

The chain of delegation: from the Banking Act to FINMA's ordinances

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How does a Basel standard enter Swiss law? The answer lies in a chain of delegation that runs from the Federal Assembly through the Federal Council to FINMA. The Banking Act itself contains only the basic principle that banks must hold adequate capital and spread their risks appropriately, together with the special provisions for systemically important banks. The details are delegated. The Federal Council sets the capital and risk diversification requirements in the Capital Adequacy Ordinance and the liquidity requirements in the Liquidity Ordinance. FINMA, in turn, has been authorised to issue technical implementing provisions.¹

This structure has a practical advantage. Most of the Basel standards can be implemented without a parliamentary process, which allows Switzerland to follow the timetable agreed in Basel more closely than jurisdictions whose implementation depends on legislation. The European Union, which implements the standards through regulations and directives adopted by the European Parliament and the Council, has repeatedly needed years longer, with legislators modifying the standards in the course of the process. The Swiss Parliament becomes involved only when a measure requires a change to the Banking Act. This was the case for the too-big-to-fail regime of 2011, for the public liquidity backstop and for the proposal to require full capital backing of foreign participations, which was submitted to Parliament in 2026.

For many years, FINMA implemented the technical details of the Basel standards mainly through circulars. A FINMA circular is formally a statement of the authority's practice, which explains how FINMA applies the statutes and ordinances. Although it binds FINMA itself and, in practice, the supervised institutions, it is not a legal norm in the strict sense and does not bind the courts. The circulars on credit risk, market risk, the

leverage ratio, operational risk and disclosure were the main vehicles through which the Basel texts became Swiss practice.²

The implementation of the final Basel III standards on 1 January 2025 brought a change of form. FINMA replaced five circulars with FINMA ordinances, which are legal norms in the full sense: a Trading Book and Banking Book Ordinance, a Leverage Ratio and Operational Risks Ordinance, a Credit Risks Ordinance, a Market Risks Ordinance and a Disclosure Obligations Ordinance.³ The change responded to the growing number of quantitative and binding details that the Basel texts contain, which fitted poorly into an instrument that formally only describes the supervisor's practice. It also strengthened legal certainty for banks and their auditors. For the relationship between Basel and Bern, the shift means that the Basel standards now enter Swiss law at three normative levels: the statute, the Federal Council's ordinance and FINMA's ordinances.

The delegation has limits. The Financial Market Supervision Act requires FINMA to regulate only where this is necessary for the purposes of supervision, to take account of the costs, to consider the different business models and risks of the institutions and to take international minimum standards into account. An implementing ordinance of the Federal Council, in force since 2020, made these principles more concrete. Among other things, it requires the authorities to explain deviations from international standards and to involve the industry at an early stage of regulatory projects.⁴ The Swiss finish is therefore subject to a duty of justification. A requirement that goes beyond Basel must be explained, either by the specific risk situation of the Swiss financial sector or by the size of an institution relative to the Swiss economy.

1 Notes

1. On the basic capital requirement and the delegation to the Federal Council (Art. 4 Banking Act, SR 952.0), the Capital Adequacy Ordinance (CAO, SR 952.03) and the Liquidity Ordinance (LiqO, SR 952.06), and FINMA's regulatory power under Art. 7 FINMASA (SR 956.1), see the respective texts. To be verified. ↩
2. On the legal nature of FINMA circulars as administrative ordinances without the character of legal norms (Art. 7 para. 1 lit. b FINMASA) and the case law of the Federal Supreme Court on their limited binding effect on the courts, see the standard commentaries on FINMASA. To be verified. ↩
3. FINMA press release of 27 March 2024 on the implementation of the final Basel III standards: the FINMA ordinances TBEO-FINMA

(replacing Circular 2013/1), LROO-FINMA (replacing Circular 2015/3 and parts of Circular 2008/21), CreO-FINMA (replacing Circular 2017/7), MarO-FINMA (replacing Circular 2008/20) and DisO-FINMA (replacing Circular 2016/1), in force since 1 January 2025. To be verified. ↩

4. On the principles of financial market regulation (Art. 7 para. 2 FINMASA) and the Ordinance to the Financial Market Supervision Act of 13 December 2019 (FINMASO, SR 956.11), in force since 1 February 2020, including the provisions on international standards, proportionality and the involvement of stakeholders, see the respective texts. To be verified. ↩

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