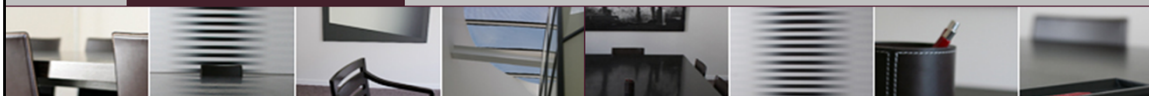


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AVOCATS ATTORNEYS-AT-LAW



Update 2013/2014 Swiss banking & financial law

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I. Revised CISA/CISO (1)

- Background:
 - ✓ AIFMD (entry into force in July 2013)
 - ✓ Why? Need to give a chance to Swiss asset managers to access the EU market
- Shift from the concept of « public offering » to « distribution »
- What is « distribution »?
- What is a « qualified investor » and why is it still relevant?
- Twofold mandatory study:
 - ✓ From the sponsor/distributor to the financial intermediary
 - ✓ From the financial intermediary to the investor

I. Revised CISA/CISO (2)

- **Main transitional provisions:**

- ✓ **01.03.2013:** entry into force of the revised CISA/CISO (subject to exceptions)
- ✓ **01.06.2013:** entry into force of the revised article 10.3*bis* and 10.3*ter* CISA
- ✓ **31.08.2013:** announcement deadline at FINMA (asset managers, distributors)
- ✓ **01.01.2014:** new inventory duty (24 CISA/34*a* CISO + SBA Circular)
- ✓ **28.02.2014:**
 - Application deadline at FINMA for Swiss banks willing to pursue their activities as Swiss representatives of foreign funds
 - Deadline for signing of a cooperation agreement between FINMA and the foreign supervisory authorities monitoring foreign CIS approved for distribution in CH
- ✓ **28.02.2015:**
 - Mandatory compliance with revised CISA and application deadline at FINMA for Swiss asset managers, distributors, representatives of foreign CIS (except banks, see above)
- ✓ **01.06.2015:**
 - entry into force of the opting-in requirement of HNWI (absent any discretionary management mandate)

II. Revised rules governing wealth management

- **Circular FINMA 09/1 « guidelines on asset management »** (e.i.f. 1.7.2013):
 - ✓ Risk profile / investment strategy
 - ✓ Financial inducements
 - ✓ Calculation parameters and value range
 - ✓ A « *Swiss Suitability* »
- **Implementation at the SRO's level?**
- **SBA Directive of 6th November 2013** (e.i.f. 1.1.2014):
 - ✓ At least 23 preliminary versions!
 - ✓ Purpose: to adapt to FINMA Circular 09/1 and case law
 - Existing clients: contractual documentation shall be adapted by 1.1.2015
 - New clients: contractual documentation shall be adapted **immediately**
 - ✓ **Main info: investment strategy may diverge from risk profile...**
...but shall be subject to prior notice by the Bank

III. US issues (1)

Below : Blue = FATCA Red = *Lex USA* Green = US Program

(colors have no particular meaning... well...)

- 14.02.2013: Signature of FATCA Model 2 Agreement, CH-USA
- 10.04.2013: Message of the Swiss Federal Council (SFC) re Swiss FATCA law
 - 29.05.2013: « *Lex USA* » project is published...
 - same date: SFC to allow foreign disclosure (art. 271 SCC) ?
- 07.06.2013: Signature of a *MoU* regarding FACTA interpretation
 - 19.06.2013: « *Lex USA* » project is dead...
 - 03.07.2013: SFC finally allows foreign disclosure upon request (art. 271 SCC)
 - 29.08.2013: *Joint statement* signature in Washington, CH-USA
 - 30.08.2013: Communication FINMA n° 50

III. US issues (2)

Below : Blue = FATCA Red = *Lex USA* Green = US Program

(colors have no particular meaning... well...)

- 30.09.2013: FATCA to be implemented in CH as from 01.07.2014 (instead of 01.01.2014)
 - 06.11.2013: FAQ from DOJ
 - 29.11.2013: First « 271 SCC authorisations » delivered by the SFC
 - 31.12.2013: Announcement deadline at DOJ for category 2 banks
- 25.04.2014: Registration deadline for all FFIs
 - 30.06.2014: Deadline for category 2 banks to file all required information (incl. IE's report) in view of NPA
- 01.07.2014: Entry into force of FATCA in CH + 30% withholding duty on all income payments originated from the US to « recalcitrant account holders »
 - 31.10.2014: Announcement/filing deadline (incl. IE's report) at DOJ for category 3 and 4 banks in view of NTL

IV. French issues

- 2011: Announcement by French government of its intent to terminate existing double taxation treaty on successions (DTTS) with Switzerland, dated 1953
- **19.03.2013:** **Jérôme Cahuzac forced to resign as Minister for the budget in response to his alleged tax fraud**
- 11.07.2013: Signature of a revised DTTS between CH and France
- 04.09.2013: SFC's message regarding revised DTTS
- **05.12.2013:** **Indictment of *Reyl Bank* CEO's François Reyl**
 - Enhanced awareness of a legal/reputation risk in France...
 - ... and in Switzerland due to a possible breach of their duty of "fit and proper" conduct (*garantie d'une activité irréprochable*)
 - Fundamental change in the way to handle French clients by Swiss banks
- 14.12.2013: Rejection by the SNC of revised DTTS
 - **The revised DTTS is (almost) dead!**
- 27.01.2014: Article in *Le Monde* re their access to 2'900 names of the *Falciani list*
- 29.01.2014: Mr. Reyl is free to travel back to Switzerland and to operate his bank

V. Who's next?



VI. Pending/upcoming legal changes

1. White money strategy (*Weissgeldstrategie*) ?
2. Revised CDB 2014/2015 ?
3. Financial services Act (FFSA / FIDLEG)
4. Financial Market Infrastructure Act (FMIA)

VI. 1. Weissgeldstrategie, quo vadis ? (1)



VI. 1. *Weissgeldstrategie, quo vadis ? (2)*

- 15.02.2012: Revised FATF Recommendations
 - ✓ *Serious tax crimes*
 - ✓ Bearer shares
 - ✓ Enhanced mutual assistance between administrative authorities
- 22.02.2012: Declaration of intention by the Swiss Federal Council
- 27.06.2012: Message of the Swiss Federal Council
 - ✓ Enhanced assistance powers of MROS
- 01.02.2013: Tax Administrative Assistance Act (TAAA)
- 27.02.2013: Two reports on the revised SFC strategy
 - ✓ Implementation of FATF recommendations in MLA
 - ✓ Enhanced duty of care of Swiss financial intermediaries with respect to undeclared assets
- 06.06.2013: *Brunetti* report

VI. 1. *Weissgeldstrategie, quo vadis ? (3)*

- 13.12.2013: Message of the Swiss Federal Council re revised AMLA
 - ✓ No more extended duties of care at this stage
 - ✓ Main proposed changes:
 - Improved transparency in the case of legal entities and **bearer shares**
 - Mandatory involvement of a financial intermediary for **cash payments of more than CHF 100,000** for purchases of movable or immovable property
 - Introduction of a predicate offence for “**serious tax crimes**” in the area of direct taxation (criteria: forgery + CHF 200,000 of unpaid taxes)
 - Extension of the term "politically exposed person" (PEP) to include domestic PEPs and international organisation PEPs, as well as introduction of corresponding risk-based due diligence obligations
 - Increased effectiveness of the system for reporting suspicious activity
- 2015: Implementation deadline of the revised FATF recommendations

VI. 2. Revised CDB 2014/2015 ?

- Why? FATF...
- Expected additional identification duties:
 - ✓ Identification of partners and shareholders (« *Anteilseigner* ») of operative companies
 - *qualified shareholders* only?
 - If yes, what threshold shall apply?
 - Company's management?
 - Any person or group of persons exercising control?
- Cancellation of “R” forms?

VI. 3. Financial Services Act (FFSA / FIDLEG) (1)

- **Genesis**

- **Relevant dates**

- ✓ FINMA Report of 22.10.2010 and Document of 24.02.2012 definitely argue in favour of such legislation
- ✓ 28.03.2012: SFC urges FDF to issue a draft law
- ✓ 18.02.2013: FDF report « key thrusts of potential regulation »
 - Reinforcement of surveillance
 - Better documentation regarding properties of financial products (*KIID*)
 - In case of wealth management or financial advice: *suitability*. Other services: *appropriateness*
- ✓ At present: Delayed issuance of draft!
- ✓ 1st sem 2014: Expected preliminary message and draft law
- ✓ 2016 ? : Entry into force

VI. 3. Financial Services Act (FFSA / FIDLEG) (2)

- **Expected changes**

- ✓ IAMs, PTCs and other non-banking financial services providers definitely subject to prudential surveillance by FINMA
- ✓ Transfer of all existing rules of conduct in Swiss financial markets Acts (art. 1 FINMA Act) into FFSA
- ✓ Extended rules of conduct, such as to integrate MiFID's *appropriateness* and *suitability*
 - **Repealing of 24 § 3 CISA ? Inventory duty not only for CIS distribution but for every financial services**
- ✓ Accountability within 30 days upon demand ?

VI. 4. Financial Market Infrastructure Act (FMIA)

- **Relevant dates**

- ✓ 16.08.2012: EMIR
- ✓ 13.12.2013: Message of the SFC regarding FMIA
- ✓ Mid 2015: Expected entry into force of FMIA

- **Purpose**

- ✓ to regulate OTC derivatives markets, via:
 - settlement of derivatives transactions through a central counterparty
 - reporting to a trade repository
 - risk minimisation

- **Consequence**

- ✓ Transfer of all provisions governing disclosure of holdings, public takeover bids, insider trading and market manipulation from SESTA to FMIA

VII. MiFID II reform: Dickens' *great expectations* (1)

- **Historical recaps** (secondary genesis...)
- **Scope**
- **Goals (mainly 3) :**
 - to reinforce Investor's protection by avoiding conflicts of interests between Investor and financial advisers / wealth managers
 - to reinforce reporting obligations towards national financial authorities, and
 - to rule technological innovations (*high frequency trading*)
- **Relevant dates**
 - ✓ 14.01.2014: European « *trilogues* » find a compromise legislation
 - ✓ Feb. 2014: Publication of consolidated final draft
 - ✓ 2014-2015: Level 2 legislation
 - ✓ 2016-2017: Level 3 legislation

VII. MiFID II reform: Dickens' *great expectations* (2)

▪ Expectations...

- ✓ Transaction orders shall stay at least 500 milliseconds in any market order book
- ✓ Prudent optimism... as **institutional actors** (B to B) will have a free access to the European market, as long as foreign legislation and surveillance is considered as equal to European ones...
- ✓ ... as for **private actors** (B to C) Switzerland will have to negotiate separately with each Member State regarding local market access...
- ✓ **suitability** (probable art. 25 MiFID II) will imply classification of all clients of Swiss financial service providers into the two traditional MiFID categories:
 - **Retail client** and
 - **Professional client** (probable art. 4 2 § 9 et 10 MiFID II A-PE)
- ✓ **Extended duty of information to local Financial Authorities**
- ✓ **Switzerland will have to adapt numerous Federal Acts, though FFSA will be in force**

VIII. Miscellaneous

- **01.01.2013: Revised adult protection rules**
- **Relevant case law:**
 - ✓ TF 4A_122/2013: Bank's duty of care towards its client by virtue of its AML duties
 - ✓ TF 4A_547/2013: Bank's ability to rescind option contract as a result of a client's failure to comply with a margin call
 - ✓ TF 4A_27/2013: Jurisdiction applicable to consumers in the context of international bank services (Lugano Convention)
 - ✓ TF 2C_119/2013: Incapacity of a bank's client to act as a party in a FINMA proceeding
- **01.05.2013: Articles 161 and 161bis SCC replaced by Articles 40 and 40a of the revised Sesta**
 - ✓ Insider trading and market abuse as preliminary crime to money laundering if > CHF 1mio
 - ✓ Extended definition of *Tippee* (e.g. taxi driver hearing a confidential information incidentally)
- **01.10.2013 FINMA circular 13/8 on market abuse**

Thank you for your attention!

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There were also...