Insider Trading (Switzerland)

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A Practice Note providing an overview of insider trading laws in Switzerland. This Note discusses the legislation setting out insider trading offences, the behaviours and activities amounting to prohibited insider trading, the types of securities and persons subject to insider trading restrictions, defences against insider trading claims or prosecutions, and potential consequences of violation. This Note also outlines what public companies and relevant persons should do to ensure compliance with these insider trading laws.

In Switzerland, insider trading is an offence with potentially severe consequences. Public companies, their insiders, and other persons with access to insider information should understand the elements of insider trading to help prevent its occurrence.

This Note provides an overview of insider trading offences in Switzerland, including:

- What constitutes unlawful insider trading behaviour.
- The types of securities and persons subject to insider trading prohibitions.
- The defences against insider trading claims or prosecutions.
- How insider trading laws are enforced and what the potential penalties are.

This Note also discusses the compliance processes and procedures that should be considered to help public companies and individuals properly handle insider information and avoid insider trading.

Elements of Insider Trading

In Switzerland, insider trading is prohibited under the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, 958.1 (Financial Market Infrastructure Act (FinMIA)).

Insider trading is defined as the unlawful use or disclosure of confidential, price-sensitive information that would significantly affect the value of securities traded on a Swiss trading venue if disclosed.

The insider trading regulations aim to protect the integrity and transparency of the Swiss capital market by ensuring that all investors are treated equally and have access to the same information when making investment decisions.

The Swiss regulation regarding insider trading is a dual-track system, reflected in the administrative and criminal prohibition of insider trading (Articles 142 and 154, FinMIA). The requirements and sanctions for the administrative and criminal prohibition differ.

Definition of Insider Information

Insider information is defined as confidential information which, on public disclosure, would materially influence the price of securities on a Swiss-regulated exchange or digital ledger technology (DLT) trading platform (Article 2(j), FinMIA). For information to qualify as insider information, it must meet three cumulative conditions:

- A required degree of concreteness. The information must relate to a past, present, or future internal or external event (for example corporate results, leadership transitions, mergers, patent filings, or natural catastrophes affecting business prospects or client orders of market-moving magnitude). This encompasses not only established, verifiable facts, for example, quarterly financial reports, but also prospective occurrences, on the condition that they are adequately specific, and their realisation is reasonable. Mere subjective assessments, unfounded gossip, or ambiguous intentions lacking a definite implementation strategy are not considered insider information. The information must have progressed beyond the realm of pure speculation to a point where it possesses a substantive foundation.

- Confidentiality. Information is deemed confidential if it is not publicly known. Information ceases to be confidential not just through widespread public propagation, like ad hoc press releases or coverage in prominent Swiss newspapers, but also if it is obtainable by the investing public through diligent investigation. The existence of market rumours does not inherently negate confidentiality, unless the rumour's content is so precise and widely circulated that it effectively constitutes public knowledge. The decisive factor is whether an exclusive group of individuals maintains privileged access or not.

- Price sensitivity. Price sensitivity signifies that the information's disclosure is, from an *ex-ante* viewpoint, objectively capable of exerting a substantial influence on the security's or derivative's price. The relevant test is whether a reasonable investor would deem the information relevant to their investment decision. Although the actual price fluctuation following the information's release can serve as an indicator, the legal standard is normative. It evaluates the potential for a significant price effect, not whether a price movement actually occurred. However, the empirical realities of market behaviour must be recognised, as investors' rationality is limited.

Types of Securities Subject to Insider Trading Prohibitions

The prohibition of insider trading under FinMIA applies to all securities and derivatives that are admitted to trading or are traded on a trading venue in Switzerland. The Swiss law defines securities as "standardised certificated and uncertificated securities, in particular uncertificated securities and ledger-based securities, as well as derivatives and intermediated securities, which are suitable for mass trading" (Article 2(b), FinMIA).

Persons Liable for Insider Trading

The persons liable differ depending on whether the insider trading prohibition is criminal or administrative.

The criminal prohibition distinguishes three main groups of potential violators according to their proximity to the insider information:

- Primary insiders, who are individuals who gain access to insider information by virtue of their position. Primary insiders encompass:

- members of the governing, supervisory, or management bodies of an issuer; and
- individuals who, due to their professional activity or shareholding, possess legitimate access to such information.

(Article 154(1), FinMIA.)

It is a prerequisite for primary insiders to have acquired knowledge of the insider information not merely by chance, but specifically through their privileged access to sensitive information. A functional connection is necessary.

Primary insiders are members of both formal and de facto organs, including major shareholders and external service providers who are acquainted with confidential corporate affairs. While the protection of confidential and price-sensitive information is an element of their work, a legal or contractual duty of confidentiality is not a condition for being qualified as a primary insider.

- Secondary insiders, who are either persons who obtain insider information directly or indirectly from a primary insider (tippees) or those who obtain it through criminal activity (delict insiders) (Article 154(3), FinMIA).
- Tertiary or coincidental insiders, who are individuals who come into possession of insider information coincidentally or by means other than those that characterise primary or secondary insiders (Article 154(4), FinMIA).

Potential offenders are limited to natural persons only.

The administrative prohibition against exploiting insider information makes no distinction between primary, secondary, and tertiary insiders. The prohibition extends beyond natural and legal persons supervised by the Swiss Financial Market Supervisory Authority (FINMA) to any natural or legal person.

Prohibited Behaviours and Activities

The FinMIA distinguishes between the criminal and the administrative insider trading prohibition regarding prohibited behaviours and activities.

Criminal Prohibition

The criminal prohibition differentiates the prohibited behaviours based on the classification as primary, secondary, or tertiary insiders.

Primary, secondary, and tertiary insiders are prohibited from abusing insider information by purchasing or selling relevant securities, including their derivatives, for themselves or for the account of a third party. This rule applies to transactions executed both on recognised exchanges and over the counter, on the condition that the security is listed for trading in Switzerland. For options and conditional transactions, both the initial commitment to trade and its subsequent execution are legally relevant.

The revocation or change of a previously placed order, prompted by newly obtained insider knowledge, is also penalised under the FinMIA.

Primary insiders also face a prohibition against:

- Disclosing insider information to any other individual (tipping). An exception is made if the disclosure is mandated by law or is a necessary component of their professional duties, such as sharing information with a consultant under a non-disclosure agreement. It is sufficient that the possibility to become aware of the insider information is provided. A complete disclosure of the information is not required.

- Using insider information to advise third parties to trade the associated securities or their derivatives. The underlying insider information does not have to be disclosed for this conduct to apply.

In all criminal cases of insider trading, a completed offence requires the offender to obtain a pecuniary benefit for themselves or a third party by means of insider trading (Article 154, FinMIA). The pecuniary advantage may manifest itself as the materialisation of a gain resulting from an increase in prices or, should prices fall, the prevention of a loss. However, even if no financial benefit is realised, primary and secondary insiders are liable for the attempt to commit insider trading and are thus subject to penalty according to the criminal prohibition under the FinMIA.

Further, the act of exploiting insider information requires a causal connection between the possession of the information and the trading decision.

In subjective terms, intent is required, whereas conditional intent may be sufficient. A person acts with conditional intent if the person:

- Realises the possibility that the act may have certain results.

- Accepts this possibility and acts anyway.

In the context of:

- Disclosing information, intent is deemed lacking if the insider did not foresee the possibility that the recipient would utilise the information to execute transactions. Disclosing the information alongside a plea for discretion or a prohibition of its use does not negate the conditional intent that transactions could still occur.

- The confidential nature of insider information and its potential to affect prices, it is a matter of debate whether specific knowledge is necessary or if conditional intent suffices. Under the latter view, it would be sufficient if the offender realises that the information may be confidential and price sensitive.

- The required causality between the possession of the information and the trading decision, conditional intent suffices.

- Pecuniary benefit, conditional intent is considered adequate (meaning that the person must foresee that a pecuniary benefit may be obtained and nevertheless decides to act).

Administrative Prohibition

The administrative and criminal prohibitions on insider trading encompass nearly identical offences. However, the administrative prohibition of insider trading:

- Does not penalise merely providing access to insider information; instead, it requires the actual disclosure of the information's content.
- Sets a lower threshold of fault since no intent is needed. Rather, the decisive factor is whether an individual knew or should have known that the information constituted insider information.
- Does not require a financial benefit to be realised from the offence.

Defences Against Insider Trading Claims

The Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, 958.11 (Financial Market Infrastructure Ordinance (FinMIO)) contains specific exceptions and safe harbours concerning the criminal and administrative prohibition on insider trading (Articles 122-128, FinMIO). These include:

- Stabilisation measures (if any) conducted within a defined timeframe following a public offering (which typically occurs after an IPO), subject to certain limitations.
- Share repurchases subject to specified parameters and constraints.
- The communication of insider information for the purpose of concluding an agreement, such as a merger agreement, or to designated service providers or authorities, such as auditors, who are performing contractual or statutory obligations. In practice, this is a very important safe harbour to enable reasonable business interactions. For this safe harbour to be applicable, these communications must be documented (typically) through the maintenance of an insider list, and a declaration affirming that the insider information may not be exploited. The conclusion of an agreement encompasses both the signing of the contract (the establishment of the obligation) and its subsequent fulfillment.

Enforcement and Penalties

Violations of Swiss insider trading regulations may result in both:

- FINMA bringing administrative proceedings.
- The Federal Prosecutor bringing criminal charges.

The severity of penalties for violating the criminal prohibition under FinMIA depends on the category of the perpetrator:

- Primary insiders face imprisonment for up to three years or a monetary penalty. Should a primary insider obtain a financial gain exceeding CHF1 million, the potential sentence of imprisonment increases to a maximum of five years or a monetary penalty.

- Secondary insiders face imprisonment for up to one year or a monetary penalty.
- Tertiary insiders are subject to a fine.

Liability is not limited to natural persons. Companies are also (subsidiarily) criminally accountable under Article 102 of the Swiss Criminal Code, 311.0, if organisational deficiencies prevent the identification of the responsible individual, with potential fines reaching up to CHF5 million.

FINMA is empowered to utilise some administrative measures outlined in the Federal Act on the Swiss Market Supervisory Authority, 956.1 (Financial Market Supervision Act (FINMASA)) for breaches of the administrative prohibition, even against market participants that are not under prudential FINMA supervision. FINMA has the authority to:

- Issue a declaration of breach of financial market laws and publicise this declaration (a practice known as naming and shaming).
- Confiscate any obtained profits.
- Compel the offender to provide FINMA with all information and documents necessary for the execution of their duties.

FINMA can also prohibit responsible individuals in the financial institutions it supervises from holding management roles in the financial industry or from practicing a profession. FINMA is not authorised to levy fines.

Compliance Considerations

Insider Lists

While Swiss public companies are not required to maintain insider lists by law, it is a widely adopted precautionary measure and market practice to prevent insider trading.

Insider lists contain the names and details of the relevant insiders. As a rule, it is advisable in practice to disseminate insider information on a need-to-know basis, for example, only among the competent decision makers and to the (core) project team of a certain transaction including external advisors. In each case confidentiality should be ensured, to the extent possible.

The FinMIA is currently undergoing amendments. The draft legislation, if passed, will obligate issuers and their agents (including advisors) to maintain insider lists, provide them promptly to the authorities on request, and retain them for 15 years. In contrast to other jurisdictions, the specific format of insider lists will not be regulated in detail, but it is expected that the template provided under EU Market Abuse Regulation (*596/2014*) will be even more widely used in Switzerland than it is already. For more information, see Practice Note, EU Market Abuse Regulation (EU MAR): overview: Insider lists.

Insider Reporting Requirements

Under Article 56 of the SIX Listing Rules and the provisions of the SIX Directive on the Disclosure of Management Transactions, Swiss listed issuers must ensure that:

- Members of their board of directors (board) and their senior management report transactions in the company's securities (and related financial instruments, such as options or derivatives linked to the company's securities) to the company within two trading days of the transaction.
- The company files an official report with the stock exchange within three trading days of receipt of the report.

On receiving an insider's report, the exchange publishes this information in anonymised form (for example: "A non-executive member of the board of directors. Transaction executed by a related natural person"). The public can therefore see that a management transaction has been carried out, but not specifically by whom.

Swiss listed companies are required to maintain systems to collect, verify, and promptly transmit these disclosures.

The purpose of this obligation is to promote transparency and market integrity by enabling regulators, investors, and the public to monitor the trading activities of insiders who may possess insider information.

Insider Trading Policies

Insider trading policies are not required by law for public companies, but it can be assumed that the vast majority have adopted a policy as it is market practice.

In addition, it is standard procedure for listed companies to implement black-out periods or trading bans as a preventative measure against insider trading, during which certain individuals are prohibited from trading in the company's securities. These prohibitions on trading are imposed on members of the board, management, and designated key employees and are usually based on, and regulated in more detail in, the insider trading policy.

Ordinary black-out periods are trading bans enacted prior to the announcement of financial results and extend for a brief cooling-off interval after the announcement.. Under the FinMIA and FinMIO revision currently pending, these ordinary black-out periods will most likely become mandatory.

Extraordinary black-out periods are established when the disclosure of a specific insider information is postponed, for example, during an M&A transaction.

In addition, insider trading policies include the group of individuals classified as insiders, the pre-clearance mechanism, and the reporting of trades.

Trading Plans

Swiss doctrine considers securities dealings under a pre-established (or pre-defined) trading plan exempt from insider trading prohibitions since there is no causal link between the possession of the insider information and the trading decision. The transaction order embodied in such plan had already been placed before knowledge of the insider information was obtained. Pre-established trading plans are not specifically regulated under Swiss law.

Ad Hoc Publicity

To prevent insider trading and ensure the equal treatment of all investors, the self-regulatory frameworks governing Switzerland's stock exchanges mandate the prompt disclosure of any non-public material price-sensitive information that could materially affect share prices (known as ad hoc publicity under Article 53 of the SIX Listing Rules). The general guidelines for ad hoc announcements (SIX Directive on Ad hoc Publicity) include:

- The announcements must be explicitly flagged as ad hoc announcements.
- Publication must take place outside trading-critical periods.
- For violations of the ad hoc publicity guidelines, the stock exchanges may impose significant sanctions, which vary from a reprimand to financial penalties up to CHF10 million, publicising the violation through a press release, and ultimately, delisting the company.
- A company can postpone ad hoc publications under specific conditions (Article 54, SIX Listing Rules).

Duty to Report

Swiss law imposes a strict duty on FINMA-supervised individuals and entities (but not on unregulated issuers and market participants) to immediately report to FINMA any incident that is of substantial importance to the supervision, such as the reasonable suspicion of insider trading.

The failure to comply with this reporting duty can lead to administrative sanctions.

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