Swiss Banking

Position of the Swiss Bankers Association (SBA)

Too-big-to-fail regulation to amend the Banking Act and other decrees

The SBA considers the present reform as a whole to be excessive and unbalanced. It is characterised by a one-sided focus on stability without taking appropriate account of the cost-benefit ratio or more competitive alternatives.

To respond to Credit Suisse's failure with a wave of regulation across the entire banking sector is incomprehensible and unique on an international scale. Many of the proposed measures lack a connection to the causes of this crisis and a proven additional contribution to financial stability. At the same time, there is a risk of significant administrative burdens, implementation costs and negative effects on the international competitive position of the Swiss financial centre.

Measurability, proportionality and a clear relevance to the problem must be decisive. New regulatory requirements are only justified where there is a specific regulatory or enforcement gap and their benefits outweigh the associated costs. Regulation must be consistently geared to the size, complexity, business model and risk profile of the institutions. In particular, requirements that are tailored to globally systemically important and highly complex banks must not be applied indiscriminately to medium-sized and smaller institutions.

The regulatory impact assessment is insufficient for a reform package of this magnitude. We lack a comprehensive, methodically robust analysis of the direct, indirect and cumulative costs as well as the impact on banks, clients and the real economy.

The SBA does not oppose targeted measures to strengthen corporate governance, provided they are designed to be streamlined and practical. This includes raising essential governance requirements to a legislative level. The SBA is also expressly committed to the goal of strengthening responsibilities. However, the proposed senior managers regime does not support the SBA in this form. It is excessively bureaucratic and entails a great deal of effort for the institutions concerned, without any discernible added value for corporate governance and system stability. Particularly disruptive is its connection with the verification of compliance, which is thus extended to a large number of other people. However, responsibility and warranty regimes pursue very different purposes and therefore must be clearly distinguished from each other. Instead of introducing an additional, formalistic and bureaucratic regime, clear responsibilities, a practised culture of responsibility and effective sanctioning of misconduct can also be achieved through the systematic and clearly defined specification of existing instruments.

Legal principles for a long-term and risk-conscious remuneration policy can generally be supported as long as they are proportionally structured. In particular, the complexity, business model and risk profile of a bank should be decisive. We reject direct intervention by FINMA in individual remuneration decisions. Likewise, there should be no mandatory clawbacks of variable remuneration that has already been paid out, as these are highly problematic from a labour, tax and social security perspective and their additional benefits have not been proven. Rather, compensation measures should take effect prior to the final allocation or payout.

The SBA resolutely rejects the planned massive expansion of FINMA's competences to a large extent. The handling of the Credit Suisse crisis does not primarily highlight a shortage of legal supervisory instruments, but in particular deficiencies in their application. FINMA already has wide-ranging instruments at its disposal. Before additional competencies are created, the existing opportunities must be made full use of consistently. Additional skills alone do not ensure more effective supervision and can even make the supervisory relationship considerably more difficult due to increasing formalisation.

The planned extension of FINMA's duty to provide information and report, as well as its rights to information and its powers to impose sanctions are particularly problematic. A personal reporting obligation by numerous guarantors and a duty to provide information on the part of all employees would be disproportionate and would create considerable legal uncertainty as well as additional liability and sanction risks. The rights of natural persons, in particular the prohibition on compelling a person to incriminate themselves, must be effectively safeguarded. Likewise, FINMA's public relations work must not become a naming and shaming tool or a de facto means of enforcement and sanctions. The existing sources of information available to FINMA are sufficient.

The tightening of professional and activity bans and the confiscation of profits goes much too far. In particular, the connection of an employment ban for serious breaches of internal bank regulations relevant for regulatory purposes, the possibility of a permanent employment ban and the extension of the confiscation of profits to all employees are unfounded and not tenable. The instruments currently in place already enable systematic interventions in the event of serious breaches of supervisory regulations. Further tightening also entails the risk of undermining the appeal of responsible management and key positions in the Swiss financial sector.

Legal protection must not be sacrificed in the interests of speeding up proceedings; rather, the proceedings themselves must be expedited. We therefore reject any general statutory removal of the suspensive effect of appeals against FINMA rulings. Far-reaching capital, liquidity and organisational measures can have irreversible economic consequences before their legality can be reviewed by an independent court. Instead, binding processing deadlines and specialist judges with expertise in financial market law at the Federal Administrative Court should speed up proceedings. Immediate enforcement must be limited to urgent exceptional cases.

Financial administrative sanctions against supervised entities are firmly rejected. Neither a specific need nor a sufficient additional regulatory benefit has been demonstrated. There are also fundamental concerns regarding the rule of law, in particular with regard to freedom from self-incrimination, procedural guarantees and concentration of expertise at FINMA. If financial administrative sanctions are nevertheless introduced, the minimum procedural requirements must be to separate the investigation from the sanction decision and to ensure full judicial review.

The proposed early intervention model needs to be thoroughly revised. Clear legal criteria must be used to distinguish between the levels of ongoing supervision, early intervention and protective measures in the event of a risk of insolvency. The greater the intervention in business decisions and the division of powers under company law, the higher the intervention thresholds must be. Early intervention should be an option for action and not an obligation to act on the part of FINMA. In addition, FINMA must take into account statutory mandates that apply to banks. We demand that the individual responsibility of the Board of Directors and the Executive Board as well as the usability of regulatory capital and liquidity buffers remain safeguarded.

In the audit procedure, the tried-and-tested dual supervisory system must be maintained. Additional direct audits by FINMA must be strictly risk-based and clearly defined by law. We reject the automatic

mandatory rotation of audit firms and blanket bans on further services in the absence of any proven relevance to the problem. Instead, account must be taken of specific conflicts of interest and actual independence risks.

Practical and credible stabilisation and resolution regimes are essential for an effective too-big-to-fail regulation. The measures must be risk-appropriate, proportionate and compatible with international standards. SIB-specific obligations may not be transferred to non-systemically important banks. Additional capital and liquidity requirements must be limited to specific and material deficiencies in resolvability and may only be imposed as a last resort. Clear legal requirements, sufficiently defined powers of intervention and effective legal protection must be ensured for the settlement procedure.

Above all, the reform needs a clear return to legal certainty as a location factor and a competitive advantage. Significant infringement of fundamental rights, organisational autonomy and economic freedom must be regulated in a sufficiently definite manner in statutory law. However, the bill delegates far-reaching regulatory powers to the Federal Council and FINMA in various points.