements were determined by the CFTC to be comparable to the risk management requirements applicable to swap dealers under CFTC Rule § 23.600, subject to the condition that Swiss firms produce quarterly risk exposure reports in accordance with CFTC Rule § 23.600(c)(2). 78 Fed. Reg. at 78,904. CFTC Rule 23.600 was adopted by the CFTC pursuant to CEA Section 4s(j)(2), which is identical to the duty to establish a risk management system under Section 15F(j) of the Exchange Act.

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	<p>and provide such information to the Commission upon request;</p> <ul style="list-style-type: none"> • implement conflict-of-interest systems and procedures; and • address antitrust considerations. 	<p>Swiss law requires banks to adopt procedures to prevent or otherwise mitigate conflicts of interest, both external and internal, and disclose to customers any conflicts that remain. Article 3 BA; Article 12 BO. These requirements are described in more detail below in section 3.b.8.</p> <p>Under Swiss law, the two primary antitrust-related laws – the Antitrust Act and the Unfair Competition Act – apply unconditionally to firms and cover both classic antitrust and merger law (<i>e.g.</i>, cartels, restraints of competition) and unfair practices in relation to competitors and dealings with clients.</p>	<p>Swiss law requirements to prevent conflicts of interest and mitigate any conflicts that cannot be avoided requires a firm to adopt comparable policies and procedures to manage conflicts-of-interest as those required by Section 15F(j) of the Exchange Act. The comparability of conflicts of interest requirements under Swiss law are discussed further in section 3.b.8.</p> <p>Generally, firms are subject to antitrust laws globally depending on where they operate. As part of their supervisory obligations, firms are expected to comply with these laws and maintain appropriate policies and procedures to prevent violations of these laws. Accordingly, firms are expected to maintain policies and procedures that address relevant antitrust laws, both under Swiss law and applicable foreign law, consistent with the obligations required by Section 15F(j) of the Exchange Act.</p>
2. In what ways are firms required to have supervisory policies and procedures for the review of	SEC Rule 15Fh-3(h)(2)(iii)(A) requires an SBSB's written policies and procedures to include procedures for supervisory review of transactions for which registration as an SBSB is	Article 3(2)(a) of the BA requires a Swiss bank to have a proper business organization and conduct in order to be able to register. Article 12(2) of the BO formalizes this registration	Consistent with SEC Rule 15Fh-3(h)(2)(iii)(A), as part of a Swiss bank's obligation to maintain an adequate organization, the firm is in practice

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
transactions?	required.	<p>requirement, in that it requires a firm to capture, supervise and limit <i>inter alia</i> also reputational, operational and legal risks. Furthermore, the respective responsibilities and processes are to be set out in internal rules and guidelines.</p> <p>From a Swiss law perspective, market misconduct constitutes reputational, operational and especially legal risk, given that market misconduct is potentially subject to a variety of criminal law sanctions (<i>e.g.</i>, fraud, <i>cf.</i> Article 146 of the Swiss Criminal Code; exploitation of insider information, <i>cf.</i> Article 154 FinMIA; price manipulation, <i>cf.</i> Article 155 FinMIA). According to Marg. 2 of FINMA Circular 2013/8, market conduct is part of the proper business conduct pursuant to Article 3 BA. The impairment of the proper business conduct requirement, which is a licensing requirement, will pose a serious reputational, operational and legal risk for the organization as a whole (and relevant staff). This is supported by the requirements in Marg. 45 and 46 of that Circular to perform a risk assessment and to implement respective mitigating measures. The supervised institution is required to apply the organizational requirements in a manner commensurate to its risk situation. Further, Internal Risk Control is responsible for operating an adequate risk monitoring system to ensure compliance especially regarding capital adequacy, risk diversification and liquidity. Marg. 72 FINMA</p>	<p>required to adopt internal policies that would address the review of transactions entered into as part of its SBS trading business as part of its overall obligation to manage and monitor risk arising out of market misconduct. For example, it is appropriate for a firm to put in place detective controls operated by the second line of defense, which are designed to identify behaviors that may indicate a market conduct concern and result in review of transactions. These controls may be designed to include coverage of the following risks (but are not limited to them): insider dealing, market manipulation, front-running, market sounding and stabilization. Further, Swiss law capital and liquidity requirements require a firm to monitor trading in order to ensure the firm maintains adequate capital and liquidity levels. Together, these obligations require firms to adopt policies and procedures for the supervisory review of transactions, which is generally similar to the requirements of SEC Rule 15Fh-3(h)(2)(iii)(A).</p>

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		Circular 2017/1. The organizational requirements under Marg. 2, 45 & 46 FINMA Circular 2013/8 and risk monitoring systems under Marg. 72 FINMA Circular 2017/1, in practice, require supervisory personnel to monitor transactions and manage unauthorized trading and related risks. Marg. 46 FINMA Circular 2013/8; FINMA Newsletter 31. ⁴⁹	
3. In what ways are firms required to have supervisory policies and procedures for the review of correspondence and internal communications? Are firms also required to have supervisory policies and procedures for the supervision of oral communications?	<p>SEC Rule 15Fh-3(h)(2)(iii)(B) requires an SBSB's written policies and procedures to include procedures for supervisory review of incoming and outgoing written (including electronic) correspondence with counterparties or potential counterparties and internal written communications related to the SBSB's business involving SBS.</p> <p>In addition, while SEC Rule 15Fh-3(h)(2)(iii)(B) only requires review of written communications, an SBSB that records oral communications with counterparties or potential counterparties, including in order to comply with the daily trading record recordkeeping requirements imposed by SEC Rule 18a-6(b)(2)(ii), should generally consider providing such communications for supervisory review as well. 81 Fed. Reg. 29,960, 30,006.</p>	<p>As part of the broad principles to manage market misconduct outlined above in section 3.b.2, firms are in practice required to review both external and internal correspondence.</p> <p>The types of correspondence firms would be expected to review would include records of certain communications with the client, such as all the information that has been asked from the client and the recommendation to the client if such recommendation leads to the client buying or selling a product. The mandatory contractual duty of care between service providers and clients, Article 398 CO, and the respective obligation to render account (<i>i.e.</i>, preserve and hand over all documents produced within the context of the relationship between the firm and its client), Article 400 CO, also require maintenance of internal correspondence between personnel that relate to clients. These records, as well as client related correspondence maintained</p>	<p>Requirements to maintain all client-related correspondence result in firms having to maintain records of correspondence between firm personnel and clients.</p> <p>Requirements for documenting client interaction in accordance with the general requirements to keep and maintain books and records of all the correspondence and documents relating to the business, including the recording of client communication and correspondence, Article 957 ff. CO, also require the maintenance of certain correspondence between the firm and client. While there is no explicit requirement to record oral communications, in practice a firm will take notes of the communication to record on its systems. As applied, the broad obligation to maintain an effective supervisory system as part of the adequate organization requires a firm to review</p>

⁴⁹ FINMA Newsletter 31 is applicable to banks. There are specific rules in the newsletter for banks when engaging with third parties (see Marg. 26 ff. of the Newsletter on Outsourcing).

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		<p>according to Article 958f of the CO and records of internal and external telephone conversations and electronic communication of all staff working in securities trading which are required to be maintained in accordance with Marg. 59-61 FINMA Circular 2013/8, would also be subject to review by the independent control functions, including Internal Audit, in the course of the ordinary review of the business. Marg. 72 of FINMA Circular 2017/1 requires banks to establish systems to monitor compliance with regulatory requirements, if deemed necessary to ensure compliance. The independent risk control bodies have to develop a risk-based review framework to ensure compliance with the law, which will also include review of communication, and UBS AG's and Credit Suisse AG's independent risk control bodies have implemented policies on this subject.</p>	<p>these communications as part of its internal control requirements. In addition, records of the communications would be subject to review by the internal control functions, including Internal Audit, in the course of the ordinary review of the business. For example, it is appropriate for a firm to put in place detective controls operated by the second line of defense that are designed to identify behaviors that may indicate a market conduct concern, which would cover the review of communication-based market conduct, Marg. 59 ff. FINMA Circular 2013/8, in addition to Internal Audit's review in the ordinary course, Marg. 91 ff. FINMA Circular 2017/1.</p> <p>These review requirements are included in the risk control policy framework for firms, consistent with the intent of SEC Rule 15Fh-3(h)(2)(iii)(B).</p>
<p>4. In what ways are firms required to have supervisory policies and procedures for annual or periodic review that are intended to prevent and detect violations of applicable law?</p>	<p>SEC Rule 15Fh-3(h)(2)(iii)(C) requires written policies and procedures to include procedures for a periodic review, at least annually, of the SBS business in which the SBSD engages that is reasonably designed to assist in detecting and preventing violations of applicable federal securities laws and the rules and regulations thereunder.</p>	<p>The Compliance function must conduct an annual assessment of the compliance risks of the firm and prepare a risk-oriented activity plan that must be approved by the executive board. Marg. 78 FINMA Circular 2017/1. The Compliance function assesses the firm's compliance with legal and regulatory requirements. This derives from Article 12 BO, which requires banks to detect, monitor, and mitigate, <i>inter alia</i>,</p>	<p>Swiss law requires both the Internal Audit and Compliance functions to annually review the compliance framework, which would include potential violations of law and regulatory change, and update policies and procedures accordingly to remediate any identified issues or weaknesses. This annual review and update process is generally consistent with the requirements</p>

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		operational and legal risks. The Compliance function also assesses compliance with internal policies and procedures. Marg. 62 of FINMA Circular 2017/1. In addition, Internal Audit carries out a comprehensive risk assessment on an annual basis in accordance with an annual audit plan which would also review for potential violations of applicable law by specifically taking into account regulatory changes. Marg. 92 FINMA Circular 2017/1. Internal Audit needs to assess whether the independent control function actually adheres to their regulatory tasks, including the firm’s compliance with the law and the firm’s compliance with policies and procedures, as laid out in Marg. 62 of FINMA Circular 2017/1.	of SEC Rule 15Fh-3(h)(2)(iii)(C).
5. In what ways are firms required to have supervisory policies and procedures for investigating the character, business repute, qualifications and experience of associated persons?	SEC Rule 15Fh-3(h)(2)(iii)(D) requires written policies and procedures to be reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder for the SBSB and its associated persons and include procedures to conduct a reasonable investigation regarding the good character, business repute, qualifications, and experience of any person prior to that person’s association with the SBSB.	The performance of employee background checks, which would include a review of an employee’s character, business repute, qualifications and experience, is considered a part of the proper business organization requirement stipulated by Article 3 of the BA. The performance of employee background checks is also considered a part of the requirements relating to having policies and procedures for the internal risk management framework under Article 12 of the BO, since an unqualified employee or an employee with questionable character poses potential risk to the firm.	As described above in section 3.a.3, Swiss law broadly requires Swiss banks to ensure that their staff have the appropriate qualifications and skills to serve in their roles. These requirements indirectly require firms to adopt policies and procedures for the background check of their employees. Because firms also must adopt policies and procedures for their internal risk framework, and an unqualified or employee with questionable character could pose a potential risk, firms also generally include, as part of their background investigations, research into

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			the character and business repute of their employees (in practice, an employee would have to provide the firm with an excerpt of her or his criminal history and previous employers will be asked to provide references). Together, these requirements effectively require a firm to adopt policies and procedures for extensive background checks on employees that cover the characteristics listed in SEC Rule 15Fh-3(h)(2)(iii)(D).
6. In what ways are firms required to have supervisory policies and procedures for approving and supervising the outside trading of associated persons?	SEC Rule 15Fh-3(h)(2)(iii)(E) requires written policies and procedures to include procedures for the approval of an associated person to establish or maintain a securities or commodities account or a trading relationship in the name of, or for the benefit of, such associated person at another SBSB, broker, dealer, investment adviser, or other financial institution; and if permitted, procedures to supervise the trading at the other SBSB, broker, dealer, investment adviser, or financial institution.	Marg. 53 ff. FINMA Circular 2013/8 require Swiss banks to adopt rules for the acquisition and disposal of financial instruments by staff for their own account as part of the firm's comprehensive scheme to prevent market misconduct. Within this framework a firm would introduce requirements to approve and supervise trading by employees. In addition, Article 12(2) of the BO imposes similar requirements as part of the firm's obligation to adequately control its operational risks.	Swiss law requires a bank to adopt procedures for the outside trading of personnel, which would include the firm having procedures to approve and supervise personal trading by staff, as part of its overarching framework to prevent conflicts of interest and control operational risks, consistent with the requirements under SEC Rule 15Fh-3(h)(2)(iii)(E).
7. Are firms required to have supervisory policies and procedures to generally prevent self-supervision, and to address self-supervision when it is unavoidable? What factors must be met to conclude that self-	SEC Rule 15Fh-3(h)(2)(iii)(G) requires written policies and procedures to include procedures prohibiting an associated person who performs a supervisory function from supervising his or her own activities or reporting to, or having his or her compensation or continued employment determined by, a person or persons he or she is	As part of maintaining an adequate organization under Article 3 of the BA, a Swiss bank would be expected to have policies and procedures in place to prevent self-supervision and mitigate risks where self-supervision was unavoidable. In this regard, all licensed entities within the financial market legislation in Switzerland,	Although there is not a specific requirement in Swiss law to adopt supervisory procedures addressing self-supervision, it is understood that the general requirements around maintaining a sufficient supervisory framework for a firm would require the firm to adopt

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supervision is unavoidable?	<p>supervising. However, if the SBSB determines that compliance with this requirement is not possible because of the firm’s size or a supervisory person’s position within the firm, it must document the factors used to reach such determination and how the supervisory arrangement with respect to such supervisory personnel otherwise complies with SEC Rule 15F-3(h)(1)’s requirements. The SBSB must include a summary of such determination in the annual compliance report prepared by its CCO.</p>	<p>including banks (Article 3 BA, Article 12 BO, Marg. 60 FINMA Circular 2017/1), portfolio managers and trustees (Article 21(2) FinIA), and securities firms (Article 68 FinIO, Marg. 60 FINMA Circular 2017/1, also applicable to securities firms) are required to have independent controls. Hence, the concept of self-supervision should not occur at all, except for very small independent asset managers (Article 26 FinIO). For securities firms and banks, this exception is not available.</p> <p>Swiss law also requires firms to take adequate organizational measures (including implementing necessary policies and procedures) to prevent conflicts of interest that may arise providing their services or to rule out any impairment for the client. Article 3 BA; Article 12 BO. These requirements and safeguards would similarly prevent self-supervision by supervisory personnel to the extent it poses a conflict of interest and would require any conflict be mitigated. In addition, given the requirement to maintain independent supervision, Marg. 60 ff. FINMA Circular 2017/1, self-supervision should not occur as firms must ensure “effective” monitoring through internal controls. Further, a firm’s control functions must be independent and separate from its revenue-generating units. Article 12(2) BO. According to Article 3(2)(a) BA, as a part of a bank’s licensing requirement, the bank must establish a supervision and control</p>	<p>policies and procedures around self-supervision intended to monitor and mitigate any related risks. Requirements to adopt procedures to prohibit conflicts of interest would also prohibit self-supervision to the extent it posed a conflict of interest. Additionally, self-supervision should not occur due to a firm’s requirements to ensure “effective” monitoring of its business and requirements that the control functions remain independent from those they are supervising. Cumulatively, these requirements generally limit self-supervision from occurring, which is generally consistent with the goals of SEC Rule 15Fh-3(h)(2)(iii)(G).</p>

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		function that guarantees an efficient and adequate monitoring of the business, which means the bank must maintain independent supervision and ensure that supervisory staff remain independent from those he or she is supervising. This requirement has been further set out in Article 12(2) BO and incorporated into the independent risk control framework of Marg. 62 ff. of FINMA Circular 2017/1. Therefore, the Circular also refers to, <i>inter alia</i> , Article 3(2)(a) BA as a legal basis (see page 1 of the Circular).	
8. In what ways are firms required to have supervisory policies and procedures to prevent the supervisory system from being compromised due to conflicts of interest?	SEC Rule 15Fh-3(h)(2)(iii)(H) requires written policies and procedures to include procedures reasonably designed to prevent the supervisory system from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the SBSB, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised.	As described above, firms have to take adequate organizational measures (including implementing necessary policies and procedures) to prevent conflicts of interest that may arise providing their services or to rule out any impairment for the client. Article 3 BA; Article 12 BO. The safeguards against conflicts of interest must include measures and procedures to identify conflicts and prevent them if possible. If conflicts of interest occur nevertheless, they must be mitigated, <i>e.g.</i> , by disclosure. Article 3 BA; Article 12 BO. Regarding the internal control system, conflicts of interest should be monitored and prevented by Internal Audit as Internal Audit monitors the appropriateness and effectiveness of an institution's internal control system. Marg. 91 FINMA Circular 2017/1. Further, compensation of the independent functions must be structured in such a way as to not create conflicts of	Swiss firms are required under Article 3 BA and Article 12 BO, as implemented by Marg. 29 of FINMA Circular 2017/1, to adopt policies and procedures to identify and prevent conflicts of interest and, to the extent the conflict cannot be prevented, mitigate such conflict and disclose its existence to its counterparties. The BoD is explicitly required to set up rules addressing conflicts of interest. Pursuant to Marg. 29 of FINMA Circular 2017/1, conflicts of interest must be avoided and, in case that is not possible, the firm must take appropriate steps to mitigate. The universe of possible conflicts that would be expected to be prevented or mitigated is large, and includes the specific examples provided in SEC Rule 15Fh-3(h)(2)(iii)(H) relating to an employee's position and

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		<p>interest. Marg. 63 FINMA Circular 2017/1. Specifically, Swiss law requires compensation arrangements to avoid conflicts of interest within the first line of defense and independent control bodies. Marg. 63 of FINMA Circular 2017/1 explicitly states that the compensation system for independent control bodies must not create incentives which could lead to conflicts of interest with the duties of these bodies, which prevents firms from providing compensation in a way that would create incentives to breach legal and regulatory obligations. For the first line revenue-generating units, similar requirements are in practice derived from the fundamental obligation to be adequately organized under Article 3 of the BA and these requirements are further substantiated in FINMA Circular 2010/1, laying out principles on compensation systems. According to these rules it is unlawful to create incentives that incite the taking of inappropriate risks, the infringing of applicable laws or regulations, internal rules or the violation of agreements. Instead, remuneration schemes must have in view the long-term success and the stability of the company.</p>	<p>compensation arrangements as well as to conflicts more generally.</p>
<p>9. When are firms required to amend their policies and procedures?</p>	<p>SEC Rule 15Fh-3(h)(4) requires an SBSB to promptly amend its written supervisory procedures when material changes occur in applicable securities laws or rules or regulations thereunder, as well as when material changes</p>	<p>Generally, the obligation for adequate organization under Article 3 of the BA inherently requires a Swiss bank to have its policies and procedures constantly up to date. Therefore, Internal Risk Control has to establish a system to</p>	<p>Although there is not a specific requirement to “promptly” amend policies and procedures due to a material change in applicable law or a change in the firm’s business or supervisory system, Swiss law</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>occur in its business or supervisory system and promptly communicate any material amendments to its supervisory procedures to all relevant associated persons.</p>	<p>constantly monitor the regulatory environment and initiate implementation of changes. Marg. 72 FINMA Circular 2017/1. In addition, the Compliance function and Internal Audit are required to undertake an annual review of procedures to inform the need for any updates.</p> <p>As part of the requirement for a proper business organization, Swiss firms must ensure that their staff possess the necessary skills, knowledge and experience to perform their work. Article 3 BA; Article 12 BO. This requirement also includes the obligation to ensure that firm personnel adhere to the latest policies, laws and regulations and, in practice, requires the firm to communicate any relevant changes to its personnel. In addition, the requirements to have internal policies and procedures to document, limit and monitor operational risks would also require the firm's personnel comply with any changes to the relevant rules.</p> <p>In addition, according to Marg. 20 of FINMA Circular 2018/3, the firm has to integrate third-party providers into the risk control framework. Further, the firm has to ensure that it has the necessary control and supervisory rights with regard to that third party. Marg. 21 FINMA Circular 2018/3. This ensures that material amendments of supervisory procedures are also passed on to the relevant third-party provider. Further, the obligation for firms to ensure their</p>	<p>requires, at a minimum, that policies and procedures be updated annually as a result of the annual compliance review to remediate any noted deficiencies, which would include needed changes due to changes in applicable law, business or the firm's supervisory system. Further, a firm needs to be in compliance with all relevant and applicable legal and regulatory requirements and implement changes in relevant regulatory requirements, and this requirement also applies to keeping relevant guidelines and policies updated to reflect the current legal requirements that are actually in force, and supervisory expectations require passing on material changes within the firm and to relevant third-party providers. If a policy does not reflect changes in legal requirements, it is likely that this will be noted in the regulatory audit firm's long form report (established on an annual basis) with an associated risk rating and recommended measures. The firm would then be given a deadline to remediate the issue, with review by the auditor of the firm's progress. Accordingly, in practice, the obligation to maintain an adequate supervisory system requires a firm to promptly amend its supervisory policies and procedures if there is a change in</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		staff possess the necessary skills, knowledge and experience to perform their work extends to personnel from third-party providers, and requires the firm ensure these personnel adhere to the latest policies, laws and regulations.	applicable securities laws or material changes in the firm’s business or supervisory system. In case of any material failure, FINMA could act directly and require the firm to become compliant. Articles 31 & 32 FINMASA.
10. What is the potential liability that firms or their personnel may face for failing to supervise compliance with requirements applicable to their SBS businesses?	In general, SBSs can face civil penalties for failing to diligently supervise persons subject to its supervision. However, SBSs will not be liable for failures to supervise another person if either the other person is not subject to the SBS’s supervision or if the safe harbor in SEC Rule 15Fh-3(h)(3) is satisfied. 81 Fed. Reg. at 30,007.	The Swiss Financial Market Supervision Act imposes several different measures FINMA may take against a firm for failing to comply with the law, including for having deficient supervisory systems as a result of failing to properly supervise compliance with applicable requirements by its personnel. Article 32 FINMASA. These measures may be established on behalf and at the cost of the firm, Article 32(2) FIMASA, and may require posting bonds where client interests are in jeopardy as well as disgorging unlawful profits, Article 35 FINMASA. Ultimately, such measures could lead up to withdrawal of the license for a financial service provider.	In general, Swiss firms that fail to supervise compliance with applicable law by persons that are subject to the firm’s supervision may be subject to civil, and potentially, criminal penalties, as well as the loss of their license, in the case of a financial service provider, or a professional bar, for individuals, consistent with liability under U.S. law. Supervisory personnel may be personally liable for their failure to supervise and subject to both civil and potentially criminal penalties and professional bans.
Does following policies and procedures provide a safe harbor from this potential liability or otherwise reduce the potential liability? If so, what are the prerequisites (<i>e.g.</i> , no “red flags”) for that safe harbor or reduction of liability?	SEC Rule 15Fh-3(h)(3) provides a safe harbor for SBSs or their associated persons against failure to supervise claims where the entity or individual satisfies two conditions. First, the SBS must have established policies and procedures, and a system for applying those policies and procedures, which would reasonably be expected to prevent and detect, to the extent	Following policies and procedures does not <i>per se</i> provide a safe harbor. Any case would have to be assessed individually. However, if non-compliance with applicable Swiss or foreign legal or regulatory requirements has been established, following policies and defined procedures may in certain cases mitigate the severity of measures and lessen the sanctions for	Following policies and procedures does not provide a safe harbor, although it may result in lower sanctions at the regulator’s discretion.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to SBS. Second, the SBSB or associated person must have reasonably discharged its duties and obligations incumbent on it by reason of such procedures and system without a reasonable basis to believe that such procedures were not being followed.</p>	<p>individuals. It could not serve as an absolute safeguard against supervisory or criminal sanctions or civil law liability. This is standard practice in Swiss criminal proceedings where, in addition to establishing the objective basis of a violation, the subjective circumstances, such as the intent of the defendant, have to be considered (subjective basis). Accordingly, following duly enacted policies and defined procedures could provide evidence that the violation was not intentional and could lessen the individual's culpability and subsequently lessen the sanction. However, in the end, every case needs to be assessed individually.</p>	

c. Chief Compliance Officer Designation, Reporting Authority and Job Security

According to Swiss law, a bank must appoint a CCO. This position must be independent from revenue-generating units, represented in the executive board and have a direct access to the BoD. The Compliance function has comprehensive authority within the firm (inspection and access rights) and needs to be staffed and resourced adequately in order for the function to perform its duties. As Swiss law emphasizes the independence of the function through organizational safeguards and the reporting lines into the executive board and the BoD, other measures such as explicit job security and protection against sanctions are not known to Swiss law. Notably, despite similar differences with the CFTC CCO requirements, the CFTC found the Swiss requirements to be comparable, noting that “the Swiss law and regulations . . . are generally identical in intent to [the CFTC CCO requirements] by seeking to ensure firms have designated a qualified individual as the compliance officer that reports directly to a sufficiently senior function of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance.”⁵⁰ Considering the organizational setup and the authority of the function, we believe that the Swiss law requirements relating to the appointment and function of the CCO would also qualify for substituted compliance with respect to the Commission’s requirements, which are very similar to the CFTC’s requirements.

⁵⁰ 78 Fed. Reg. at 78,903.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>1. Are firms required to establish a CCO or similar function?</p>	<p>Per Section 15F(k) of the Exchange Act, an SBSB must designate an individual to serve as a CCO. Although there are no specific competency requirements, the SEC has stated that the CCO should be competent and knowledgeable regarding the federal securities laws, empowered with full responsibility and authority to develop appropriate policies and procedures for the SBSB, as necessary, and responsible for monitoring compliance with the firm’s policies and procedures. 81 Fed. Reg. at 30,055.</p> <p>SEC Rule 15Fk-1(b) provides that the CCO’s responsibilities include taking reasonable steps to establish, maintain and review compliance policies and procedures related to the firm’s business as an SBSB, administer each policy and procedure established as part of the compliance system and, in consultation with the BoD or senior officers,⁵¹ take reasonable steps to resolve any material conflicts of interest that arise.</p>	<p>Swiss law and FINMA require a regulated entity within FINMA’s jurisdiction to appoint members of senior management (<i>i.e.</i>, a member of the executive board) to act in the capacity of a CCO and CRO, with responsibility for the oversight of all of the entity’s regulated businesses, including its swaps and SBS businesses. Marg. 65 FINMA Circular 2017/1. As such, the CRO and CCO must have the necessary management expertise and sufficient knowledge and experience of banking and financial services required to ensure compliance with applicable legal requirements. Marg. 51 FINMA Circular 2017/1. Further, the CCO and CRO are subject to FINMA’s “fit and proper” test according to Article 3(2)(c) of the BA. Under Swiss law, compliance entails the adherence to legal, regulatory and internal provisions, as well as the observance of the customary standards and rules of professional conduct within the market. The risk of violations against provisions, standards or rules of professional conduct and the corresponding legal and regulatory sanctions, financial losses or damage to one’s reputation is deemed to be a compliance risk. Marg. 65 FINMA Circular 2017/1.</p>	<p>Similar to the Exchange Act and Commission rules, Swiss law requires the appointment of a CCO who is responsible for the oversight of the firm’s Compliance function with regard to the firm’s regulated businesses, including its SBS activities.</p>

⁵¹ The senior officer shall include the CEO or other equivalent officer. SEC Rule 15Fk-1(e)(2).

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>2. How do the requirements of your jurisdiction address lines of reporting for the CCO or similar function? How do those requirements otherwise help ensure that those persons have necessary authority and resources?</p>	<p>To address concerns that an SBSB's commercial interests could have an undue influence on the CCO's ability to make forthright disclosure to the BoD or senior officers about any compliance failures, Section 15F(k)(2) of the Exchange Act requires the CCO to report directly to either the BoD or to the firm's senior officer.</p>	<p>The CCO is required by law to report to the BoD and the executive board of the regulated entity with respect to any material compliance issues in any of the banking entity's businesses. Marg. 81 FINMA Circular 2017/1. In addition to this reporting obligation, independent control bodies, such as the Compliance function, must be represented in the executive board and must have direct access to the BoD. Marg. 66 FINMA Circular 2017/1.</p>	<p>Similar to the Exchange Act requirements, Swiss law requires the CCO to report directly to senior management with respect to any material compliance issues, in addition to having representation on the executive board and direct access to the BoD.</p>
<p>3. Do the requirements of your jurisdiction provide protections to the CCO or similar function with regard to removal, compensation or sanctioning? If so, what are those protections?</p>	<p>To further promote the independence of the CCO, SEC Rule 15Fk-1(d) requires that compensation and removal decisions regarding the CCO be made by a majority of the BoD.</p>	<p>Swiss law does not provide explicit protections for the removal, compensation or sanctioning of the CCO. However, the following requirements provide similar protections:</p> <p>(1) Regarding compensation, the general compensation rules in FINMA Circular 2010/1 (Remuneration Schemes) provide that, when determining compensation a firm must take into account strategic and operational responsibility and all significant risks attributable to a person. Neither the nature of the remuneration nor the criteria applicable for its allocation must create any incentive for taking inappropriate risks or for violating applicable law, regulations, internal rules or agreements. FINMA Circular 2010/1 further provides that the compensation calculation for persons in control functions must not be directly dependent on the performance of the business units, specific products or transactions these persons monitor. Swiss law requirements that compensation be structured to avoid conflicts of</p>	<p>Swiss law does not provide explicit protections for the removal, compensation or sanctioning of the CCO. However, the requirement that the CCOs have direct access to the BoD and representation on the executive board guarantees certain safeguards against undue termination of their employment or sanction imposed by the executive reporting line, which, together with the general compensation and removal-related requirements applicable to COOs, provides certain protections to the CCO from removal or sanctions.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>interest also require that the CCO's compensation arrangements do not conflict with the CCO's obligation to serve as an independent control function. Marg. 63 FINMA Circular 2017/1.</p> <p>(2) Regarding sanction and removal, Swiss labor law provides for protection against wrongful termination of employment. Article 336 ff. CO.</p>	

d. Chief Compliance Officer Policies and Procedures

Swiss law requires the Compliance function, Internal Risk Control function and Internal Audit to exercise vast authority and responsibility for implementing and enforcing legal requirements within the firm's organization. Despite being fully fledged independent control entities, the control functions frequently collaborate to ensure the overall supervisory system remains up to date and effective (*e.g.*, the Compliance function provides its annual assessment to Internal Audit for verification and gaps within the compliance policies and procedures identified by Internal Audit require remediation by the Compliance function). The Compliance function specifically conducts regular self-assessments and reviews, with noted deficiencies spurring the continual update of compliance policies and procedures. While the CCO manages the day-to-day actions of the Compliance function, ultimate responsibility for compliance policies rests with the BoD. Likewise, the BoD plays a key role in defining certain compliance policies, such as the conflict of interest policies, and with the implementation and enforcement of such measures falling within the responsibility of the Compliance function.

We also note that the CFTC has considered the Swiss CCO requirements in this area sufficiently comparable with its own rules to grant substituted compliance.⁵² Based on the above, the Swiss law requirements regarding the review of compliance policies, obligations to remediate non-compliance and, more generally, the role of the Compliance function within the organization are consistent with the intent of Section 15F of the Exchange Act and Commission rules.

⁵² Specifically, the CFTC found that the Swiss law requirements for the appointment of the CCO, scope of the Compliance function and operational measures to ensure the firm's compliance with applicable law are comparable to and as comprehensive as the requirements under CFTC Rule § 3.3. 78 Fed. Reg. at 78,903.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
1. Is the CCO or similar function required periodically to review the firm’s compliance with applicable requirements? Is a written assessment required?	SEC Rule 15Fk-1(b)(2)(i) requires the CCO to review the firm’s compliance with respect to the requirements under Section 15F of the Exchange Act and underlying rules and regulations, “where the review shall involve preparing the registrant’s annual assessment of its written policies and procedures reasonably designed to achieve compliance with” the statute and the rules by the SBSB.	Swiss law requires the Compliance function of a firm to perform an annual assessment of the firm’s compliance risk, which includes review of its written policies and procedures, ⁵³ and to develop, on the basis of that assessment, a risk-aligned activity plan to mitigate those risks. Marg. 78 FINMA Circular 2017/1. In addition, the Compliance function must annually report on this assessment on the firm’s compliance status to the BoD, to Internal Audit and to the external audit firm conducting the regulatory audit. Marg. 80 FINMA Circular 2017/1.	Consistent with the requirements of Exchange Act Section 15F and SEC Rule 15k-1(b)(2)(i), Swiss law requires the Compliance function to perform an annual review of the written compliance policies and procedures and its compliance with applicable law. Based on that assessment, Compliance must annually report its findings to the BoD and Internal Audit and design a remediation plan to close any identified deficiencies.
2. Is the CCO or similar function required to ensure that the firm implements policies and procedures to remediate non-compliance? What methods are to be used to identify non-compliance?	SEC Rule 15Fk-1(b)(2)(ii) requires the CCO to take reasonable steps to ensure that the firm “establishes, maintains and reviews” policies and procedures to remediate non-compliance issues that have been identified by the CCO through any means, including through any compliance office review, look-back, internal or external audit finding, self-reporting and validated complaints. In addition, SEC Rule 15Fk-1(b)(2)(iii) requires the CCO to take reasonable steps to ensure that the registrant establishes and follows procedures for the “handling, management response, remediation, retesting, and resolution” of non-compliance	As mentioned above in section 3.d.1, the Compliance function must perform an annual assessment of a firm’s compliance with the law and its compliance policies and procedures. Marg. 78 FINMA Circular 2017/1. Based on that assessment, Compliance will then define mitigating measures within its activity plan to ensure compliance with all applicable legal requirements. Marg. 78 FINMA Circular 2017/1. In order to ensure compliance with the regulatory framework, the Compliance function interacts closely with the other independent control functions of the firm. All	Under Swiss law, the Compliance function, headed by the CCO, must perform an annual assessment to identify deficiencies in its compliance policies and implement policies and procedures to remediate these deficiencies. These obligations are part of the broad requirement to maintain effective supervisory processes and procedures. Compliance reports identifying deficiencies in the compliance program, as well as its remediation efforts, are shared with and further reviewed by Internal Audit. Similarly, reports by Internal Audit on deficiencies in the compliance program are shared with the Compliance function for remediation. Consistent with the requirements of SEC Rule 15Fk-1(b)(2)(ii), these

⁵³ Independent control bodies monitor risks and compliance with statutory, regulatory and internal rules. Marg. 62 FINMA Circular 2017/1. This includes the review of policies with regard to their compliance with the regulatory requirements, and such review would then flow into the assessment of the compliance risk. Marg. 78 FINMA Circular 2017/1.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	issues.	<p>the functions must share information with the others and they must take into account the findings of the other control units. Therefore, compliance reports have to be shared with Internal Audit, and <i>vice-versa</i>. Marg. 75, 76 78, 80, 81 & 97 FINMA Circular 2017/1. Further, Compliance and Internal Risk Control respectively are responsible for eliminating shortcomings or implementing recommendations of Internal Audit. Marg. 97 FINMA Circular 2017/1.</p> <p>Finally, Compliance must report to the regulatory audit firm (acting on behalf of FINMA) on an annual basis. Marg. 80 FINMA Circular 2017/1. “Serious compliance breaches and matters with far-reaching implications” (on the threshold for which FINMA did not provide further guidance) must also be reported to the executive board, the BoD and Internal Audit. Marg. 81 FINMA Circular 2017/1. Subsequently, FINMA has to be informed. Article 29(2) FINMASA.</p>	<p>obligations require the Compliance function to take action to remediate non-compliance within the compliance policies and procedures identified through review by the Compliance function or Internal Audit. The general principle to ensure compliance with applicable law similarly requires Compliance to remediate non-compliance raised through other means (<i>e.g.</i>, complaints, internal self-reporting, etc.).</p>
3. Is the CCO or similar function required to take steps to resolve conflicts of interest? To what extent are board members or senior personnel required to participate in the resolution of conflicts of interest?	<p>SEC Rule 15Fk-1(b)(3) requires the CCO, in consultation with the BoD or the senior officer of the firm, to “take reasonable steps to resolve any material conflicts of interest that may arise.”</p> <p>The Commission has clarified that conflicts of interest could include conflicts between the commercial interests of an SBSB and its</p>	<p>As discussed above, Article 3 of the BA requires a Swiss bank to have a sound and adequate organization. This also requires the firm to avoid and resolve conflicts of interests or disclose the conflict if it cannot be avoided or resolved. Article 25 FinSA. Within that framework, it is the BoD that defines how conflicts of interest are to be handled. Marg.</p>	<p>The BoD is heavily engaged in the resolution of conflicts of interest and determines how conflicts of interest are to be handled by the Compliance and Internal Risk Control functions. The Compliance and Internal Risk Control functions are responsible for maintaining and monitoring the firm’s compliance with applicable law and are responsible for implementing the legal requirements around</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>statutory and regulatory responsibilities, and conflicts between, among or with associated persons of the firm.</p> <p>The Commission has stated that it understands that the primary responsibility for the resolution of conflicts generally lies with the business units within the firm because the business line personnel are those with the power to make decisions regarding the business of the SBSB. As a result, the CCO's role with respect to such resolution and mitigation of conflicts of interest includes the recommendation of one or more actions, as well as the appropriate escalation and reporting with respect to any issues related to the proposed resolution of potential or actual conflicts of interest, rather than responsibility to execute the business actions that may be associated with the ultimate resolution of such conflicts. A CCO typically will not exercise the supervisory authority to resolve conflicts of interest. Accordingly, a CCO is not required to actually resolve such conflicts. 81 Fed. Reg. at 30,057.</p>	<p>29 FINMA Circular 2017/1.</p> <p>The law does not assign the tasks regarding the resolution of conflict of interest to a specific function within the firm. However, as Compliance is a key function in assessing compliance with the law (Marg. 77 ff. FINMA Circular 2017/1), and since there is a clear legal obligation to mitigate and resolve conflict of interest (Article 3 BA; Article 12 BO; Article 14g BO), Compliance would also be involved in assessing compliance with the conflict of interest framework. In particular, Article 3 of the BA, Article 12 and Article 14g of the BO, and Marg. 59 ff. FINMA Circular 2017/1 provide for a comprehensive scheme to handle conflicts of interest, and would in practice principally be implemented by the independent control functions, which include:</p> <ul style="list-style-type: none"> • Implementing measures to identify conflicts of interest. • Implementing measures to prevent information flow, where this could lead to a conflict of interest. • The functional separation of staff if necessary to prevent conflicts of interest. 	<p>conflicts of interest. As a result, the CCO and Compliance function are responsible for the day-to-day management and implementation of the conflict of interest requirements under Swiss law in accordance with instruction on how to handle such conflicts by the BoD, which is generally consistent with the role of the CCO and Compliance required by SEC Rule 15Fk-1(b)(3), as described by the Commission.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<ul style="list-style-type: none"> • The separation of tasks and assignments as necessary to prevent conflicts of interest. • Establishing a compensation system that does not give incentives for staff to act disloyally <i>vis-à-vis</i> the client or in violation of applicable law. • Issuing internal policies to prevent conflicts of interest or to handle them adequately. • Issuing rules for the acquisition and disposal of financial instruments for own account by staff. • Disclosing conflicts of interest that are neither avoidable nor resolvable (<i>e.g.</i>, disclosing the circumstances behind the conflict, the risks associated with the conflict and the precautions taken by the firm to reduce the risk). 	
4. Is the CCO or similar function required to administer all policies and procedures that are required by law?	SEC Rule 15Fk-1(b)(4) requires the CCO to administer each policy and procedure that is required to be established.	According to Swiss law, it is the BoD that is responsible for establishing an appropriate business organization and issues the rules and regulations required to achieve this. Marg. 10 FINMA Circular 2017/1; Article 716a(1)(1) CO. In practice, the day-to-day administration of the Compliance function and Internal Risk Control (which also plays an important role in ensuring compliance with relevant legal	While the BoD remains ultimately responsible for the compliance and risk functions, in practice, the responsibility for the day-to-day administration of the Compliance function and policies and procedures required by law is performed by the CCO and CRO, which is generally consistent with the requirements of SEC Rule 15Fk-1(b)(4).

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<p>The Commission has clarified that this administration generally should involve:</p> <ul style="list-style-type: none"> • reviewing and evaluating the policies and procedures for the SBSB, including procedures reasonably designed for the handling, retesting and resolution of non-compliance issues; • advising the SBSB and its risk management and compliance personnel on the development, implementation and monitoring of the SBSB's policies and procedures, including procedures reasonably designed for the handling, retesting and resolution of non-compliance issues; and 	<p>requirements), and each policy and procedure required by law to be established, is performed by the CCO and CRO.</p> <p>The role of the CCO, CRO, Internal Risk Control and Compliance function within the firm includes:</p> <ul style="list-style-type: none"> • annually reviewing and assessing the firm's compliance policies and procedures (which under Swiss law entails adherence to legal, regulatory and internal provisions, as well as the observance of customary standards and rules of professional conduct in the market), including those that provide for the remediation of non-compliance issues, and to develop, on the basis of that assessment, a plan to mitigate and remediate identified risks and deficiencies, Marg. 78 FINMA Circular 2017/1; • ensuring senior management, the BoD and both the internal control functions and compliance and risk management personnel in the front-line revenue-generating units are kept abreast of changes to the firm's compliance policies and procedures, including those that address the remediation of non-compliance issues, 	<p>Consistent with the Commission's guidance, the CCO and Compliance function ensure that all of the firm's compliance policies and procedures, including those that relate to the remediation of non-compliance issues, are and continue to be effective.</p> <p>Consistent with the Commission's guidance, the CCO and Compliance function are also expected to keep the firm and its independent control functions and front-line staff informed of changes to the Compliance framework to ensure such changes are properly implemented.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<ul style="list-style-type: none"> • reviewing, following and reasonably responding to the development, implementation and monitoring of the SBSB's processes for: <ul style="list-style-type: none"> ○ modifying its policies and procedures as business, regulatory and legislative changes dictate; ○ evidencing supervision by the personnel responsible for the execution of its policies and procedures; 	<p>Marg. 75–81 FINMA Circular 2017/1; and</p> <ul style="list-style-type: none"> • continuously monitoring the firm's overarching compliance framework and following, developing and implementing processes, Marg. 69-72 & 78 FINMA Circular 2017/1, to: <ul style="list-style-type: none"> ○ in addition to the annual review noted above and consistent with the firm's obligation to maintain an adequate organization under Article 3 of the BA, implement any necessary changes to compliance policies and procedures due to changes in the firm's business or applicable law or regulations, Marg. 78 FINMA Circular 2017/1; ○ ensure that the Compliance function maintains appropriate access and oversight over the revenue-generating units, Marg. 64 FINMA Circular 2017/1; 	<p>Consistent with the Commission's guidance, the CCO and Compliance function are also expected to continuously review and monitor the firm's compliance framework.</p> <p>As a component of maintaining an adequate organization, the CCO and Compliance function monitor and implement any needed changes to the compliance framework to account for changes in the firm's business or applicable law, consistent with Commission's expectations.</p> <p>In order to maintain an adequate organization, the Compliance function must have the appropriate authority and oversight of the firm's business activities. Accordingly, the Compliance function is expected to have processes in place to supervise the firm's adherence to the compliance framework, consistent with the Commission's expectations.</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
	<ul style="list-style-type: none"> ○ testing the SBSB’s compliance with, and the adequacy of, its policies and procedures; and ○ resolving, escalating and reporting issues or concerns. <p>In carrying out its administration, the CCO should consult, as appropriate, with the business lines, management and independent control groups regarding resolution of compliance issues. 81 Fed. Reg. at 30,057.</p>	<ul style="list-style-type: none"> ○ annually test the firm’s compliance with, and effectiveness of, its compliance policies and procedures, Marg. 69 FINMA Circular 2017/1; ○ provide for internal self-reporting of issues or concerns by the firm’s staff; ○ report identified non-compliance issues out of the Compliance function to senior management and the BoD, as well as Internal Audit and the regulatory audit firm, Marg. 80 FINMA Circular 2017/1; and ○ remediate identified non-compliance, including non-compliance identified by Internal Audit, Marg. 78 FINMA Circular 2017/1. <p>In carrying out its obligations, the Compliance function works closely with the other business lines, and in particular with Internal Audit, to remediate compliance issues. Marg. 78, 80, 81 & 97 FINMA Circular 2017/1.</p>	<p>As described above in section 3.d.1, the Compliance function must annually test the compliance framework and the firm’s adherence to the compliance framework, consistent with the Commission’s expectations.</p> <p>As a component of maintaining an adequate organization, the compliance framework must include appropriate procedures for the reporting and escalation of compliance issues and the remediation of identified issues. As described above in section 3.d.1, these reporting processes include requirements for material compliance issues to be reported to senior management, the BoD and both Internal Audit and the regulatory audit firm. The Compliance function is also delegated responsibility for complying with processes to remediate identified compliance issues, whether identified by the Compliance function or Internal Audit. Together, these requirements and expectations are consistent with the expectations included in the Commission’s guidance for the compliance functions of U.S. SBSBs.</p> <p>Consistent with the Commission’s guidance, under Swiss law, the Compliance function is effectively required to work closely with the other independent control functions, as well as the first line revenue-generating units, in order to ensure the firm’s compliance framework is properly followed and kept updated. This includes providing</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
			compliance reports to the audit functions and remediating any shortcomings identified by Internal Audit or the regulatory audit firm.
5. Are firms permitted to rely on another corporate officer to perform a similar function to a CCO? If so, to what extent is that job function similar to the CCO job function described by Exchange Act requirements?	Although the Exchange Act requires an SBS to appoint a CCO, it does not prohibit the person from having additional roles or responsibilities outside of compliance, such as being a member of the firm’s legal department or from serving as the firm’s general counsel. If the overlapping responsibilities or roles pose potential or actual conflicts of interests, the firm’s written policies and procedures should be designed to identify and mitigate any such conflict. 81 Fed. Reg. at 30,054.	A firm may have a CRO also assume responsibility for compliance. However, in the case of systemically important institutions, the CRO needs to be on the executive board of the firm. Marg. 68 & 68 FINMA Circular 2017/1.	Consistent with the requirements of Exchange Act Section 15F and the Commission’s guidance, the CCO role of a firm may have outside roles or responsibilities. For instance, the firm may appoint the CRO to serve as the CCO as well. In such a case, the CRO would be subject to the same requirements as the CCO would be and would also benefit from the same “protections” described above in section 3.c.3. Further, any conflicts posed by the dual role would be required to be either prevented or mitigated in accordance with Swiss law requirements to manage conflicts as described in section 3.d.3 and the firm’s policies on conflicts of interest.

e. Chief Compliance Officer Reports

Through effective interaction between the independent control functions, supervision of a Swiss bank's business is ensured at any time. Compliance and Internal Audit each report to the executive board, the BoD and ultimately to FINMA or its agent, the regulatory audit firm. The emphasis in Swiss law is more on the actual removal of any compliance shortcomings rather than on formal processes. Therefore, the internal control functions act together in order to detect (assessment of compliance risk) and remediate compliance risks.

Nevertheless, all the independent control functions report on their activities similarly as required under the Commission's rules, with regular annual reporting but also with *ad hoc* reporting elements in case of urgency. While we believe the Swiss compliance reporting scheme should qualify for substituted compliance with the relevant Commission requirements without the imposition of additional restrictions, the Commission could consider as a condition to substituted compliance requiring an annual compliance report that covers the Commission's requirements in accordance with standards for compliance reporting under Swiss law, and that the firm provide relevant aspects of this report to the Commission with a certification by the CCO or CEO. This approach would be similar to the CFTC's comparability determination.⁵⁴

⁵⁴ 78 Fed. Reg. at 78,903.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>1. Are firms required to produce annual or other periodic compliance reports? If so, who is required to prepare them and what are the required contents? Are such reports required to disclose material non-compliance matters identified and the resources devoted to compliance efforts?</p>	<p>SEC Rule 15Fk-1(c)(1) requires that the CCO annually prepare and sign a compliance report that contains a description of the SBSB’s written compliance policies and procedures, including the code of ethics and conflict of interest policies.</p> <p>SEC Rule 15Fk-1(c)(2)(i)(A)-(E) provides that the compliance report must describe, at a minimum:</p> <ul style="list-style-type: none"> • Self-assessment of the effectiveness of the compliance policies and procedures, • Material changes to the firm’s policies and procedures, • Areas for improvement, • Material non-compliance matters identified, and • Compliance resources and deficiencies. 	<p>Swiss law requires the Compliance function to issue several internal reports. Specifically, Marg. 77 ff. FINMA Circular 2017/1 requires compliance to issue the following internal reports:</p> <ul style="list-style-type: none"> • Annual assessment of compliance risks and development of a risk-aligned activity plan. The report includes all the minimum requirements that are also required for the SBSB annual report according to the Commission’s rules, although some of the issues are being dealt with by Internal Risk Control or Internal Audit rather than by Compliance. <ul style="list-style-type: none"> ○ Self-assessment of the effectiveness of the compliance policies and procedures. Marg. 80, 91 FINMA Circular 2017/1. ○ Material changes to the firm’s policies and procedures. Marg. 79 FINMA Circular 2017/1. ○ Areas for improvement. Marg. 80 FINMA Circular 2017/1. ○ Material non-compliance matters identified. Marg. 81 FINMA Circular 2017/1. 	<p>Swiss law requires the Compliance function to prepare several different compliance reports with varying frequency that address compliance risks and material non-compliance events, for both Swiss and applicable foreign laws, and include the kinds of information provided for in the annual compliance report set forth in SEC Rule 15Fk-1(c)(2)(i)(A)-(E). Because certain reporting is periodical or <i>ad hoc</i>, rather than solely on an annual basis like the compliance report under SEC Rule 15Fk-1(c)(1), the Compliance function is actually required under Swiss law to provide more frequent communication on compliance risks, deficiencies and other relevant information to the executive board, BoD and Internal Audit. Notably, the annual assessment must cover the same minimum requirements as a compliance report under Rule 15Fk-1(c)(2)(i).</p> <p>As noted above, while we believe that the Swiss requirements sufficiently address the goals of the Exchange Act and rules thereunder, to the extent the Commission finds that differences <i>vis-à-vis</i> the Commission’s annual</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<ul style="list-style-type: none"> ○ Compliance resources and deficiencies. Marg. 80 FINMA Circular 2017/1. <p>The final responsibility for these reports lies with the CCO (or the CRO, if under the bank’s governance structure the compliance function reports to the CRO).⁵⁵ Marg. 65 FINMA Circular 2017/1.</p> <ul style="list-style-type: none"> ● Periodic reporting to the executive board and BoD. ● <i>Ad-hoc</i> reporting to the executive board and BoD on extraordinary events (<i>e.g.</i>, material non-compliance events). <p>In addition to the executive board and BoD, these reports are also given to Internal Audit and the external auditor appointed by FINMA. Marg. 80 FINMA Circular 2017/1. The reports are</p>	<p>compliance report requirements to prevent the Swiss requirements from achieving comparable outcomes, the Commission may consider granting the requested substituted compliance determination on the conditions that (1) a Swiss bank would address compliance with Commission requirements within its annual compliance report in accordance with standards for compliance reporting under Swiss law (but not necessarily including all elements laid out in SEC Rule 15Fk-1(c)(2)(i))⁵⁶; and (2) such portions of the report would be submitted to the Commission in accordance with SEC Rule 15Fk-1(c)(2)(ii),⁵⁷ similar to the condition imposed by the CFTC in its grant of</p>

⁵⁵ Swiss banks are required to implement both a risk and a compliance function, but may have several functions ultimately report to the CRO. Marg. 67 FINMA Circular 2017/1. Therefore, ultimate responsibility for the obligations under Marg. 79 through 81 FINMA Circular 2017/1 depends on the governance of the relevant institution.

⁵⁶ We note that this proposed condition is modelled on the CFTC’s condition in connection with its comparability determination that a Swiss firm must comply “with the Swiss law and regulations . . . subject to certifying and furnishing the [CFTC] with the annual report required under Swiss law and regulations . . . in accordance with § 3.3(f).” CFTC Rule 3.3(f), which is parallel to SEC Rule 15Fk-1(c)(2)(ii), addresses the time, form, and manner in which compliance reports are to be submitted to the CFTC, but not the substantive contents of the report, which is addressed in CFTC Rule 3.3(e), a requirement parallel to SEC Rule 15Fk-1(c)(2)(ii). The CFTC’s approach is reasonable because the substantive contents of the report under Swiss law would track the elements of substantive Swiss law, which have been found to be comparable to the CFTC requirements. Requiring a Swiss firm to produce a compliance report that includes all elements in CFTC Rule 3.3(e) (or, in the Commission’s case, SEC Rule 15Fk-1(c)(2)(ii)) would impose unnecessary burden on the firm. However, if the Commission believes that the currently proposed condition is insufficient to address the Commission’s concerns, it could impose more tailored conditions – specifically, that relevant portions of a Swiss firm’s compliance report (1) be provided to the Commission in English, (2) include a certification under penalty of law that, to the best of the certifier’s knowledge, the report is accurate and complete in all material respects, and (c) address the Swiss firm’s compliance with any other condition the Commission may impose in connection with its comparability determination.

⁵⁷ By “such portions of the report,” we meant to exclude other portions of the report that cover many Swiss requirements that are not relevant to a firm’s business as SBSBs and that do not have parallel Commission requirements, such as sections addressing retail banking, lending, and mortgage activity. We believe that submitting those portions of the report would be unnecessary and would create “white noise,” hindering the Commission’s review. The CCO, who would provide certification in accordance with SEC Rule 15Fk-1(c)(2)(ii)(D) under the currently proposed condition, would be responsible for determining, in consultation with relevant personnel and counsel, which portions of the report would be submitted to the Commission.

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>discussed in the BoD's risk committee. Marg. 41 ff. FINMA Circular 2017/1. Further, the executive board together with the BoD develop the institution-wide risk management framework based on these reports.</p> <p>Given the potential for violations of applicable foreign law to constitute violations of Swiss supervisory requirements, these compliance reports would also include breaches of applicable foreign law, the same as other infringements of Swiss legal requirements. Marg. 75 & 76 Circular 2017/1; Marg. 136.1 FINMA Circular 2008/21.</p>	<p>substituted compliance.</p> <p>We note that the annual compliance report described in the paragraph above would be prepared for the BoD pursuant to Marg. 80 FINMA Circular 2017/1, and the ultimate responsibility for creation and submission of the report to the BoD lies with the CRO (for systemically important banks) or the CCO.</p>
<p>2. Are compliance reports subject to certification and internal review requirements? If so, how?</p>	<p>SEC Rule 15Fk-1(c)(2)(ii) requires that the compliance report include a certification by the CCO or senior officer that, to the best of his or her knowledge and reasonable belief and under penalty of law, the compliance report is accurate and complete in all material respects. Prior to submitting the report to the Commission, the report must be submitted to the BoD and audit committee (or equivalent bodies) and the firm's senior officer. The senior officer and CCO must also meet to discuss the report within the preceding 12 months.</p>	<p>Swiss law requires the compliance function to create the annual compliance report and submit the report to the BoD and to both Internal Audit and the regulatory audit firm. Marg. 80 and Marg. 97 FINMA Circular 2017/1 (setting out FINMA's interpretation of Article 3(2)(a) BA in connection with Article 12 BO). Because at least one member of the executive board is ultimately responsible for the independent control functions (including the compliance function), the compliance report must also be submitted to the executive board. Furthermore, compliance has to report to the executive board on any major changes in the compliance risk assessment. Marg. 79 FINMA Circular 2017/1. Ultimate responsibility for the compliance report lies with the CRO (for systemically important banks) or</p>	<p>While there is no requirement under Swiss law for the compliance reports to include a certification by the CCO or senior officer or be discussed separately by the senior officer and CCO, Swiss law does require that compliance reports be submitted for review to the executive board, the BoD and both the Internal Audit and the external, regulatory audit firm appointed by FINMA. To the extent the Commission believes that the lack of a specific requirement to include a certification with the compliance report prevents Swiss law from achieving comparable outcomes with Commission requirements, the</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
		<p>the CCO, as applicable.</p> <p>The two audit functions will review the annual compliance report and define action items, if necessary, within their ordinary task performing the internal audit together with Compliance and Internal Risk Control. Internal Audit findings have to be reported at least every six months to the BoD and need to be remediated accordingly. Marg. 97 FINMA Circular 2017/1.</p> <p>The risk committee of the BoD will discuss the compliance report as part of its review of the firm's institution-wide risk management framework and present relevant recommendations to the broader BoD. Marg. 41 FINMA Circular 2017/1. The risk committee further receives regular reports from the CRO and/or CCO on the risk management framework. Marg. 46 FINMA Circular 2017/1.</p> <p>There is no requirement under Swiss law that the compliance reports be accompanied by a certification by the CCO or senior officer or separately discussed in a meeting of the senior officer and CCO.</p>	<p>Commission may consider granting the requested substituted compliance determination on the condition that a Swiss bank would include the certification as required by SEC Rule 15Fk-1(c)(2)(ii)(D) with its annual compliance report and that relevant portions of such report would be submitted to the Commission, similar to the certification condition imposed by the CFTC in its grant of substituted compliance.</p> <p>Although the certification in the proposed condition in the paragraph above would pertain to the relevant portions because, as noted in footnote 57, non-relevant portions of the report would be unrelated to SBS activities, we note that because Swiss law independently requires the annual report to be reviewed by the firm's executive board, BoD, and internal and external audits and prohibits the firm from providing false information or withholding essential information in its reports, the scope of the certification would not affect the assurance to the Commission of the report's accuracy and completeness.</p>
3. Are the required reports required to	SEC Rule 15Fk-1(c)(2)(ii)(A) requires the annual	Swiss law requires the annual compliance report	Under Swiss law, the annual

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
<p>be submitted to the regulator? Are reports with material errors or omissions required to be amended?</p>	<p>compliance report to be submitted to the Commission within 30 days following the filing deadline for the SBSB’s annual financial report with the Commission. Further, SEC Rule 15Fk-1(c)(2)(v) requires the SBSB to “promptly” amend its compliance report if it identifies any material errors or omissions, with the amendment containing the same certification by the CCO or senior officer as the annual compliance report.</p>	<p>and the semiannual Internal Audit report to be produced to the regulatory audit firm who acts and supervises the firm on behalf of FINMA. Marg. 80 FINMA Circular 2017/1. Hence, FINMA is made aware of such reports, including the assessment of the compliance risks and a description of the activities of the Compliance function.</p> <p>According to Article 29(1) FINMASA, FINMA may also request all information that is necessary to perform supervision. The firm must also proactively and immediately report to FINMA any incident that is of substantial importance to FINMA’s supervision. Article 29(2) FINMASA. Providing false information, withholding essential information or failing to make a mandatory report to FINMA, or the regulatory audit firm, may lead to criminal sanctions and firms are similarly required to report instances where the firm provided material misinformation to FINMA or the regulatory audit firm, respectively. Article 45 FINMASA.</p>	<p>compliance report must be provided to the external audit firm appointed by FINMA, which ensures that FINMA is aware of the report and its contents. Firms are prohibited from providing false information or withholding essential information in their reports to FINMA and the regulatory audit firm, and must alert FINMA and the regulatory audit firm to the extent it discovers that it provided material misinformation in connection with such reports. Separately, Swiss law requires firms to alert FINMA to any incidents relevant to FINMA’s supervision. The annual compliance report is also the same report that Swiss firms relying on the CFTC’s order granting substituted compliance must provide to the CFTC.</p> <p>To the extent the Commission believes that the lack of a specific requirement to provide the compliance report to the Commission or amend reports with material errors or omissions prevents Swiss law from achieving comparable outcomes with Commission requirements, the Commission may consider granting the requested substituted compliance determination on the condition that a firm would</p>

Staff Question(s)	Summary of Relevant Exchange Act Requirement(s)	Summary of Relevant Swiss Law Requirement(s)	Analysis
			submit relevant portions of its annual compliance report to the Commission, similar to the condition imposed by the CFTC in its grant of substituted compliance, and amend such reports to the extent they contain material errors or omissions.

III. Element four: Effectiveness of FINMA’s Supervisory Compliance Program and Enforcement Authority

1. UBS Response to Staff Questionnaire – Information Regarding Foreign Supervisory Compliance and Enforcement Programs for Substituted Compliance Applications (12.15.2020)



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Draft: December 15, 2020

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Staff Questionnaire – Information Regarding Foreign Supervisory
Compliance and Enforcement Programs for Substituted Compliance
Application for Swiss Bank Security-Based Swap Dealers

Dear Ms. Countryman:

We are submitting this questionnaire to provide information regarding supervisory compliance and enforcement programs under Swiss law in connection with our substituted compliance application, the most recent draft of which was submitted to the staff of the U.S. Securities and Exchange Commission (the “Commission”) on September 17, 2020. This questionnaire is prepared by UBS AG in accordance with the Staff Guidance.¹

The format of the enclosed questionnaire is consistent with the questionnaire set out on pages 3 to 7 in the Staff Guidance, with each question in bold and individual answers appearing directly below the questions. We note that we did not respond to certain questions in the questionnaire, and it is our understanding that the Swiss Financial Market Supervisory Authority will provide responses to these questions to the Commission staff directly.

We welcome the opportunity to discuss the questionnaire and its contents with Commission staff in further detail. Please do not hesitate to reach out to Gordon Kiesling (gordon.kiesling@ubs.com) or Thomas Bischof (thomas.bischof@ubs.com) with any questions or concerns.

¹ See Staff Questionnaire – Information Regarding Foreign Supervisory Compliance and Enforcement Programs for Substituted Compliance Applications, at <https://www.sec.gov/files/information-memo-substituted-compliance-questionnaire.pdf> (“Staff Guidance”).

Sincerely,

/S/ Gordon Kiesling

/S/ Thomas Bischof

Information Regarding Foreign Supervisory Compliance and Enforcement Programs for Swiss Substituted Compliance Questionnaire

I. Supervisory Framework

1. Please generally describe your jurisdiction's supervisory authority and related requirements or procedures to identify deficiencies and weaknesses in its Regulated Entities' relevant market activities. To the extent relevant, please consider the following:

a. the statutory, regulatory or other provisions under law that grant the relevant supervisory authority, or that otherwise describe or limit the scope of this supervisory authority;

FINMA is Switzerland's independent financial-market regulator. It is responsible for financial market supervision, including supervision of banks, insurance companies, other financial institutions (securities dealers, independent asset managers and trusts), collective investment schemes and their asset managers as well as fund management companies. It also regulates insurance intermediaries. FINMA also supervises financial infrastructures and regulates anti-money laundering. FINMA is also responsible for granting authorizations/licenses for the financial institutions.

The legal basis for FINMA's supervisory activities is the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA).¹ In relation to banks, in addition the Banking Act (BankA), the Financial Institutions Act (FinIA) and the Financial Services Act, including implementing Ordinances, apply. As regards securities dealers and banks acting in that capacity, also the Financial Market Infrastructure (FMIA) and relevant Ordinances apply. Additional regulations are set out by FINMA either by Ordinances or in Circulars.

Pursuant to these authorities, FINMA employs a range of supervisory tools to ensure that supervised institutions comply at all times with the license conditions set out in the applicable acts, ordinances and circulars. The tools it uses include the following:

- on-site supervisory exams (Article 12 Administrative Procedure Act)²
- assessment letters (Article 24 et seq. FINMASA)
- stress tests (e.g., Article 9 Liquidity Ordinance)³
- recovery and resolution planning (Article 9 BankA)

FINMA applies these and all other tools in a risk-oriented manner. Specifically, FINMA's supervisory activities have a forward-looking and prudential focus in respect of banks, insurance companies and other financial service providers: these institutions must always have

¹ Financial Market Supervision Act of 22 June 2007 (FINMASA), <https://www.admin.ch/opc/en/classified-compilation/20052624/index.html> (status as of 1 January 2020).

² Federal Act on Administrative Procedure (Administrative Procedure Act, APA) of 20 December 1968 (Status as of 1 April 2020); <https://www.admin.ch/opc/en/classified-compilation/19680294/index.html>.

³ <https://www.admin.ch/opc/de/classified-compilation/20122528/index.html>

adequate capital buffers and liquidity, and should have their risk exposure under control. FINMA must also ensure that senior management of supervised firms comply with the professional and personal requirements set out in financial market legislation. FINMA monitors these requirements regularly and thoroughly, whilst also taking a proactive perspective. A risk-based approach is pursued by FINMA to ensure that its priorities in respect of prudential supervision are correct.

FINMA's level of supervision is most intensive in areas whose risk it considers greatest. Thus it assigns banks, insurance companies, collective investment schemes and SROs to six different supervisory categories depending on their size, complexity and risk structure (see below, question 3). In principle, the intensity of supervision depends on the institution's supervisory category, but FINMA reserves the right to follow up indications of extraordinary events on a case-by-case basis.

Category 1 includes large, interconnected and complex companies which engage in risk-prone activities that, under certain circumstances, could threaten the stability of the financial system. Smaller, low-risk financial service providers are subject to less intensive supervision. Category 6 comprises market participants who are authorized by FINMA but are not subject to prudential supervision.

FINMA also operates a rating system used to perform regular evaluations of the institutions subject to prudential supervision by FINMA, although these ratings are not made public. If any ratings drop into negative territory, FINMA subjects the respective institutions to more intensive supervision.

Licensed audit firms also perform supervisory tasks on FINMA's behalf. Also in this respect, the intensity of the supervision depends on the risk posed by the respective financial market participant. The audit firms draw up an annual risk analysis on each institution subject to prudential supervision, which is provided to FINMA. Every regulatory audit performed results in an audit report which is submitted to FINMA by the audit firm (for the annual review, so called "long-form reports"). In the event of case-related audits, FINMA may appoint additional mandataries, if, for example, specialist expertise or an independent opinion is required.

Even when FINMA has appointed a licensed audit firm for the performance of the regulatory audits, the ultimate responsibility for supervision remains with FINMA (Article 24 FINMASA). FINMA also retains the power to undertake separate, special audits, specifically but not exclusively as regards banks (Article 23 BankA).

As regards enforcement, FINMA distinguishes between informal investigation and actual enforcement proceedings. Investigations can be launched whenever FINMA receives information about (potential) irregularities or violations of the law. This information typically comes from its supervisory activities (audits, own exams, etc.), reports by other authorities in and outside Switzerland, and complaints from investors and clients. Investigations aim to

establish whether enforcement proceedings are needed or whether the irregularity can be dealt with as part of normal supervision.

In case of non-compliance with supervisory law, FINMA may open enforcement proceedings and impose measures to restore compliance with the law (Article 31 et. Seq. FINSA, see below). The decision to initiate enforcement proceedings against a licensed entity, its ultimate management, owners or staff based on investigations is normally taken by FINMA Executive Board's Enforcement Committee or, in matters of substantial importance, its Board of Directors. Depending on the outcome of the investigations, FINMA may also have to file a criminal complaint (Article 38 FINMASA), where FINMA obtains knowledge of common law felonies and misdemeanors or of offenses against this Act or the financial market acts.⁴

FINMA has a range of administrative sanctions at its disposal, the most severe being the enforcement instruments set out in Article 29 ff. FINMASA. The ultimate goal of these measures is the restoration of compliance with the law. The broad spectrum of measures available for this purpose ranges from taking precautionary measures (e.g., appointing an investigating agent), issuing declaratory rulings, ultimately to license withdrawals and specific orders under Article 31 FINMASA to restore compliance with the law. A license withdrawal can result in liquidation and, in the case of over-indebtedness, bankruptcy of the relevant entity. FINMA can also order the disgorgement of profits generated and costs avoided by illegal means (Article 35 FINMASA), issue cease and desist orders (Article 32 FINMASA) as well as publish the final ruling (Article 34 FINMASA). It may ultimately also impose professional bans on individuals (Article 33 and 33a FINMASA).

Decisions and measures of FINMA are subject to judicial review by the federal courts.

b. a description of how you supervise recordkeeping and retention requirements applied to Regulated Entities;

Recordkeeping and retention requirements are part of the prudential rules where the ordinary supervision procedure applies. There is no specific supervision framework especially designed for these requirements. In practice the regulatory audit firm will assess together with FINMA whether a financial institution is in compliance with these requirements.

c. a description of the authority of the applicable regulator to access and inspect the records of Regulated Entities for domestic and cross-border activities, including activities in foreign offices or branches;

FINMA does have comprehensive rights to request, access and inspect the records of the Regulated Entities as this is necessary to perform supervision (Article 29 FINMASA). It may therefore also ask the institution to produce information regarding the foreign branches and offices as FINMA assumes responsibility for consolidated supervision where a Swiss

⁴ See also generally, FINMA enforcement policy of 25 September 2014, at: <https://www.finma.ch/en/enforcement/market-supervision>.

institution operates such branches and offices abroad. However, FINMA's assessment of the foreign branches and offices of Regulated Entities would be limited to Swiss laws applicable to foreign branches and offices (such as AML and certain prudential requirement regarding liquidity, capital, risk management (including compliance oversight and supervision)), where FINMA would assume a group view in order to manage the respective risks also from a group perspective and respective FINMA requirements (such as trade confirmation and portfolio reconciliation).

d. a description of the authority of the applicable regulator to conduct on-site or off-site inspections of Regulated Entities, including the ability to inspect foreign offices or branches;

Pursuant to Article 24 FINMASA, FINMA has comprehensive authority to perform on-site and off-site inspections of Regulated Entities. This also includes the ability to inspect foreign offices or branches (Article 43 (1) FINMASA).

e. a description of the authority of the applicable regulator to obtain information related to the customers, clients or employees of Regulated Entities;

Pursuant to Article 29 FINMASA, FINMA is entitled to request all documentation and information that it deems necessary for the supervisory purpose. This includes information on customers, clients and/or employees of Regulated Entities.

f. a description of the ability of the applicable regulator to test or verify responses or other information obtained from the Regulated Entities during the course of supervisory efforts;

FINMA uses comprehensive means to test and verify information. First of all, it may perform on-site visits to verify information provided by the Regulated Entity. Furthermore, it may perform interrogations and interviews with employees and also third parties (such as clients or counterparties). With regard to reportable derivative trades, FINMA also has access to all the information in the trade repositories, where complete information about each trade may be found.

g. a description of how examination priorities are developed and the process for adjusting and updating such priorities, including what factors are used in developing priorities; and

FINMA defines its examination strategy along the risk assessment that is performed by the regulatory audit firm for every Regulated Entity on an annual basis (FINMA-Circular on the regulatory audit of Regulated Entities, 2013/3). This assessment takes into account the Regulated Entity in its entirety, the risk associated with the business model, market environment, the economic and the political environment. The risk analysis is performed with a prospective approach. Besides, FINMA also identifies examination priorities through its own supervisory activities, external information or general developments (e.g., new legislation),

always applying a risk-based approach. In addition, FINMA also defines focus areas where examination priorities are set across all the Regulated Entities, amongst others on the basis of its strategic goals as published regularly.

- h. any other information that would assist in understanding the scope of the relevant supervisory authority.**

FINMA-Circular on the regulatory audit of Regulated Entities, 2013/3

- 2. Please describe the supervisory tools your jurisdiction uses in practice to identify risk and detect potential breaches of law. To the extent relevant, please consider the following:**

- a. any form(s) of ongoing or ad hoc monitoring and surveillance by the regulator or another organization;**

The ongoing supervision/monitoring in case of large banks is performed by FINMA and certified audit firms together. This supervision is ongoing and, in case necessary (if there is reason to believe that a Regulated Entity is in breach of law), there are also ad-hoc measures that may be implemented, such as the appointment of a special audit mandatary (Article 24a FINMASA). If there is a breach of relevant law, FINMA may order measures to restore compliance with the law at any time. However, there is a high level of discretion for FINMA to choose the applicable instrument in a given case. In particular, FINMA may substitute performance of actions necessary to restore compliance with the law (Article 32 FINMASA). In any event, such instrument must be proportionate and suitable to achieve compliance with the law. Furthermore, it has to apply the instruments that interferes as little as possible with the rights or the legal position of the Regulated Entity, while still achieving the goal.

- b. any process to receive tips or complaints about the activities of a Regulated Entity;**

FINMA is obliged to receive and process any tips or complaints about the activities of a Regulated Entity. If such a tip gives reason for justified suspicion that a Regulated Entity is in non-compliance with the law, FINMA is ex officio required to investigate further and eventually open proceedings (Article 12 Administrative Procedure Act).

- c. the submission of periodic filings from Regulated Entities; and**

Regulated Entities have in several fields comprehensive reporting requirements (e.g., Capital and Liquidity FINMA Circular on Prudential disclosure 2016/1, Risk reports FINMA Circular on Corporate Governance Banks 2017/01).

Furthermore, there is the general rule that Regulated Entities must provide FINMA and the regulatory audit firm in any event with all information that is necessary for them to complete their task (Article 29 (1) FINMASA).

d. the submission of reports from Regulated Entities based on any event or trigger.

Article 29 (2) FINMASA requires every Regulated Entity to immediately report any incident that is of substantial importance to supervision. Furthermore, the external auditor of the supervised entity must inform FINMA immediately of any serious violation of supervisory provisions or serious irregularities at the audited firm (Article 27 (3) FINMASA) and/or inform FINMA immediately about any incident that is of substantial importance for supervision (Article 29 (2) FINMASA).

Additionally, the law provides in specific areas (mainly with regard to capital and liquidity requirements) very precisely described trigger events that would require reports from Regulated Entities (see, e.g., Article 42 (3) Capital Adequacy Ordinance regarding minimum capital requirements or FINMA Circular on Prudential disclosure 2016/1).

3. Please describe your jurisdiction's examination or inspection processes. In responding, please include:

a. a description of the examination cycle (e.g., routine periodic basis or risk-based). If the examination is periodic, please include the time frame;

FINMA supervision follows a risk-based approach. Regulated Entities are divided into risk categories, with category 1 including the most complex entities requiring the most comprehensive supervision regime, including permanent monitoring mechanisms. Category 1 applies to the two large Swiss banks, UBS Group and Credit Suisse Group (on a consolidated group level and individual institution level).

Within four months after the financial year ends, audit firms perform a thorough assessment of the risk situation to which each supervised institution is exposed, and submit this assessment to FINMA on a standard form. The risk analysis covers all audit fields with a view to determining net risk from a combination of the different risk factors.

For supervised institutions in FINMA Supervisory Categories 1 and 2, FINMA exercises greater influence on the audit fields to be assessed by defining the audit strategy in a dialogue with the audit firm. The audit firm implements the audit strategy on site at the premises of the supervised institution.

See also <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

Apart from that, FINMA conducts on-site reviews, applying a risk-based approach. Furthermore, FINMA introduced an internal, non-public risk rating system according to which Regulated Entities are assessed regularly, taking into account behavioral aspects such as past compliance with legal requirements and other specific risk factors. Depending on the specific rating of a Regulated Entity the supervision and monitoring regime is adopted accordingly.

b. a description of the processes and factors considered when selecting Regulated Entities for examination (e.g., time since last examination, tip, complaint or referral, etc.);

Supervision and examination of Regulated Entities are based on the annual risk assessment provided by the certified regulatory audit firm. Upon these assessments FINMA defines the examination strategy for each Regulated Entity. Within that assessment the Regulated Entity is scrutinized in its entirety including the risk associated with the business model, market environment, and the economic and political environment. Tips and complaints are also taken into account for the examination.

c. a description of the processes, including factors considered, to determine the scope for examination or inspection and the process for amending the scope if warranted;

See also response 3b above and the FINMA-Circular 2013/03, where the processes are described in detail.⁵

d. a description of the types of books and records typically reviewed during examinations;

FINMA and the regulatory audit firm has the right to review all types of books and records with the Regulated Entity as necessary to perform the supervisory task (Article 29 (1) FINMASA). There is no statutory limitation for reviewing books and records as long as there is some relevance for financial market supervision.

Depending on the type and stage of examination typically FINMA would review the following:

- Policies and regulations of the Regulated Entities
- Financials
- Business plans
- Selected client files
- Internally produced documentation (e.g., memoranda, opinions)
- E-Mail traffic (especially in an enforcement context)
- Protocols of the managing boards
- Trade repository data

However, as noted above, there is no statutory limitation for books and records to be reviewed.

In the area of securities trading, there are additional transaction, journaling, and reporting requirements (Article 38, 39 FMIA; Article 36, 37 FMIO).

⁵ <https://www.finma.ch/de/~media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2013-03-01012020.pdf?la=de>.

e. whether you conduct interviews with employees of the Regulated Entities;

Yes, FINMA regularly conducts interviews with employees of Regulated Entities.

f. whether you test or verify responses given to you by the Regulated Entities;

FINMA assesses, tests and/or verifies responses given by the Regulated Entities when and as appropriate. Possible means of testing include written inquiries, interviews, desk reviews, on-site reviews or, in exceptional cases, the appointment of an independent third party, such as a licensed audit firm as described in response 1a above.

g. how you communicate deficiencies or other areas of concern to Regulated Entities, whether such communications are public, and how such communications are documented;

Deficiencies that have been found within the regular examination of the Regulated Entity will be listed in the long-form audit report. Such issues would then have to be addressed and mitigated as necessary by the Regulated Entity. Such audit reports are not published. The progress of the mitigation procedure would then be supervised by the regulatory audit firm and FINMA.

In case of a deficiency that has been detected outside of the regular audit cycle, FINMA would approach the Regulated Entity in a first informal step to investigate the matter and ask for mitigation. However, where there are indications of supervisory violations, FINMA could open formal proceedings that will lead to a formal decree, ordering the Regulated Entity to restore compliance with the law. Further measures to be ordered by FINMA may include the issuance of a declaratory ruling, substitution of performance by FINMA, publication of the supervisory ruling and disgorgement of profit that has been made through a serious violation of supervisory provisions. As an ultimate measure FINMA may also revoke the license of a Regulated Entity. With regard to individuals, FINMA may order a prohibition from practicing a profession within the financial markets, see Articles 31 et seq. FINMASA.

FINMA does not publish information on individual proceedings, unless there is a particular need to do so from a supervisory point of view and in particular if the information is necessary for the protection of market participants or the supervised persons and entities, to correct false or misleading information, or to safeguard the reputation of Switzerland's financial center (Article. 22 Abs. 2 FINMASA).

Where there is a serious supervisory violation, FINMA may publish in electronic or printed form its final ruling once it takes full legal effect, and disclose the relevant personal data (Article 34 FINMASA). Nevertheless, FINMA has certain discretion over whether publication is appropriate. However, a prohibition from practicing is a remedy available only in case of a severe breach. Therefore, publication of such a prohibition is generally expected. Furthermore,

FINMA maintains for this purpose a Warning List. This is a list of companies and individuals that may be operating without the requisite FINMA authorization.

- h. to whom you direct communications (e.g., compliance office, senior management); and**

Depending on the issues that have to be communicated, the addressee may be different. Whereas most important communications would be directed to the CEO of a Regulated Entity, minor issues would be communicated to the respective person within the regulated firm directly responsible for the firm.

However, Regulated Entities appoint and define single points of contact through whom communication from and to FINMA is channeled and further distributed within the Regulated Entity as deemed necessary or as defined by FINMA.

In relation to large entities, FINMA agrees with the Regulated Entity on regular meetings (ordinarily quarterly basis) with relevant functions and function holders, including compliance and senior management.

In case of a formal proceedings, the formal ruling would have to be directed to the Regulated Entity as such and thus FINMA directs the communication to the CEO of the Regulated Entity.

- i. how Regulated Entities respond to identified issues.**

In general Regulated Entities are given a certain period of time within which they would have to mitigate the identified issues and restore compliance with the law. FINMA and the external auditor supervise the progress made by the Regulated Entity in restoring compliance with the law and order further measures if deemed necessary. Depending on the severity and the nature of the issue, FINMA could also appoint an audit agent that would supervise this process (Article 25a FINMASA).

4. Please describe the resources available for your supervisory efforts. In responding, please include:

- a. the typical background and qualification of your supervisory staff;**
- b. the use of experts, such as persons who can analyze models or perform data analytics;**
- c. the use of analytical software and tools in conducting examinations and other supervisory work;**
- d. the use of SROs or exchanges to perform supervisory functions;**

SROs are only used with non-licensed entities for AML purposes. For Regulated Entities, supervision is only performed by FINMA and their certified auditors.

Exchanges and Organized Trading Facilities also have certain supervisory tasks. Exchanges must establish under the supervision of FINMA their own regulatory and supervisory organization and they are responsible for the supervision of trading (organization of trading, pre- and post-trade transparency, the guarantee of orderly trading, the admission and suspension of participants, Article 27 ff. FMIA).

- e. **training programs for supervisory staff; and**
- f. **the resources/size of the supervisory group relative to the volume and complexity of Regulated Entities.**

5. Please describe whether your jurisdiction has regulatory authority and related requirements or procedures to obtain the information necessary from Regulated Entities (or their offices or branches) to support your supervisory functions.

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

A breach of the obligation to provide Information or the provision of false information can lead to a custodial sentence of up to three years or to a monetary penalty (Article 45 (1) FINMASA). If committed through negligence, the fine will be up to 250'000 francs.

Finally, FINMA may appoint an audit agent to conduct audits of supervised entities (Article 24a FINMASA).

6. How do you communicate deficiencies or other areas of concern to Regulated Entities? For example, what remedies, or other corrective actions, are available to your supervisory program (e.g., deficiency letters, referrals to other regulators, enforcement actions, etc.)? Please include whether one type of action may be more prevalent than another and whether the actions are verbal or in writing. Please include recent statistics on how often each type of action is used.

Deficiencies below a certain severity threshold are communicated informally or in writing, with the expectation that the Regulated Entity will mitigate the issue accordingly. There is no

statutory proceeding for such interaction, which are part of the supervisory process. They are issued depending on the specific circumstances of the relevant case.

As mentioned, banks in supervisory categories 1 to 3 also undergo a formal assessment at regular intervals following which they receive an assessment letter, detailing the risk rating, any weaknesses that have been identified and the action that needs to be taken. The bank can respond to this in writing. The aim of FINMA's formal assessment is to identify weaknesses and work out a risk rating. FINMA assesses banks in supervisory categories 1 and 2 every year and those in category 3 at least every two years.

Deficiencies identified in the course of on-site examinations are communicated in the examination report or letter, including recommendations for measures to be taken.

Where the proceedings reveal that the supervised person or entity has seriously violated supervisory provisions, but there is no longer a need to order measures to restore compliance with the law, FINMA may issue a declaratory ruling (Article 30 FINMASA).

If an enforceable ruling from FINMA is not observed within the set deadline after a prior warning, FINMA may perform the required act itself or have it performed at the expense of the non-complying party.

The means of communication depends on the severity and nature of the deficiency or area of concern. As a consequence, FINMA does not maintain statistics on how often each type is used. What can be said, though, is that enforcement is rarely used (please refer to FINMA's annual report).⁶ Also, it holds generally true that FINMA uses the frequent meetings with the management of the GSIBs to communicate its concerns orally when and as needed.

7. Does your jurisdiction use risk monitoring and assessment or surveillance as part of your supervisory framework? If so, how do you use this information and what actions do you take if potential violations are identified?

Supervision and examination of Regulated Entities are based on the annual risk assessment provided by the certified regulatory audit firm. Furthermore, Regulated Entities are obliged to monitor and report on compliance and other risks. Those reports are shared with internal audit, the external regulatory audit firm and eventually with FINMA. Such reports are issued annually on a regular and ad-hoc basis in case of severe incidents (FINMA Circular on Corporate Governance, 2017/1 but also reporting requirements in Article 29 FINMASA).

In case of indications of violations of supervisory provisions, FINMA may open formal proceedings in order establish the facts and to restore compliance with the law (Article 30 FINMASA).

⁶ <https://www.finma.ch/en/documentation/finma-publications/annual-reports--and-financial-statements/>.

8. Please describe how your jurisdiction reviews and evaluates corrective action undertaken by Regulated Entities.

9. Please describe any regulatory consequences for non-compliance with corrective actions, including the form and frequency of referrals to enforcement or other judicial authorities.

Measures to be ordered by FINMA may include the issuance of a declaratory ruling, substitution of performance by FINMA (where a Regulated Entity is obliged to act but fails to do so, FINMA can perform that action on behalf of the Regulated Entity), publication of the supervisory ruling, and confiscation of profit that has been made through a serious violation of supervisory provisions. As an ultimate measure FINMA may also revoke the license of a Regulated Entity. With regard to individuals, FINMA may order a prohibition from practicing a profession (within financial markets) (Articles 31 et seq. FINMASA) or decide that an individual no longer meets the fit and proper requirement under Swiss law and can therefore no longer hold a leading position in the Bank (Article 3 (2)(c) BA).

In case of a suspected criminal offense FINMA would have to refer the case to the criminal prosecutors. In the year 2018, there were more than 200 such referrals, of which more than 150 were due to a violation of reporting duties pursuant the FMIA (Page 40 of the Enforcement report 2018).⁷

10. Please describe how your jurisdiction communicates with the industry and the public about best practices, common compliance issues or other areas of misconduct risk, including how Regulated Entities are informed about the consequences of misconduct or noncompliance.

FINMA publishes circulars explaining how it applies financial market legislation in carrying out its supervisory duties.

FINMA uses guidance as a flexible, rapid, transparent and, if necessary, ad hoc means of conveying useful information to groups of supervised institutions. FINMA guidance can also set out expectations or draw attention to potential risks. The FINMA published guidance has replaced its newsletters issued earlier in its place.

See also FINMA general Communication Policy,
<https://www.finma.ch/en/finma/activities/finma-policies/>.

11. Please describe your jurisdiction's participation in international organizations of securities and other regulators, such as the IMF and IOSCO.

⁷ <https://finma.ch/en/documentation/archiv/enforcementbericht/>

12. Please provide a copy of Principles 10 and 12 from your most recent self-assessment for the FSAP⁸.

⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

II. Enforcement Framework

1. Please describe your jurisdiction's ability to investigate and bring administrative or judicial actions against domestic and foreign parties to enforce your regulatory framework. In responding, please address:

a. your jurisdiction's authority (statutory, regulatory or otherwise) to take enforcement action both domestically and in connection with cross-border activity, describing both judicial and non-judicial forms of action where applicable; and

FINMA is a financial market supervisory authority. Therefore, FINMA has comprehensive supervisory authority over all Regulated Entities and enforces the Financial Market laws: Mortgage Bond Act, Insurance Contract Act, Collective Investment Schemes Act, Banking Act, Financial Institutions Act, Anti-Money Laundering Act, Insurance Supervision Act, Financial Market Infrastructure Act and the Financial Services Act.

Within that perimeter FINMA is responsible for supervision. In that capacity FINMA may issue orders for Regulated Entities to comply or restore compliance with the law and it may issue cease and desist orders, sanctions such as the disgorgement of the proceeds of unlawful actions, issuance of a prohibition from performing an activity within the financial market and ultimately the revocation of licenses.

FINMA's authority also reaches to foreign branches of Regulated Entities, i.e., measures against a Regulated Entity can include measures concerning individual branches of it including branches abroad.

FINMA expects Regulated Entities to adhere to foreign supervisory laws. They must adequately record, mitigate and monitor risks resulting from cross-border activity (see Circular on Operational Risk – Banks 2008/21, n. 136.2 – 136.5). Therefore, non-compliance with foreign law in a cross-border situation may also result in a breach of Swiss supervisory law. In consequence, a breach of foreign legal requirements could also lead to supervisory measures and enforcement actions in Switzerland.

b. the impact of any privacy laws or other related provisions that may impede your ability to conduct thorough investigations.

As a matter of Swiss law, FINMA has the authority to investigate without limitation of any privacy or other laws as far as it acts within its assigned task of financial market supervision.

2. Please describe the tools your jurisdiction can utilize to conduct investigations, including the ability to obtain detailed records to reconstruct transactions and identify parties to a transaction. For example, please address the ability to:

a. obtain electronic communication and other records from internet service providers or other third-parties;

Due to the securities dealers' (and banks' acting in that capacity) obligation to book and record relevant transactions, FINMA can request extracts or conduct on-site examinations where necessary to inspect relevant books, records and recordings (Art. 38, 39 FMIA, 36 & 37 FMIO) and the relevant trade repositories must provide free access to the data that FINMA requires to perform its tasks (Article 77 FMIA). Derivatives transactions must also be reported to a trade repository (Article 104 ff. FMIA), to which FINMA has access. In addition, firms are required to ensure that external and internal telephone calls of all employees working in securities trading are recorded (FINMA Circular 2013/8 Market conduct rules, marg. 59 ff.). Thus, for its supervisory purposes, including its own investigations, FINMA has unrestricted access to such information as long as it deems such information relevant for the performance of its supervisory tasks.

Where irregularities are sanctioned by criminal law, FINMA may file a complaint with the competent prosecuting authorities (Federal Department of Finance, Office of the Attorney General and cantonal prosecutors), but it cannot lead criminal law investigation or proceedings.

In general FINMA does not have jurisdiction over third-parties and specifically cannot prosecute the violation of crimes, such as price manipulation or insider trading (Article 154 & 155 FMIA). According to Article 23 BA, third party firms which provide essential services to a bank are subject to the reporting and information duties pursuant Article 29 FINMASA. FINMA may also perform onsite visits at these third party providers. In outsourcing situations, the Regulated Entity must oblige the third party service provider to provide such information to the Regulated Entity or FINMA when needed. The Regulated Entity and FINMA must have the contractual right to inspect and audit all information relating to the outsourced function at any time without restriction. However, outside the framework outlined above, electronic communication held by third parties, such as telephone companies or internet providers, can only be obtained by the competent public prosecuting authority in the course of criminal law proceedings. FINMA may provide or exchange information with the prosecutors under Article 38 FINMASA and in accordance with applicable criminal procedure law as necessary to fulfill its supervisory duties.

b. compel statements and information from witnesses; and

According to Article 12 Administrative Procedure Act, FINMA may, in formal proceedings, obtain information from witnesses and other third parties as necessary for the supervision of financial market. This includes the provision of documents, information requests, the

examination of witnesses or third parties, examination of premises or acquisition of opinions from experts.

- c. **receive tips, complaints and referrals from corporate insiders (such as whistleblowers) and the public.**

FINMA must establish the facts ex officio (Article 12 Administrative Procedure Act). Therefore it must take into account any tips, complaints and referrals from the public or corporate insiders.

- 3. Please describe the investigative capacities your jurisdiction has under relevant law, including methods and technology used for market surveillance. Please also describe the role of experts, self-regulatory organizations and exchanges in assisting or performing enforcement functions.**

FINMA may investigate and obtain evidence by means of official documents, information from the involved parties, information and testimony from witnesses and third parties, inspection of documents and premises and engaging experts for their opinions (Article 12 Administrative Procedure Act).

FINMA may also appoint an investigating agent to investigate the circumstances of a specific case. Often audit firms act on behalf of FINMA to establish and analyze the facts of the case. Such audit firms and law firms are usually very important in investigating large scale cases (e.g., screening email traffic and documents).

FINMA may also investigate trading records from securities dealers and trade reports from trade venues and trade repositories in case of any suspicion regarding potential market abuse committed by regulated or non-regulated entities. Furthermore, FINMA may obtain evidence by testimony from involved (non-regulated) parties.

Trading venues (including exchanges) supervise price formation and transactions executed (on and off venue) in order to detect insider dealing, market manipulation, and other violations of provisions. In the event of suspicious activities, the responsible supervisory body is required notify FINMA or competent prosecution authorities (Article 31 FMIA).

- 4. Please describe the legal proceedings, remedies, and sanctions available in your jurisdiction to support your enforcement mechanism, including, for example, available tribunals, types of penalties or other monetary sanctions, and the ability to seek prospective relief, temporary restraining orders, asset freezes or make criminal referrals.**

The primary goal of Swiss financial market supervision is to maintain and if necessary restore compliance with the law by Regulated Entities. Therefore, FINMA has a variety of instruments to enforce the law: measures to be ordered by FINMA may include the issuance of

a declaratory ruling, substitution of performance by FINMA, publication of the supervisory ruling, cease and desist orders, disgorgement of profit that has been made through a serious violation of supervisory provisions, activity bans against individuals, industry bans, or liquidation and bankruptcy. As an ultimate measure FINMA may also revoke the license of a Regulated Entity. FINMA has additional competences in the financial market supervision, e.g., issuing a purchase ban or suspension of voting rights in case of violation of disclosure of shareholdings (Article 144 FMIA).

For criminal sanctions and proceedings it is the ordinary criminal law proceedings that are applicable. This also applies to asset freezes in connection with a criminal law proceeding, as FINMA does not have such power. Competent authorities are the (cantonal and federal) public prosecutors. It is therefore only such prosecutors who have the authority to order asset freezes.

Issuance of criminal law sanctions are also reserved to competent criminal courts. However, within the perimeter of financial market laws, in a number of areas, prohibited activity has both an administrative law, supervisory angle (e.g., insider dealing and market manipulation, Article 142 & 143 FMIA) where FINMA is entrusted with the investigation and enforcement on the supervisory side but at the same time there are also criminal law prohibitions (insider trading and price manipulation, Article 154 & 155 FMIA) that are prosecuted by criminal law prosecutors.

In criminal law proceedings, coercive measures, such as asset freeze, are available, subject to proportionality.

There are also a number of criminal law provisions directly concerning securities and/or derivatives trading, such as the violation of the record keeping duties or disclosure (Article 38 & 39 FMIA in conjunction with Article 149 FMIA) or the violation of the reporting or risk mitigation duties (Article 150 FMIA). Prosecution of these offenses is in the competence of the Federal Department of Finance.

As indicated above, FINMA has the right and obligation to refer a case to the competent public prosecution authorities, if it suspects a criminal act by a Regulated Entity (Article 38 (3) FINMASA).

5. Please describe how your jurisdiction publishes information about enforcement initiatives, including disclosure of enforcement matters and violations and public disclosure of enforcement objectives.

As a general principle FINMA does not publish individual proceedings unless such publication is necessary (i.) for the protection of the market participants or the supervised persons and entities, (ii.) to correct false or misleading information, or (iii.) to safeguard the reputation of the Swiss financial market (Article 22 (2) FINMASA). It does however, inform the general public at least annually about its supervisory activities and supervisory practices (Article 22 (1) FINMASA).

In case of a serious violation of supervisory law, FINMA may also publish the supervisory ruling in an individual case. Art 34 FINMASA.

6. Please provide information regarding your jurisdiction's track record of enforcement activity for the last three years and the use of civil or criminal enforcement authority against individuals and entities, including

a. information about the number of actions taken;

2019: 30 enforcement proceedings concluded / 195 criminal charges filed (thereof 177 with the FDF Criminal Law department) / 50 rulings by FINMA / 37 court decisions rendered / 45 measures imposed via rulings (see various statistics <https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/>).

2018: 42 enforcement proceedings concluded / 229 criminal charges filed (thereof 215 with the FDF Criminal Law department) / 90 rulings by FINMA / 44 court decisions rendered / 70 measures imposed via ruling (see "Enforcement report 2018" <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>).

2017: 38 enforcement proceedings concluded / 135 criminal charges filed (thereof 115 with the FDF Criminal Law department) / 67 rulings by FINMA / 41 court decisions rendered / 166 measures imposed via rulings (see "Enforcement report 2017" <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>).

b. the types of violations subject to action, including in connection with requirements for which substituted compliance is sought (e.g., capital and margin, business conduct, etc.); and

2019: 9 unauthorized activities / 21 violations by license holders (of which 10 banks/securities dealers) (see "General enforcement statistics" <https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/>).

2018: 10 unauthorized activities / 32 violations by license holders (of which 21 banks/securities dealers) (see "Enforcement report 2018" <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>, p 33).

2017: 12 unauthorized activities / nine violations by license holders (of which five banks/securities dealers) / 17 proceedings against individuals (see "Enforcement report 2017" <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>, p 36).

c. the outcomes of such actions, including whether money was returned to harmed investors. In responding, please provide information about the types of penalties assessed and length of time from initiation of an investigation to the date of charge or closure.

2019: eight special conditions and restrictions / four industry bans / 1 activity ban / 7 cease-and-desist orders / 3 publication of rulings / 3 disgorgement of profits / 12 investigating agents / 2 implementation overseen by third parties / 5 bankruptcy/liquidation proceedings (see “Rulings on enforcement cases” and for duration “General enforcement statistics” <https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/>).

2018: 8 special conditions and restrictions / 6 industry bans / 1 activity ban / 14 cease-and-desist orders / 13 publication of rulings / 1 disgorgement of profits / 13 investigating agents / 9 implementation overseen by third parties / 5 bankruptcy/liquidation proceedings (see “Enforcement report 2018” <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>, p. 38, see for duration p. 31).

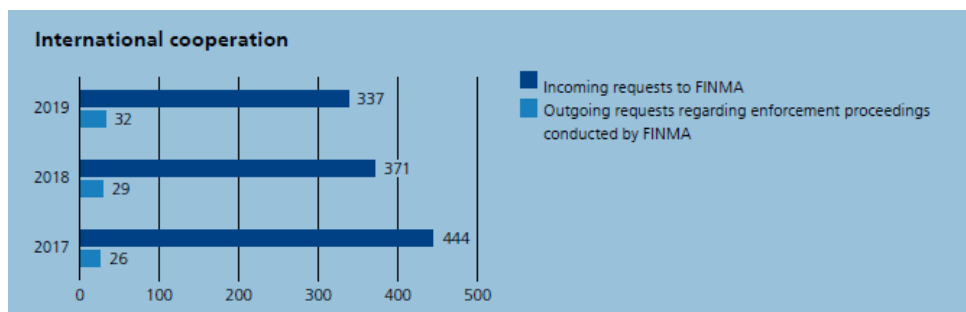
2017: 7 special conditions and restrictions / 6 industry bans / 3 activity bans / 30 cease-and-desist orders / 23 publication of rulings / 8 disgorgement of profits / 18 investigating agents / 3 implementation overseen by third parties / 9 bankruptcy/liquidation proceedings / 58 declaratory rulings and further measures / 1 declaratory ruling without further measures (see “Enforcement report 2017” <https://www.finma.ch/en/documentation/archiv/enforcementbericht/>, p. 41, see for duration p. 34).

- 7. Please describe whether the enforcement authorities in your jurisdiction have readily accessible mechanisms to obtain documents and other forms of assistance from a foreign enforcement authority. In responding, please address:**
- a. whether your jurisdiction has ratified international conventions, treaties and agreements relevant to cooperation in enforcement matters,**
 - b. whether the relevant authorities in your jurisdiction have signed the IOSCO MMoU or IOSCO EMMoU, and**
 - c. whether your jurisdiction has any legal requirements to preserve records obtained in the course of investigative matters such that those records would be available upon request from another enforcement authority.**

III. Supervision and Enforcement Cooperation

- 1. Please describe your jurisdiction's ability to share, and the process for sharing, non-public information with (or obtain it for) authorities such as the SEC. In responding, please address any limitations for sharing (a) information from Regulated Entities and (b) internal work product. Please address whether any blocking statutes, privacy or secrecy laws, or other legal or regulatory requirements impede sharing information, including customer or employee information, by authorities or firms located in your jurisdiction.**

FINMA may share non-public information in a financial market supervisory proceeding via administrative assistance (Article 42 FINMASA), subject to the principle of specialty (Article 42 (2) (a) FINMASA) and the requirement that the receiving authority is bound by a professional or official secrecy obligation (Article 42 (2) (b) FINMASA). Administrative assistance applies for both information from Regulated Entities and internal work products.⁹



The sharing of information via administrative assistance may be subject to judicial review, in particular with regard to the transmission of (non-public) client information. In the client information example, FINMA would have to specifically inform such client and issue a formal decree that is subject to an appeal before the Federal Administrative Court. This has happened rarely in the past (approximately 5 to 15 cases per year).

This applies only to protected client information, i.e., information of a client booked at a bank or securities dealer in Switzerland, as the client secrecy only applies in relation to transactions or accounts booked in Switzerland (but, e.g., not if booked in a branch abroad). Information about the Regulated Entity may be transmitted rather informally (e.g., via telephone). However, in principle, where it could establish harm, the Regulated Entity has the right to have the transmission reviewed by a court. However, as FINMA does not have the obligation to inform the Regulated Entity about the intended transmission, the right to challenge becomes obsolete in most cases.

⁹ Source: FINMA Annual Report 2019 (<https://www.finma.ch/en/documentation/finma-publications/annual-reports-and-financial-statements/>, p. 52).

Blocking Statutes do not hinder an authority to transmit information, as they apply to private persons. Privacy and secrecy laws protection of clients or third parties as such also do not hinder the transmission of the information by an authority, but as outlined above, the relevant clients or third-parties are protected insofar as they may appeal against the transmission in court. A court would only prohibit the information transfer, if:

- the principle of specialty or the secrecy obligation may not be guaranteed by the foreign authorities; or
- the information to be transmitted would appear as clearly not being necessary for the respective supervisory purpose by the foreign authority.

In case of criminal proceedings the formal legal assistance proceedings apply.

As an exception, FINMA can provide client or third party information without prior information of the relevant client or third party, if such information could jeopardize the purpose of the administrative assistance and the effective fulfilment of its tasks by the requesting authority. In such instance, clients or third parties will only need to be informed after the transmission has occurred (Article 42a (4) FINMASA). Furthermore, the Regulated Entity does not have to be informed at all about such transmission abroad.

2. Under your jurisdiction’s relevant laws, regulations, and policies, would the SEC, (a) have prompt access to the books and records of a Regulated Entity located in your jurisdiction and (b) be able to conduct onsite inspections or examinations of a Regulated Entity located in your jurisdiction? Please describe any applicable limitations or conditions on such access.

Regulated Entities are allowed to share directly with the SEC non-public information located in Switzerland, if that information concerns a matter within the scope of the areas supervised by FINMA (Article 42c & Article 1 FINMASA). The Regulated Entity must, however, notify FINMA if the information transfer is of major importance. In such case FINMA has the right to require that the information be transmitted through the formal administrative assistance procedure. For those proceedings, see above.

FINMA has detailed its practice in the Circular 2017/6 Direct Transmission, <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2017-06.pdf?la=en>. FINMA has declared the SEC as per se eligible for direct transmission according to Article 42c FINMASA and Marg. 20 of the FINMA Circular 2017/6.

Where the Regulated Entity is directly transmitting the information, it can only lawfully do so if the rights of clients and third parties are safeguarded, i.e., transmission is only possible if they have waived their right to confidentiality and to the protection of their personal data prior

to the transmission. In general clients would only be allowed by the Regulated Entity to trade derivatives if they had waived their rights as outlined above.

FINMA may allow onsite inspections by foreign regulators at the Regulated Entity's premises on request (Article 43 FINMASA). The applicable principles for such onsite inspections are the same as for administrative assistance, i.e., the principle of specialty and professional secrecy of the foreign requesting authority must be observed (Article 43 (2) (b) FINMASA in conjunction with Article 42 (2) FINMASA). Furthermore, FINMA may decide to attend such onsite visits.

2. FINMA Response to Staff Questionnaire – Information Regarding Foreign Supervisory Compliance and Enforcement Programs for Substituted Compliance Applications (12.22.2020)

SEC Swap Dealer Registration - Substituted Compliance Questionnaire (FINMA submission)

Section I – Supervisory Framework

1. Please generally describe your jurisdiction's supervisory authority and related requirements or procedures to identify deficiencies and weaknesses in its Regulated Entities' relevant market activities. To the extent relevant, please consider the following:

- a. the statutory, regulatory or other provisions under law that grant the relevant supervisory authority, or that otherwise describe or limit the scope of this supervisory authority;

[See UBS submission](#)

- b. a description of how you supervise recordkeeping and retention requirements applied to Regulated Entities;

[See UBS submission](#)

- c. a description of the authority of the applicable regulator to access and inspect the records of Regulated Entities for domestic and cross-border activities, including activities in foreign offices or branches;

[See UBS submission](#)

- d. a description of the authority of the applicable regulator to conduct on-site or off-site inspections of Regulated Entities, including the ability to inspect foreign offices or branches;

[See UBS submission](#)

- e. a description of the authority of the applicable regulator to obtain information related to the customers, clients, or employees of Regulated Entities;

[See UBS submission](#)

- f. a description of the ability of the applicable regulator to test or verify responses or other information obtained from the Regulated Entities during the course of supervisory efforts;

[See UBS submission](#)

- g. a description of how examination priorities are developed and the process for adjusting and updating such priorities, including what factors are used in developing priorities; and

[See UBS submission](#)

- h. any other information that would assist in understanding the scope of the relevant supervisory authority.

[See UBS submission](#)

2. Please describe the supervisory tools your jurisdiction uses in practice to identify risk and detect potential breaches of law. To the extent relevant, please consider the following:

- a. any form(s) of ongoing or ad hoc monitoring and surveillance by the regulator or another organization;

[See UBS submission](#)

- b. any process to receive tips or complaints about the activities of a Regulated Entity;

[See UBS submission](#)

- c. the submission of periodic filings from Regulated Entities; and

[See UBS submission](#)

- d. the submission of reports from Regulated Entities based on any event or trigger.

[See UBS submission](#)

3. Please describe your jurisdiction's examination or inspection processes. In responding, please include:

- a. a description of the examination cycle (e.g., routine periodic basis or risk-based). If the examination is periodic, please include the time frame;

[See UBS submission](#)

- b. a description of the processes and factors considered when selecting Regulated Entities for examination (e.g., time since last examination, tip, complaint or referral, etc.);

[See UBS submission](#)

- c. a description of the processes, including factors considered, to determine the scope for examination or inspection and the process for amending the scope if warranted;

[See UBS submission](#)

- d. a description of the types of books and records typically reviewed during examinations;

[See UBS submission](#)

- e. whether you conduct interviews with employees of the Regulated Entities;

[See UBS submission](#)

- f. whether you test or verify responses given to you by the Regulated Entities;

[See UBS Submission](#)

- g. how you communicate deficiencies or other areas of concern to Regulated Entities, whether such communications are public, and how such communications are documented;

[See UBS submission](#)

- h. to whom you direct communications (e.g., compliance office, senior management); and

[See UBS submission](#)

- i. how Regulated Entities respond to identified issues.

[See UBS submission](#)

4. Please describe the resources available for your supervisory efforts. In responding, please include:

- a. the typical background and qualification of your supervisory staff;

FINMA's Banks division is responsible for the authorisation (licensing) and supervision of banks and securities firms. The Authorisation and Supervision sections are supported by specialist teams in the areas of Risk Management and Data Analytics within the Banks division, and several other expert teams in other divisions, e.g. the specialists for Anti Money Laundering and suitability in the Markets division. FINMA has five layers each for managers and specialists. The first layer is reserved for members of FINMA's Executive Board. Employees with responsibility for the supervision of large banks are classified either in the second (senior manager / expert) or the third layer (manager / senior specialist).

The average length of FINMA service for these employees is 9+ years. Also, these employees in general have a university degree – master level, often including a CPA certification – in areas such as

economics, mathematics, computer science/data science or law, as well as several years of professional experience outside FINMA, mostly in external or internal audit roles or in compliance and risk management functions in the banking industry.

- b. the use of experts, such as persons who can analyze models or perform data analytics;

The cross-divisional Risk Management function, which is divided up into Capital Adequacy and Planning, Interest Rate Liquidity and Funding Risk, Quantitative Risk Management and Operational, Cyber and IT Risks plays a key part in the integrated approach adopted by the Banks division. The Risk Management function's professional background ranges from banking, economy, supervisors to IT, natural sciences (e.g. physics and mathematics) with various academic degrees. The Capital Markets group, set up in 2009, has enabled FINMA to focus on building up specialist knowledge of investment banking with an increased focus on onsite activities. The Analytics and Instruments group is a special unit for data analytics, with expert data science backgrounds and knowledge.

If additional model and data analytics expertise is required, FINMA may appoint independent third parties to executive tasks on FINMA's behalf.

- c. the use of analytical software and tools in conducting examinations and other supervisory work;

FINMA uses standard software for its supervisory work. Apart from that, FINMA has developed its own analytical software, e.g. for a quantitative and highly automated rating assessment of banks, stress test loss potential analyses and stress tests on specific risk categories. Furthermore, FINMA has established a data innovation lab which uses state-of-the-art methods (e.g. artificial intelligence, machine learning, natural language processing) to optimize efficiency and effectiveness in supervision. The lab also applies analytical software.

- d. the use of SROs or exchanges to perform supervisory functions;

[See UBS submission](#)

- e. training programs for supervisory staff; and]

In terms of qualitative personnel planning, FINMA identifies its strategic education and training needs. Appropriate company-wide training focuses are set and training measures are carried out every year. Regular town-halls are held on a firm-wide and on a divisional level to provide cross-divisional updates on supervisory developments. Apart from that, the Banks division holds internal brown bag trainings to keep the supervisory staff abreast of developments and trends, and to provide a forum for exchange with the various subject matters experts and sometimes also external experts.

Furthermore, each department within the Banks Division is responsible for quantifying its individual training requirements for each person on an annual basis and planning training courses for its staff. The number of annual paid vacation days per employee for education and training has increased significantly in recent years. This includes participation in international, targeted trainings offered by international supervisory authorities and bodies such as the Bank of England, the ECB or the Financial Stability Institute of the Bank for International Settlements, but also relevant university courses to obtain degrees such as CAS (Certificate of Advanced Studies), MAS (Master of Advanced Studies) or MBAs in Switzerland or abroad. Further, FINMA employees can participate in the training programs of the Training Center of the Swiss Federal Administration, which offers more general courses to develop IT, management, personal or other skills, or in external auditor trainings.

Apart from that, FINMA has a company-wide talent development program. In a systematic, annual process, new and existing participants in the program are selected and / or confirmed with the involvement of the divisional management teams. Participants in the talent program receive a mentor from Senior Management, draw up a dedicated development plan, and benefit from special development measures.

- f. the resources/size of the supervisory group relative to the volume and complexity of Regulated Entities.

FINMA pursues a risk based supervisory approach. All banks are classified into a supervisory category on the basis of their balance sheet, AuM, secured deposits and minimum own funds

(i.e. their risk impact on creditors, investors, and the financial system as a whole, as well as the reputation of the Swiss financial sector) and receive a supervisory rating. The combination of category and rating determines the intensity of supervision, the choice of supervisory instruments and the level of interaction between direct supervision by FINMA and the assigned regulatory audit firms for individual institutions. For the two Swiss G-SIBs, there are dedicated supervisory teams with experts in the field of accounting, risk management, finance, conduct, etc. Medium sized banks usually have one Key Account Manager who is responsible for defining the supervisory strategy and the use of supervisory instruments. Cross-functional experts from the risk management department are included in daily supervision as appropriate for all banks.

Alongside FINMA's direct supervisory activities, audit firms make a significant contribution to achieving this responsibility by undertaking regulatory auditing tasks. They serve to extend FINMA's reach and perform their duties on its behalf and in accordance with FINMA's guidelines. The audit firms allow FINMA to make use of dedicated specialized knowledge in a risk-focused manner.

All activities specifically relating to banking supervision, for both the large banking groups and others, are currently concentrated within a single division. The supervision teams covering the two G-SIBs and the other two banking supervision departments report directly to the Head of Banks division. The cross-divisional Risk Management function, which is divided up into Capital Adequacy and Planning, Liquidity, Interest Rate and Funding Risk, Quantitative Risk Management and Operational, Cyber and IT Risks plays a key part in the integrated approach adopted by the Banks division. The Capital Markets group allows FINMA to use specialist investment banking knowledge to focus on onsite activities at the two G-SIBs.

In addition, the Banks division is supported by other divisions. In particular, the Recovery and Resolution division is responsible for measures to stabilize companies subject to financial market laws in the event of a crisis, for the emergency and resolution planning of supervised institutions as well as the execution of restructuring, liquidation and insolvency proceedings. Other subject matter experts for specific areas such as Suitability, AML, Cross-border or Market Conduct are also located outside the Banks division, supporting the supervision of banks and other regulated entities.

5. Please describe whether your jurisdiction has regulatory authority and related requirements or procedures to obtain the information necessary from Regulated Entities (or their offices or branches) to support your supervisory functions.

[See UBS submission](#)

6. How do you communicate deficiencies or other areas of concern to Regulated Entities? For example, what remedies, or other corrective actions, are available to your supervisory program (e.g., deficiency letters, referrals to other regulators, enforcement actions, etc.)? Please include whether one type of action may be more prevalent than another and whether the actions are verbal or in writing. Please include recent statistics on how often each type of action is used.

[See UBS submission](#)

7. Does your jurisdiction use risk monitoring and assessment or surveillance as part of your supervisory framework? If so, how do you use this information and what actions do you take if potential violations are identified?

[See UBS submission](#)

8. Please describe how your jurisdiction reviews and evaluates corrective action undertaken by Regulated Entities.

In cases of corrective actions, FINMA stipulates clear deadlines for completion – usually, the banks have to submit regular progress reports of the corrective action and the submission of the appropriate evidence of closure. FINMA can task internal audit or a third party to look at corrective actions if deemed appropriate.

The review and evaluation of corrective action undertaken by Regulated Entities are performed on a case-by-case basis, depending on the severity of the deficiency and the risks that had to be addressed. While minor issues may be addressed through correspondence, more material issues will be reviewed and evaluated through interviews or desk reviews of the appropriate material. In more severe cases, FINMA can conduct an on-site review, order an additional audit to be conducted by the external audit firm or appoint an audit mandatary.

9. Please describe any regulatory consequences for non-compliance with corrective actions, including the form and frequency of referrals to enforcement or other judicial authorities.

[See UBS submission](#)

10. Please describe how your jurisdiction communicates with the industry and the public about best practices, common compliance issues or other areas of misconduct risk, including how regulated Entities are informed about the consequences of misconduct or noncompliance.

[See UBS submission](#)

11. Please describe your jurisdiction's participation in international organizations of securities and other regulators, such as the IMF and IOSCO.

Switzerland is member many international organisations such as the IMF and the FSB (represented by the Swiss Federal Department of Finance and the Swiss National Bank). As integrated financial market supervisory authority, FINMA presents Switzerland in the international standard setting bodies IOSCO, BCBS, IAIS and NGFS.

FINMA is member of the BCBS Group of Governors and Heads of Supervision (GHOS), IAIS' Executive Committee (ExCo), IOSCO Board and NGFS' Plenary. In IOSCO, FINMA is also engaged in the Financial Stability Engagement Group (FSEG) as well as in most of IOSCO's committees and working groups. The same is true for many committees and working groups of BCBS, IAIS and NGFS. In the FSB, FINMA chairs the FSB Resolution Steering Group and is member of the Standing Committee on Supervisory and Regulatory Cooperation (SRC), the Steering Committee group on NBFIs (SCN) and many FSB working groups.

The IMF conducted its last FSAP on Switzerland in 2019. The assessment was focused on systemic risks and, thus, not covering all core principles. Together with other responsible Swiss authorities (Swiss Federal Department of Finance (Lead) and the Swiss National Bank), FINMA contributed to this assessment. FINMA also takes part in IMF's annual Article IV missions on Switzerland, IMF's annual country reports on Exchange Arrangements and Exchange Restrictions (AREAER) and on macroprudential policy (Macroprudential Policy Survey).

12. Please provide a copy of Principles 10 and 12 from your most recent self-assessment for the FSAP¹.

As the FSAP on Switzerland in 2019 was only focused on systemic risk, FINMA's self-assessment of the IOSCO Principles was limited to certain aspects of relevant principles. FINMA would be happy to provide the available material to Principles 10 and 12 if SEC was interested.

Section II – Enforcement Framework

1. Please describe your jurisdiction's ability to investigate and bring administrative or judicial actions against domestic and foreign parties to enforce your regulatory framework. In responding, please address:

- a. your jurisdiction's authority (statutory, regulatory or otherwise) to take enforcement action both domestically and in connection with cross-border activity, describing both judicial and non-judicial

¹ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>

forms of action where applicable; and

[See UBS submission](#)

- b. the impact of any privacy laws or other related provisions that may impede your ability to conduct thorough investigations.

[See UBS submission](#)

2. Please describe the tools your jurisdiction can utilize to conduct investigations, including the ability to obtain detailed records to reconstruct transactions and identify parties to a transaction. For example, please address the ability to:

- a. obtain electronic communication and other records from internet service providers or other third-parties;

[See UBS submission](#)

- b. compel statements and information from witnesses; and

[See UBS submission](#)

- c. receive tips, complaints and referrals from corporate insiders (such as whistleblowers) and the public.

[See UBS submission](#)

3. Please describe the investigative capacities your jurisdiction has under relevant law, including methods and technology used for market surveillance. Please also describe the role of experts, self-regulatory organizations and exchanges in assisting or performing enforcement functions.

[See UBS submission](#)

4. Please describe the legal proceedings, remedies, and sanctions available in your jurisdiction to support your enforcement mechanism, including, for example, available tribunals, types of penalties or other monetary sanctions, and the ability to seek prospective relief, temporary restraining orders, asset freezes or make criminal referrals.

[See UBS submission](#)

5. Please describe how your jurisdiction publishes information about enforcement initiatives, including disclosure of enforcement matters and violations and public disclosure of enforcement objectives.

[See UBS submission](#)

6. Please provide information regarding your jurisdiction's track record of enforcement activity for the last three years and the use of civil or criminal enforcement authority against individuals and entities, including

- a. information about the number of actions taken;

[See UBS submission](#)

- b. the types of violations subject to action, including in connection with requirements for which substituted compliance is sought (e.g., capital and margin, business conduct, etc.); and

[See UBS submission](#)

- c. the outcomes of such actions, including whether money was returned to harmed investors. In responding, please provide information about the types of penalties assessed and length of time from initiation of an investigation to the date of charge or closure.

[See UBS submission](#)

7. Please describe whether the enforcement authorities in your jurisdiction have readily accessible mechanisms to obtain documents and other forms of assistance from a foreign enforcement authority. In responding, please address:

- a. whether your jurisdiction has ratified international conventions, treaties and agreements relevant to cooperation in enforcement matters,

Switzerland has concluded many multilateral and bilateral conventions, treaties and agreements for international mutual legal assistance, especially in criminal matters. The competent Swiss authority for international mutual assistance in criminal matters is the Federal Office of Justice.

- b. whether the relevant authorities in your jurisdiction have signed the IOSCO MMoU or IOSCO EMMoU, and

[See UBS submission](#)

- c. whether your jurisdiction has any legal requirements to preserve records obtained in the course of investigative matters such that those records would be available upon request from another enforcement authority.

The retention period at FINMA is generally 15 years (for supervisory and procedural cases) or 10 years for the other documents, starting from the conclusion of the case. FINMA may exchange respective information with other domestic authorities under the prerequisites stated in Art. 38 et seq. FINMASA and with foreign financial market supervisory authorities in accordance with Art. 42 et seq. FINMASA.

Section III – Supervision and Enforcement Cooperation

1. Please describe your jurisdiction's ability to share, and the process for sharing, non-public information with (or obtain it for) authorities such as the SEC. In responding, please address any limitations for sharing (a) information from Regulated Entities and (b) internal work product. Please address whether any blocking statutes, privacy or secrecy laws, or other legal or regulatory requirements impede sharing information, including customer or employee information, by authorities or firms located in your jurisdiction.

[See UBS submission](#)

1. Under your jurisdiction's relevant laws, regulations, and policies, would the SEC, (a) have prompt access to the books and records of a Regulated Entity located in your jurisdiction, and (b) be able to conduct onsite inspections or examinations of a Regulated Entity located in your jurisdiction? Please describe any applicable limitations or conditions on such access.

[See UBS submission](#)

3. FINMA Response to SEC's Follow-up Questions (3.3.2021)

Questions to FINMA: Follow up to Substituted Compliance Questionnaire/Application

General Supervision

1. Can you provide more detail on FINMA's supervisory approach to security-based swap dealers (SBSDs)? For example, please provide more detail on the day-to-day responsibilities of supervisors of the firm(s) that will be applying for substituted compliance (e.g., UBS/Credit Suisse).
 - Could you walk us through an average week or month of the UBS supervisory team? For example, what kinds of reports are they reviewing? How often do they have meetings with a firm?
 - Verbal update / discussion
 - How do the supervisors verify the information given to them by the firms?
 - Verbal update / discussion
 - Regulatory filings are audited by the regulatory auditor.
 - How often do supervisors have an onsite visit with a firm? Can you talk a little about the topics the supervisors are covering with the firms at the periodic meetings/visits?
 - Verbal update / discussion
 - How many supervisors does FINMA have dedicated to UBS and Credit Suisse?
 - Verbal update / discussion
 - Are there any FINMA supervisors based onsite at UBS/Credit Suisse? If so, what are their roles?
 - Verbal update / discussion
2. If the supervisors see an issue during monitoring or other supervisory work, how is it resolved?
 - Verbal update / discussion
 - When we conduct on-site activities (SR and DD) we issue a dedicated letter or report with findings / recommendations.
3. Are all systemically important banks in the Category 1 risk rating?
 - We apply the following supervisory categories:
 - "Category 1: extremely large, important and complex market participants. Very high risk.
 - Category 2: very important, complex market participants. High risk.
 - Category 3: large and complex market participants. Significant risk.
 - Category 4: medium-sized market participants. Medium risk.

- Category 5: small market participants. Low risk."¹
 - UBS and CS are in Category 1.
4. UBS noted that FINMA operates a non-public rating system used to perform regular evaluations. Can you describe the system and the ratings the SBSDs have?
- "In order to implement [its] risk based approach in a consistent manner, the SFBC [sc: predecessor of FINMA][...] developed an early warning / rating system similar to that employed by various foreign supervisory authorities, which it uses in its risk based approach to its supervisory activities."²
 - "The system is based on the internationally-recognised CAMELS approach. CAMELS stands for the following categories: Capital adequacy, Asset quality, Management factors, Earnings, Liquidity and Sensitivity to market risks. In each of these six categories both quantitative and qualitative information is processed. The quantitative data consist of key figures, which are largely drawn from [...] regulatory reporting."³
 - Verbal update / discussion
 - For further details, please go to the SFBC report on the internet.⁴
5. Can you explain the role of auditors in FINMA's supervisory regime?
- "Audit firms play an important role in FINMA's supervisory activities, primarily undertaking regulatory auditing. They serve to extend FINMA's reach and work in accordance with FINMA's guidelines."⁵
 - Please describe what a regulatory audit conducted by an audit firm is and the circumstances for which it would be conducted for an SBSD? Are there set topics? Does FINMA set the required scope?
 - "The auditing process assesses institutions' compliance with supervisory requirements and whether they can continue to adhere to these requirements for the foreseeable future. Audit firms are requested by the supervised institutions to carry out these audits, which are conducted in line with FINMA's specifications.
- The auditing process comprises the basic audit and the additional audit.
- The basic audit involves carrying out a periodic assessment of all supervised institutions in a particular supervisory area or a clearly defined group of supervised institutions to ensure compliance with fundamental requirements set out in supervisory law. FINMA defines a minimum standard audit strategy for each supervisory area. "⁶ So, an SBSD will be

¹ <https://www.finma.ch/en/supervision/banks-and-securities-firms/categorisation/>

² https://www.finma.ch/FinmaArchiv/ebk/e/dossiers/pdf/20070327_Information_e.pdf

³ https://www.finma.ch/FinmaArchiv/ebk/e/dossiers/pdf/20070327_Information_e.pdf

⁴ https://www.finma.ch/FinmaArchiv/ebk/e/dossiers/pdf/20070327_Information_e.pdf

⁵ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/>

⁶ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

subject to the basic audit if it is a supervised institution – which both UBS and Credit Suisse are.

- "As the basis for their regulatory audits, audit firms generally issue FINMA with an annual risk analysis on each supervised institution. As part of this risk analysis, FINMA expects auditors to present a forward-looking view of the audited institution's risk situation. This can have a significant impact on the audit areas, and the frequency and depth of the audit to be performed."⁷
 - "For supervised institutions in FINMA Supervisory Categories 1 and 2, FINMA exercises greater influence on the audit fields to be assessed than for smaller banks, by defining the audit strategy in a dialogue with the audit firm."⁸
 - FINMA has published circular 2013/3 "Auditing"⁹ with guidelines to the circular, as well as the standard audit strategies, audit points and a reporting template¹⁰.
- Describe the process for a case-related audit. When would FINMA choose to use a case-related audit?
 - We do not really use the term "case-related audit". However, FINMA can choose between two setups to assign a firm to audit a specific topic.
 - "Additional audits assess audit areas depending on the business model or risk situation of a particular supervised institution."¹¹ They are carried out by the regular audit firm, in conjunction with or separate from the annual audit. This would be used to review an area of interest.
 - FINMA can also appoint an independent audit mandatary to act as an investigating agent or similar specific function. "FINMA selects its mandataries carefully, taking account of the situation and circumstances in each individual case. Often they have to be deployed on matters of urgency. To ensure that it can choose the right mandatary swiftly when needed, FINMA maintains a list of suitable candidates. They must have knowledge and experience of mandates in the specific field, as well as an appropriate infrastructure. [...] FINMA defines the content and the expected costs of the mandate at the outset. It also monitors discharge of the mandate on an ongoing basis." ¹²

⁷ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/>

⁸ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

⁹ https://www.finma.ch/de/~media/finma/dokumente/dokumentencenter/myfinma/rundschreiben/finma-rs-2013-03-01012021_de.pdf?la=de

¹⁰ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

¹¹ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/>

¹² <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/20160317-fb-beauftragte-de.pdf?la=en>

- For further details, please refer to FINMA's fact sheet on mandataries:¹³
 - Do the auditors report findings directly to FINMA?
 - Yes, they do. Art. 27 of the Swiss Financial Market Supervision Act (FINMASA) provides:
 - 1) The audit company provides FINMA with a report on its audits. The audit company provides the supreme management body of the audited supervised person or entity with a copy of the report.
 - 2) If it detects violations of supervisory provisions or other irregularities, it gives the audited supervised person or entity an appropriate period to restore compliance with the law. If the period is not complied with, it informs FINMA.
 - 3) In the case of serious violations of supervisory provisions or serious irregularities, the audit company notifies FINMA immediately.
 - "Audit firms provide the findings from their audits to FINMA in a standardised report on the regulatory auditing of banks and securities firms which includes general information about the audit procedure, a statement of the auditors' independence and other information about the development of the respective institution's business activity and its organisation. The report also contains a commentary on any irregularities discovered or on recommendations for improvements."¹⁴
 - Does FINMA have any control over who the firm chooses as its auditor?
 - The institutions have to advise FINMA of the appointment of an audit firm (Art. 25 par. 2 FINMASA).
 - In justified cases, FINMA may require the supervised person or entity to change audit company (Art. 28a par 2 FINMASA).
6. Can you provide more details on how the FINMA supervisory teams supervise the following areas for firms like UBS/Credit Suisse: risk management (in particular management of credit risk and market risk), AML, and portfolio reconciliation.
- **Risk Management** – verbal update / discussion
 - **AML:** In the past years, FINMA has placed a strong focus on conduct supervision. "As part of its supervisory activities, FINMA also monitors the financial intermediaries subject to its supervision with regard to their compliance with anti-money laundering requirements and in this respect, carries out a number of on-site reviews each year (31 in 2019). In addition to its own reviews, FINMA's supervisory activities also primarily rely on the audit firms, which extend its reach and work in line with its directives." In 2019, FINMA focused its AML survey form to be used

¹³ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/20160317-fb-beauftragte-de.pdf?la=en>

¹⁴ <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

annually by the audit firms "more strongly on the risks involved. The audit items have been reduced to a sensible minimum, which have to be audited as part of every audit. There are now also five thematic modules, which are applied in line with the risks involved. These relate to the monitoring of foreign booking centres, identification rules, complex structures, trade finance and a more in-depth focus on the topic of politically exposed persons."¹⁵

- Verbal update / discussion

- **Portfolio Reconciliation**

- This topic is covered by the base audit performed by the regulatory auditor. The regulatory auditor regularly reviews supervisory filings (reports sent to SNB) and reconciles the information provided to the financial systems of the bank.

7. Are the supervisory processes we discussed above the same for all areas where substituted compliance has been requested?

- Verbal update / discussion

Inspections

1. What's the difference between an on-site and off-site inspection (other than going on-site)? When would an on-site inspection be used instead of an off-site inspection?

- "On-site supervisory reviews are a tool used for direct supervision. They take place within the framework of prudential supervision and allow FINMA to form its own impression of a business division, department or function of the respective supervised institution."¹⁶ "On-site supervisory reviews enable FINMA to gain a better understanding of an institution's situation and offer the opportunity for direct dialogue."¹⁷
- Verbal update / discussion

2. What is the difference between an on-site inspection and a case-related audit? When would the inspection be used instead of an audit?

- The on-site inspection is done by FINMA employees and provides us with direct first-hand knowledge and understanding, while the audit mandatory is a third party reporting to FINMA. The choice of instruments depends on the purpose.

¹⁵ https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/geschaeftsbericht/20200402_finma_jahresbericht_2019.pdf?la=en&hash=A2B31B575330B72F61BA3D413E4EB C40C675B1E9

¹⁶ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

¹⁷ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

3. How often are inspections conducted that relate to the SBSB portion of the entities' business (either directly or as a component of overall risk such as market risk)?
 - Verbal update / discussion
4. What would cause FINMA to do an onsite inspection? UBS's response says that FINMA defines its exam strategy based on the risk assessment provided by the regulatory audit firm. What does this mean? How does FINMA determine when to examine an SBSB and on which areas to focus? How often do inspections focus on the SBSB side of the business?
 - For G-SIBs, FINMA defines the exam strategy, both for the regulatory audit as well as its own supervisory work.
 - We assume you refer to UBS's response to question I.1.g "FINMA defines its examination strategy along the risk assessment that is performed by the regulatory audit firm for every Regulated Entity on an annual basis (FINMA-Circular on the regulatory audit of Regulated Entities, 2013/3)." - This response does not refer to FINMA's own on-site inspections but to the definition of the audit strategy (which can include additional audits, as referenced above, question 5). Here, the risk assessment of the audit firm plays an integral role, as referenced above, question 5.
 - As for FINMA's on-site supervisory reviews: "FINMA can carry out on-site supervisory reviews as part of its supervisory activities. It decides to do so on the basis of general financial market risks or specific events. On-site supervisory reviews provide important insights for supervision and if necessary result in further measures.
 - On-site supervisory reviews are topic-related controls. They take place within the framework of prudential supervision and allow FINMA to form its own impression of a business division, department or function of the respective supervised institution."¹⁸
 - "[FINMA] uses this supervisory tool on the one hand for an assessment of risks associated with particular circumstances or the specific institution. On-site supervisory reviews enable FINMA to gain a better understanding of an institution's situation and offer the opportunity for direct dialogue. At the same time, FINMA also uses this supervisory tool to assess specific financial market risks. A comparison of the review results between the institutions also enables important assessments of general financial market risks to be carried out.
 - FINMA carries out on-site supervisory reviews in a risk-based manner in accordance with its supervisory approach. The subject of the review can be a detailed review of a supervisory topic that is considered relevant for the supervisory area in question based on the risk assessment of FINMA. It also selects the institutions to be reviewed with due regard to their business models and risk profiles. For example, such reviews can be

¹⁸ <https://www.finma.ch/en/supervision/cross-sector-issues/on-site-supervisory-reviews/>

triggered from FINMA's supervisory activities or from audit firms and media reporting."¹⁹

- For further details, please see our fact sheet on on-site supervisory reviews.²⁰
 - Unterfrage: How often do inspections focus on the SBSB side of the business?
 - Verbal update / discussion
5. Who conducts the inspections? The supervisory team or another FINMA group?
- "Depending on the content focus, employees from the specialised onsite supervisory review teams, regular supervision or experts take part in such reviews."²¹
6. Briefly describe the FINMA inspection process.
- "Before conducting a review, FINMA defines its subject and scope.
 - FINMA requests information and documents from the institution and simultaneously informs it of the topic and scope of the review. The insights gained in advance are then verified during the on-site review and open questions investigated further in dialogue with the institution.
 - The results of the on-site supervisory review culminate in a qualitative assessment by FINMA regarding the scope defined in advance. This assessment is made available to the institution concerned in the form of a summarising report or feedback letter that contains the key findings of the on-site supervisory review and their evaluation. FINMA can also define follow-up measures if required."²²
7. What type of actions could the FINMA supervisory team take if problems are found at a firm? How are the results communicated to a firm? For example, do you send a letter to the firm outlining the findings? Must a firm respond? Does FINMA determine whether the response is adequate? Is there a system to document findings and responses?
- "The results of the on-site supervisory review culminate in a qualitative assessment by FINMA regarding the scope defined in advance. This assessment is made available to the institution concerned in the form of a summarising report or feedback letter that contains the key findings of the on-site supervisory review and their evaluation. FINMA can also define follow-up measures if required."²³

¹⁹ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

²⁰ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

²¹ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

²² <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

²³ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

- Verbal update / discussion
8. The UBS reponse for item 3g states that deficiencies that have been found within the regular examination of the entity are listed in the long-form audit report. Is this referring to exams by FINMA or the audit firm? The response also indicates that the entity would need to address and mitigate as necessary. Can you give examples of what a firm does to mitigate? Are there ever deficiencies that are serious enough that more serious measures would be taken right away (ex. Referring to Enforcement Dept, etc)?
- The statement refers to the audit firm, not to FINMA's on-site inspections. The long-form audit report is a work product of the audit firm.
 - Verbal update / discussion

Priorities

1. Do you develop annual examination priorities? If so, what is this process? Are these priorities different from your strategic goals?
- We understand your question to refer to FINMA's on-site examinations, not to the audits of the audit firms. "As a rule, on-site supervisory reviews are performed as part of annual planning. However, unscheduled supervisory reviews may also be performed additionally due to specific events."²⁴ So, yes, we do have annual examination plans.
 - "Every four years, FINMA's Board of Directors defines the supervisory authority's strategic goals and submits these to the Federal Council for approval. [...] Derived from its mandate, FINMA's strategic goals set out those priorities and demonstrate how FINMA will fulfil its remit. These goals, which are reviewed every four years, reflect developments in the financial industry and the challenges they bring. The underlying strategy defined in each goal thus creates a link between FINMA's legal mandate and its specific activities, giving the work performed by FINMA a longer-term focus."²⁵
 - Verbal update / discussion
2. How are these priorities (or your strategic goals) used in your supervisory regime? Do you conduct examinations or have audits conducted related to these priorities?
- Verbal update / discussion
3. Does FINMA develop enforcement priorities? If so, how are they communicated?
- Yes. FINMA summarizes its priorities in an enforcement policy and publishes it on its website (<https://www.finma.ch/en/enforcement/all-about-enforcement/>). According to this enforcement policy, enforcement aims to remedy shortcomings, restore compliance with the law and exert a deterrent effect by imposing sanctions for violations. Serious lapses, such as serious violations of market integrity and market manipulation performed by participants in the Swiss securities market, are dealt with as

²⁴ <https://www.finma.ch/en/supervision/cross-sector-issues/on-site-supervisory-reviews/>

²⁵ <https://www.finma.ch/en/finma/supervisory-objectives/strategy/>

a matter of urgency. In addition, FINMA takes targeted action against individuals responsible for serious violations of supervisory law.

Anti-Money Laundering

1. Can you describe the FINMA's approach to AML supervision? Does the process differ from the process described above?
 - AML has been one of the key focus areas of FINMA's supervisory work in the last years. FINMA applies its normal supervisory tools. Beyond that, to support the financial intermediaries in their work against money laundering, FINMA published good and bad practice examples in its annual reports 2017²⁶ and 2018²⁷.
 - For further details, please refer to FINMA's fact sheet on AML.²⁸

Access to Books and Records

1. Do FINMA supervisors have the authority to obtain any book and record from the firm that they need as part of their supervisory responsibilities?
 - Yes. Art. 29 Par. 1 FINMASA provides "The supervised persons and entities, their audit companies and auditors as well as persons or companies that are qualified investors or that have a substantial participation in the supervised persons and entities must provide FINMA with all information and documents that it requires to carry out its tasks."
2. Are there any requirements before documents can be requested (e.g., a cause matter must be opened up)?
 - We are not sure whether we understand this question correctly. Article 29 FINMASA establishes a comprehensive duty of disclosure on the part of supervised persons directly to FINMA. These obligations are connected to FINMA's supervisory competence and not, for example, to the question of whether or not formal enforcement proceedings are being conducted. FINMA has a proper archiving system.
3. Can you confirm that the SEC's exam program could obtain any SBSB-related supervisory work product needed from FINMA through the substituted compliance MOU as well as a supervisory cooperation MOU if put into place?
 - In principle yes, provided that the information contained in the supervisory work product is relevant for the SEC's supervision of SBSB.

Tips and Complaints

1. How does FINMA process tips and complaints? How are these tips and complaints used in the supervisory process?

²⁶ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/geschaeftsbericht/20180327-jahresbericht-2017-30-33.pdf?la=en>

²⁷ https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/geschaeftsbericht/aufsichtsschwerpunkte-2018_de.pdf?la=en

²⁸ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-geldwaeschereibekampfung-finanzintermediaere-sorgfaltspflichten.pdf?la=en>

- FINMA accepts tips and complaints from anyone via its website (<https://www.finma.ch/en/finma-public/reporting-information/>). Such complaints are treated confidentially, unless FINMA is legally obliged to disclose them. While FINMA follows up any specific complaints it receives, it does not respond to them individually (see question #5 below). Information received by way of such complaints is reviewed by the supervisory team responsible for the respective firm and followed up appropriately, be it within the ongoing supervisory process, through informal investigations or formal enforcement proceedings (see also question #1 and #8 below). If informal investigations or (formal) enforcement proceedings are opened, an informant has no party status and is not supported by FINMA in any civil disputes.

Enforcement

1. In your response to Section I, #1a of the Questionnaire, you refer in the third paragraph from the bottom to the distinctions between “informal investigations” and “actual enforcement proceedings.” Please explain further the distinctions between these two processes, for example, when, why and how would a decision be made to begin an “actual enforcement proceeding” versus carrying out an “informal investigation.” Is there a separate enforcement investigation? How are these two processes different? Are different remedies available?
 - FINMA uses informal investigations to follow up on indications of possible regulatory irregularities or violations of the law in order to decide whether or not enforcement proceedings are required. In this regard, informal investigations regularly form the interface between ongoing supervisory activities and the conduct of (formal) enforcement proceedings by FINMA. Unlike in Swiss competition law (Article 26 Cartel Act), neither the financial market laws nor the Administrative Procedure Act (APA) mention the term “informal investigation”. Like in ongoing supervisory work, FINMA is empowered to conduct informal investigations on all activities that need a FINMA authorization. The APA is not applicable during the stage of informal investigation.
 - At the end of an informal investigation, a decision is made according to certain, general criteria (i.e. supervisory interest on enforcement action, severity of presumed legal violation) regarding the opening of enforcement proceedings. In the case of license holders or their employees this decision is made by a special committee of FINMA's executive board. Where the criteria are met, especially the indications of violations of supervisory provisions have been confirmed and are judged as sufficiently important, FINMA opens enforcement proceedings and notifies the parties of this (Article 30 Financial Market Supervision Act [FINMASA]). With the opening of (formal) enforcement proceedings, the APA with its respective obligations and rights of the parties becomes applicable. If, on the other hand, the initial suspicion is not confirmed, the investigation will be closed and, if needed, alternative measures over the regular supervision

process implemented. There are no remedies available by statutory law against the decision by FINMA to open enforcement proceedings.

2. Are the administrative sanctions at FINMA's disposal discussed in the second to last paragraph of the response to Section I, #1a of the Questionnaire (declaratory rulings, license withdrawals and orders under Art/ 31 FINMASA, disgorgement of profits, cease and desist orders, professional bans) used in informal investigations or enforcement proceedings?
 - In case of non-compliance with supervisory law, FINMA may open enforcement proceedings and impose measures to restore compliance with the law (Article 31 et seq. FINMASA). The instruments foreseen by Article 31-37 FINMASA are, however, not applicable in the course of a foregoing informal investigation (see also question #1). Thus, the mentioned administrative sanctions can only be ordered as a result of (formal) enforcement proceedings.
3. In your response to Section II, #2a in the Questionnaire, you explain that FINMA has unrestricted access to certain books, records, and recordings for its supervisory investigations. Are these tools available for purposes of enforcement proceedings?
 - Yes, these tools are also available for purposes of enforcement proceedings. Article 29 para 1 FINMASA stipulates a comprehensive duty of supervised persons (as well as their audit firms and auditors and persons or companies that are qualified investors or that have a substantial participation in the supervised persons and entities) to provide FINMA with all information and documents that it requires to carry out its tasks. This obligation is connected to FINMA's supervisory competence and not to the question of whether informal investigations or (formal) enforcement proceedings are being conducted. It therefore makes no difference whether FINMA requests information from supervised persons as part of ongoing supervision, in informal investigations or in enforcement proceedings. However, in contrast to regular supervision and informal investigations, FINMA has additional instruments at its disposal in ongoing (formal) enforcement proceedings (in particular, the examination of witnesses or the appointment of an investigating agent [Article 36 FINMASA]; see also questions #6 and #7).
4. Are the investigative capacities you describe in response to Section II, #3 of the Questionnaire part of a supervisory investigation or an enforcement proceeding?
 - The investigative capacities described in response to Section II, # 3 of the Questionnaire can generally be employed in informal investigations as well as enforcement proceedings (see also question #3). However, testimony from third parties can only be collected and compelled in (formal) enforcement proceedings (see also question #7) and under certain circumstances within the framework of international administrative assistance (Article 42a FINMASA). Also, the use of experts can be broader in such formal proceedings (e.g. they can be empowered to act directly for the supervised persons; see also question #6).

5. Are there incentives or protections for whistleblowers?
- There are no incentives for whistleblowers under financial market laws in Switzerland. In addition, following a long legislative process over the last couple of years, whistleblowers in Switzerland remain without specific statutory protection.
 - Reporting an incident to FINMA or filing a complaint can, however, be made by anyone through FINMA's website (<https://www.finma.ch/en/finma-public/reporting-information/>). Complaints are treated confidentially unless FINMA is legally obliged to disclose them (for instance the parties to enforcement proceedings have generally the right under the APA to consult their respective case file). While FINMA will follow up on any specific complaints, it does generally not respond to them individually.
6. Explain whether FINMA uses experts in investigations or enforcement proceedings.
- FINMA may use the services of experts to perform its duties. In the course of ongoing supervision, FINMA may appoint mandated auditors to conduct audits at supervised institutions (Article 24a FINMASA). FINMA may also call in an expert during informal investigations, if it does not carry out all the investigations on its own.
 - In addition, FINMA may also appoint an expert in enforcement proceedings (investigating agent; Article 36 FINMASA). The main tasks of such expert are to clarify the relevant facts of a case; but he can also be mandated to implement supervisory measures ordered by FINMA and be given additional powers in this regard. The appointment of an expert is an important tool for FINMA, as it allows FINMA to make selective and targeted use of additional external resources and thus to conduct complex investigations within a reasonable period of time. FINMA regularly uses experts in enforcements proceedings (in the years 2014-2019 an average of 19 investigation mandates were assigned per year).²⁹
7. Your response to Section II, #2b of the Questionnaire says that “FINMA may, in formal proceedings, obtain information from witnesses and other third parties necessary of the supervision of the financial market.” Please clarify whether FINMA is able to compel witness statements as part of enforcement proceedings, and if so, which types of enforcement proceedings?
- Article 29 FINMASA establishes a comprehensive duty of disclosure on the part of supervised persons directly to FINMA. These obligations are connected to FINMA's supervisory competence and not, for example, to the question of whether or not formal enforcement proceedings are being conducted (see also question #3).
 - Where FINMA has indications that it has been provided with untrue or incomplete information, it can enforce the duty to provide information

²⁹ Source: <https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/> → Rulings on enforcement cases ("Measures").

using the means of the Administrative Procedure Act (APA). In this regard, FINMA is able to compel witness statements as part of all types of enforcement proceedings (Article 14 para. 1 APA). In (formal) enforcement proceedings, everyone is generally obliged to testify (Article 15 APA). However, the statutory law foresees the right to refuse to testify if certain statutory prerequisites are met (Article 16 APA).

- As mentioned (see question #1), the APA is not applicable during the stage of informal investigations. Therefore, only discussions and informal interviews can be conducted during this stage. Such discussions and (informal) interviews are not formally recorded, but notes of the discussions and informal interviews are prepared for the internal files.
8. Please describe the steps of an investigation or an enforcement proceeding from the initial identification of misconduct through final resolution. If applicable, please provide an example of an infringement under rules for which substituted compliance is sought that could result in a criminal referral to a prosecuting authority. To the extent there are differences among Supervisory Groups, please identify the distinctions.
- At the outset it should be noted that a strict distinction must be drawn between an informal investigation and a (formal) enforcement proceeding (see also question #1).
 - If FINMA receives indications of possible misconduct or violations of supervisory law, the steps are as follows (in practice deviations may occur, e.g. when different process steps coincide or are omitted):
 - In most cases, the suspicions and allegations will be preliminary investigated as part of informal investigations. Such preliminary investigations qualify as "informal administrative activities", which are not subject to further regulation (e.g. in the FINMASA or APA; see also question #1). Only if the informal investigation substantiates the suspicion, or at least does not dispel it, FINMA will consider to open (formal) enforcement proceedings (Article 30 FINMASA; see also question #1) to which the procedural rules of the APA are applicable. During the enforcement proceedings, more comprehensive evidence will be collected, investigating agents may be appointed, on-site inspections may be carried out and (formal) interviews in accordance with the APA may be conducted. Usually, the evidence will then be summarized in a statement of facts, which will be provided to the parties for their comments. Finally, the enforcement proceeding will be concluded with an order by FINMA; where the suspicions have not been confirmed, the matter will be formally closed.
 - Under Swiss supervisory law the concept of substituted compliance by criminal referral to a prosecuting authority does not exist as such. However, Article 38 para. 3 FINMASA requires FINMA to notify the competent prosecution authorities if it becomes aware of common law felonies and misdemeanors as well as violations of criminal provisions of FINMASA or the financial market acts. Such notifications are usually

made at the end of FINMA's investigations. Article 38 para. 1 and 2 further provide that FINMA and the competent prosecution authorities share all necessary information and coordinate their investigations as far as possible (especially in areas where parallel competences exist, e.g. insider dealing).

9. As part of a remedy, is money ever returned to harmed investors?
- According to Article 35 para 1 FINMASA, FINMA may confiscate any profit that a supervised person or entity or a responsible person in a management position has made through a serious violation of the supervisory provisions. The same applies if a supervised person or entity or a responsible person in a management position has prevented a loss through a serious violation of supervisory provisions (Article 35 para 2 FINMASA). The assets confiscated by FINMA go directly to the Swiss Confederation, in so far as they are not used to compensate injured parties (Article 35 para 6 FINMASA). Generally, FINMA does not directly order the compensation of harmed investors as an administrative sanction. However, if in the same case harmed investors are compensated directly by the supervised institution, FINMA usually takes this into account and reduces the confiscated amount accordingly.
10. Please describe what enforcement investigations, sanction proceedings, and/or other final resolutions the Authorities make public and what information is included in a public notice.
- FINMA does not provide information on individual proceedings, unless there is a particular need to do so from a supervisory point of view and in particular if the information is necessary i) for the protection of market participants or the supervised persons and entities; ii) to correct false or misleading information; iii) to safeguard the reputation of Switzerland's financial centre (Article 22 FINMASA). If these conditions are met, FINMA limits such public information to the extent necessary (e.g. not the entire ruling will be published, but only a summary).
 - FINMA aims to give the general public a clear and transparent picture of its supervisory activities and informs the general public at least once each year about its supervisory activity and supervisory practices (FINMA's annual report is available through FINMA's website: <https://www.finma.ch/en/documentation/finma-publications/annual-reports--and-financial-statements/>). In this regard, FINMA also publishes anonymized summaries of its enforcement actions in a database on its website (<https://www.finma.ch/en/enforcement/case-reports-and-court-decisions/kasuistik/>).
 - In addition, as an administrative sanction, Article 34 FINMASA gives FINMA the power to publish all or part of a final ruling on a serious violation of supervisory law, including personal details of those involved, once this ruling has become legally binding and the publication is explicitly ordered by it (i.e. naming and shaming). FINMA makes a

gradation in the assessment of the publication period. A list of rulings published under Article 34 FINMASA can be found on FINMA's website (<https://www.finma.ch/en/enforcement/enforcement-tools/publication-of-final-rulings/>).

- Moreover, FINMA maintains and publishes on its website a warning list of companies and individuals who may be carrying out unauthorized services and are not supervised by FINMA (<https://www.finma.ch/en/finma-public/warning-list/>). FINMA checks the companies and individuals on its warning list to see if they are providing unauthorized services. Furthermore, when FINMA investigations reveal an imminent and considerable threat to investors, the providers involved are also entered in the list. The fact that a company is on FINMA's warning list does not automatically mean that its activities are unlawful. Their entry in the list does, however, highlight the lack of authorization. The companies and individuals in question will be removed from the list once FINMA has completed its investigations and taken any appropriate measures.

11. Please confirm the applicable statutes of limitations for violations of the relevant rules. What is the average length of time from inception of an investigation to completion?

- Statutes of limitations

In principle, supervisory law does not provide for strict limitation periods for violations of relevant rules. The FINMASA only provides for a limitation period of 7 years with respect to the right of confiscation (Article 35 para 4 FINMASA) and the criminal prosecution of minor offences in the financial market area (Article 52 FINMASA). In practice, FINMA will usually not investigate presumed violations of supervisory law dating back more than ten years.

- Duration

Although enforcement proceedings can be very time-consuming, time is a decisive factor. FINMA has set internally the target to conclude enforcement proceedings within six to twelve months or even faster.

The duration of the enforcement proceedings for the years 2014-2019 was as follows:

Duration of cases concluded in months	2019	2018	2017	2016	2015	2014
Median						
Investigations: licence holders	3.27	3.48	3.25	3.30	3.75	2.67
Investigations: unauthorised financial services providers	1.67	2.38	2.71	2.85	8.60	3.40
Investigations: market supervision	4.92	8.39	9.40	7.00	4.61	2.03
Disclosures	2.52	2.30	0.58	2.23	1.25	7.42
Takeover procedures	0.37	1.77	2.15	1.43	0.71	0.68
Enforcement proceedings (excluding international cooperation)	10.87	13.97	14.34	7.82	9.57	8.80
Requests for assistance from foreign supervisory authorities	0.80	0.56	1.62	1.49	2.29	3.36

- As mentioned (see questions #1 and #8), the enforcement procedure is usually preceded by an informal investigation. The duration of such an informal investigation would also have to be taken into account for the total length of an investigation. In this regard, for example in 2019, the total length of an investigation (informal investigation and enforcement

proceedings combined) against a license holder took on average 14.14 months.

4. FINMA Response to SEC's Follow-up Questions (7.14.2021)

FINMA- ENF Questions

1. As a preliminary matter, please walk through an overview of the Enforcement process from inception (receipt of tip, surveillance leading to opening, etc.) to resolution (litigated result, settlement, discontinuation, etc.). In addition, it would be helpful to hear a description of the administrative process, including appeals. In the overview, please address who, by title or office, has the authority to file, litigate and/or settle actions.

Answer: At the outset it should be noted that a strict distinction must be drawn between an *informal preliminary investigation* and a *(formal) enforcement proceeding* (see also question #7).

If FINMA receives indications of possible misconduct or violations of supervisory law, the steps are as follows (in practice deviations may occur, e.g. when different process steps coincide or are omitted):

Informal preliminary investigations: The information typically comes from FINMA's supervisory activities (audits, own exams, etc.), reports by other authorities in and outside Switzerland, and complaints from investors and clients. In most cases, the suspicions and allegations will be preliminary investigated as part of informal investigations. Such preliminary investigations qualify as "informal administrative activities", which are not subject to further regulation (e.g. in the Financial Market Supervision Act ["FINMASA"] or Administrative Procedure Act ["APA"]); see also question #7). The preliminary Investigations aim to establish whether (formal) enforcement proceedings are needed or whether the irregularity can be dealt with as part of normal supervision ("triage" function). The opening of such informal investigations is decided by the Management of the Enforcement division; the investigations will be conducted by members of the Investigations section of the division.

Formal enforcement proceedings: If the informal investigations further substantiate the suspicions, or at least do not dispel it, FINMA will consider to open (formal) enforcement proceedings (Article 30 FINMASA; see also question #7) to which the procedural rules of the APA are applicable. The opening of (formal) enforcement proceedings against licence holders or their directors or employees is decided by a special committee of the FINMA Executive Board (Enforcement Committee ["ENA"]; this committee comprises three permanent members: the Chief Executive Officer (Chair), as well as the heads of the Strategic Services and Enforcement divisions. In addition, the respective heads of the responsible division for the license holder participate on a case-by-case basis); the proceedings itself will be conducted by members of the Proceedings section of the Enforcement division. At the opening of the proceedings, it is also decided whether precautionary measures (e.g. appointing of an investigating agent) should be taken.

During the enforcement proceedings, more comprehensive evidence will be collected, especially investigating agents carrying out on-site inspections may be appointed and (formal) witness hearings in accordance with the APA may be conducted (see also question #9). Usually, the

evidence will then be summarized in a statement of facts, which will be provided to the parties for their comments (legal right to be heard).

FINMA Decision: Finally, the enforcement proceeding will be concluded with a decision by FINMA; where the suspicions have not been confirmed, the matter will be formally closed. Again in the case of enforcement proceedings against licence holders or their directors or employees the decision to conclude the proceedings and the respective measures / sanctions will be decided by the ENA. Under Swiss administrative law there is no formal settlement process between FINMA and the parties concerned.

FINMA has a range of administrative sanctions at its disposal, the most severe being the enforcement instruments set out in Article 29 et seq. FINMASA. The ultimate goal of these measures is the restoration of compliance with the law. The broad spectrum of measures available for this purpose ranges from issuing declaratory decisions, ultimately to license withdrawals and specific orders under Article 31 FINMASA to restore compliance with the law. A license withdrawal can result in liquidation and, in the case of over-indebtedness, bankruptcy of the relevant entity. FINMA can also order the disgorgement of profits generated and costs avoided by illegal means (Article 35 FINMASA), issue cease and desist orders (Article 32 FINMASA) as well as publish the final decision (Article 34 FINMASA). It may ultimately also impose professional bans on individuals (Articles 33 and 33a FINMASA). FINMA has additional competences in the area of financial market supervision, e.g. issuing a (temporary) purchase ban or suspension of voting rights in case of violation of disclosure of shareholdings (Article 144 Financial Market Infrastructure Act ["FMIA"]).

Appeal procedure: Decisions and measures ordered by FINMA are subject to judicial review by the Federal Administrative Court ("FAC"). The concerned parties can thus appeal FINMA's decisions to the Court. The FAC has a broad review scope and can review the facts of the case as well as its legal assessment. FINMA is a party to the appeal proceedings and its Proceedings section can thus also make submissions to the Court.

The decisions of the FAC are subject to further appeal by the parties or FINMA to the Federal Supreme Court ("FSC"). The review scope of the FSC is, however, generally limited to legal arguments.

2. The UBS's Questionnaire responses note that FINMA has the authority to investigate without limitation of any privacy or other laws as far as it acts within its assigned task of financial market supervision. What are the limits of "the assigned task of financial market supervision"? Please provide examples of matters that fall within and outside of the limitation.

Answer: Article 29 para. 1 FINMASA stipulates a comprehensive duty of *supervised persons* (i.e. persons carrying out activities requiring a license, recognition or registration by FINMA as well as their audit firms and auditors and persons or companies that are qualified investors or that have a substantial participation in the supervised persons and entities) to provide FINMA with all

information and documents that it requires to *carry out its tasks*. The same duty applies to persons in the scope of the market manipulation and market transparency rules (Article 145 FMIA).

Thus, for its supervisory purposes, including its own investigations, FINMA has generally unrestricted access to information of *supervised persons* as long as it deems such information relevant for the performance of its supervisory tasks.

However, certain restrictions apply:

- FINMA's information requests have to be proportional, i.e. they have to be limited to the necessary extent and relevant for its supervision tasks. E.g. if a supervised person also operates a business completely unrelated to the financial area, FINMA's right to request information is limited to the necessary extent.
- Supervised persons may – under certain conditions – rely on an applicable attorney-client-privilege (especially if formal enforcement proceedings have been opened).
- The comprehensive duty of supervised persons and their employees to provide all necessary information to FINMA generally relates to the relevant financial business. E.g. FINMA can carry out on-site inspections of the business offices, but not search the employees private homes.

3. Please discuss the circumstances under which sharing of customer information via administrative assistance may be subject to judicial review. Under what circumstances is the client required to be informed of the sharing of information? What standard does the court apply in reviewing these requests?

Answer:

- In general, transmission of client information is only possible either with a client's consent, or via legal mechanisms (Article 42a para. 4 FINMASA; "delayed notification") to presume such consent or via a legally enforced judgment from the FAC. When analyzing what information needs to be transmitted, FINMA has to:
 - First, determine if among the information to be sent there is information falling under the definition of client information;
 - then, determine whether a client-procedure should be run with a prior notification to the client and its consent before the transmission,
 - or, whether there are specific circumstances where FINMA is allowed to transmit information before notifying the concerned client ("delayed notification", see question #6).
- Prudential information which relates to information regarding supervised parties does not fall under the concept of client information and can generally be transmitted without notifying the supervised parties and without any formal decision (see question #5).
- FINMA will render a formal decision in case the client objects to the transmission of client information. FINMA examines in its formal decision the conditions granting the assistance

(e.g. specialty, confidentiality and proportionality) including analyzing the initial suspicion on which the request is based, as well as whether the transmission of the requested information is proportionate.

- Under Article 42a para. 6 FINMASA, the FINMA decision may be challenged by the client, within ten days of its receipt, before the FAC, acting as a first and final instance:
 - The FAC assesses both facts of the case and the rights applicable. As such, it can fully review whether all the conditions for administrative assistance are fulfilled. When the FAC assesses the conditions of Articles 42 et seq. FINMASA, it takes into account previous case law.
 - In practise, the remedy and form of order sought by the appellant will be to cancel FINMA's decision, state that the requirements for granting administrative assistance are not fulfilled and in the alternative, that the transmission may be withheld until additional clarifications are given by the Foreign Financial Supervisory Markets Authority or that the transmission may be restricted to specific documents or information.
 - Should the judgment be in favor of the transmission, FINMA will proceed without delay to the transmission. The modalities of transmission are the same as for prudential information (see question #5).
 - Article 42a para. 4 FINMASA enables FINMA to postpone the notification ("delayed notification"), but not to exclude the notification altogether (see question #6). Where the Foreign Financial Supervisory Markets Authority has informed FINMA to release the notification, the client will be notified by FINMA. A notified client which considers the transmission was unlawful, may at any time require a formal decision from FINMA under Article 25a lit. c APA which is subject to appeal before the FAC.
 - In 2019, FINMA did not have to issue any formal decision. In 2020, FINMA had to issue a total of two decisions, with only one being appealed. However, this appeal was dismissed by the FAC (see Document "General enforcement statistics" on <https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/>).
4. Please confirm the statement in UBS's submission that clients would only be allowed to trade derivatives if they waived their rights to confidentiality and to the protection of their personal data. Please provide any information to describe how this requirement would operate in practice.

Answer:

- As the financial market supervisory authority of Switzerland, FINMA has no competence to interpret or comment whether and under which legal conditions clients or third parties may lawfully waive their rights deriving from data protection, employment or general civil law.
5. With respect to a firm, UBS' submission noted that information could be transmitted informally, and that FINMA is not obligated to inform the firm that it intends to transmit information. However, it also noted that the firm has the right to seek judicial review of the transmission. Please discuss how these two concepts intersect with each other.

Answer:

- Insofar as prudential information (see also question #3, second bullet) is the subject of a request for administrative assistance and such information is already available with FINMA, it can generally be transmitted to the foreign supervisory authority informally, i.e. without a transmission order. Such transmission of prudential information can be carried out without any formalities. In practice, information relating to any activities carried out by a supervised party, which are not conducted for or on behalf of a client, fall under prudential information.
 - FINMA's supervision is practice-oriented and therefore FINMA requires (prudential) information from supervised parties on a voluntary basis first.
 - However, when FINMA faces a refusal to collaborate (i.e. because the supervised party argues that it is directly affected by the request for administrative assistance) but adheres to the information request, the supervised party may theoretically demand a formal decision from FINMA. It is subject to appeal before the FAC. In practice, however, the opening of a formal administrative procedure is hardly ever necessary.
6. With regard to the delay of notification to a client or third party that FINMA has shared their information with the SEC, how long can the notification be delayed?

Answer:

- In practice, in order for FINMA to consider the application of Article 42a par. 4 FINMASA under the principle of proportionality, a requesting Foreign Financial Supervisory Markets Authority should demonstrate within its request how a prior notification to a potential client could endanger its on-going investigation or supervisory exercise.
 - Notification of the client may be delayed as long as the identified risks (e.g. risk of collusion) exist and outweigh the client's private interest in being informed about the proceedings (this may take several months or years). Accordingly, the duration of the delay must be assessed on a case-by-case basis. The principle of proportionality has to be observed.
7. Please discuss the distinction between “informal investigations” and “actual enforcement proceedings.” Please explain further the distinctions between these two processes, for example, when, why and how would a decision be made to begin an “actual enforcement proceeding” versus carrying out an “informal investigation.” Is there a separate enforcement investigation? How are these two processes different? Are different remedies available? For example, are the administrative sanctions discussed in Section I, #1a of UBS’s response (declaratory rulings, license withdrawals and orders under Article 31 FINMASA, disgorgement of profits, cease and desist orders, professional bans) used in informal investigations or enforcement proceedings?

Answer: FINMA uses *informal preliminary investigations* to follow up on indications of possible regulatory irregularities or violations of the law in order to decide whether or not (*formal*) *enforcement proceedings* are required (“trriage” function; see also question #1).

General distinction: In this regard, informal investigations regularly form the interface between ongoing supervisory activities and the conduct of (formal) enforcement proceedings by FINMA. Unlike in Swiss competition law (Article 26 Cartel Act), neither FINMASA nor the APA mention the term "informal investigation". Like in ongoing supervisory work, FINMA is empowered to conduct informal investigations on all activities that need a FINMA authorization. The APA is not applicable during the stage of informal investigation.

At the end of an informal investigation, a decision is made according to certain, general criteria (i.e. supervisory interest on enforcement action, severity of presumed legal violation) regarding the opening of enforcement proceedings. In the case of license holders or their employees this decision is made by the ENA (see also question #1). Where the criteria are met, especially the indications of violations of supervisory provisions have been confirmed and are judged as sufficiently important, FINMA opens enforcement proceedings and notifies the parties of this (Article 30 FINMASA). With the opening of (formal) enforcement proceedings, the APA with its respective obligations and rights of the parties becomes applicable. If, on the other hand, the initial suspicion is not confirmed, the investigation will be closed and, if needed, alternative measures over the regular supervision process implemented. There are no remedies available by statutory law against the decision by FINMA to open enforcement proceedings.

Measures / sanctions: The administrative sanctions foreseen by Articles 31-37 FINMASA can only be ordered as a result of (formal) enforcement proceedings (see also question #1). They are not applicable in the course of a foregoing informal investigation.

Investigative capacities: The duty of supervised persons to provide all necessary information to FINMA (Article 29 para. 1 FINMASA; see also question #2), is applicable in informal investigations as well as formal enforcement proceedings. However, testimony from third parties can only be collected and compelled in (formal) enforcement proceedings (see also question #9). Also, the use of experts can be broader in such formal proceedings (e.g. they can be empowered to act directly for the supervised persons [Article 36 FINMASA]).

8. Does FINMA offer any incentives and/or protections to whistleblowers who provide information about misconduct?

Answer: There are no incentives for whistleblowers under financial market laws in Switzerland. In addition, following a long legislative process over the last couple of years, whistleblowers in Switzerland remain without specific statutory protection.

Reporting an incident to FINMA or filing a complaint can, however, be made by anyone through FINMA's website (<https://www.finma.ch/en/finma-public/reporting-information/>). Complaints are treated confidentially unless FINMA is legally obliged to disclose them (for instance the parties to enforcement proceedings have generally the right under the APA to consult their respective case file). While FINMA will follow up on any specific complaints, it does generally not respond to them individually.

Information received by way of such complaints is reviewed by the supervisory team responsible for the respective firm and followed up appropriately, be it within the ongoing supervisory process, through informal investigations or formal enforcement proceedings (see also question #1). If informal investigations or (formal) enforcement proceedings are opened, an informant has no party status and is not supported by FINMA in any civil disputes.

9. Please confirm that Article 12 of the Administrative Procedures Act permits FINMA to compel information from witnesses and third parties.

Answer: Article 29 FINMASA establishes a comprehensive duty of disclosure on the part of supervised persons directly to FINMA. These obligations are connected to FINMA's supervisory competence and not, for example, to the question of whether or not formal enforcement proceedings are being conducted (see also question #2).

Examination of witnesses: Where FINMA has indications that it has been provided with untrue or incomplete information, it can enforce the duty to provide information using the means of the APA. In this regard, FINMA is able to compel witness statements as part of an enforcement proceeding (Article 14 para. 1 APA). In (formal) enforcement proceedings, everyone is generally obliged to testify and produce documents (Articles 15 and 17 APA). However, the statutory law foresees the right to refuse to testify if certain statutory prerequisites are met (Article 16 APA).

As mentioned (see question #1), the APA is not applicable during the stage of informal investigations. Therefore, only discussions and informal interviews can be conducted during this stage. Such discussions and (informal) interviews are not formally recorded, but notes of the discussions and informal interviews are prepared for the internal files.

10. Please confirm that, similar to its supervisory investigations, FINMA has unrestricted access to firms' books, records, and recordings for purposes of its enforcement proceedings.

Answer: Yes, the same tools are also available for purposes of enforcement proceedings (see also questions #2 and #7). Article 29 para. 1 FINMASA stipulates a comprehensive duty of *supervised persons* (as well as their audit firms and auditors and persons or companies that are qualified investors or that have a substantial participation in the supervised persons and entities) to provide FINMA with all information and documents *that it requires to carry out its tasks*. This obligation is connected to FINMA's supervisory competence and not to the question of whether informal investigations or (formal) enforcement proceedings are being conducted. It therefore makes no difference whether FINMA requests information from supervised persons as part of ongoing supervision, in informal investigations or in enforcement proceedings.

Certain restrictions: As mentioned (see question #2), certain restrictions may apply, i.e. proportionality and relevancy of the information request and (under certain conditions) the applicability of the attorney-client-privilege (especially in enforcement proceedings).

11. Regarding sanctions, does FINMA have the ability to impose or seek penalties or fines in addition to disgorgement? If not, do the criminal prosecutors have this authority in the securities/derivatives area? As part of a remedy, may money be returned to harmed parties?

Answer:

No penalties /fines: No, FINMA has no additional competence to impose penalties or fines. FINMA's primary goal is to restore compliance with the law, it has no competence to punish supervised persons per se.

Criminal sanctions: Where irregularities fall under criminal law, FINMA files a complaint with the competent prosecution authorities (Federal Department of Finance, Office of the Attorney General of Switzerland ("OAG") or cantonal prosecutors).

In this regard, the criminal prosecutors can impose penalties (e.g. custodial sentence) or fines in the securities/derivatives area (e.g. for insider trading and price manipulation, Articles 154 and 155 FMIA).

Harmed Investors: According to Article 35 para. 1 FINMASA, FINMA may confiscate any profit that a supervised person or entity or a responsible person in a management position has made through a serious violation of the supervisory provisions. The same applies if a supervised person or entity or a responsible person in a management position has prevented a loss through a serious violation of supervisory provisions (Article 35 para. 2 FINMASA).

The assets confiscated by FINMA go directly to the Swiss Confederation, in so far as they are not used to compensate injured parties (Article 35 para. 6 FINMASA). Generally, FINMA does not directly order the compensation of harmed investors as an administrative sanction. However, if in the same case harmed investors are compensated directly by the supervised institution, FINMA usually takes this into account and reduces the confiscated amount accordingly.

12. Are there other authorities, including exchanges or other self-regulatory organizations, that have an enforcement role relating to the areas of regulation for which substituted compliance is requested? If yes, please explain that role, including a discussion of their areas of competence, their powers to investigate and sanction, any tools available to them, who may be subject to their authority, and any limitations on their authority.

Answer:

Swiss Stock Exchange: The law provides for self-regulation of the Swiss Stock Exchange under the supervision of FINMA (Articles 27 et seq. FMIA). A specific, independent body of the exchange, Stock Exchange Regulation ("SER"), regulates and monitors the behavior of *issuers, exchange participants, their traders* and *reporting agents* on the Stock Exchange. SER monitors compliance with the trading rules of the Stock Exchange and, in case of rule violations, initiates sanction proceedings within the scope of self-regulation, which are judged by the independent judicial

bodies of the Exchange. In this regard, SER must be provided with sufficient material and personnel resources by the Stock Exchange.

SER's Surveillance & Enforcement department monitors price movement / formation and transactions / trading on the Swiss Stock Exchange (on and off venue). It surveils the Stock Exchange to ensure that any insider trading, price and market manipulation and other irregular activities and regulatory breaches are detected (Article 31 para. 1 FMIA). In the event of anomalies, the department conducts further evaluations and investigations. The department uses special surveillance technologies to detect trading irregularities. It also takes into account suspicions reported by third parties.

If the rules of the Stock Exchange are breached, SER initiates sanctions proceedings. The Sanctions Commission of the Stock Exchange can impose sanctions on *issuers, exchange participants, their traders and reporting agents*. The scope of its activities under self-regulation ranges from *reprimands, suspension, expulsion, revoking of registration, suspension of trading and delisting, to fines of up to CHF 10 million*. In certain cases, the independent Appeals Board can be called in (Article 37 FMIA), and the higher instance is the Board of Arbitration of the Stock Exchange.

If irregular activity is substantiatedly suspected, SER forwards its findings to FINMA, and if criminal offences may have been committed, it also notifies the relevant law enforcement authorities.

FINMA / OAG: In the event of suspicious activities, the Stock Exchange is required to notify FINMA and/or the competent prosecution authorities, usually the OAG (Article 31 para. 2 FMIA), who are responsible for the further enforcement. In the following, enforcement in the area of securities/derivatives trading is split between FINMA (supervisory law) and the OAG (criminal law; see also question #15). FINMA, the OAG and the Stock Exchange exchange the information which they require within the context of their collaboration and in order to carry out their tasks (Article 31 para. 3 FMIA).

13. Please describe how the participation of an outside lawyer and/or auditor who acts as an investigating agent in a FINMA investigation would affect information-sharing with the SEC in such a matter. Could FINMA share information in the possession of the investigating agent with the SEC? Is there a scenario under which FINMA would share SEC nonpublic materials with an investigating agent? Please discuss the notice and confidentiality protections.

Answer:

Information-sharing: The participation of an investigating agent would generally not affect the information-sharing of FINMA with the SEC. The investigating agent acts in the direct mandate of FINMA (as its so-called "extended branch"). FINMA has therefore immediate and direct access to information collected by the investigating agent and can also share this information through the appropriate channels with the SEC. The respective information will always be shared by FINMA, not the investigating agent. No specific confidentiality protections are applicable.

SEC-Information: It is not excluded that FINMA will share nonpublic information of other, foreign supervisory authorities (like the SEC) in its possession with the investigating agent, if useful or even necessary for its investigation. The investigating agent is, however, bound by same official secrecy provisions as FINMA itself.

14. Please give an example of a situation in which FINMA would publish an individual proceeding for the protection of the market participants or the supervised persons and entities. What form of general information does FINMA provide annually about its enforcement activities? Does FINMA publish aggregate information about charges in relation to sanctions imposed in order to deter misconduct by others? In what other ways does FINMA communicate its enforcement objectives and/or priorities to the public?

Answer:

Individual proceedings: As a general principle FINMA does not publish individual proceedings unless such publication is necessary (i.) for the protection of the market participants or the supervised persons and entities, (ii.) to correct false or misleading information, or (iii.) to safeguard the reputation of the Swiss financial market (Article 22 para. 2 FINMASA).

If these conditions are met, FINMA limits such public information to the extent necessary (e.g. not the entire decision will be published, but only a summary).

An example for an individual proceeding that has been published for the protection of the market participants was the case of the foreign exchange manipulation at UBS: <https://www.finma.ch/en/news/2014/11/mm-ubs-devisenhandel-20141112/>.

General information: FINMA aims to give the general public a clear and transparent picture of its supervisory activities and informs the general public at least once each year about its supervisory activity and supervisory practices (Article 22 para. 1 FINMASA; FINMA's annual report is available through FINMA's website: <https://www.finma.ch/en/documentation/finma-publications/annual-reports--and-financial-statements/>).

In this regard, FINMA also publishes anonymised summaries of its enforcement actions (case reports) and selected court decisions in a database on its website (<https://www.finma.ch/en/enforcement/case-reports-and-court-decisions/>). In addition FINMA publishes an area on its website with figures and statistics on enforcement (<https://www.finma.ch/en/documentation/finma-publications/kennzahlen-und-statistiken/statistiken/enforcement/>). The statistical information includes for example the number of final decisions and the type of measures imposed.

As an administrative sanction, Article 34 FINMASA gives FINMA the power to publish all or part of a final decision on a serious violation of supervisory law, including personal details of those involved, once this decision has become legally binding and the publication is explicitly ordered by it (i.e. naming and shaming). FINMA makes a gradation in the assessment of the publication period. A list of decisions published under Article 34 FINMASA can be found on FINMA's website (<https://www.finma.ch/en/enforcement/enforcement-tools/publication-of-final-rulings/>).

Moreover, FINMA maintains and publishes on its website a warning list of companies and individuals who may be carrying out unauthorized services and are not supervised by FINMA (<https://www.finma.ch/en/finma-public/warning-list/>). FINMA investigates whether the companies and individuals on its warning list are providing unauthorized services. The findings, however, have so far been inconclusive because the companies and individuals concerned have not complied with the requirement to provide information, or the information they provided is false. Furthermore, when FINMA investigations reveal an imminent and considerable threat to investors through the potential illegal activity, the providers involved are also entered in the list. The fact that a company is on FINMA's warning list does not automatically mean that its activities are unlawful. Their entry in the list does, however, highlight the lack of authorization. The companies and individuals in question are removed from the list once FINMA has completed its investigations and taken any appropriate measures.

Enforcement priorities: FINMA summarizes its priorities in an enforcement policy that is published on its website (<https://www.finma.ch/en/enforcement/all-about-enforcement/>). According to this enforcement policy, enforcement aims to remedy shortcomings, restore compliance with the law and exert a deterrent effect by imposing sanctions for violations. Serious lapses, such as serious violations of market integrity and market manipulation performed by participants in the Swiss securities market, are dealt with as a matter of priority. In addition, FINMA takes targeted action against individuals responsible for serious violations of supervisory law.

15. UBS's response notes that: "In general FINMA does not have jurisdiction over third-parties and specifically cannot prosecute the violation of crimes, such as price manipulation or insider trading (Articles 154 and 155 FMIA)." Please confirm that FINMA may assist the SEC when the SEC is in investigating these matters or raise these matters to the SEC, even though such matters are outside of FINMA's jurisdiction. Please also clarify whether there FINMA has any non-criminal jurisdiction for price manipulation or insider trading.

Answer: Issuance of criminal law sanctions (such as under Articles 154 and 155 FMIA) are reserved to competent criminal authorities. However, within the perimeter of financial market laws, in a number of areas, prohibited activity may be addressed under administrative law / supervisory law as well as under criminal law. For example, insider dealing and market manipulation constitute breaches of supervisory law under Articles 142 and 143 FMIA which FINMA is competent to investigate and to enforce; the same facts may be (and often are) relevant under criminal law (insider trading and price manipulation, Articles 154 and 155 FMIA) and be prosecuted by criminal law prosecutors.

FINMA is thus entrusted with the investigation and enforcement of insider dealing and market manipulation (Articles 142 and 143 FMIA) on the supervisory side. In this context, FINMA can share the relevant information with the SEC. On the criminal side (insider trading or price manipulation or, Articles 154 and 155 FMIA) the OAG is competent. In this context, FINMA and the OAG coordinate their investigations and exchange the information that they require to fulfil their respective tasks (Article 38 FINMASA). Information that FINMA has received from the OAG can also be shared with the SEC.

16. Please identify any statutes of limitation applicable to the areas for which substituted compliance is requested.

Answer: In principle, Swiss supervisory law does not provide for strict limitation periods for violations of relevant rules. The FINMASA only provides for a limitation period of 7 years with respect to the right of disgorgement of profits (Article 35 para. 4 FINMASA) and the criminal prosecution of minor offences in the financial market area (Article 52 FINMASA). In practice, FINMA will usually not investigate presumed violations of supervisory law dating back more than ten years.

17. What is the average length of time taken for an enforcement investigation, from inception to filing a case or closing the matter without action?

Answer: Although enforcement proceedings can be very time-consuming, time is a decisive factor. FINMA has set internally the target to conclude enforcement proceedings within six to twelve months or even faster.

The duration of the enforcement proceedings for the years 2014-2020 was as follows:

Duration of cases concluded in months	2020	2019	2018	2017	2016	2015	2014
Median							
Investigations: licence holders	3.93	3.27	3.48	3.25	3.30	3.75	2.67
Investigations: unauthorised financial services providers	1.60	1.67	2.38	2.71	2.85	8.60	3.40
Investigations: market supervision	5.17	4.92	8.39	9.40	7.00	4.61	2.03
Disclosures	1.28	2.52	2.30	0.58	2.23	1.25	7.42
Takeover procedures	1.63	0.37	1.77	2.15	1.43	0.71	0.68
Enforcement proceedings (excluding international cooperation)	9.57	10.87	13.97	14.34	7.82	9.57	8.80
Requests for assistance from foreign supervisory authorities	0.90	0.80	0.56	1.62	1.49	2.29	3.36

As mentioned (see questions #1 and #7), the enforcement proceedings are usually preceded by an informal investigation of the division. The duration of such an informal preliminary investigation would also have to be taken into account for the total length of an enforcement investigation. In this regard, for example in 2020, the total length of an enforcement investigation (informal investigation and enforcement proceedings combined) against a license holder took on average 13.5 months.

5. FINMA Response to SEC's Follow-up Questions (7.23.2021)

Information to be included in the Application (Element 4)

Substituted compliance will be limited to systemically important banks that are supervised by FINMA as Category 1 firms. Your responses to all the questions should relate to those institutions and should be tailored to the supervision of the securities-based swap business in areas where substituted compliance has been requested.

1. Confirm that both UBS and Credit Suisse are Category 1 firms and that FINMA assigns multiple supervisors to such firms.

UBS Group AG and Credit Suisse Group AG are Category 1 firms. Multiple supervisors are assigned to the supervision of these banks.

2. Does FINMA conduct any sort of thematic reviews? If yes, are the thematic reviews based on the strategic goals and/or the annual supervisory priorities? Are the results of such reviews made public to give transparency to the industry?

FINMA does conduct thematic reviews based on its risk assessment (see FINMA risk monitor). In the past, FINMA has for instance carried out thematic reviews in areas such as real estate, AML or suitability. The results of reviews are shared with the bank and the external audit firm but not made public.

3. Confirm that the annual supervisory priorities are developed using the strategic goals. If true, describe the development of the annual supervisory priorities and how they relate to the annual assessment letter, including confirming that the assessment letter outlines the supervisory priorities for each bank for the upcoming year.

Confirmed. The legal framework within which FINMA operates and performs its supervisory activities allows it considerable scope to establish its own priorities. Derived from its mandate, FINMA's strategic goals set out those priorities and demonstrate how FINMA will fulfil its remit. These goals, which are reviewed every four years, reflect developments in the financial industry and the challenges they bring. The underlying strategy defined in each goal thus creates a link between FINMA's legal mandate and its specific activities, giving the work performed by FINMA a longer-term focus.

FINMA's strategic management contains two layers: First, the multiyear strategic goals set by FINMA BoD. Based on these overarching strategic guidelines, the Executive Board develops annual supervisory priorities. The assessment letter contains both elements of the annual supervisory priorities as well as firm-specific supervisory priorities that are not necessarily related to the annual priorities.

- a. Do banks need to submit a remediation plan based on weaknesses identified in the assessment letter? If not, what other corrective action must banks take relating to the assessment letter?

Yes, remediation action have to be submitted and execution is tracked by FINMA.

4. Confirm that in addition to the team of supervisors assigned to a Category 1 firm, the supervisors also work with cross-divisional subject-matter experts (in subjects such as AML, liquidity risk, or internal risk management) to supervise a Category 1 firm. Please provide one to two sentences describing the role of the cross-divisional subject matter experts in the supervision of Category 1 firms.

Confirmed. In addition to the bank specific supervisory team (line supervision), other cross-divisional teams are covering specific aspects of the supervision of the institutions in cooperation or coordination with the line supervision. Important cross-divisional functions are in Risk Management, AML, Compliance/Conduct or Recovery and Resolution. These functions add valuable expert knowledge in their respective field and are able to benchmark with market standards or peer banks.

5. Provide more details on the role of the supervisors for a Category 1 firm.

- a. Confirm that supervisors have quarterly meetings with senior management of a Category 1 firm, but that meetings may increase in frequency if needed.

Confirmed.

- b. Confirm that supervisors have multiple interactions with the firm in a week (phone calls, emails, etc.).

Confirmed.

- c. Confirm that the supervisors review monthly reports related to, among other topics, AML and risk, as well as a daily liquidity report.

Confirmed.

- d. Describe how supervisors follow up with the firm if they see red flags or inconsistencies in the reports they review. For example, mention that they may require an independent third party (such as an audit firm) to look at certain topics on behalf of FINMA.

FINMA employs a broad range of supervisory instruments that are used according to the situation¹. In specific circumstances, FINMA may appoint an independent third party to look at certain topics on behalf of FINMA².

6. Provide more details on inspections.

- a. Confirm that FINMA conducts multiple onsite inspections of Category 1 firms each year, some of which relate to the derivatives business.

Confirmed. In recent years, FINMA carried out around 40-50 onsite inspections at Category 1 banks including several onsite inspections at the Investment bank, see [FINMA Annual Report 2020](#) page 50.

- b. Confirm that after an onsite inspection, FINMA provides the firm with a summary report or letter containing key findings. The firm is then required to provide FINMA with a remediation plan and FINMA or the audit firm tracks the progress of the firm to remedy any deficiencies. For significant issues, FINMA may assign an audit firm to monitor the progress.

Confirmed. See FINMA fact sheet on On-site supervisory reviews³

- c. Confirm that when FINMA sees significant issues, or if the remediation plan is not adequate, the matter is referred to Enforcement.

Confirmed.

7. FINMA's website states: "On an annual basis, FINMA conducts a formal assessment of the firms taking into account reports from internal auditors and the audit firms, and annual reports, and FINMA's view of regulatory, economic, and business developments." Please provide more information on the content of these annual reports. Are you referring to the annual financial audit? Are the annual reports referred to in this statement reports that are filed with FINMA by the firms?

The regular assessment of the Bank by FINMA takes into account all relevant reports and information available at FINMA. Annual reports in practice usually play a minor role as they contain public information on the business activities and the financial and risk situation of the bank that are known to FINMA in more detail and more timely through other channels.

¹ <https://www.finma.ch/en/supervision/banks-and-securities-firms/supervisory-instruments/>

² <https://www.finma.ch/en/supervision/cross-sector-issues/auditing/auditing-of-banks/>

³ <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-vor-ort-kontrollen.pdf?la=en>

8. If any of the regulations for which substituted compliance is requested do not apply to certain cross-border transactions, please explain (e.g., transactions with counterparties located outside of Switzerland).

Verbal update

IV. Element Five: The Commission's Access to Books and Records and Onsite Inspection and Examination

1. Certifications by UBS AG and Credit Suisse AG

Certification Pursuant to 17 C.F.R. § 240.3a71-6(c)(2)(ii)

Certification

UBS AG can, as a matter of Swiss law, and will, on and after November 1, 2021:

- (1) provide the Commission with prompt access to its Swiss Books and Records, and
- (2) submit to onsite inspection and examination by the Commission in relation to its Swiss Books and Records and US Books and Records.

Definitions

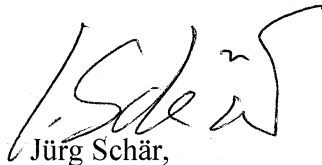
“Commission” means the U.S. Securities and Exchange Commission

“Swiss Books and Records” has the meaning given it in the attached opinion dated August 10, 2021 by Schellenberg Wittmer Ltd.

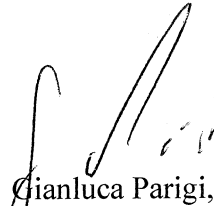
“US Books and Records” has the meaning given it in the attached opinion dated August 10, 2021 by Schellenberg Wittmer Ltd.

Signature:

Name and Title:



Jürg Schär,
Executive Director



Gianluca Parigi,
Director

Date:

August 10, 2021

Certification Pursuant to 17 C.F.R. § 240.3a71-6(c)(2)(ii)

Certification

Credit Suisse AG can, as a matter of Swiss law, and will, on and after November 1, 2021:

- (1) provide the Commission with prompt access to its Swiss Books and Records, and
- (2) submit to onsite inspection and examination by the Commission in relation to its Swiss Books and Records and US Books and Records.

Definitions

“Commission” means the U.S. Securities and Exchange Commission

“Swiss Books and Records” has the meaning given it in the attached opinion dated August 9, 2021 by Schellenberg Wittmer Ltd.


“US Books and Records” has the meaning given it in the attached opinion dated August 9, 2021 by Schellenberg Wittmer Ltd.

Date: August 9, 2021

Credit Suisse AG



André Ruchin
Director



Andrin Schnydrig
Managing Director

2. Opinion of Swiss Counsel

By courier

Securities and Exchange Commission
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Listed in the Cantonal Attorney Registry

With a copy to

UBS AG
Credit Suisse AG

(together the "**Addressees**" and each an "**Addressee**")

Date August 9, 2021
Reference 210054/SW-06281533/OFA

SBSD SEC Registration

Ladies and Gentlemen

We, Schellenberg Wittmer Ltd, are acting as special Swiss counsel to each of UBS AG and Credit Suisse AG (each a **Bank**) in connection with their applications for substituted compliance as non-US security-based swap (**SBS**) dealers (**SBSDs**) with the United States Securities and Exchange Commission (**SEC**).

1. Background

We have been requested to provide an opinion in connection with certain issues of Swiss law based on the facts described hereinafter with respect to:

- (i) access by or on behalf of the SEC to the books and records relating to the "U.S. business" (as defined in SEC Rule 3a71-3(a)(8)¹) of the Bank as a nonresident SBSD,² *i.e.*, records that relate to an SBS transaction that is either (a) entered into, or offered to be entered into, by or on behalf of a Bank, with a U.S. person (other than a transaction conducted through a foreign branch of that person);³ or

¹ 17 C.F.R. § 240.3a71-3(a)(8), available at <https://ecfr.io/Title-17/Section-240.3a71-3>.

² See Cross-Border Application of Certain [SBS] Requirements, 85 Fed. Reg. 6270, 6296 (Feb. 4, 2020), available at: <https://www.govinfo.gov/content/pkg/FR-2020-02-04/pdf/2019-27760.pdf> (the "SEC Guidance").

³ See 17 C.F.R. § 240.3a71-3(a)(8)(i)(A), available at <https://ecfr.io/Title-17/Section-240.3a71-3>. A "U.S. person" means any person that is "(i) a natural person resident in the U.S.; (ii) a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or

- (b) arranged, negotiated, or executed by personnel of the Bank located in a U.S. branch or office, or by personnel of an agent of the Bank located in a U.S. branch or office⁴ (the **SBS Business**, such books and records related to the SBS Business the **Books and Records**); and
- (ii) any on-site inspections and examinations by the SEC of the Books and Records taking place in Switzerland in relation to the SBS Business.

This legal opinion is provided in order to satisfy the requirement in SEC Rule 3a71-6(c)(2)(ii)⁵ for the Banks to provide an opinion of counsel in connection with their application for substituted compliance.

As regards Books and Records that are relevant for the purposes of this legal opinion, they are held by each Bank as follows:

- (i) Some Books and Records are physically held or electronically stored in Switzerland (the **Swiss Books and Records**); and
- (ii) Some Books and Records are physically held or electronically stored in the United States (the **US Books and Records**).

2. Questions

Against this background we have been asked to analyze the following questions:

- A. Can the Bank, as a matter of Swiss law, provide the SEC with prompt access to the Swiss Books and Records?
- B. Can the Bank, as a matter of Swiss law, submit to on-site inspection and examination by the SEC in relation to the Swiss Books and Records?
- C. Does the Bank breach Swiss law by submitting to on-site inspections and the examination of its US Books and Records by the SEC in the US?

3. Scope

This legal opinion is limited to matters of Swiss law arising in the context of (a) the access by the SEC to Swiss Books and Records, (b) the on-site inspections and examinations of

having its principal place of business in the United States; (iii) an account (whether discretionary or non-discretionary) of a U.S. person; or (iv) an estate of a decedent who was a resident of the United States at the time of death." 17 C.F.R. § 240.3a71-3(a)(4), available at <https://ecfr.io/Title-17/Section-240.3a71-3>. A "foreign branch" means "any branch of a U.S. bank if: (i) the branch is located outside of the United States; (ii) the branch operates for valid business reasons; and (iii) the branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located." 17 C.F.R. § 240.3a71-3(a)(2), available at <https://ecfr.io/Title-17/Section-240.3a71-3>. An "SBS conducted through a foreign branch" means an SBS that is "arranged, negotiated, and executed by a U.S. person through a foreign branch of such U.S. person if: (A) the foreign branch is the counterparty to such security-based swap transaction; and (B) the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States." 17 C.F.R. § 240.3a71-3(a)(3)(i), available at <https://ecfr.io/Title-17/Section-240.3a71-3>.

⁴ See 17 C.F.R. § 240.3a71-3(a)(8)(i)(B), available at <https://ecfr.io/Title-17/Section-240.3a71-3>.

⁵ 17 C.F.R. § 240.3a71-6(c)(2)(ii), available at <https://ecfr.io/Title-17/Section-240.3a71-6>.

such Swiss Books and Records by the SEC taking place in Switzerland and/or (c) the on-site inspections and examinations of US Books and Records by the SEC taking place in the US.

On the basis that each Bank has a "prudential regulator", this opinion does not cover financial records necessary to assess compliance with SEC margin and capital requirements.

4. Documents reviewed

For the purposes of this opinion, we have examined the following documents:

- (i) A waiver issued by the Swiss Financial Market Supervisory Authority FINMA (the **FINMA Waiver**) dated August 5, 2021 concerning the transmission of, or access to, the Swiss Books and Records as required by the SEC;
- (ii) A permission issued by the Swiss Financial Market Supervisory Authority FINMA (the **FINMA Permission**) dated August 5, 2021 concerning the on-site inspection and examination by the SEC in relation to the Swiss Books and Records; and
- (iii) A Memorandum by the Federal Data Protection and Information Commissioner (**FDPIC**) dated June 25, 2021 concerning Swiss Firm Data Processing and Sharing of Information with the U.S. Securities and Exchange Commission (the **FDPIC Memorandum**).

For the purposes of this opinion, we have reviewed no documents other than those mentioned in section 4.

5. Assumptions

In giving our opinion, we have assumed the following:

- 5.1 The SBS Business consists of SBS transactions that are either (i) entered into, or offered to be entered into, by or on behalf of a Bank, with a U.S. person (other than a transaction conducted through a foreign branch of that person) or (ii) arranged, negotiated, or executed by personnel of the Bank located in a U.S. branch or office, or by personnel of an agent of the Bank located in a U.S. branch or office, in each case that are booked with a non-Swiss office of the Bank.
- 5.2 The Swiss Books and Records are held with the Bank or a material group company of the Bank in the sense of article 2bis para. 1 lit. b Swiss Federal Banking Act of November 8, 1934 (the **Banking Act**).
- 5.3 The access to, the transmission of and the on-site inspections and examinations of the Books and Records are regarding clients forming part of the SBS Business (the **Relevant Clients**) and employees of the Bank based in Switzerland (the **Relevant Employees**).

- 5.4 The Relevant Clients are investment banking clients and the Books and Record are therefore not linked to the asset management, securities trading or deposit business for individual clients.
- 5.5 The Relevant Clients and Relevant Employees have been appropriately informed of the disclosure of the information to the SEC and have waived their rights that could conflict with the disclosure of information to the SEC, including without limitation such rights resulting from bank-client confidentiality, the applicable data protection rules, the employment relationships or applicable employment laws, as applicable, provided that, to the extent any such waivers are required under Swiss law for lawfully providing or making available the information to the SEC, (i) such waivers are validly given under Swiss law (including without limitation under Swiss civil law) or, if they are not governed by Swiss law, the applicable foreign law, and (ii) in respect of Relevant Employees, to the extent that such waiver may not validly be given, the disclosure of information is justified by the necessity to perform the contract with the Relevant Employees, an overriding private interest of the Bank or by an overriding public interest (each as further set out in the FDPIC Memorandum).
- 5.6 The disclosure of information and any on-site inspections and examinations are limited to information which is necessarily required for the supervisory and enforcement activity of the SEC, as required by the applicable data protection rules or, as applicable, as determined by FINMA.
- 5.7 Any processing of data by the Bank forming part of the Books and Records occurs in compliance with Swiss data protection rules, to the extent applicable (as further set out in the FDPIC Memorandum).
- 5.8 The access to, the transmission of and the on-site inspections and examinations of the Books and Records are exercised by the SEC and not by or on behalf of any other foreign authorities.
- 5.9 As regards the access to, and the transmission of, the Swiss Books and Records to the SEC and the on-site inspections and examinations of the Swiss Books and Records by the SEC, the SEC and/or the persons and/or organizations directly or indirectly active on behalf of the SEC in this respect (i) are bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings, (ii) will use the Swiss Books and Records exclusively for the lawful supervision (including enforcement) of financial institutions and financial markets under U.S. laws and regulations and (iii) will not forward the Swiss Books and Records to other authorities, courts or bodies for any purpose other than as stated under (ii).
- 5.10 The access to, the transmission of and the on-site inspections and examinations of the Books and Records are taking place in compliance with the FINMA Waiver and/or the FINMA Permission, to the extent needed.



- 5.11 Any on-site inspections and examinations of the US Books and Records occurs in the United States and, as ensured by the Bank, without the involvement of employees or other representatives or agents of the Bank or of a Bank group company located in Switzerland.
- 5.12 The Bank will keep US Books and Records in the United States in accordance with the SEC rules.
- 5.13 Information which is not covered by the FINMA Waiver (the **FINMA Waiver Carve Out**) may be delivered to the SEC by FINMA via administrative assistance channels or may be delivered to the SEC by a Bank directly in the absence of an objection of FINMA.
- 5.14 The FINMA Waiver and the FINMA Permission are unconditionally given and in place, to the extent needed.

6. Question A: Can the Bank, as a matter of Swiss law, provide the SEC with prompt access to the Swiss Books and Records?

6.1 Blocking Statute of article 271 para. 1 of the Swiss Criminal Code

6.1.1 Definition

Article 271 para. 1 of the Swiss criminal code of December 21, 1937 (**CC**) (*Unlawful activities on behalf of a foreign state*) protects Swiss territorial sovereignty and primarily aims at preventing foreign countries or parties to foreign proceedings from circumventing international conventions on judicial assistance.

6.1.2 Applicable to "Official Acts"

Pursuant to article 271 para. 1 CC, the actions conducted for a foreign state must have the characteristics of an official act to fall under this prohibition. The determination whether an action qualifies as an official act is solely based on Swiss law and not on foreign or international law. Article 271 para. 1 CC may, thus, even apply in cases where a foreign state would not consider its interests or its sovereignty affected. In this regard, the Swiss Federal Supreme Court held that any action, which "according to its nature" under Swiss law lies within the competence of a public authority, is reserved to the powers of the Swiss public authorities and must not be executed on Swiss territory without prior authorization by the competent Swiss authority.⁶

The gathering, compiling and establishing of means of evidence (e.g. documents, witness statements, depositions, databases) for use in foreign court proceedings (whether civil, penal or administrative) is, in Switzerland, considered to be an official act within the meaning of article 271 para. 1 CC and may only be performed by Swiss authorities. Also, any direct service of subpoenas, summons and other court orders or official documents from a foreign state to a person or entity in Switzerland may violate article 271 para. 1 CC.

⁶ See for example decision 114 IV 131 of the Swiss Federal Supreme Court.

What constitutes "official acts" for these purposes is therefore interpreted extensively and includes also actions that – if executed lawfully – could in principle be executed by a foreign public authority or public official on Swiss territory but the legal requirements or procedures for such action have not been complied with (i.e. judicial assistance procedures).

6.1.3 Disclosure permitted by Swiss law

The prohibition of article 271 para. 1 CC will not apply if the disclosure is permitted by Swiss law, including but not limited to any permitted transmission of information pursuant to article 42c of the Financial Market Supervision Act of June 22, 2007 (**FINMASA**).

6.2 Article 42c para. 1 FINMASA

6.2.1 Definition

Pursuant to article 42c para. 1 FINMASA, supervised persons may transmit non-public information to the foreign financial market supervisory authorities responsible for them and to other foreign entities responsible for supervision provided:

- (a) the conditions set out in article 42 para. 2 FINMASA are fulfilled; and
- (b) the rights of clients and third parties are preserved.

Article 42c FINMASA only applies when information is transmitted from Switzerland to another country, i.e. across national borders and not when representatives of the foreign authority or entity are in Switzerland.⁷ In such other event, article 43 FINMASA applies (see section 7 below).

The purpose of article 42c para. 1 FINMASA is a carve out from article 271 para. 1 CC.⁸

Article 42c FINMASA intends to allow, subject to certain requirements (see section 6.2.4 and 6.2.5 below), supervised parties to transmit non-public information to a foreign financial market supervisory authority without an authorization allowing the transfer of such information that would otherwise be required.⁹

6.2.2 Supervised persons

As regards its personal scope, article 42c para. 1 FINMASA applies to all persons and entities supervised by FINMA pursuant to article 3 FINMASA.¹⁰

The Bank, as a Swiss legal entity subject to prudential supervision by FINMA as a bank under the Banking Act, qualifies as a "supervised person" in the sense of article 42c FINMASA and therefore falls into its personal scope.

⁷ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 4.

⁸ Explanatory Report to the Financial Market Infrastructure Act (FMIA) of September 3, 2014, p. 7620.

⁹ Such authorization would be required by the competent Federal Department (*Departement*) and Federal Chancellery (*Bundeskanzlei*) under article 31 para. 1 of the Ordinance on the Organization of the Government and the Administration of 25 November 1998 (**OOGA**).

¹⁰ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 2.

6.2.3 Transmission to foreign financial market supervisory authority

In the case at hand, the Swiss Books and Records shall be transmitted to the SEC.

As competent regulator under the US Securities Exchange Act of 1934 and the Securities Act of 1933, the SEC qualifies as a "foreign financial market supervisory authority" in the sense of article 42c FINMASA.

6.2.4 Article 42c para. 1 lit. a FINMASA

a. Requirements of article 42 para. 2 FINMASA

Pursuant to article 42c para. 1 lit. a FINMASA, the requirements set out in article 42 para. 2 FINMASA must be met in order to exercise the rights of direct transmission.

Pursuant to article 42 para. 2 FINMASA, FINMA may transmit non-public information to foreign financial market supervisory authorities only if:

- (a) this information is used exclusively to implement financial market law, or it is forwarded for these purposes to other authorities, courts or bodies (*speciality requirement*); and
- (b) the requesting authorities are bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings (*confidentiality requirement*).

In order to facilitate the work of supervised persons and to allow them to apply article 42c para. 1 lit. a FINMASA independently and uniformly, FINMA publishes a list of foreign financial market supervisory authorities to which FINMA has provided administrative assistance in the past. If an authority appears on the list, supervised persons may generally assume that the requirements of speciality and confidentiality under article 42 para. 2 FINMASA are met without further checks.¹¹

However, further assurances may be required, where (i) the requesting authority does not state the purpose for which information shall be used (which would not be relevant in the present circumstances where it is understood that the SEC makes the request in the context of the SBS Business) or (ii) there is a reason to suspect that requesting authority will not adhere to confidentiality or (iii) that it will not only use it in the context of enforcing financial market laws or that it will forward it to other authorities, courts or bodies for other purposes.¹² Such assurance may be provided e.g. by a confirmation from the foreign authority or entity or with a written opinion from a local lawyer specialising in financial market law or an international law firm.¹³

¹¹ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 21

¹² FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 24 et seq.

¹³ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 26.

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b. SEC satisfying article 42 para. 2 FINMASA

The SEC is listed by FINMA as a foreign financial market supervisory authority to which it has provided administrative assistance in the past.¹⁴

Furthermore, the purpose of the transmission of information is the ongoing oversight of the SBS Business and the Bank's compliance with the applicable US law.

On this basis and on the assumptions that the SEC (i) is bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings, (ii) will use the Swiss Books and Records exclusively for the lawful supervision (including enforcement) of financial institutions and financial markets under US laws and regulations and (iii) will not forward the Swiss Books and Records to other authorities, courts or bodies for any purpose other than as stated under (ii), the SEC meets the requirements of article 42 para. 2 FINMASA.

The FINMA Waiver may be considered as evidence that FINMA came to the same conclusion.

6.2.5 Article 42c para. 1 lit. b FINMASA

a. Preservation of the rights of the clients and third parties

Article 42c FINMASA does not constitute a carve-out from business and bank-client confidentiality obligations, data protection regulations and rights resulting from employment relationships.¹⁵ Such rights of clients and third parties must therefore be complied with when applying article 42c FINMASA (article 42c para. 1 lit. b FINMASA).

For these purposes,

- "*Clients*" are the natural persons and legal entities whom FINMASA and the financial market law intend to protect, in particular creditors and investors (article 5 FINMASA);¹⁶
- "*Third parties*" are all other natural persons and legal entities that are mentioned in the information to be transmitted or can be identified from it, including employees of supervised parties, authorised representatives and beneficial owners.¹⁷

Neither the statutory rules of the FINMASA nor FINMA define how the rights of clients and third parties should be complied with in this context. The measures to be taken therefore depend on the specific case and the relevant provisions of the Swiss privacy, data protection and employment laws.

¹⁴ See <<https://finma.ch/de/ueberwachung/branchenuebergreifende-themen/direktuebermittlung/>>.

¹⁵ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 30; BSK FINMASA-du Pasquier/Menoud, Art. 42c N 30.

¹⁶ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 16.

¹⁷ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 17.

b. Banking secrecy

To the extent that Relevant Clients have provided a valid consent to the disclosures to the SEC, the question does not arise whether the access to the Swiss Books and Records could constitute a breach of any Swiss banking secrecy obligations.

c. Data protection

According to article 6 para. 2 Federal Act on Data Protection of June 19, 1992 (**FADP**) personal data may - under certain conditions, such as a consent, contractual clauses or overriding public interests - be transmitted to a country without, from the perspective of the FADP, an adequate level of data protection. The US falls into such category (see section 2.4 FDPIC Memorandum).

Pursuant to article 6 para. 2 lit. b and article 4 para. 5 FADP, consent is valid only if given in the specific case voluntarily on the provision of adequate information ("informed consent"). Additionally, consent must be given expressly in the case of processing of sensitive personal data or personality profiles (article 4 para. 5 FADP). Such consent is voluntarily given and valid, even though the Bank would not have been prepared to enter into a contract if the customer had not consented (see section 2.4.2 FDPIC Memorandum).

Alternatively, personal data may also be disclosed abroad if the processing is directly connected with the conclusion or the performance of a contract and the personal data is that of a contractual party (article 6 para. 2 lit. c FADP; see also section 2.4.3 FDPIC Memorandum). According to the FDPIC, in respect of the Relevant Clients, the transfer of customer data to the SEC can be based on article 6 para. 2 lit. c FADP provided that, in the individual case, there are not any overwhelming interests of the data subject that would not allow the disclosure.

Personal data may also be disclosed abroad if disclosure is essential in the specific case in order to safeguard an overriding public interest (article 6 para. 2 lit. d FADP). According to Swiss doctrine, an overriding public interest may exist in the event that a company is required by foreign law to disclose business records, for example in the context of supervision by a foreign regulatory authority. On the basis of these conditions, the FDPIC therefore assumes that a transfer of personal data to the SEC is, in principle, justified by an overriding public interest (see section 2.4.5 FDPIC Memorandum). This can be based on article 6 para. 2 lit. d FADP, provided that, in the individual case, there are not any overwhelming interests of the data subject that would not allow the disclosure.

We understand that in case the transfer of Swiss Books and Records in the ordinary course of business is leading to an investigation of an individual, this would not be prohibited disclosures under the meaning of "overwhelming interests of the data subject." Otherwise no information could be transmitted, as it cannot be excluded that some information of the data subjects may theoretically lead to an investigation.

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Even if a cross-border transfer is compatible with article 6 FADP, the fundamental data protection principles mentioned in articles 4, 5 and 7 FADP must still be observed when processing, including transferring, personal data (see section 2.5 FDPIC Memorandum).

d. Employment law

As regards the Relevant Employees, the question may arise whether a consent to the disclosure to the SEC is valid from an employment law perspective. While such consent should be valid from the perspective of being an inherent condition to the performance of their roles with respect to the SBS Business, we cannot exclude that the consent would be invalidated on the basis that the relevant employees have no choice to withhold the consent (see section 2.4.4 FDPIC Memorandum). In such event, an alternative legal basis would be needed to provide access to the Swiss Books and Records to the SEC.

Article 328b of the Swiss Code of Obligations of 30 March 1911 (**CO**) states that the employer may handle data concerning the employee only to the extent that such data concern the employee's suitability for his employment or are necessary for the performance of the employment contract.

We share the opinion of the FDPIC that a disclosure of employee data to the SEC should be viewed as necessary for the performance of the employment contract, in which case data processing is compatible with article 328b CO (see section 2.4.4 FDPIC Memorandum). As an alternative legal basis, the disclosure may be justified by overriding public interests (see section 2.4.4 FDPIC Memorandum). We do not have further caveats to raise in this respect other than the points set out in the FDPIC Memorandum.

6.3 Obligation to notify FINMA

Pursuant to article 42c para. 3 FINMASA, the transmission of information qualified as being of substantial importance in accordance with article 29 para. 2 FINMASA must be reported to FINMA prior to making any such transmission.

Such information may either be subject to such reporting to FINMA regardless of the transmission under article 42c FINMASA or the transmission abroad is itself of substantial importance.¹⁸

Pursuant to the FINMA Circular 2017/6, any information subject to the obligation of article 42c para. 3 FINMASA may not be transmitted abroad before FINMA provided a response.¹⁹

FINMA informs the supervised party usually within five working days as to whether it requires the use of administrative assistance channels (see section 6.4 below) instead of allowing the supervised entity to proceed with the direct transmission.²⁰ Also, note that FINMA may say that it only refrains from requiring the use of administrative assistance

¹⁸ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 44 et seq.

¹⁹ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 72 et seq.

²⁰ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 71.

channels (see section 6.4 below) subject to certain conditions. However, please note that FINMA requested in its practice the use of administrative assistance channels only in exceptional circumstances.

If a supervised party intends to transmit information to a foreign authority or entity, FINMA may, in a general manner, waive the need for future transmissions to be reported to it prior to a transmission of such information either on its own initiative or on request.²¹

Such a waiver has been given by FINMA with the FINMA Waiver (please also see section 6.4 below). According to the FINMA Waiver, FINMA agreed that the Bank may report to FINMA simultaneously with the transmission to the SEC, and is not obliged to wait for FINMA's response.

When receiving a notice under article 42c para. 3 FINMASA, FINMA does not verify whether the conditions for transmission under article 42c para. 1 FINMASA are met, in particular whether the rights of clients and third parties are preserved. The supervised party is responsible for complying with these requirements.²²

6.4 Administrative assistance channels

Pursuant to article 42c para. 4 FINMASA, FINMA may require the use of administrative assistance channels instead of allowing the supervised entity to proceed with the direct transmission. FINMA may for instance use these powers for a *specific* communication that came to FINMA's attention as result of the notice under article 42c para. 3 FINMASA.²³

The FINMASA does not specify any specific conditions on the basis of which FINMA may use such powers. However, according to the FINMA Waiver, FINMA waived its rights to require the use of administrative assistance channels in accordance with article 42c para. 4 FINMASA with regard to information in connection with the SBS Business of the Bank, with the exception of the information forming part of the FINMA Waiver Carve Out, on the conditions that:

- (1) the information is used exclusively for the lawful supervision (including enforcement) of financial institutions and financial markets under US laws and regulations, or is forwarded to other authorities, courts or bodies for this purpose;
- (2) the SEC is bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings; and
- (3) the rights of clients and third parties resulting from bank client confidentiality, data protection laws or employment laws are preserved.

²¹ FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 69.

²² FINMA Circular 2017/6 Direct transmission of December 8, 2016, n. 74.

²³ Explanatory Report to the Financial Market Infrastructure Act (FMIA) of September 3, 2014, p. 7620.

6.5 Supervisory privilege

Pursuant to article 42c para. 5 FINMASA and separately from article 42c para. 4 FINMASA, FINMA may make the transmission, publication or forwarding of files it is involved in in the *context of its supervision* subject to its approval if this is required for completing its supervisory roles and such approval does not conflict with overriding private or public interests. However, this "supervisory privilege" is limited to correspondence and communications between FINMA and the supervised entity.²⁴

Based on this provision, FINMA may in particular require its consent prior to the disclosure of any correspondence with FINMA, minutes of meetings with FINMA, FINMA audit reports or orders.

We understand that the "supervisory privilege" is limited to the information according to the FINMA Waiver Carve Out and such information may either be delivered to the SEC by a Bank directly in the absence of an objection by FINMA or may be delivered to the SEC by FINMA via administrative assistance channels.

6.6 Conclusion

Based on the above and subject to the qualifications set forth herein (see section 9 below), we are of the opinion that the Bank can, as a matter of Swiss law, provide the SEC with prompt access to the Swiss Books and Records.

7. Question B: Can the Bank, as a matter of Swiss law, submit to on-site inspection and examination by the SEC in relation to the Swiss Books and Records?

7.1 Blocking Statute of article 271 para. 1 of the Swiss Criminal Code

Reference is made to section 6.1 above.

7.2 Requirements of on-site inspections or examinations

7.2.1 Definition

Pursuant to article 43 para. 2 FINMASA, FINMA may permit foreign financial market supervisory authorities to carry out direct audits of supervised parties provided:

- (a) these authorities are responsible for the supervision of the audited supervised party as part of home country supervision (*home regulators*) or are responsible for supervising the activity of the audited supervised party in their territory (*host regulators*); and
- (b) the conditions for administrative assistance set out in article 42 para. 2 FINMASA are met.

²⁴ Urs Zulauf, Titel Kooperation oder Obstruktion? – 20 Jahre Amtshilfe im Finanzmarktrecht vom Börsengesetz zum FINFRAG, GesKR 215, p. 350 f.; Monsch/von der Crone, SZW 2015, p. 663.

7.2.2 FINMA permission requirement

As a result of the sovereignty of the Swiss Confederation and in line with the principles of international law, foreign financial market supervisory authorities may not carry out direct audits of supervised parties in the absence the FINMA permission as set out above.²⁵ FINMA is free to determine the form in which it grants this permission. Such permission may also be given informally. Furthermore, the foreign authority is not a "party" to the proceedings concerning the approval of an on-site inspection in Switzerland. In general, there is no entitlement on the part of the foreign authorities or the supervised persons in Switzerland to the granting of such authorisation.

By issuing the FINMA Permission, FINMA has given its permission to on-site visits and examinations to the SEC.

7.2.3 Access by foreign authorities

A "*foreign financial market supervisory authority*" pursuant to article 42c para. 1 FINMASA (please see 6.2 above) also qualifies as such in the sense of article 43 para. 2 FINMASA. While article 43 para. 2 FINMASA does not explicitly mention "*other foreign bodies entrusted with supervision*", an on-site inspection and examination could also be conducted by third parties which are appointed by a foreign financial market supervisory authority or which are appointed by the supervised institution at the request of a foreign financial market supervisory authority to investigate a particular issue.²⁶

Where the foreign authority is a host regulator, it must have a specific connection to an activity carried out by the supervised entity to be examined in the territory of such foreign authority.²⁷

7.2.4 Requirements of article 42 para. 2 FINMASA

The on-site inspections and examinations must meet the conditions set out in article 42 para. 2 FINMASA (see section 6.2.4 above).

7.2.5 Information required for supervisory activity

Pursuant to article 43 para. 3 FINMASA, information may be collected through on-site inspections and examinations only if the collection of such information is *required* for the supervisory activity of the foreign financial market supervisory authority. This includes in particular the information stated in article 43 para. 3 FINMASA, which is a non-exhaustive list.

Information which is not necessarily required for the supervisory activity of the SEC, as determined by FINMA, would not be covered by article 43 para. 3 FINMASA. Client information would usually fall into this category, unless it is at the same time relevant for

²⁵ BSK FINMASA-Rayroux/Mehmetaj, Art. 43 N 8.

²⁶ FINMA Guidelines regarding on-site visits of March 3, 2017 (the Art. 43 FINMASA FINMA Guidelines), clause 2.2.

²⁷ Art. 43 FINMASA FINMA Guidelines, Scope of Application.

the supervision of the FINMA supervised firm. However, the client may agree to the sharing of the relevant information.

Therefore, where the client has – as a pre-requisite to be able to deal with the Bank – consented to the sharing of relevant information with the competent foreign supervisory authority, the information may be provided on this basis also as part of article 43 para. 3 FINMASA, subject to the limitations resulting from the FINMA Permission (as stated in section 7.3 below).

7.3 Form of on-site inspections or examinations

According to the FINMA Permission, FINMA grants the SEC a permission to conduct on-site inspection and examination in relation to the Swiss Books and Records and conducting informal interviews with employees of the Bank in connection with the SBS Business and necessary for the SEC's supervision of the SBS Business.

Except in cases of emergency, the SEC will have to notify FINMA two weeks in advance of a planned on-site inspection and examination. Both authorities should consult on the intended timeframe for, and the purpose and scope of the on-site inspection and examination.

FINMA informed in the FINMA Permission that on conclusion of each review of files or meeting with the Bank's personnel during an on-site inspection and examination, the SEC's examination staff may take personal notes from the premises of the bank. These personal notes may not include client identifying information linked to the asset management, securities trading or deposit business for individual clients (article 43 para. 3^{bis} FINMASA). However, such personal notes may include client identifying information concerning other clients, e.g., the Bank's commercial customers, corporate finance customers, business and investment banking customers as well as interbank transactions, provided that the rights of these clients are preserved. The SEC's staff may not take copies of any documents shown to them during the on-site inspection and examination that contain non-public information from the Banks's premises. These documents must be left at the facilities of the Bank. If the SEC wishes to obtain such documents, the SEC may request their transmission either from FINMA or from the Bank.

7.4 Protection of client interests

Pursuant to article 43 para. 3^{bis} FINMASA, if during on-site visits in Switzerland foreign financial market supervisory authorities wish to consult information linked directly or indirectly to the asset management, securities trading or deposit business for individual clients, FINMA shall collect this information itself and transmit it to the requesting authorities through the administrative assistance process (also referred to as "private banking carve-out").

The purpose of this private banking carve-out is to protect the privacy of Swiss or foreign clients managed by the supervised institution in Switzerland in the context of a long-

standing bank-client relationship involving also the personal assets of the client. The carve-out aims at ensuring that the right of appeal of clients (who had not previously consented to the disclosure of their information to a foreign supervisory authority) is safeguarded. In contrast, where the client had consented to the disclosure in advance as in case of SBS transactions, the carve-out would de facto not apply.

However, the carve-out of article 43 para. 3^{bis} FINMASA does not apply to the investment banking or commercial banking business.

7.5 Conclusion

Based on the above and subject to the qualifications set forth herein (see section 9 below), we are of the opinion that the Bank can, as a matter of Swiss law, submit to on-site inspection and examination by the SEC in relation to the Swiss Books and Records.

8. Question C: Can the Bank, as a matter of Swiss law, submit to on-site inspection and examination by the SEC in relation to its US Books and Records?

8.1 Blocking Statute of article 271 para. 1 of the Swiss Criminal Code

Based on the assumption that any on-site inspections and examinations of the US Books and Records occurs in the United States and, as ensured by the Bank, without the involvement of employees or other representatives or agents of the Bank or of a Bank group company located in Switzerland, there is no action taking place on Swiss territory. On this basis, the on-site inspection and examination by the SEC in relation to its US Books and Records does not constitute a potential offence on Swiss territory and is therefore outside of the scope of application of article 271 para. 1 CC.

8.2 Conclusion

Based on the above and subject to the qualifications set forth herein (see section 9 below), we are of the opinion that the Bank can, as a matter of Swiss law, submit to on-site inspection and examination by the SEC in relation to its US Books and Records.

9. Qualifications

The opinions set forth herein in section 6.6, 7.5 and 8.2 are subject to the following qualifications:

- 9.1 The opinions expressed herein are limited to the laws of Switzerland as in force on the date hereof and as currently applied and construed by the courts of Switzerland. In the absence of statutory or established case law, we base our opinion on our independent professional judgement. We have not investigated and do not express or imply any opinion herein concerning any other laws, including without limitation with respect to the law of the place of booking of the SBS.
- 9.2 The exercise of discretion or the giving of an opinion by a third party or the reliance by any such party (in particular FINMA) on certain circumstances may not be valid unless such

discretion is exercised reasonably or such opinion or reliance is based on reasonable grounds.

- 9.3 No opinion is expressed as to the accuracy of the facts set out or referred to in the documents reviewed or the factual background assumed therein.
- 9.4 Legal terms or concepts expressed in English in this opinion or in the Agreement (or in any and all agreements and documents referred to therein) may not be identical to the concepts described by the same English terms as they exist under the laws of other jurisdictions.

We express no opinion on matters of fact and we assume no obligation to advise the Addressee of any changes of factual or legal matters relevant to this legal opinion that may be brought to our attention after the date hereof. This legal opinion is strictly limited to the matters stated in it and to the confirmations set forth in sections 6, 7 and 8 and does not apply by implication to any other matters.

This opinion is furnished to the Addressee in connection with the SBSD registration of the Bank.

This opinion is governed by and construed in accordance with Swiss law. By relying on this opinion, the Addressee agrees that all disputes arising out of or relating to this opinion shall be subject to the exclusive jurisdiction of the competent courts of the city of Zurich (city district no. 1), Switzerland.

Yours sincerely

SCHELLENBERG WITTMER LTD



Olivier Favre



Martin Lanz

Appendix 1

Financial Market Supervision Act of June 22, 2007

"Article 29 Duty to provide information and to report

1 *The supervised persons and entities, their audit companies and auditors as well as persons or companies that are qualified investors or that have a substantial participation in the supervised persons and entities must provide FINMA with all information and documents that it requires to carry out its tasks.*

2 *The supervised persons 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 42 Administrative assistance

1 *In order to implement the financial market acts, FINMA may ask foreign financial market supervisory authorities to provide information.*

2 *It may transmit non-public information to foreign financial market supervisory authorities only if:*

a. *this information is used exclusively to implement financial market law, or is forwarded to other authorities, courts or bodies for this purpose;*

b. *the requesting authorities are bound by official or professional secrecy, notwithstanding provisions on the public nature of proceedings and the notification of the general public about such proceedings.*

3 *Paragraphs 1 and 2 apply by analogy to the exchange of information between FINMA and foreign authorities, courts and bodies involved in the restructuring and resolution of authorised parties.*

4 *The administrative assistance shall be carried out swiftly. FINMA shall observe the principle of proportionality. The transmission of information concerning persons who are manifestly uninvolved in the matter being investigated is not permitted.*

5 *FINMA may, in agreement with the Federal Office of Justice, authorise the forwarding of information to prosecution authorities for purposes other than those mentioned in paragraph 2 letter a, provided that mutual legal assistance in criminal matters is not excluded."*

" Article 42c Transmission of information by supervised parties

1 Supervised parties may transmit non-public information to the foreign financial market supervisory authorities responsible for them and to other foreign entities responsible for supervision provided:

- a. the conditions set out in Article 42 paragraph 2 are fulfilled;
- b. the rights of clients and third parties are preserved.

2 Furthermore, they may transmit non-public information related to the transactions of clients and supervised parties to foreign authorities and to entities acting on the authorities' behalf if the rights of clients and third parties are preserved.

3 The transmission of information that is of substantial importance in accordance with Article 29 paragraph 2 must be reported to FINMA beforehand.

4 FINMA may reserve administrative assistance channels."

5 It may make the transmission, publication or forwarding of files in the context of supervision subject to its approval if this is in the interest of its task fulfilment and is not in conflict with overriding private or public interests."

" Article 43 Cross-border audits

1 In order to implement the financial market acts, FINMA may itself carry out direct audits of supervised persons and entities abroad or have such audits carried out by audit agents.

2 It may permit foreign financial market supervisory authorities to carry out direct audits of supervised parties provided:

- a. these authorities are responsible for the supervision of the audited supervised party as part of home country supervision or are responsible for supervising the activity of the audited supervised party in their territory; and
- b. the conditions for administrative assistance set out in Article 42 paragraph 2 are fulfilled.

3 Information may be collected through cross-border direct audits only if it is required for the supervisory activity of the foreign financial market supervisory authority. This includes in particular information on whether an institution throughout its group structure:

- a. is appropriately organised;
- b. records, limits and monitors in an appropriate manner the risks inherent in its business operations;
- c. is managed by persons who guarantee proper business conduct;
- d. fulfils the own funds and risk diversification regulations on a consolidated basis; and
- e. properly complies with its reporting duties vis-à-vis the supervisory authorities.

3bis If during direct audits in Switzerland foreign financial market supervisory authorities wish to consult information linked directly or indirectly to the asset management, securities trading or deposit business for individual clients, FINMA shall collect this information itself and transmit it to the requesting authorities. The same applies to information which directly or indirectly relates to individual investors in collective investment schemes. Article 42a applies.

3ter FINMA may, for the purposes detailed in paragraph 3, allow the foreign financial market supervisory authority which is responsible for the consolidated supervision of the audited supervised party to consult a limited number of individual client dossiers. The dossiers must be selected randomly on the basis of predefined criteria.

4 FINMA may accompany the foreign authorities responsible for financial market supervision on their direct audits in Switzerland or arrange for them to be accompanied by an audit company or an audit agent. The supervised persons and entities concerned may request such accompaniment.

5 Establishments organised under Swiss law must provide the foreign financial market supervisory authorities and FINMA with the information required to carry out the direct audits or the information that FINMA requires to provide the administrative assistance, and must permit the inspection of their books.

6 Establishments are defined as:

- a. subsidiaries, branch offices and representative offices of supervised persons and entities or of foreign institutions; and*
- b. other companies, provided their activity is included by a financial market supervisory authority in the consolidated supervision."*

Swiss criminal code of December 21, 1937

" Article 271

1. Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any person who carries out such activities for a foreign party or organisation, any person who facilitates such activities,

shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

2. Any person who abducts another by using violence, false pretences or threats and takes him abroad in order to hand him over to a foreign authority, party or other organisation or to expose him to a danger to life or limb shall be liable to a custodial sentence of not less than one year.

3. *Any person who makes preparations for such an abduction shall be liable to a custodial sentence or to a monetary penalty."*

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