

Principles of Enforcement (Enforcement Policy)

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Introduction

Through its licensing and oversight activities, the Federal Audit Oversight Authority (FAOA) ensures the proper fulfilment and quality of statutory audit services (Art. 1 para. 2 AOA¹) and thus contributes to the protection of investors and all other recipients of audit reports as well as the reliability of financial reporting.

The FAOA's main tasks include in particular the licencing of persons and companies that provide statutory audit services, the oversight of the audit bodies and audit firms of public interest entities as well as the handling of national and international administrative assistance in the area of audit oversight. The FAOA is therefore primarily a law applying authority.

Purpose

With this enforcement policy the FAOA provides the audit profession and other interested parties with greater transparency as to its policies in carrying out enforcement. The document will be published on the FAOA homepage. She adopted the first version of the Enforcement Policy on 8 December 2016. The current, second version was adopted on 4 December 2023.

Definition

The term «Enforcement» includes all investigations, proceedings and measures the FAOA uses to enforce the applicable laws and regulations and to verify and, if appropriate, punish relevant law violations by coercive means.

¹ Federal Act of 16 December 2005 on the Licensing and Oversight of Auditors (Auditor Oversight Act, AOA; SR 221.302).

Overview of the new Principles

Principle 1	Legal coercive means	The FAOA enforces applicable law by coercive means where necessary.
Principle 2	Sound Judgement	Before the FAOA opens an enforcement proceeding, it carefully weighs up all material circumstances and considers possible alternative options for action.
Principle 3	Information Sources	Enforcement-proceedings are conducted on the basis of corresponding information obtained through licencing procedures, inspections, other enforcement proceedings on the same or related facts, notices made by licenced natural persons or audit firms or other administrative bodies, from press report or from other third parties (whistleblowing).
Principle 4	Fast and focused proceedings	The FAOA conducts its proceedings in a swift and decisive manner and aims for a conclusion in the first instance within 12 months of opening proceedings.
Principle 5	Fair and transparent proceedings	The FAOA conducts its proceedings under strict observation of procedural fairness and the procedural rights.
Principle 6	Parties to proceedings	Enforcement-proceedings are primarily directed against licencees, against persons, who are employed by an audit firm under state oversight and against persons or companies conducting statutory auditing services without holding the necessary licence.
Principle 7	Internal Organisation	Whenever possible, the same persons within the FAOA are not responsible for the ongoing supervision of state-regulated audit firms and for enforcement proceedings against those.
Principle 8	Cooperation with other authorities	The actions of the FAOA and the law enforcement authorities are coordinated as far as possible and necessary. The FAOA also cooperates with other national authorities and foreign audit oversight authorities within its legal framework.
Principle 9	Cautious communication	The FAOA solely informs the public on individual proceedings for reasons of overriding public or private interests. It however publishes legally binding court judgements on its website and informs on anonymous basis of enforcement proceedings completed in the first instance and publishes the measure decreed.

Principle 1 The FAOA enforces the applicable law, if necessary by coercive means («Enforcement»)

Audit stakeholders are primarily shareholders, creditors, the general public, the state, but also the board of directors, management and the employees of the audited entity². They are entitled to audit services prescribed by Federal law that are properly performed and of appropriate quality³.

Enforcement aims to rectify deficiencies, restore order and preventatively punish violations of legal obligations. In so doing, the FAOA strengthens the position of audit stakeholders as well as the credibility of financial reporting and of financial markets oversight. It is therefore justified for the FAOA to also enforce applicable law by coercive means if a certain extent of violations of legal obligations has been reached, both for reasons of credibility and to ensure the preventive effect of its activities. This is done by way of orders which are subject to appeal before the court. The FAOA however only intervenes where investigations have revealed well-founded and concrete indications of a breach of duty.

In addition to the periodic, routine reviews (so called inspections⁴), the FAOA conducts factual clarifications on the one hand and formal enforcement proceedings within the meaning of the Administrative Procedure Act⁵ in the event of suspected breaches of legal obligations.

The FAOA pursues a cooperative approach in its supervisory activities, which is shaped by the will of the supervised persons and firms to continuously and in interaction with the FAOA improve the quality of auditing services. If an agreement cannot be reached with regard to findings and measures, the FAOA will enforce the applicable law by the coercive means at its disposal.

Depending on the circumstances, a status of legal compliance may also be restored outside of enforcement proceedings. This may however not be sufficient. In particular, a guarantee of a natural person's proper auditing activities⁶ is not a licencing requirement, which is automatically restored by the removal of the breach of legal obligation.⁷ Whether a person can be considered to continue to offer guarantee of irreproachable audit work is ultimately a question of whether or not the addressees of the audit can continue to have confidence in their audit work. This confidence must be (re)gained with time and through corresponding conduct. Only then can the necessary licencing requirements be regarded as fulfilled again.

Principle 2 Enforcement based on sound judgement

The FAOA opens an enforcement proceeding where necessary under the provisions of the Administrative Procedure Act. Such proceedings can negatively impact the legal position of those concerned. Consequently, the FAOA weighs up all significant facts carefully and considers possible alternative actions before formally opening a proceeding.

The FAOA thereby takes account of all relevant criteria and particularly the risk to audit stakeholders, the credibility of financial reporting and of the financial markets oversight, the severity and timing of the law violation and the function of the responsible persons. The FAOA further considers the availability of resources, the valid expectations of the general public and other audit stakeholders, as well as possible (proactive) remedial actions by the parties concerned.

When choosing a measure, the FAOA gives highest priority to the protection of confidence in the audit and always assesses whether a milder measure is more proportional.

² Dispatch by the Federal Council of 23. June 2004 on the Amendment to the Code of Obligations (audit obligation in company law) and to the Federal Act on the Licensing and Supervision of Auditors, FOBI 2004 3969 et seq., 3989 et seq.

³ Art. 1 para 2 in connection with Art. 2 lit. a AOA.

⁴ Art. 16 AOA.

⁵ Federal Act of 20 December 1968 on Administrative Procedure (Administrative Procedure Act, APA; SR 172.021).

⁶ Art. 4 para. 1 Ordinance of 22 August 2007 on the Licensing and Oversight of Auditors (Auditor Oversight Ordinance, AOO; SR 221.302.3).

⁷ In the place of many: Judgement of the Federal Supreme Court Nr. 2C_121/2016 of 14. November 2016, E. 3.2.4.

As part of the proportionality test, the FAOA takes into account all relevant aspects in an overall assessment, regardless of whether they burden or relieve the persons concerned. However, it should always be noted that a spotless record or the guarantee of irreproachable auditing activities is considered the standard. In this respect, exculpatory or positive facts relevant to good repute must be included in the overall assessment, provided the FAOA is aware of them, but are not automatically considered exculpatory. Rather, they are to be treated as neutral in a similar way as a lack of previous convictions is treated in criminal proceedings.⁸ Repute and the guarantee of irreproachable auditing activities are determined on the basis of past incidents and circumstances to be currently assessed. Equally, exonerating personal elements must be taken into account, such as the realisation of one's own misconduct, compensation for the damage caused, restoration of the lawful situation, the number of misdemeanours or the time that has since elapsed⁹.

In determining its measures, the FAOA takes account of whether a breach can be regarded as light, moderate, severe or very severe. For the classification in individual cases, the nature, duration and intensity must be assessed. Measures that come into question are reprimands and licence withdrawals¹⁰. When determining measures and, in particular, the duration of a licence withdrawal, it is guided by the following range:

Level of infringement	Range
minor	No measures to a written reprimand, if applicable with threat of withdrawal of licence in case of a renewed breach of legal obligations.
Moderate	Withdrawal of licences for 5-6 years
severe	Withdrawal of licences for 3-4 years
very severe	Withdrawal of licences for 5-6 years
Continuing breach ¹¹	Indefinite withdrawal of licence
Breach of duty to assist	Indefinite withdrawal of licence, until the FAOA has obtained all requested information and documentation for the clarification of facts and as made ruling at the first instance

Figure 1: Differentiations of the FAOA for the determination of measures

Even if a person concerned has restored the lawful condition, the breach of duty is not automatically categorised as minor. Particularly in an area in which the FAOA does not exercise systematic supervision of institutions and often only becomes aware of irregularities by chance or following a notice, the threat of licence withdrawal or the issuing of a reprimand must not be too easily qualified as appropriate. This would otherwise create an incentive for persons concerned not to rectify the irregularities until discovered by the FAOA without the risk of licence withdrawal¹².

In the area of oversight of audit firms under state oversight, it may be appropriate, in particular in the case of serious infringements, to instruct the firm to restore compliance with the law by removing offending employees from certain mandate functions¹³ or to no longer involve them in certain audit In serious cases¹⁴, it may even be justified to instruct the company to terminate a specific audit service for the protection of investors¹⁵.

⁸ Cf. Judgements of the Federal Administrative Court Nr. B-5113/2011 of 28. June 2012, E. 5.1; Nr. B-4465/2010 of 3. November 2011, E. 4.2.4; see also BGE 136 IV 1, E. 2.6.4.

⁹ Judgements of the Federal Administrative Court Nr. B-5112/2011 of 28. June 2012, E. 5.3; Nr. B-4465/2010 of 3. November 2011, E. 4.2.4; Nr. B-7967/2009 of 18. April 2011, E. 5.2.2.

¹⁰ The FAOA primarily utilises administrative measures that are not of a criminal law nature: cf. BGE 142 II 243, E. 3.4, according to which a professional ban issued by FINMA is to be qualified as an administrative measure not of criminal law nature despite repressive elements.

¹¹ Cf. In particular the case of existing loss certificates (Art. 4 para 2 lit. b AOO), for which a forecast may not be possible due to the unrectified financial situation.

¹² Judgement of the Federal Administrative Court Nr. B-4117/2016 of 16. January 2017, E. 4.1.2.

¹³ For example, as lead auditor, as EQCR, as a member of the audit team or generally for functions where influence can be exercised over the specific audit service or a specific type of audit service, such as for public interest entities.

¹⁴ Cf. Art. 16 para 4 AOA.

¹⁵ Dispatch by the Federal Council (Fn. 2), FOBI 2004 4076.

Persons working for an audit firm under state oversight may also, in the event of repeated or gross violations, be directly prohibited from exercising their activity or a specific function within the audit firm under state oversight, regardless of whether they are authorised by the FAOA or not¹⁶.

Principle 3 Information sources

The FAOA follows up rigorously on indications of relevant law violations. These arise particularly from licensing procedures, inspections of audit firms under state oversight, other enforcement proceedings on the same or similar facts, reports from licensed individuals and firms, notifications by other authorities, media reports or notifications by other third parties. (Whistleblowing).

All licenced natural persons and companies are, under threat of prosecution, obliged to notify the FAOA of all incidents relevant to the review of licencing requirements¹⁷. In principle, the same information must be submitted as when submitting the licencing application¹⁸. In particular, first or higher instance judgements and settlements in civil or administrative proceedings in connection with auditing activities, in criminal and administrative criminal proceedings and in proceedings before professional bodies as well as existing certificates of loss must be reported, even if they are not (yet) legally binding. The obligation to notify remains in force for the duration of a temporary withdrawal of licence but does not apply if the licence is not reissued¹⁹.

Notices can also be made anonymously via the external Whistleblowing-Platform. The data is transmitted to the RAB in encrypted form via the secure external platform. Notices are not technologically traceable. Whistleblowers can set up a protected mailbox on the external platform through which they can communicate with the FAOA - anonymously if they wish.

If disclosed or identifiable, the FAOA will treat the name of the third party providing the information confidentially within the framework of the applicable legal system. An overly liberal practice regarding the disclosure of identity would lead to this valuable source of information drying up. Without adequate protection for the whistleblower, violations of the law might never come to light and valuable information would not penetrate the wall of silence²⁰. This public interest in the identification and elimination of irregularities relevant under licensing and supervisory law outweighs the (in itself already debatable) private interest of the licensed natural persons and audit firms that no information relating to them comes to the attention of the FAOA. It should be noted that the FAOA and its employees are subject to official secrecy²¹. The infringement on the other hand is punishable by law²². In addition, it must be taken into account that the third party providing the information also has a private interest in protecting their identity²³. This applies all the more as the third party providing the information is not involved as a party in FAOA enforcement proceedings²⁴ and is therefore not in a position to assert its rights.

Principle 4 Fast and focused proceedings

Parties to the proceedings are in particular entitled to an assessment within a reasonable period of time²⁵. The FAOA therefore conducts its proceedings expeditiously and resolutely and in general

¹⁶ Art. 18 AOA.

¹⁷ Art. 15a para 2 and Art. 39 para 1 lit. b AOA

¹⁸ Cf. Art. 3 para 1 AOO and margin no. 7 of the FAOA Circular 1/2007 of 27. August 2007 on Required Licensing Information, Documents to be Submitted and the Duty to Notify during the Licence Period, RS 1/2007.

¹⁹ Art. 17 para 4 AOA.

²⁰ BGE 123 IV 157, E. 5c.

²¹ Art. 34 para 1 AOA.

²² Art. 321 Swiss Criminal Code of 21 December 1937 (SCC; SR 311.0) and Art. 40 para 1 lit. d AOA.

²³ Art. 28 Swiss Civil Code of 10 December 1907 (CC, SR 210) and Art. 1 Federal Act of 25 September 2022 on Data Protection (Data Protection Act, FADP, SR 235.1); cf. Judgement of the Federal Supreme Court Nr. 5A.1/2004 of 13. February 2004, E. 2.2 f., with further details.

²⁴ Cf. Principle 6.

²⁵ Art. 29 para 1 Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst, SR 101).

strives for first instance completion of proceedings within twelve months of opening them. Grave transgressions are in comparison to less severe cases handled as a priority because of public interest. When possible, the FAOA recognises media interest in swift results but gives precedence to the legal requirements for a fair process²⁶.

The FAOA continues to strictly oppose attempts to delay proceedings in the context of exercising party rights. Applications for a first-time extension of deadlines are only approved on plausible grounds and applications for further extension of deadlines only on qualified grounds. Furthermore, the FAOA continuously reviews whether the subject matter of the proceedings can or must be restricted.

Principle 5 Fair and transparent proceedings

The FAOA conducts its proceedings under strict observation of procedural fairness and the statutory procedural rights of the parties²⁷. For the purpose of a transparent enforcement-procedure, the FAOA informs the parties about the opening of proceedings and, if requested, status and cessation of a proceeding.

As whistleblowers and informants are not parties to a proceeding, they are in general not entitled to be informed about the status and outcome of the evaluation of the information and notices submitted²⁸. They further do not hold right of appeal against any rulings based on their information²⁹. If overriding public or private interests of the third party providing the information require, the FAOA may at least partially refuse inspection of the files by the parties to the proceedings³⁰. This however only takes place, in as far as it does not curtail the right of the party to the proceedings to be heard and possibility to deal with all legally relevant elements of the facts remains.

Principle 6 Parties to proceedings

Enforcement proceedings are directed primarily against licence holders (individuals and audit firms), individuals who work for audit firms under state oversight and individuals and audit firms who potentially perform audit work requiring a licence without holding one.

In general, the FAOA does not conduct proceedings against individuals and firms who may have violated legal obligations but have given up their licence and no longer work in the audit field. However, if they re-apply for a licence the FAOA considers the circumstances that led them to give up the original licence.

Principle 7 Internal organisation

Whenever possible, those responsible for the supervision of audit firms under state oversight are not the same as those responsible for enforcement proceedings against them within the FAOA. This however does not preclude individual FAOA employees in both areas being involved as specialists in proceedings against the same groups of persons³¹.

The Financial Audit and Regulatory Audit departments are responsible for ongoing supervision and the associated review procedures. If, on the other hand, enforcement procedures are required during an inspection³², be it because of the severity of the breaches identified or because no agreement

²⁶ Cf. Principle 4.

²⁷ This includes in particular the principles of legality (Art. 5 para 1 Cst), of public interest (Art. 5 para 2 Cst), proportionality (Art. 5 para 2 Cst), legal equality (Art. 8 Cst), good faith (Art. 5 para 3 and Art. 9 Cst) and fair treatment (Art. 29 para 1 Cst) as well as the right to a fair hearing (Art. 29 para 2 Cst).

²⁸ Cf. Art. 71 APA.

²⁹ Judgement of the Federal Supreme Court Nr. 2C_98/2023 of 14. June 2023, E. 6.4.

³⁰ Art. 27 para 1 APA.

³¹ See Judgement of the Federal Administrative Court Nr. B-5121/2011 of 31. May 2012 (=BVGE 2012/10), E. 2.

³² Art. 16 para 4 and possibly also Art. 18 AOA.

could be reached on measures to remedy the breaches identified³³, the proceedings are continued by the Legal & International Affairs department. This does not affect subsequent enforcement proceedings against the audit firm under state oversight or its employees, insofar as these have not been combined.

The FAOA ensures that all proceedings are conducted in a consistent and coherent way. It trains those responsible for instructions on enforcement proceedings to maintain a professional standard and draws the necessary conclusions for future proceedings from the enforcement proceedings.

The Board of Directors is consulted in advance on proceedings of great importance.

Principle 8 Cooperation with other authorities

The FAOA ensures that its contacts with other authorities serve its own aims.

Prosecuting authorities

FAOA enforcement proceedings and the criminal proceedings of prosecuting authorities with the same factual subject matter are separate proceedings and can therefore be conducted concurrently or successively³⁴. Depending on the circumstances, however, it may also be appropriate to wait for outcome of the criminal investigation and of the criminal proceedings (at least in the first instance) before initiating enforcement proceedings. However, this postponement is only possible in cases in which the risk assessment does not require immediate intervention. The approach of the FAOA and the prosecuting authorities is coordinated as far as possible and necessary.

Insofar as a violation of audit and audit oversight law provisions is suspected, the FAOA gives priority to evaluating this. It focuses on measures to rectify irregularities and ensures that order is restored³⁵. The FAOA supports the work of the prosecuting authorities within the legal framework and taking account of its own resources.

If aware of crimes and offences and violations of audit oversight law³⁶, the FAOA notifies the responsible prosecuting authorities. Notification is conditional upon there being reasonable grounds for suspicion. The FAOA reports an offence only if it is convinced that, based on its assessment, at least the objective element of the criminal act is highly probable, and a criminal conviction cannot be ruled out.

Other state authorities

Within the legal framework³⁷, the FAOA cooperates with other domestic authorities and foreign audit oversight authorities to assist them in fulfilling their respective duties. At the same time, it also expects corresponding cooperation from these authorities. The FAOA exercises caution in authorising its officers and employees to give evidence at the proceedings of other authorities.

Stock exchanges

The FAOA coordinates its supervisory activities to avoid duplication of effort with the Swiss stock exchanges³⁸. They mutually inform about pending proceedings and decisions that may be relevant to their respective supervisory activities. If FAOA sanctions cannot be enforced for breaches of Articles 7 and 8 of the AOA, the stock exchange imposes the necessary sanctions.

³³ Art. 15 Ordinance of 17 March 2008 of the Federal Audit Oversight Authority on the Oversight of Audit Firms (Oversight ordinance FAOA, OAFO-FAOA SR 221.302.33).

³⁴ See Judgement of the Federal Administrative Court Nr. B-5113/2011 of 28. June 2012, E. 10.2.

³⁵ Cf. Principle 1.

³⁶ Art. 40 AOA.

³⁷ Principle of official secrecy (Art. 34 AOA) and administrative assistance only with a legal basis and fulfilment of the corresponding conditions (Art. 22 et seqq. AOA).

³⁸ Here to and in the following Art. 23 para 1 AOA.

Auditors' professional associations

As the FAOA and its employees are subject to professional secrecy and in the absence of a legal basis for the exchange of information, the FAOA does not cooperate with auditors' professional associations. To ensure its independence it also does not strive to do so. This however does not preclude the FAOA from drawing attention to any existing reporting obligations to the professional bodies in decisions concluding proceedings. In return, the FAOA expects the professional bodies to also draw their members' attention to the statutory reporting obligation in the context of sanction decisions³⁹.

In contrast to the professional associations, the self-regulatory organisations (SROs) under the Anti-Money Laundering Act ⁴⁰ are obligated to inform the FAOA of all incidents and to provide it with all information and documents relating to an audit firm or a lead auditor that the FAOA requires to fulfil its tasks⁴¹.

Principle 9 Cautious Communication

As a rule, the FAOA does not provide information on individual proceedings to the public. Also, in response to inquiries, it generally does not confirm, deny or comment upon proceedings or stages of proceedings.

The FAOA can publicise ongoing or completed proceedings given overwhelming public or private interest (Art. 19 para. 2 AOA). Although the FAOA has discretionary powers in this respect, caution is required in view of the potentially far-reaching consequences. In addition to the correction of false or misleading information, the constellation in which there are doubts about the credibility of the supervisory activity to the detriment of the capital market or if it is necessary to protect market participants should be considered in particular⁴².

If the FAOA decides, after weighing up the interests involved, to inform the public about an enforcement procedure, it generally provides information proactively. It can also name the individuals and audit firms and/or the audited entities concerned. It is cautious in referring to the names of individuals for privacy reasons. Even when proactively providing information it generally gives no specific details of the proceeding.

As a rule, where the FAOA has provided information on an ongoing proceeding it also proactively provides information on its outcome, immediately upon first instance completion or final judgement. If it discontinues the proceeding it can abstain from providing information at the request of those concerned.

For access requests under the Federal Act on Freedom of Information in the Administration⁴³, Article 19 paragraph 2 AOA does not constitute a special provision⁴⁴. Applications for access must therefore also be dealt with in accordance with the FoIA if FAOA licencing, supervisory and enforcement procedures are affected. However, depending on the circumstances, access may be restricted, postponed or denied, which is the case in particular if professional and trade secrets⁴⁵ or the private sphere of third parties⁴⁶ are affected. Whether the public interest in the information requested by a FoIA applicant outweighs any other interest⁴⁷, is decided on a case-by-case basis by the FAOA. It is in particular to be considered that the FAOA has no legal basis for "naming and shaming"⁴⁸. Personal

³⁹ Art. 15a AOA in conjunction with Margin No. 7 lit. o No. 4 of FAOA Circular 1/2007, see also Principle 3.

⁴⁰ Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA; SR 955.0).

⁴¹ Art. 25a AOA.

⁴² Dispatch Federal Council (Fn. 2), 4077.

⁴³ Federal Act on Freedom of Information in the Administration (Freedom of Information Act, FoIA; SR 152.3).

⁴⁴ Judgement of the Federal Supreme Court Nr. 1C_93/2021 of 6. May 2022, E. 3.6.

⁴⁵ Art. 7 para. 1 lit. g FoIA.

⁴⁶ In particular the auditors and audit firms affected by a procedure and their employees, but also the audited companies.

⁴⁷ Art. 7 para 2 FoIA.

⁴⁸ Art. 34 Federal Act of 22 June 2007 on Federal Financial Market Supervision (Financial Market Supervision Act, FINMASA SR 956.1) e contrario.

data is to be anonymised as far as possible⁴⁹. Documentation, which cannot be anonymised is to be assessed in accordance with the FADP⁵⁰, whereby, according to the case law of the Federal Supreme Court, a distinction must be made as to whether data of the audited company itself⁵¹ or personal data of employees or other natural persons is concerned⁵². The FAOA shall refuse, restrict or impose conditions on the disclosure if essential public interests or obviously legitimate interests of a data subject or statutory confidentiality obligations or special data protection regulations so require⁵³.

Legally binding court rulings are published by the FAOA on its website if they are listed in the public judgement database of the issuing court. These are anonymised in accordance with the rules applicable to the courts. It also publishes rulings with fundamental implications as leading cases on its website. In addition, the FAOA publishes enforcement proceedings concluded in the first instance on its website in anonymised form by publishing the subject matter of the proceedings and the measure imposed.

⁴⁹ Art. 9 para. 1 FoIA.

⁵⁰ Art. 9 para 2 FoIA in conjunction with art. 19 FADP.

⁵¹ With regard to legal entities, the FoIA no longer refers to the Data Protection Act (Art. 36 FADP), but to Article 57s of the Government and Administration Organisation Act of 21 March 1997 (GAOA; SR 172.010). According to Art. 57s para. 4 GAOA, federal bodies may disclose data of legal entities to the public ex officio or based on the Federal Act on the FADP as part of official information if (a) the data is related to the fulfilment of public tasks and (b) there is an overriding public interest in the disclosure.

⁵² Judgement of the Federal Supreme Court Nr. 1C_93/2021 of 6. May 2022, E. 5.1

⁵³ Art. 19 para. 4 FADP.