Annex 1: Regulatory Process and Regulatory Implementation

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1 Introduction

1.1 Background

In the wake of the financial crisis, efforts were initiated to secure the stability of the financial system, preserve competitive parameters, secure market access, and strengthen investor protection. The trend towards international harmonisation of such endeavours poses new challenges to Swiss financial market regulation. Among other things, it has become clear that Switzerland continues to have problems in recognising and implementing international standards, particularly from a temporal perspective. On the one hand, this may be attributed to the democratic nature of the Swiss legislative process. On the other hand, however, when adopting international standards Switzerland makes too little attempt to arrive at a basic consensus between the authorities, the political establishment, and the norm addressees. The regulatory process and the implementation of regulation therefore need to be optimised if competitive parameters and market access are to be preserved. Expedient, broad-based, and efficient regulation of high quality is crucially important to the future of the Swiss financial centre.

1.2 Review mandate

On the basis of these findings, a review was carried out to establish the individual areas of the regulatory process – including the regulatory implementation phase – in which the desired optimisation might be achieved. Specifically, the potential for improvement was examined in the following areas, which essentially follow the chronology of the regulatory process:

1. Involvement of market participants (Section 3)
2. Early recognition of regulatory developments (Section 4)
3. Regulatory impact assessment / impact analysis (Section 5)
4. Evaluation of the need for regulation (Section 6)
5. Legislative procedure: hierarchy of norms (Section 7)
6. Regulatory implementation (Section 8)

An overall picture of the results of the review of these different areas is provided in summary form below. As key aspects that affect the entire regulatory process, the involvement of market participants and the regulatory impact assessment (RIA) are dealt with at the beginning of the report.

2 The regulatory process – principles

2.1 Definition of the regulatory process

Formally speaking, legislative initiatives may be triggered either by the Federal Assembly (Article 160 FC) or by the Federal Council (Article 181 FC). In the context of the formally defined regulatory process (i.e. the regulatory process in the narrower sense), the onus is on the Federal Council to determine and set out financial market and regulatory strategies. In practice, this process is often initiated in response to political developments as a result of parliamentary motions, but may also be initiated by the federal administration or by market participants themselves. The Consultation Procedure Act stipulates that the cantons as well as interested associations and circles have to be included in a specific phase of this regulatory process. Whereas the regulatory process is formally laid down during the consultation and parliamentary deliberation stages, the concept stage and the regulatory implementation stage are not structured, particularly from a formal perspective. For example,

the monitoring of market behaviour and regulatory trends prior to the regulatory process (in the narrower sense) is not currently subject to any standardised or formal processes.

This report is based on a comprehensive definition of the regulatory process (i.e. the regulatory process in the wider sense), which includes not only the monitoring of market behaviour and regulatory trends in the international environment, but also the associated review of the need for regulation, and the actual legislative procedure as per the Consultation Procedure Act and the Parliament Act. The comprehensive regulatory process includes the regulatory impact assessment (RIA), including the analysis of regulatory consequences that must take place at every stage of the process. The regulatory process also includes regulatory implementation, which is understood to mean the execution of regulation in the form of ordinances, circulars and newsletters issued by the supervisory authority, as well as (formally recognised) self-regulation.[1] By contrast, the actual implementation of regulatory requirements by the norm addressees is not covered by this concept of regulatory implementation.

2.2 International involvement in the regulatory process

Intensive regulatory activity in the EU and the USA in recent years has forced the Swiss financial centre to adjust its financial market regulation in order to secure market access and preserve its competitiveness. In other words, the regulatory process in Switzerland can no longer be managed and understood at a (purely) national level.

International legal developments and international obligations are also increasingly acting as triggers for new domestic legislative initiatives, with international standards having a growing impact on national legislation. In addition, it is now increasingly expected by the relevant standard-setting organisations or bodies that Switzerland will implement these standards too. Switzerland is represented on international standard-setting bodies such as the OECD, the FSB, the FATF, the Basel Committee for Banking Supervision, the IAIS and the IASB. In 2013 it was able to participate in the Finance Track of the G20 and thereby gather valuable insights into the way the G20 functions.

For reasons of competitiveness, a number of financial market participants are at times reliant on Swiss legislation being adjusted in line with international developments in a way that creates equivalency (thereby ensuring the preservation of market access). However, adjustments to Swiss regulation may also be required with a view to protecting the reputation of the Swiss financial centre.

Switzerland's active participation in international bodies has turned out to be crucial. In addition, regulations typically evolve within these bodies rapidly and via processes that have little structure. Occasionally, the adoption of these regulations can be imposed upon Switzerland through the threat of sanctions. The Swiss authorities are keen to have a say in the structuring of international standards. Switzerland's positioning in the international environment can be greatly improved if the stance it adopts on a particular issue has been set out in advance and agreed with all relevant authorities.

The momentum of both international legal developments and domestic developments is increasingly putting great time pressure on legislative procedures. In some cases, market participants and experts from the world of academia are involved in the process at too late a stage, which can lead to draft legislation having deficiencies from the standpoint of practicability. Getting to grips with the material in question in an in-depth way is becoming more difficult, with complex issues having to be mastered – including by parliament – within a short space of time. When adopting international standards, it is important to identify potential room for manoeuvre. At the same time, it needs to be ensured that a systematic

[1] Cf. also diagram in Appendix

approach to financial markets regulation is not abandoned, and the quality of legislation remains intact.

2.3 The basis of financial market policy

The starting point in this respect is the constitutional mandate to the Confederation (and the cantons) to preserve the interests of the overall economy and create favourable parameters for the private sector.[2] The objectives and principles of financial market policy set out in the Federal Council's Report of 19 December 2012[3] are based on this mandate. These objectives and principles are drawn on here as the basis for efficient and effective regulation.

In its report, the Federal Council first of all declares the high quality of services, the stability of the economy, and the integrity of the Swiss financial centre to be **objectives of financial market policy**. As part of a constitutional review of the regulatory process, the financial market policy objectives overall are perceived as being in the public interest.

In addition, the Federal Council also lays down general as well as specific **principles** for the regulation of the financial centre in its pursuit of the financial market policy objectives:[4]

General principles:

- Preserving and where possible improving the appeal of Switzerland as a location
- Striving for a level playing field when setting parameters
- Being aware of international freedom of manoeuvre
- Minimising risks
- Proportionality in the use of political instruments

Specific principles:

- Economic necessity and individual responsibility
- Weighing up the costs and benefits for market participants and introducing differentiated regulation
- Reviewing regulatory needs and the impact of existing and new regulations in a systematic and ongoing way
- Ensuring transparency and comprehensibility of regulation and involving all relevant parties
- Coordinating the content and timing of regulations
- International standards
- Guaranteeing legal security

By way of making a recommendation for the improvement of the quality of national regulation, the OECD Council issued a checklist for the regulatory decision-making process back in 1995.[5] [6] On the basis of this checklist, the Council issued specific recommendations on regulatory policy and governance in 2012.[7] The regulatory principles and objectives of the Confederation are largely aligned with those of the OECD in terms of their content.

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[2] Article 94 paras 2 and 3 FC; SR **101**

[3] Report on Switzerland's financial market policy of 19 December 2012 (hereinafter "Federal Council Report"); see http://www.efd.admin.ch/dokumentation/zahlen/00578/02679/index.html?lang=en

[4] Cf. Federal Council Report, pp. 17 et seq. for the detailed content of these principles and objectives

[5] Recommendation of the Council on Improving the Quality of Government Regulation, 9 March 1995; http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=128&InstrumentPID=124&Lang=en&Book=False

[6] The OECD Reference Checklist for Regulatory Decision-Making: http://www.oecd.org/regreform/regulatory-policy/35220214.pdf

[7] Recommendation of the Council on Regulatory Policy and Governance, OECD 2012.

3 Involvement of market participants

3.1 Existing basis

The involvement of market participants in financial market regulation[8] is already enshrined at a constitutional level (Article 147 FC). The specific detail regarding the process of consultation is set out in the Consultation Procedure Act (Article 3, Article 2 para. 1 CPA).[9]

The Financial Market Supervision Act[10] (FINMASA) then obliges the Swiss Financial Market Supervisory Authority to ensure a transparent regulatory process and the appropriate participation of all involved parties (Article 7 para. 4 FINMASA). FINMA has further concretised this statutory requirement in its Guidelines on Financial Market Regulation (FINMA Guidelines)[11].

With regard to the involvement of market participants in regulatory planning, the Guidelines for Financial Market Regulation of the FDF[12] (FDF Guidelines) referred to in the Federal Council Report envisage the regulatory authorities providing information about planned and pending regulatory projects. In addition, affected parties should be involved in the planning of regulation in an appropriate way (Section 8, FDF Guidelines). In addition, FINMA should provide information on pending regulatory projects and their progress as early as possible (Section 14, FINMA Guidelines).[13]

The principle of participatory financial market regulation is also recognised internationally. In its Recommendation on Regulatory Policy and Governance, the OECD Council recommends that countries "adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest."[14]

3.2 The challenge of implementation

3.2.1 Putting the basic principle of participatory financial market regulation into practice

With the exception of the consultation procedure envisaged in the Consultation Procedure Act, the normative obligation to involve market participants has not been more specifically formulated in Switzerland. A systematic mechanism whereby market participants can be involved outside of formal consultation (as per the Consultation Procedure Act) is lacking.

Significant time pressure can lead to situations in which regulatory planning – as well as the elaboration of regulatory drafts – only takes place within the federal administration, without the appropriate involvement of affected parties at an early stage. Although Switzerland can at least draw on the experience and knowledge of the authorities when faced with the dynamism of international legal developments, the specialist knowledge of market participants at a practical level is lost in such situations.

On the other hand, the involvement of market participants must not lead to paralysis or to any one-sided influence on the planning or process of regulation (i.e. the danger of

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[8] Depending on the extent to which regulatory initiatives affect them, non-financial companies may also be included in this process, e.g. in their capacity as issuers.

[9] SR **172.06**

[10] SR **956.1**

[11] FINMA 07/13; http://www.finma.ch/d/regulierung/gesetze/Documents/leitlinien-finanzmarktregulierung-20130703-d.pdf [not available in English]

[12] https://www.sif.admin.ch/sif/en/home/dokumentation/dokumente-nach-thema/finanzmarktregulierung-und--aufsicht.html

[13] Cf. also Legislative Guidelines of the Federal Office for Justice, e.g. Section 1321.1 GL BJ 2007; https://www.bj.admin.ch/dam/data/bj/staat/legistik/hauptinstrumente/gleitf-d.pdf [not available in English]

[14] OECD Recommendations 2012, Section I.2., p. 6

"regulatory capture"), but should be aligned with the public interest. If Switzerland is to end up with regulation that is in keeping with its regulatory principles, market participants must be in a position – particularly at the early recognition stage – to avoid conflicts of interests, or must at least disclose such conflicts. The early involvement of market participants should also not lead to a situation in which better-organised entities obtain an advantage and influence regulation in a way that is favourable to them. The interests that are specific to a market participant should not be raised until the consultation stage.

Nevertheless, it may be stated that the accessibility of the authorities and the involvement of interested parties is more pronounced in the Swiss regulatory process that is customary elsewhere. This characteristic should be preserved.

3.2.2 The Financial Centre Forum

Switzerland's "Financial Centre Forum", which is chaired by the State Secretariat for International Financial Matters (SIF), and is responsible at a strategic level for fulfilling early recognition functions in particular, currently involves the SNB, FINMA, the SBA, SIX, the SIA, the SFAMA, and now independent asset managers too. Depending on the topic, the Financial Centre Forum may also bring in other interest groups if need be.

The task of the Financial Centre Forum is to ensure the involvement of affected market participants when designing parameters and implementing financial market policy measures by means of institutional collaboration between the authorities and the private sector, thereby achieving needs-oriented and differentiated solutions.[15] In addition, Switzerland's financial market policy and the associated intention of the Federal Council should be communicated in a consistent way so that it is perceived as credible outside Switzerland. For its part, the FDF should involve the private sector and collaborate with the DFA – in particular Swiss representative offices abroad and Presence Switzerland – in drawing up and implementing appropriate communication strategies and concepts.[16]

3.3 Potential for improvement

3.3.1 Expansion of the institutionalised dialogue

In order to keep pace with regulatory developments in other financial markets, while at the same time drawing up regulation for the Swiss financial market which is credible, nationally accepted, and internationally recognised (and where appropriate achieving equivalency), the above-mentioned shortcomings must be eliminated at the various individual levels of today's regulatory process. A key priority is the appropriate involvement of market participants.

The early recognition of regulatory developments both in Switzerland and abroad can be significantly optimised through an ongoing, institutionalised dialogue between authorities, market participants, the world of academia, and where appropriate representatives of parliament. This dialogue should comprise a rolling form of regulatory planning with the involvement of market participants, involving the setting of priorities that take into account the globalised environment. The authorities must structure this dialogue transparently and organise it in a way that ensures the appropriate representation of all involved parties. The authorities pursue a transparent communication policy with respect to the financial market strategy and planning of the Federal Council and the positioning of Switzerland in international bodies.

In addition, the basic strategy for financial market regulation as laid down by the Federal Council must be developed continuously as part of the ongoing dialogue with market participants and experts. Due to their networks and the corresponding ease with which they can obtain information, market participants can make an important contribution to the early

[15] Cf. Federal Council Report, Section 4.1.2, p. 24

[16] Cf. Federal Council Report, op. cit.

recognition of a need for regulation. As a result, the regulatory process can be initiated at an early stage of a requirement assessment.

3.3.2 Proactive communication

In addition to an expanded dialogue, the involvement of stakeholders on a broad front can also be ensured through a proactive or offensive communications strategy that accompanies the regulatory process as a whole. Moreover, the early recognition of regulatory projects is likely to result in market participants and the political powers-that-be becoming heavily involved in the regulatory process at a stage where adjustments to the course of regulation can still be made.

Communications effort in this area should continue to include informal appearances by FDF/FINMA representatives in the specialist press, at specialist conferences, and at meetings of associations. The onus is on the latter to ensure that the information communicated to them is duly passed on to association members.

It has therefore been suggested that the FDF – and possibly also FINMA – should make institutionalised appearances before a specialist public on an annual or semi-annual basis in the future, with a view to providing information on current or future regulatory initiatives and where appropriate on other topical financial market issues.

The authorities should also provide more transparent communication (during the consultation process in particular) with respect to the evaluation and relative weighting of opinions submitted by the norm addressees affected by regulation. This may be achieved through a dispatch, but it can also be achieved through informal discussions with affected parties.

3.3.3 Financial Centre Forum as point of coordination

In future, the Financial Centre Forum should act as the point of coordination for the dialogue on regulatory issues between the authorities and the various market participants. Subsidiary working groups should be formed to draw up findings and recommendations on behalf of the Financial Centre Forum, whereby the composition of these subgroups may vary according to the issue being tackled. The expanded institutionalised dialogue at the early recognition stage should be coordinated with the mandate of the Financial Centre Forum[17]. The findings that emerge from this dialogue need to be utilised and managed, while the organisation and the mandate of the Financial Centre Forum should be specified with this in mind. The composition of the Forum should be adjusted so that all involved market participants are appropriately represented.

4 Early recognition of regulatory developments

4.1 Background

The regulatory process in a wider sense is not clearly specified with respect to the procedure to be followed and the involvement of affected parties.[18] There is absence of guidelines for a standardised procedure to identify regulatory trends at an early stage. In view of the time pressure that is increasingly becoming a problem given the international context of regulatory projects, an institutionalised early recognition mechanism would have the positive effect of enabling the corresponding regulatory trends to be identified at an early stage so that the appropriate implementation concepts can be drawn up promptly.

[17] Cf. "Strategic directions for Switzerland's financial market policy - Report in response to the Graber postulate (09.3209)" (Report on the Graber postulate): pp. 60 et seq.

[18] Cf. Section 2.1

4.2 The "FFA" project

In its report in response to postulate 09.3209 tabled by Konrad Graber, a member of the Council of States, on 16 December 2009 ("Strategic directions for Switzerland's financial market policy"[19]), the Federal Council found that regulatory measures in other key financial markets, particularly in the US and EU, were increasingly – and at increasingly short notice – having an impact on Switzerland, and that Switzerland's early recognition mechanism for regulatory developments needed to be strengthened accordingly. The stated aim of the FFA project (FFA: "Früherkennung Finanzmarktregulierung Ausland", or "Early recognition of financial market regulation abroad") was to facilitate the exchange of information via a closed electronic platform. This was conceived as a continuation of collaboration between the financial centre, the authorities, and the government to improve parameters and strengthen the competitiveness of the Swiss financial centre.[20] The FFA system, to which selected members of the authorities and industry associations have access, has the potential to be highly functional, but it has become clear that confidential information continues to be relayed only bilaterally, which is why the benefits of this platform have been minimal and it is hardly used.

4.3 Potential for improvement

4.3.1 Positioning of Switzerland

The authorities should intensify their efforts to participate in international bodies and in the development of international standards. To this end, the specialist knowledge of globally networked market participants should also be brought to bear as part of the institutionalised dialogue. When it comes to contributing to international standards, Switzerland's objectives and the standards that it considers to be crucial should likewise be discussed in advance as part of the institutionalised dialogue.

By ensuring a broad-based regulatory strategy and planning of this kind, the authorities will be able to position Switzerland in international bodies for the elaboration of international standards. The involvement of the market, the world of academia, and if need be the political establishment will provide the authorities not only with an enhanced degree of credibility in international negotiations, but also with the domestic support needed to make binding assurances where necessary in international bodies. Binding assurances should only be given if Switzerland benefits from the corresponding reputational gain, however. They should not restrict Switzerland's financial market strategy or regulation.

4.3.2 Early project outline

The enhanced institutionalised dialogue can also be strengthened by means of a project outline published at an early stage. This (non-justiciable) project outline should also include a concept for the involvement of market participants that sets out in particular how – and at what stage of the regulatory process – specialists should be welcomed and market participants consulted and involved in the fine-tuning process (e.g. at round table discussions, hearings, specialist group discussions). The recommended project outline, which should be established during the project planning phase as per the legislative guidelines of the Federal Office of Justice,[21] differs from the norm concept.[22]

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[19] Report on the Graber postulate; p. 61

[20] Report on the Graber postulate: pp. 60 et seq.

[21] Cf. margin no. 61 et seq. of the FOJ's Legislative guidelines: modules for acts, ordinances and parliamentary initiatives [see https://www.bj.admin.ch/dam/data/bj/staat/legistik/hauptinstrumente/module-d.pdf]

[22] Cf. margin no. 159 et seq. of the FOJ's Legislative guidelines: modules for acts, ordinances and parliamentary initiatives

On the basis of the recognised regulatory principles[23], the authorities can explain why the key concerns of market participants are being assessed in the way they are. This also has the effect of promoting transparency and understanding, as well as increasing the acceptance of regulation. Furthermore, market participants would be given the chance to prepare for the impending regulation at an early stage. For their part, market participants must make the relevant resources available for the sounding-out process, the impact analysis, and the regulatory work.

5 Impact analysis and regulatory impact assessment (RIA)

5.1 Existing basis[24]

Whereas an impact analysis has to prospectively evaluate the potential repercussions of the introduction of new legislation generally – and in particular the costs and benefits for individual market participants and the financial market as a whole – at every phase of the regulatory process, the formal regulatory impact assessment (RIA) involves a comprehensive evaluation of the need to act, alternative regulations, and the expediency of implementation. The results of the impact analysis are published in a report and set out in summary form in the dispatch.

The legislative guidelines of the Federal Office of Justice explain that an impact analysis must take place as early as the concept stage, and should have an influence on the shape of legislation as the draft develops. The execution of an impact analysis may therefore prove necessary at any point of the regulatory process in a wider sense.

Weighing up the costs and benefits of regulation in the financial market sphere is specifically envisaged in the Federal Council's financial market policy.[25] This policy also touches on the "Guidelines for Financial Market regulation" drawn up by the FDF in 2005, which to a certain extent represent a checklist for the elaboration of an RIA.[26]

When pursuing its regulatory course, FINMA must apply regulatory principles that also take into account the cost impact on involved parties (Article 7 FINMASA).

The obligation to carry out impact analyses (and in particular draw up an RIA) when creating legislation is based on the Federal Constitution[27] and the Parliament Act[28]. In addition, the Federal Council issued guidelines for drawing up an RIA back in 1999. In 2013, the EAER approved a "Regulatory impact assessment handbook" [29]. According to this handbook, an RIA must address the following points:

- Necessity and possibility of state intervention
- Repercussions for the individual social groups
- Repercussions for the overall economy
- Alternative regulations
- Expediency in execution

[23] Cf. Section 2.3

[24] The legal basis of RIAs are described in the following website: http://www.seco.admin.ch/themen/00374/00459/00465/04056/index.html?lang=de (25 April 2014) [not available in English]

[25] Cf. Federal Council Report, key message, p. 18

[26] https://www.sif.admin.ch/sif/en/home/dokumentation/dokumente-nach-thema/finanzmarktregulierung-und--aufsicht.html

[27] Cf. Article 5 para. 2 and Article 170 FC

[28] Cf. Article 141 para. 2 ParlA; SR **171.10**

[29] Cf. http://www.seco.admin.ch/themen/00374/00459/00465/04052/index.html?lang=de (25 April 2014).

- Cartel Act Article 46[30] (CartA; review of federal bills that are likely to influence competition)

According to the recommendations of the OECD[31] too, impact analyses should evaluate whether regulation is necessary, how it can achieve the political objectives in the most effective and efficient way, and take into consideration alternatives to regulatory solutions.

One of the greatest challenges of impact analyses is the procurement and evaluation of relevant data. Ideally data should be obtained empirically, be of high quality (validity, reliability, accuracy), be taken from neutral and independent sources (no distortion by interested parties), have a high degree of meaningfulness in its application, and require low resources for its capture. In addition, an RIA must be objective and balanced.

5.2 Impact analyses and RIAs as regulation parameters

Regulatory projects should not be embarked upon before the potential costs and benefits have been weighed up. Regulation must be proportionate. At the same time, it must take account of different business models and therefore be differentiated in its structuring. The impact analyses and the associated RIA represent a standardised toolkit for reviewing the compatibility of a regulatory project with these principles.

As part of the *clarification of the need for regulation*, the decision as to whether such a need exists should be based on overarching economic cost/benefit considerations. At this stage too there should be an institutionalised dialogue between the authorities and market participants, and the impact and probable effectiveness of the planned regulation should be reviewed. This dialogue should accompany the legislation process right up until its conclusion, so that the results can be drawn on during the impact analyses and the associated RIA.

After a decision in favour of regulation has been made, the ensuing regulatory process should be supported by an impact analysis that *evolves in parallel with legislation*. In other words, impact analysis considerations should be continuously drawn on as the legislative draft develops. The ongoing process of impact analysis with a view to drawing up an RIA must involve an overall economic perspective and should set out the corresponding costs and benefits. The economic consequences for market participants and the competitiveness of the Swiss financial centre should be explained, and a comparison made with the results of regulation implemented in competing financial centres.

Moreover, the impact analysis should also draw on the evaluation of *existing regulations* (review clauses). In this context, it should be reviewed whether the objectives set were actually achieved. An example of this is the review clause that was added to the TBTF legislation, which allows for the impact of the legislation and regulation to be scrutinised at regular intervals and adjustments made insofar as these are deemed necessary.

5.3 Regulatory level

A systematic impact analysis is essentially required for any legislative adjustment. An impact analysis should likewise be carried out in the case of ordinance changes, if such changes would have the effect of creating legal parameters that would in turn have macroeconomic repercussions. As a general rule, the more detailed the regulations in an ordinance and the greater the restriction of freedom of regulated entities, the greater the need for an impact analysis. Another factor likely to be crucial is the question of whether there is a very broad consensus on the adjustments envisaged in the ordinance, or whether the proposed changes are controversial. Finally, an impact analysis should also be carried out if FINMA is issuing

[30] SR **251**

[31] RIA handbook (http://www.seco.admin.ch/themen/00374/00459/00465/04053/index.html?lang=de) not available in English]

ordinances or circulars that have the potential to trigger the corresponding macroeconomic consequences, as although in formal legal terms circulars may only represent an interpretation of existing legal parameters by the supervisory authorities, to all intents and purposes they have normative character.

5.4 Implementation

From the perspective of the industry, the overriding impression with respect to new regulatory projects is that – despite the established fundamental parameters – the RIA (referred to in the dispatch) is only envisaged to take place at the end of the regulatory process, and is therefore rather removed from the heart of the project. In the industry's view, genuine interaction between impact analysis and the selection of regulatory instruments appears to be lacking. The industry is likewise unhappy about the lack of involvement of market participants capable of evaluating the impact of various measures from the industry perspective. However, there is no such thing as a specific point in time that is ideal for the RIA in every respect. In the early phase of the legislation process, before a preliminary draft of the proposed legal provisions exists, there is still great uncertainty over the precise structuring of legislation, and therefore over the potential repercussions of the measures to be taken. In later phases of the legislative process, once formulated drafts and commentaries on the legislative provisions are available, an analysis of repercussions is easier to undertake. By this stage, however, the alternative options that it makes sense to explore are often much more limited than they would have been in the earlier phase of legislation.

The tasks involved in carrying out an RIA are becoming more challenging and more comprehensive, not least due to regulatory developments abroad. The implementation of normative guidelines with respect to the RIA therefore relies on market participants making relevant impact analysis information available and contributing as a "sounding board" for provisional results. In addition, the provision of adequate resources should be envisaged by the authorities.

5.5 Potential for improvement

5.5.1 Early execution

For an impact analysis to have real benefits, it should be carried out in the early stages of the regulatory process. Indeed, it is recommended that analyses should be commenced in the very first phase of the legislative process (elaboration of project outline, report) with a view to carrying out a later RIA. The analysis can then be carried out in greater depth in the various project phases of the legislative process. The initial results that emerge during the consultation period should be set out in the explanatory report, thereby ensuring that these are already available as part of the consultation documentation during the interdepartmental discussion phase. The results of the concluding phase of the RIA should be set out in the dispatch or in the formal application to the Federal Council.

However, the need for early and ongoing analysis of the repercussions of a regulatory project should not obscure the point that the principle of proportionality in financial market policy also applies to impact analyses and the RIA itself, which means that the issue of costs and efficiency need to be factored into considerations in this context too.

If more than 10,000 companies are likely to be affected by a regulatory project and they are potentially facing a greater administrative burden, a quantitative assessment of the regulatory costs should also be carried out as part of the RIA. A qualitative assessment in the form of an SME compatibility test ("SME test") should likewise be carried out.

5.5.2 Features of a successful RIA

The experiences of recent years with this instrument have shown that various factors need to be taken into account when conducting an RIA. A crucial factor is the scope of authors involved in the process – if need be, the outsourcing of at least a part of the RIA may be

essential. Cost/benefit assessments must be transparently presented, as well as quantified where possible. Moreover, the language used in the RIA must remain comprehensible for a non-specialist (or less specialist) audience.

Just like any analysis, an RIA will benefit from both interaction and critical reflection. It therefore makes sense to involve a number of different authorities and industry representatives when drawing up an RIA. The outsourcing of the drafting of the RIA (e.g. to a university) may be the only way forward if there is little specialist knowledge of the subject, if great resistance to regulation can be expected, or if the administration lacks the necessary resources. However, in such scenarios the independence of the commission experts should be ensured to the greatest degree possible. If transparent quantitative statements are to be arrived at, cost/benefit assessments will need to be based on the corresponding available statistical data to the greatest extent possible. Where this cannot be done, the authors should explain how (and why) unquantifiable elements have been evaluated and weighted. The assessments and evaluations presented must be comprehensible.

6 Evaluation of the need for regulation

6.1 Indicators of a need for regulation

The following indicators may indicate a need for regulation[32]:

1. Events with particularly far-reaching repercussions;
2. New developments or changes in the financial market that could take place either in Switzerland or abroad;
3. Regulation introduced by other countries and international bodies;
4. Identification of a difference between the current status quo and the objectives of financial market policy (purely domestic indicator).

Problematic individual incidents that may occur in the financial market are therefore not in themselves regulatory indicators. The findings arrived at through the early recognition of regulatory developments as part of the institutionalised dialogue are also useful in the process of identifying regulatory indicators.

6.2 Identifying a need to act

The question of whether there is an actual need for regulation (as opposed to just indications of such a need) should be evaluated on the basis of the Confederation's financial market policy, as set out in the Federal Council Report of December 19, 2012.[33] The principles drawn up by the Federal Council should be drawn on in this respect.[34] The objectives and regulatory principles of financial market oversight as set out in the Financial Market Supervision Act (FINMASA[35]) are likewise valid in this context.

The need for regulation should be measured and reviewed on the basis of these principles. The aims of this "principle compatibility review" are to ensure that the evaluation of the need for regulation is objective and to improve its comprehensibility. Viewed in this light, the principles act as a kind of filter, ensuring that unnecessary regulatory processes are avoided.

[32] Or indeed a need for deregulation.

[33] Cf. Federal Council Report, Section 3, pp. 17 et seq.

[34] Cf. Section 2.3 above

[35] SR **956.1**; Article 5 and Article 7

6.3 Potential for improvement

6.3.1 Focusing on key priorities

The risks associated with a regulatory adjustment and the corresponding costs and benefits (regulatory impact assessment) need to be analysed in detail. In other words, as well as striving to deliver regulation that is highly effective and differentiated, the regulatory authorities should seek to ensure that the repercussions and costs for the affected parties (providers and clients) are evaluated and weighed against the anticipated benefits to the greatest degree possible. This is in keeping with the first recommendation of the OECD Council, namely that the economic, social, and environmental benefits of regulation must justify the costs involved.

When reviewing the need for regulation, all the objectives of financial market policy – i.e. investor protection, protection of the financial system, and competitiveness – should be taken into account. At the same time, whether or not (and how) these financial market policy objectives can be achieved with the proposed tools should likewise be reviewed as part of the impact analysis.

For all the above reasons, it makes sense to specify the following principles as part of the regulatory process. The other principles nonetheless retain their validity:

1. Weighing up the **costs and benefits** for market participants and possible ways of achieving differentiated regulation: The potential legal and economic consequences of planned regulations (at both national and international level) should be empirically assessed in advance as part of a standardised regulatory impact assessment when formulating the new regulations. These consequences should also be taken into account at all stages of the legislative process.
2. **Proportionality** in the use of political instruments / economic necessity and self-responsibility: In-depth and balanced analysis of the proportionality of regulation (expediency, necessity, and subsidiarity) makes it easier to align the issue of financial centre competitiveness with the need for investor protection and the need to protect the financial system. A regulatory measure must be a suitable tool to achieve the desired regulatory objective.
3. **International standards**: The key international standards should be defined within the framework of the institutionalised dialogue. Their adoption should be in harmony with the fundamentals of principle-based legislation, whereby exceptions should remain permissible in the event of a qualified conflict of interest, or if an exception would be in the interests of the economy as a whole. One way of judging the need for international standards to be adopted could be their actual implementation in countries with equivalent registration and comparable markets.
4. Being aware of **international freedom of manoeuvre**: Where freedom of manoeuvre exists, specific national characteristics should be taken into account. If Switzerland can define in advance which international standards it needs to adopt, while at the same time preserving its specific national features, it can strengthen its competitiveness as an international finance centre. A "Swiss finish", i.e. the passing of regulation that goes beyond international standards without a good reason for doing so, should be avoided. For example, regulatory initiatives that deviate from international standards may make sense if the resulting economic benefit justifies such a deviation.
5. Preserving and where possible improving the **appeal of Switzerland as a location**: For a location to be attractive, it must effectively protect both customers and the system as a whole. Where investor protection in concerned, the necessity of a regulatory measure should be empirically proven.

6.3.2 Implementation

The regulatory process should therefore only be initiated once a clear need has been identified and with a view to meeting the three objectives of financial market policy, i.e. it should be initiated if:

1. on the basis of indicators (e.g. events, regulation by international bodies) and
2. based on the principles of financial market policy
3. a need for regulation is identified which
4. is necessary if the objectives of financial market policy are to be achieved.

7 Legislative procedure

7.1 Hierarchy of norms

The fundamental basis here can be found in the *Federal Constitution*. Of particular significance are Article 163 FC on the forms of legislation of the Federal Assembly, Article 164 para. 1 FC on the definition of "important legislative provisions" and Article 164 para. 2 FC on legislative delegation. Similarly relevant is Article 182 FC on the Federal Council's general powers of execution and powers of ordinance. Of great importance to the political process is Article 141 FC, according to which federal laws are made subordinate to possible referendums. Additionally worthy of mention are the legislative competencies of the Federal Supreme Court and Federal Administrative Court as per Article 188 et seq. FC: While these bodies may not be able to review the constitutionality of federal acts, they can review the lawfulness of all norms at a lower hierarchical level. Furthermore, through their decisions in individual cases these bodies create pertinent case law, which in turn serves as a basis for interpretation of the entire legislative canon.

These foundations are then further concretised in a number of *federal acts* (e.g. Article 7 et seq. and Article 48 of the Government and Administration Organisation Act (GAOA)[36]. FINMA likewise has the power to issue ordinances where this is prescribed in financial market legislation, and to issue circulars on the application of financial market legislation (Article 7 FINMASA; cf. also Article 23 of the Organisation Ordinance for the Federal Department of Finance (OrgO-FDF)[37]. Moreover, Article 7 Paragraph 2 of the FINMASA sets out the key regulation principles that apply to FINMA, which include not least the express requirement for regulation to be differentiated (letter c).

According to the *Organisational Ordinance* of the Federal Office of Justice (FOJ), this federal department is entrusted with the specific task of reviewing all drafts of legislative edicts for their constitutionality and lawfulness, for their conformity and compatibility with existing national and international law, for their accuracy of content and – in collaboration with the Federal Chancellery – for their linguistic and textual appropriateness as well as any technical legislative defects ("preventative legal monitoring"[38]). The *legislative guidelines* of the FOJ contain the rules that have to be respected by the federal administration when drawing up legislation on behalf of the Confederation. All parties involved in a legislative procedure have to respect the general requirements.

[36] SR **172.010**

[37] SR **172.215.1**

[38] Cf. Article 7 para. 3 OrgO-FOJ; SR **172.213.1**

7.2 Self-regulation

Another form of regulation – albeit one that lies outside the state hierarchy of norms – is the instrument of self-regulation, which has long been recognised in Switzerland. It is important to distinguish clearly between the different types of self-regulation that exist:

In the case of voluntary, free, or genuine self-regulation, private entities create regulations for a particular circle of private sector entities (e.g. the specialist information of the Swiss Funds and Asset Management Association) without any instruction or input from the state.

In the case of delegated and mandatory self-regulation, an existing decree delegates to a particular sector the *possibility* of drawing up self-regulation (=delegated SR) or issues a particular *instruction* to do so (= mandatory SR).[39]

Recognised (or "steered") self-regulation is deemed to exist if the self-regulation in question is recognised by FINMA as a minimum standard on the basis of Article 7 para. 3 FINMASA. As a result, this form of self-regulation requires supervisory validity for a wide circle of entities (e.g. the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 08). Self-regulation cannot and should not take the place of national legislation. It should also not be used as a replacement for the correct norm level. Moreover, self-regulatory norms are typically not recognised as legislative norms abroad, particularly in the US and the EU, which means there can be no official recognition of the equivalency of Swiss regulation in this context. Used properly, however, self-regulation is essentially an acknowledged and proven instrument in Switzerland.

7.3 Implementation – norm concept

In the regulatory process, the hierarchy of norms and the principles of legislative delegation must be taken into account. The key content of regulation, the fundamental decisions and the limits of delegation must be enshrined in formal law. In the interests of legal security and acceptance, the legislative basis should be formulated in such a way that the implementing authority has clear guidelines when it comes to applying the law. At the same time, however, the principle-based approach should essentially be retained.

Switzerland's experience in implementing existing regulations with respect to the hierarchy of norms and the legislation procedure has revealed a number of problem areas. The provisions of acts and ordinances are often formulated in an insufficiently specific way, while decisions have also been delegated to a lower level of legislation at the outset. Conceptual principles for self-regulation have been unclear, or in many cases have been disregarded. The prescribed roles, tasks, and competencies of the relevant authorities have sometimes been confused, or the authorities have not always fulfilled their roles fully, e.g. due to the confidentiality of dossiers with the Federal Council.

Switzerland's lack of engagement with conceptual planning at an early stage has led to a situation where regulation is being issued at the "wrong" norm level. In the financial market area in particular, however, where extremely complex material has required regulation to be drawn up under exceptional time pressure and with many different stakeholders involved, the elaboration of a norm concept is essential. A norm concept of this kind provides the basis for drawing up a workable foundation for a preliminary draft at a later stage, and envisages a structured approach in the *problem definition - objective formulation - solution selection* process phases (for more detail on this aspect see "Acts module" of the FOJ's Legislative guidelines, margin no. 83 et seq., not available in English).

[39] e.g. Article 25 AMLA (Regulations of self-regulatory organisation) for delegated SR, Article 37*h* BankA (Deposit protection), Article 4 para. 3 CISO (Requirement of a prospectus for structured products), Article 4 SESTA (Operating, administrative and monitoring organisation of the stock exchange) for mandatory SR.

7.4 Potential for improvement

The elaboration of in-depth norm concepts (including determination of the correct norm level and the avoidance of excessively open delegation norms; if need be a decision for the appropriate form of self-regulation) and the structured harnessing of expertise from both within and outside of the federal administration (including future norm addressees of the financial sector as well as FINMA itself) both need to take place during this conceptual phase.

Based on its specific mandate, the input of the FOJ with respect to "preventative legal monitoring" should be sought by the federal administration at an early stage, i.e. before the actual issuance of decisions of general principle. In particular, the selected solution approaches (e.g. in the area of self-regulation) should be reviewed. Transparency should be ensured in the drafting process at an early stage, for example if it has not (yet) been possible to arrive at conclusive answers at the legislative level. Review or evaluation clauses (such as in the case of the TBTF regulation) or (to a lesser extent) "sunset" clauses[40] may represent feasible solution approaches in specific cases. The repercussions of such mechanisms for other edicts need to be reviewed, however. In addition, sufficient introductory and transitional provisions/deadlines must be prescribed.

Analysis of the current situation indicates that Switzerland's existing and applicable principles are perfectly capable of providing the answers to questions in connection with a hierarchy of norms and the legislative procedure. However, there is a need to act with respect to implementation and observance of these basic aspects. The above-mentioned solution approaches indicate ways in which greater commitment to the principles of a hierarchy of norms and legislative delegation can be achieved.

8 Regulatory implementation

8.1 Background

The implementation of regulation begins after the process of drawing up regulation has been concluded and the corresponding edicts have entered into force in general-abstract form. Regulatory implementation therefore faces the question of which principles the executing authority should apply when implementing federal acts and ordinances, and how the affected market participants are supposed to put these into practice.

The Swiss Financial Market Supervisory Authority FINMA must ensure that supervision is exercised in line with financial market legislation.[41] It must take the required measures and issue the necessary rulings for the implementation of financial market legislation.[42] FINMA must then inform the public about this supervisory activity and its supervisory practice.[43]

8.2 Guidelines

According to prevailing regulatory principles of supervisory law, regulation should take the form of "ordinances where this is envisaged in financial market legislation", and "circulars with regard to the application of financial market legislation".[44] The implementation of regulatory principles took effect in the "Guidelines on financial market regulation" of July 3,

[40] Sunset clause: The legislation has only a fixed period of validity unless its continued validity is agreed within a set timeframe.

[41] Article 6 FINMASA; SR 956.1

[42] Article 56 FINMASA

[43] Article 22 para. 1 FINMASA

[44] Article 7 para. 1 FINMASA

2013.[45] [46] FINMA promotes regulatory implementation in the narrower sense through information, training, and the creation of a catalogue of answers to frequently asked questions.[47]

Just like the FDF Guidelines 09/05[48], the FINMA Guidelines envisage management and observation of the repercussions of regulations passed by FINMA.[49]

The basic principles of administrative law enshrined in the Federal Constitution are binding for all activities of the state, and therefore also apply to the activities of the enforcing authorities. These include the principles of lawfulness, public interest and proportionality,[50] and legal equality[51], as well as the principle of good faith.[52]

However, there are different courses of action available to an authority in the fulfilment of its tasks. These will depend on whether a legal or material outcome is intended, whereby different procedural rights will apply. Regulatory administrative actions that take the form of legal acts are intended to bring about a direct legal consequence (e.g. edicts, decrees). "Material acts" are administrative acts that are aimed at producing a specific "physical" result and may have indirect legal effects.

8.3 Implementation

FINMA executes financial market regulation by applying statutory provisions in individual cases. In its circulars it then explains its administrative practice to the entities subject to legislation. Circulars do not have the character of legislative edicts, which impose obligations on supervised entities in a directly binding and general-abstract way, confer rights, or establish responsibilities.[53]

Moreover, FINMA communicates its position on important topics or questions in the form of working papers or position papers, or through the medium of Frequently Asked Questions (FAQs). Although communications do not give rise to legal consequences and are not legally binding for the norm addressees, they have an indirect legal impact insofar as they make it clear to the affected parties what decision FINMA would arrive at, e.g. in response to applications. Communications of this kind should therefore remain strictly in line with the legislative mandate. The communication activity of an enforcement authority should never replace the process of legislation.

8.4 Potential for improvement

First of all, the above-mentioned regulatory principles of the Federal Council and the FDF, the FINMA Guidelines, and the generally valid principles of administrative law (e.g. the sparing use of legislation) should be followed consistently.

It should also be borne in mind that the implementation of regulation is also often subject to time pressure, which is why "implementability" should be factored into considerations during the regulatory planning stage. Clear transitional provisions should be drawn up that give the affected parties sufficient time to adjust their internal processes, systems, and regulations, and if necessary inform their clients.

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[45] Article 7 para. 5 FINMASA

[46] See http://www.finma.ch/d/regulierung/gesetze/Documents/leitlinien-finanzmarktregulierung-20130703-d.pdf [not available in English]

[47] FINMA Guidelines, sentence 16

[48] Cf. FDF Guidelines 09/05 pp. 4 and 6

[49] FINMA Guidelines, sentence 17

[50] Article 5 FC

[51] Article 8 FC

[52] Article 5 para. 3 and Article 9 FC

[53] Cf. FINMASA dispatch, BBl **2006** 2861

Communications that are not legally binding (working papers, position papers, FAQs) should expressly be designated as such, and used with restraint due to their effect in practice. They must remain within the framework of the legal basis and be compatible with the goal of financial market supervision. They should not exceed the boundaries of authority as delegated by the legislator. The communication activity of the enforcing authority neither can nor should replace or supplement the established legislative process. Above all, particular care should be taken with respect to communication when it is deemed necessary to transform foreign regulatory principles into national law.

In the context of implementation too, the effectiveness and efficiency of regulation should be reviewed on a regular basis.

On 30 October 2014, FINMA published communication guidelines.[54] Once initial experience with the new communication concept has been gained, this experience should be evaluated.

The institutionalised dialogue also encompasses the planning of regulatory implementation. Implementation measures should be announced at an early stage, and entities subject to the legislation should be given sufficient time to adapt to the new regulations.

The effectiveness and efficiency of regulation should be monitored after a predefined period, either on an *ex officio* basis or at the request of the entities subject to legislation if no review is planned as a result of unfolding developments.

If they are to ensure the appropriate application of regulatory principles during implementation, the authorities must be equipped with adequate resources.

Both the FDF Guidelines and the FINMA Guidelines should be reviewed and enhanced in the light of impending findings and recommendations. The authorities entrusted with execution of the adjusted guidelines should draw up appropriate reports on compliance with these guidelines on a regular basis.

9 Conclusions and recommendations

9.1 Conclusions

9.1.1 Strong fundamental basis – deficient implementation

The Swiss financial market and the authorities have the necessary constitutional basis, legislation, and regulatory principles in place to cover the entire regulatory process. However, these aspects are not taken into consideration and implemented with sufficient consistency during the regulatory process, above all in the planning and implementation phase, but also during the actual process of drawing up legislation. The result of this shortcoming is that valuable information and findings are not available to the authorities when drawing up legislation. For the same reason, a regulatory impact assessment typically kicks in at too late a stage.

Preparatory conceptual work is neglected. The problem of time pressure in the regulatory process, which is often a consequence of the accelerated momentum of international regulatory initiatives and the resulting need for regulatory adjustments, only allows for corrections to be made to a limited extent.

Market participants believe there is a lack of transparency and an absence of both norm concepts and communication concepts in regulatory implementation.

[54] Vgl. http://www.finma.ch/d/aktuell/Seiten/mm-leitlinien-enforcement-kommunikation-20141030.aspx.

9.1.2 Expansion of dialogue

An expansion of the institutionalised dialogue should ensure that the affected market participants are involved throughout the regulatory process. On the one hand this requires market participants to have the corresponding resources, while on the other the authorities need to factor in the necessary time for an appropriate exchange of views during the regulatory planning phase.

Efforts have been made by the authorities to strengthen the involvement of market participants. However, the measures implemented have either turned out to be insufficiently attractive (e.g. the FFA or "Early recognition of financial market regulation abroad" project), or the corresponding mandate with respect to financial market regulation has proved insufficiently clear (Financial Centre Forum) to ensure the desired level of systematic involvement.

9.1.3 International involvement in the regulatory process

Regulatory developments at international and EU level are increasingly having an impact on the Swiss financial centre. There are increasing calls for international and EU legal standards to be adopted in order to preserve market access for third countries. Switzerland's active involvement in international bodies should therefore be driven forward even more strongly.

9.1.4 Involvement of market participants – conflicts of interest

"The economic policy of the Confederation (and the cantons) should preserve the interests of the Swiss economy as a whole...".[55] The consistent and institutionalised involvement of affected market participants in the various phases of regulatory planning and in the implementation of regulatory projects also gives rise to certain responsibilities for market participants themselves. Their contribution throughout the regulatory process should be commercially and politically "neutral" in keeping with regulatory principles. Whereas the formal consultation procedure is envisaged as a mechanism through which particular interests can be flagged up, market participants must ensure that their vested interests do not obstruct the regulatory process or lead to any disadvantaging of individual market participants (or market segments) in earlier phases of their involvement in the regulatory process. As part of its mandate, the Financial Centre Forum must take care to ensure that the interests of the overall Swiss economy are pursued on the one hand, and that the diverging interests of different market participants and sectors can be factored into considerations and reconciled in a balanced way on the other.

9.2 Recommendations

The criticism that market participants are insufficiently involved in the regulatory process can be addressed through the expansion of the institutionalised dialogue, particularly in the early recognition phase. The Financial Centre Forum should work to ensure coordination and steering of the dialogue in this respect. The amendment of the mandate of the Financial Centre Forum is the most significant new aspect that needs to be incorporated into the regulatory process.

An improvement of the regulatory process and regulatory implementation should then be achieved above all by ensuring more consistent adherence to the existing basis and guidelines and their implementation at all stages of the regulation process.

9.2.1 Comprehensive understanding of the regulatory process

The understanding of the regulatory process – particularly on the part of the authorities – must be expanded to include regulatory trends in the international environment, the early recognition phase, and the decision regarding the need for regulation in the first place.

[55] Federal Council Report, Section 3, p. 17; Article 94 para. 2 FC

Existing regulatory principles should be consistently applied and implemented throughout the entire regulation process (in the comprehensive sense of the term).

9.2.2 International regulatory developments – expansion of institutionalised dialogue

Where the early recognition of regulatory developments in particular are concerned, practical industry knowledge can be a valuable benefit to regulatory planning and the positioning of Switzerland, not least at an international level. The involvement of the market, the world of academia, and if need be the political establishment will provide the authorities with an enhanced degree of credibility when contributing in international bodies and to the development of international standards. In this context, Switzerland should continue to rely on existing (non-formalised) processes and procedures. These should be expanded and institutionalised, however.

The dialogue should be shaped in such a way that the appropriate representation of all involved parties is guaranteed and their various business models taken into consideration. Project outlines published at an early stage and an "offensive" (proactive) communication strategy will have the effect of strengthening the dialogue.

The involvement of market participants in the future should be structured and institutionalised as a fixed component of the comprehensive regulatory process, which also encompasses the early recognition phase.

The institutionalised dialogue between the authorities, market participants, and the world of academia should be expanded as well as specifically strengthened where the early recognition of regulatory developments phase is concerned. Offensive (i.e. proactive) communication and early project outlines will have the effect of strengthening this dialogue. The authorities, the world of academia, and market participants must all play their part in ensuring a constructive and objectivised dialogue.

9.2.3 Financial Centre Forum as point of coordination

The Financial Centre Forum should act as a point of coordination between the different market participants and the authorities and manage the ongoing dialogue, i.e. it should evaluate the findings that emerge from this dialogue and implement them accordingly. The expanded institutionalised dialogue at the early recognition stage should be coordinated with the mandate of the Financial Centre Forum. The mandate of the Financial Centre Forum, which is headed by the SIF, will require the corresponding fine-tuning.

The Financial Centre Forum should act as the coordinating party in the dialogue on questions of financial market regulation. Its mandate will need to be clarified accordingly. Finally, the composition of the Forum should be adjusted so that all involved market participants are appropriately represented.

9.2.4 Impact analyses and regulatory impact assessment (RIA)

An impact analysis should be viewed as a fixed component of all phases of the comprehensive regulatory process, and implemented consistently with a view to drawing up the regulatory impact assessment (RIA). At the same time, the relevant authorities must pay heed to the proportionality principle: Whereas a simple RIA is sufficient for less important projects, projects with far-reaching implications will require an in-depth RIA. The findings from the impact analysis/RIA should be communicated to the affected market participants transparently, as well as taken into consideration and implemented in the ongoing regulatory process.

The impact analysis/RIA should be consistently implemented throughout the regulatory process, in a form suited to the phase in question. The results should be presented and communicated transparently. The regulatory authorities should strive to deliver regulation that is highly effective and differentiated.

9.2.5 Consistent review of compatibility with principles

The assessment of the need for regulation by the authority responsible for a particular regulatory project must be consistently based on a review of compatibility with the principles of financial market policy.

The review of compatibility with these principles should be conducted as part of the assessment of the need for regulation – for every regulatory project.

9.2.6 Elaboration of norm concepts

A complete norm concept should be developed by the authorities as early as the conceptual phase. Expertise from both within and outside of the federal administration should be drawn upon. The FOJ should be instructed to carry out "preventative risk monitoring" at an early stage.

A complete norm concept should be drawn up for every regulatory project.

9.2.7 Elaboration of communication concepts

On 30 October 2014, FINMA published communication guidelines.[56] Once initial experience with the new communication concept has been gained, this experience should be evaluated. Where possible, market participants should be involved.

The executing authority should periodically review its communication concept that explains the function of the various forms of communication in a transparent manner. Market participants should be involved in this process where possible.

[56] http://www.finma.ch/e/aktuell/pages/mm-leitlinien-enforcement-kommunikation-20141030.aspx.

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Regulatory process
(in the comprehensive sense)