

## Briefing June 2019

# Authorization pursuant to article 271 para. 1 Swiss Criminal Code (SCC) for direct cooperation with the Financial Industry Regulatory Authority (FINRA)

With its ruling of 28 May 2019, the Federal Department of Finance (FDF) granted our client, a Swiss-domiciled company, authorization to cooperate directly with the US Financial Industry Regulatory Authority (FINRA) pursuant to article 271 para. 1 of the Swiss Criminal Code (SCC). The FDF made three main findings in its ruling: (i) it considers FINRA to be a state authority for the purpose of the application of article 271 para. 1 SCC, and therefore concludes that direct cooperation with FINRA constitutes an act conducted on behalf of a foreign state within the meaning of article 271 para. 1 SCC; (ii) interviewing of employees in order to respond to FINRA's request for information is an official act within the meaning of article 271 para. 1 SCC; and (iii) the balance of interests favoured the applicant's position, and an authorization was granted, in light of its considerable interest in directly cooperating with FINRA.

## Background

The background to this ruling is an investigation by FINRA involving a suspicion of insider trading. As part of this investigation, FINRA addressed a request for information to the company and asked it to interview previously identified employees regarding their contact with third parties. In particular, the persons should indicate whether they have or had a relationship with the designated third parties and describe the nature of that relationship and the frequency of any contacts. In addition, FINRA requested information about whether these persons were invested in or had their assets managed by certain third party companies. FINRA's request contained no indication that formal proceedings against the company had been opened, nor any threat of sanctions or adverse legal consequences in the event of non-cooperation.

According to its own website, FINRA is not a public authority, but is a not-for-profit organisation independent of the government (<http://www.finra.org/about>; last visited 31 May 2019). Furthermore, FINRA is not included in the list of foreign supervisory authorities published by FINMA whose compliance with the principles of specialty and confidentiality has been confirmed by a court in individual cases or to which FINMA has provided administrative assistance in the past (<https://www.finma.ch/en/supervision/cross-sector-issues/direktuebermittlung>; last visited on 31 May 2019). So far, it has therefore not been confirmed whether FINRA is authorized to request administrative assistance under the applicable Swiss laws, and, consequently, whether FINRA could be referred to administrative assistance proceedings if, in cases such as the one at hand, cooperating with FINRA may create a conflict with article 271 SCC.

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To clarify matters, Bär & Karrer AG filed an application for authorization under article 271 para. 1 SCC on behalf of the company concerned to the FDF as the competent authority (article 31 of the government and administrative organization ordinance of 25 November 1998 (RVOV), SR 172.010.1).

### Findings made in the Ruling

By its ruling of 28 May 2019, the FDF authorized the applicant pursuant to article 271 para. 1 SCC to cooperate directly with FINRA and to collect and transmit the information requested by FINRA during a certain period. The FDF ruling contains the following key findings:

#### Act on behalf of a foreign state

Under article 271 para. 1 SCC, the incriminating act must be carried out for or on behalf of a foreign state. This includes the individual territories and their agencies (decision of the Swiss Federal Criminal Court of 6 October 2017, SK.2017.16, consideration 4.2). In its ruling, the FDF qualified FINRA as a state authority, and concluded that a direct cooperation with FINRA therefore constitutes an act conducted on behalf of a foreign state within the meaning of article 271 para. 1 SCC. The FDF held that FINRA was empowered by the US Congress with the supervision of the activities of broker-dealers and that it had the authority under US law to act in such an official capacity.

#### Official acts

Criminal liability under article 271 SCC further requires that the act for the foreign state is an act attributable to an authority or a public official, which by its nature or purpose is to be characterised as an official act (decision of Federal Tribunal dated 6 November 2008, 6B\_402/2008, consideration 2.3.2). In contrast, article 271 para. 1 SCC does not apply to submissions by parties in proceedings before foreign authorities on a voluntary basis which serve to clarify the chances of the party at a trial or which constitute pure procedural acts of a party (report of the Federal Office of Justice on legal issues in connection with the cooperation with foreign authorities (administrative assistance, mutual legal assistance, protection of sovereignty) of

14 March 2011, para. 3.2.2, p. 29). In order to respond to FINRA's request for information, the applicant intended to submit written questions to its employees, which they would have been required to complete and submit electronically. The FDF held that the applicant would thereby act as an extended arm of FINRA for the purposes of its investigation. As a result, the proposed collection and transmission of information to FINRA would qualify as an official act under article 271 para. 1 SCC. The FDF's reasoning was that the information requested by the applicant went beyond the business-related knowledge of the employees attributable to the applicant, particularly because the questions related to their personal relationship with third parties. Under these circumstances, the FDF additionally held that proceedings could possibly not only be directed against the applicant but also against its employees.

#### Requirements for authorization

Article 271 para. 1 SCC does not contain any indication or directions as to the conditions under which an authorization is granted. Accordingly, the responsible authority weighs the interest in safeguarding Swiss sovereignty on the one hand against the interest in cooperating with foreign authorities on the other, taking into account the interest of the private party concerned (report of 14 March 2011 of the Federal Office of Justice on legal issues in connection with cooperation with foreign authorities (administrative assistance, mutual legal assistance, protection of sovereignty), para. 6.2.1.3, p. 50 f.).

In the case under consideration, the applicant argued that, in order to safeguard its own interests and in particular to avoid formal proceedings against it, it wished to cooperate directly with FINRA. Against this background, and also because the FDF considered the administrative assistance channel not to be excluded per se, the interests were balanced in the applicant's favour, and an authorization was granted.

#### Outlook

Requests by FINRA such as the one described here potentially concern any company in Switzerland with securities traded on American stock exchanges. With a view to criminal liability under article 271 SCC and in light of the above findings, requests for information that

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require more than answering a questionnaire or seek information that goes beyond the company's own knowledge and that of its employees attributable to the company must be treated with particular caution.

If a Swiss-domiciled company is interested in direct and voluntary cooperation with a foreign authority, an application for authorization must be filed with the competent Swiss authority. In view of its qualification as a state authority within the meaning of article 271 para. 1 SCC, FINRA otherwise must be referred to the available administrative assistance channels.

It is worth noting that an authorization only safeguards against criminal liability under article 271 para. 1 SCC. However, the authorization does not release the applicant from its duty to comply with other provisions of Swiss law. In particular, professional and business secrets, the provisions on data protection and obligations under employment law must be observed when disclosing data relating to employees and third parties to foreign authorities.

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