

Update Corporate and Banking Law

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Association of International Business Lawyers (AIBL): Luncheon

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Regulatory developments

Overview

1 January 2014:

- "Minder" Ordinance (ORAb)
- Revised Debt Enforcement and Bankruptcy Act
- Revised Collective Investment Schemes Act and Ordinance

30 June 2014: FATCA Act and FATCA Ordinance

1 July 2014:

- Revised "OPP 2/BVV 2" regarding investment regulations of pension schemes
- SFAMA guidelines on distribution and transparency in collective investment schemes

1 August 2014: revised Tax Administrative Assistance Act

1 September 2014: revised guidelines by SBA with effect on the mortgage market

25 September 2014: New FINMA Enforcement and Communication Policies

- Several double taxation agreements (e.g. with Ireland, Turkmenistan, Peru etc.)

12 December 2014: Banking Secrecy (Parliament, referendum lapses 2 April 2015, FF 2014 9461)

- Expansion of the scope of banking secrecy to internationally forwarding secret information and use of such information

Regulatory developments

Overview

1 January 2015:

- Complete Revision of the Banking Ordinance
 - Accounting rules for banks, capital adequacy and liquidity requirements (Basel III)
 - Dormant accounts
- SBA Guidelines on Dormant Assets
- Bundling of audit firm supervision and revision of the FMAO-FINMA and FAOA
- Revised Liquidity Ordinance and FINMA circular "Liquidity risks - banks", revised FINMA circular "credit rating agencies"
- Revised Collective Investment Schemes Act and Ordinance
- First tax information exchange agreements (with Jersey, Guernsey and the Isle of Man)
- Several double taxation agreements (e.g. with Ireland, Turkmenistan, Peru etc.)

Ongoing regulatory projects

Overview

Collective Investment Schemes

- **28 February 2015:** Deadline to apply for a licence as
 - an asset manager of foreign funds,
 - as distributor and representative of foreign funds (except for banks)
- **30 June 2015:** Deadline for HNWI to make an opt-in declaration (see also revised CISA)

Revised Anti Money Laundering Act

- Statute was adopted by Parliament on 12 December 2014, referendum period lapses on 2 April 2015 (FF 2014 9465).
- Revised CDB 2015 should follow.

Federal Act on Financial Market Infrastructure

- Bill pending in Parliament (FF 2014 7235)
- Committee for Economic Affairs and Taxes of the National Council has started its review

Ongoing regulatory projects

Overview

Federal Act on Financial Services and Federal Act on Financial Institutions

- Consultation period was closed on 15 October 2014 (subject to extensions)
- Bill expected in 2015

Modernisation of Corporate law

- Consultation period ends on 15 March 2015

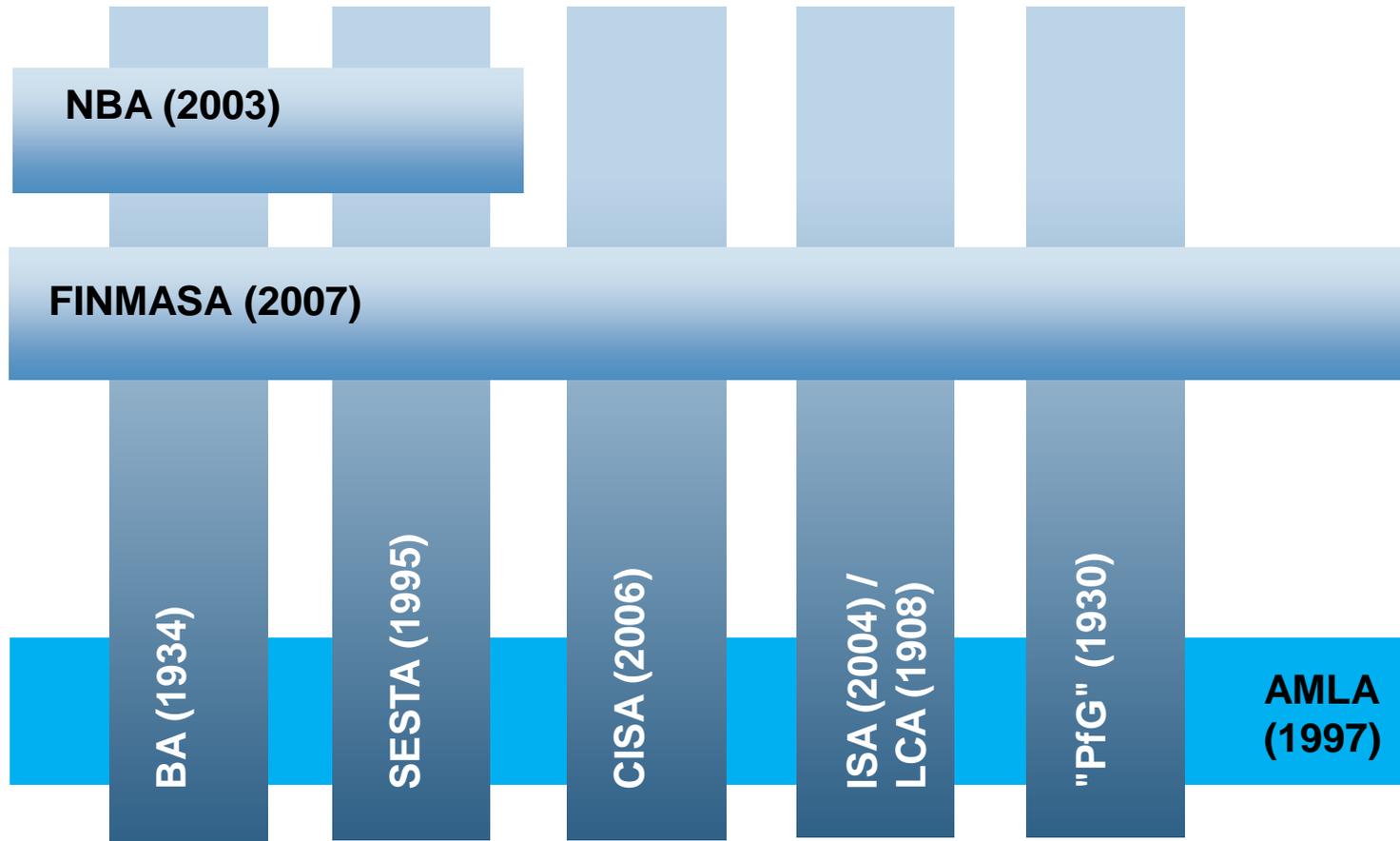
White Money Strategy and Strategy for the Financial Centre

- Priority on automatic exchange of information – negotiation with selected partners and multilateral agreement (+FATCA)
- Final report of group of experts on "further development of financial market strategy"

Financial Market Regulation

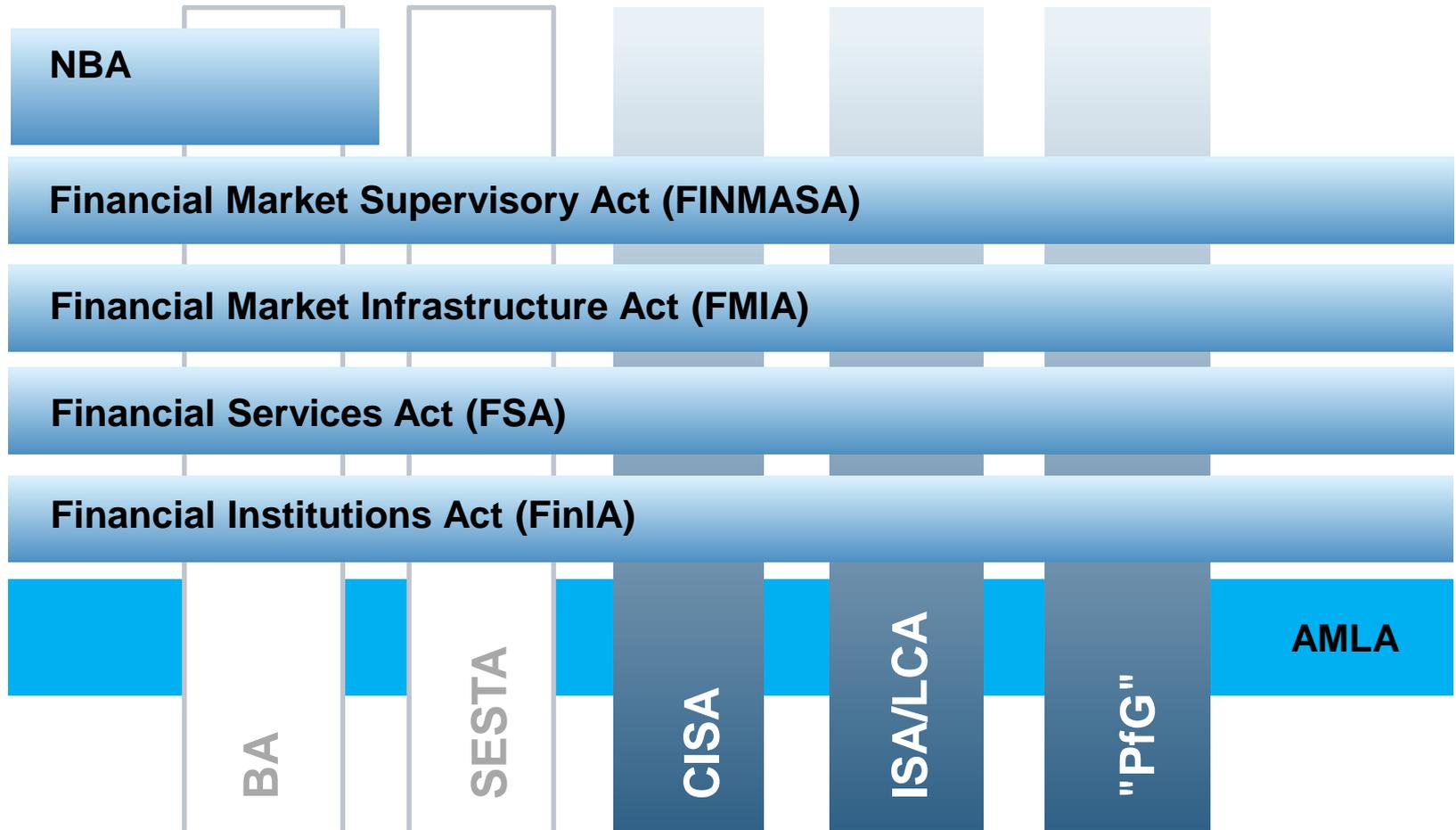
Currently: Pillar Model

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Financial Market Regulation

New Architecture: Regulatory levels



New Financial Market Law

Financial Market Infrastructure Act

Purpose

- adjust the **regulation of financial market infrastructures** and **derivatives trading** in line with market developments and **international** requirements
- **strengthen** the stability and competitiveness of Switzerland's **financial centre**
- combine provisions consistently in a **single law**

Content

- **organisation and operation of financial market infrastructures**
 - **Licensing and regulation** of trading facilities, central counterparties, central depositories, trade repositories and payment systems)
 - **New concepts:**
 - "multilateral trading facility": financial market infrastructures
 - "organised trading facility": financial institutions subject to FMI-regulation
 - Regulation of high-frequency and algorithmic traders

New Financial Market Law

Financial Market Infrastructure Act

Content (cont.)

- New rules on insolvency of **financial institutions**
 - Clarification of rules regarding transfers to bridge banks
 - Better protection of realization of collateral and netting
 - Portability of derivative transactions
- **Derivative trading**
 - Applicable to financial counterparties and certain non-financial counterparties
 - Clearing obligation for certain OTC derivatives
 - Reporting to a trade repository
 - Risk management
 - **Key issues:** definitions and scoping; cross-border transactions; recognition of foreign trade repositories

New Financial Market Law

Financial Market Infrastructure Act

Content (cont.)

- **disclosure of substantial shareholdings, takeovers and market abuse**
 - Mainly identical with current SESTA
 - Minor correction to the rules on disclosure of substantial shareholdings
 - Will the opting-out regime survive?
- **administrative assistance:**
 - Uniform set of regulations
 - Swiss financial authorities can communicate information to their foreign counterparts without informing the client (ex post remedies only)

New Financial Market Law

Financial Services Act

Purpose

- protect the clients of financial service providers
- establish a level playing field for the provision of financial services

Content

• Rules of conduct

- Client segmentation rules
- Suitability and appropriateness requirements
 - If insufficient information on the client, prohibition to trade/obligation to warn
- Obligation to document and provide documents on request
- Client advisors and foreign service providers are required to be registered

• Prospectus and basic information sheet

- Obligation to prepare a prospectus
- Approval regime for public offerings of securities
- Obligation to provide retail clients with a basic information sheet

New Financial Market Law

Financial Services Act

Content

- **Enforcement**
 - Reversed burden of proof
 - Facilitation of claims by retail investors
 - Alternative 1: Mandatory ombudsman system
 - Alternative 2: Mandatory arbitration system
 - Collective actions and settlements
- Criminal sanctions

New Financial Market Law

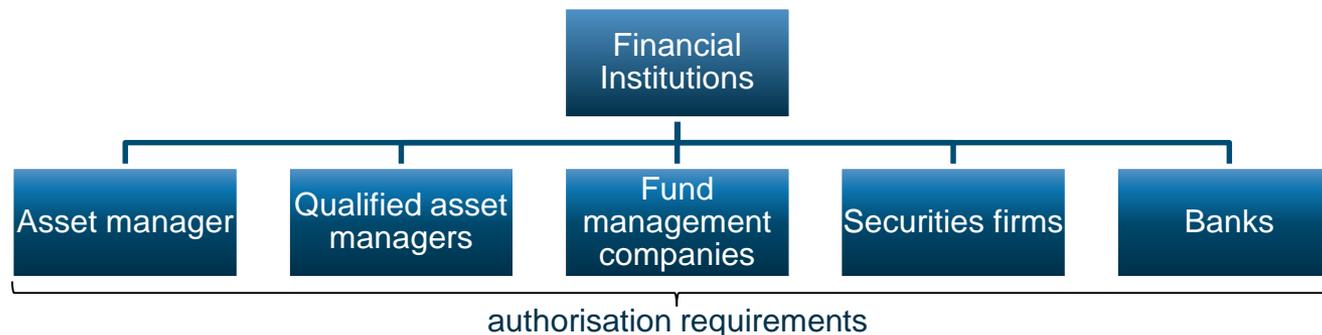
Financial Institutions Act

Purpose

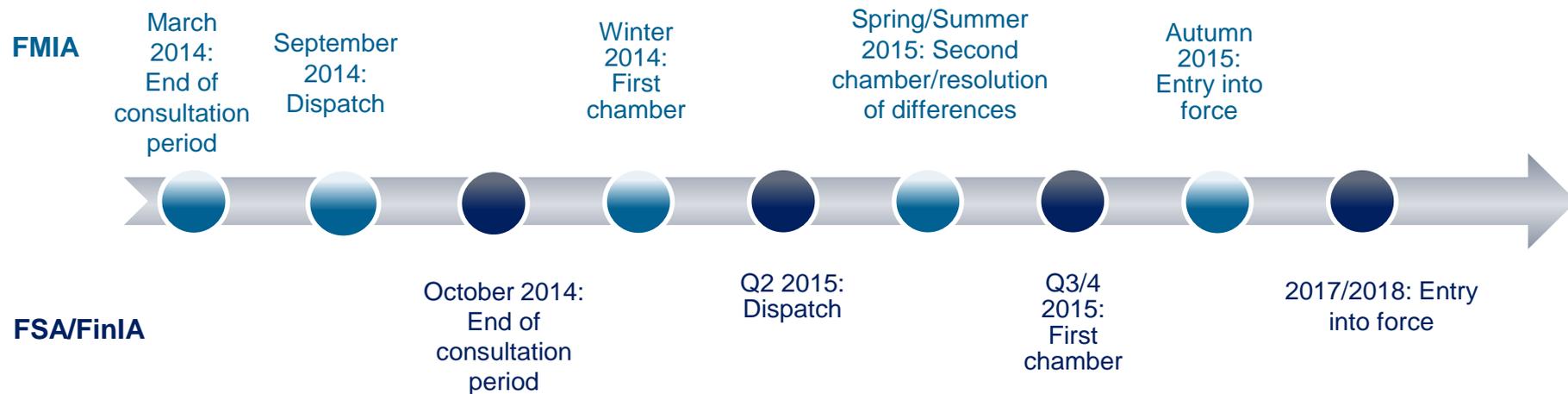
- protection of investors and clients of financial institutions
- proper functioning of the financial market and stability of the financial system
- uniform piece of legislation

Content

- governs the supervisory regime applicable to a financial institution (except insurances)
- applies also to portfolio managers and asset managers of collective investment schemes and Swiss occupational benefits schemes
- in principle: no material change, taking over rules under existing law (but harmonised in a differentiated manner according to their activity)



New Financial Market Law Timetable



New FINMA Policies

Enforcement & Communication Policies

Enforcement policy (25 September 2014)

- replaces the policy published in 2009
- FINMA takes enforcement action in response to serious breaches of the relevant legislation, specifically breaches of business conduct rules
- Focus on remedial action, not fining

Communication policy (25 September 2014)

- framework for information strategy
- sets out the criteria under which FINMA informs the public about its supervisory activity
 - Decisions regarding the supervision of institutions are not communicated
 - Violation of market conduct rules will be disclosed as a matter of information (not naming and shaming)
- right to deviate in exceptional cases

New FINMA Policies

Enforcement Policy: Example UBS AG

- UBS **informed** FINMA that an **internal investigation** had uncovered possible signs of manipulation, collusion and other market abusive conduct in foreign exchange trading
- FINMA promptly **initiated enforcement proceedings** against the Bank
- Appointment of an **investigator**
- **Ruling** of 11 November 2014
 - UBS seriously violated the requirements for **proper business conduct** and those for **adequate organization** (inadequate risk management, controls and compliance)
 - **corrective measures**
 - **CHF 134 million** to the benefit of the Swiss Confederation
- In order to determine the knowledge and conduct of the persons involved in the case, FINMA has initiated **proceedings against** eleven of the bank's former and current **employees**

Key Issues

- **Implementation of the Minder Initiative**

- Transfer the ordinance on abusive remuneration into a statute, BUT:
- No advance approval of variable compensation
- Prohibition of compensation for non-compete clauses in excess of one year
- Sign-on bonus that are not in compensation of a loss

- **Improve Corporate Governance**

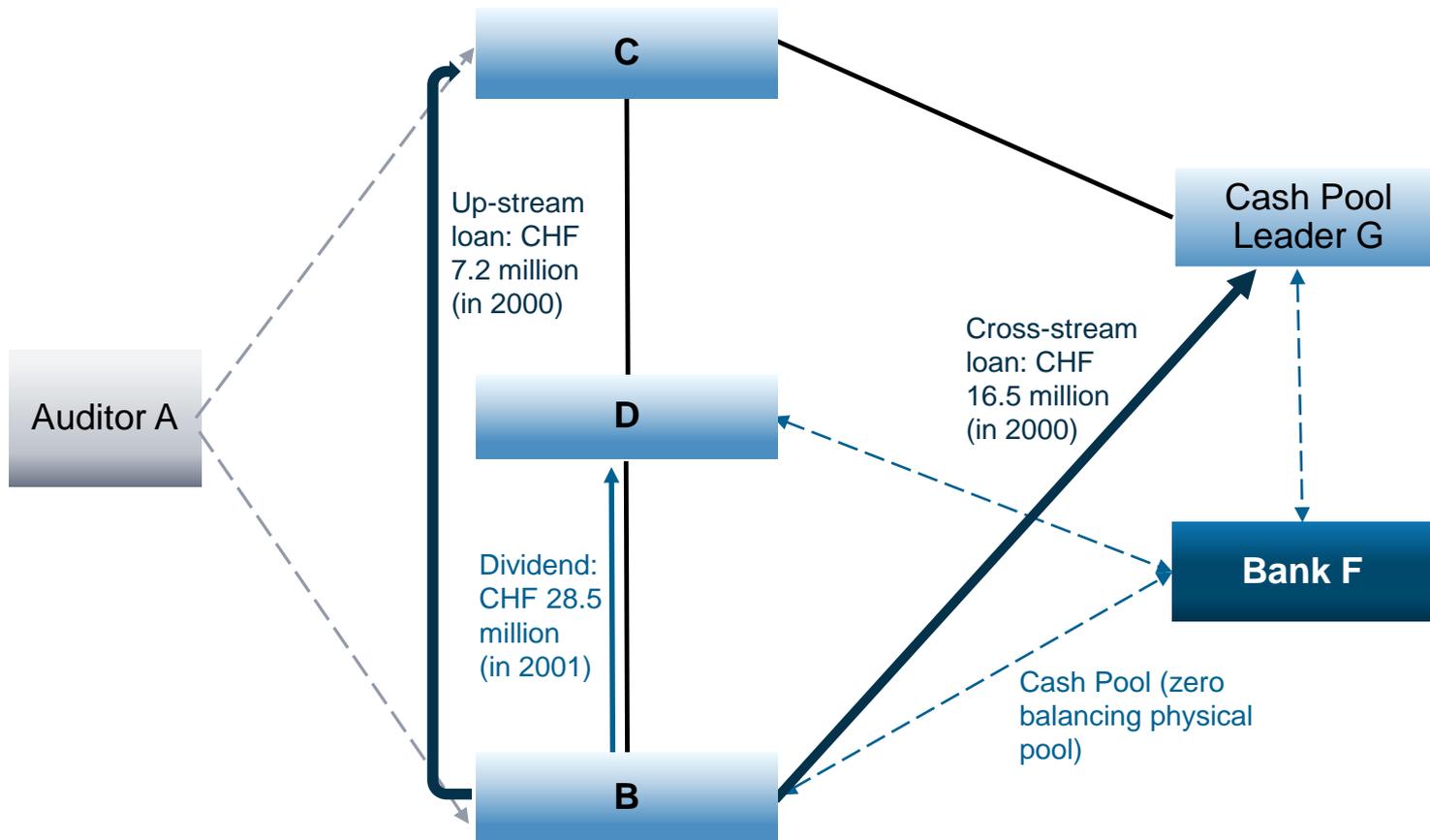
- Comply or explain, if the least-represented gender does not hold 30% of the seats in the board and the management committee
- Lower thresholds to exercise shareholder rights
- Right for shareholders holding 3% of a listed company/10% of a non-listed company to sue on behalf of the company, after a demand procedure
- Rules on voting by proxy for listed and non-listed companies
- Right to introduce 20% bonus/malus dividend for participating in the shareholders meeting
- Non-listed companies can opt into the Minder regime and must inform shareholders regarding compensation
- **But:** no rules on dispo shares

Key Issues

- **Capital requirements**
 - Rules on substantial acquisitions (*reprise de biens, Sachübernahme*) are repealed
 - No limitation for participating certificates
 - Rules on the capital margin (authorised increases and reduction of capital)
 - Possibility to distribute interim dividends, but strict hierarchy of distributable reserves
 - New **rules on restructuring** and obligation to file for insolvency
 - Coordination with accounting law (capital requirements in a foreign currency)
- **Rules on transparency**
 - **Companies in the extractive industry** → obligation to disclose payments to state bodies
 - **Federal Council** can extend these rules to trading companies

FC 4_138/2014: Cash-Pooling

Fact Situation



FC 4_138/2014: Cash-Pooling Decision

- Up-stream + cross-stream loans: possible, if at **arm's length terms** ("market conformity")
- If the transaction is not at arm's length:
 - corporate loan = hidden distribution of profits
 - **reduction** of the "freely distributable funds" in the amount of the loans
- In casu: some criteria of the market conformity test are not fulfilled
 - **No security**
 - **No credit check**
- No final statement whether the participation in the **cash pool** can ever pass the "third party test"
- **Good news: Agio** is freely distributable

Revision of Anti-Money Laundering Act

Alignment with FATF

- Serious tax offences as a predicate offence to money-laundering
 - Definition: Misdemeanors pursuant to article 186 of the Federal Act on Direct Federal Tax and article 59 (1) (1) of the Federal Act on the Harmonization of Direct Taxes of Cantons and Communes:
 - Falsification and use of false documents
 - To avoid direct taxes
 - In an amount of more than CHF 300'000 per tax period
 - (including foreign offenses)
- Rules on bearer shares and information regarding qualified shareholders of operational companies
- AML obligations for professionals in connection with sales of goods paid in cash (threshold CHF 100'000)
- Extended definition of PEPs (domestic, foreign, and international)
- Rules on cooperation with foreign AML authorities

- Cross-border tax evasion should be prevented with the help of the new **global standard** for the automatic exchange of information (AEOI)
- 21 July 2014: **OECD** published the overall package for the AEOI in tax matters
- 8 October 2014: Federal Council adopted definitive **negotiation mandates** with partner states
 - negotiate with **EU** on introduction of AEOI
 - negotiate with **US** on a **Model 1 FATCA** agreement (AEOI on a reciprocal basis)
 - negotiate with further countries with which there are close economic and political ties
- 29 October 2014: 51 states and territories signed the **Multilateral Competent Authority Agreement** on the Automatic Exchange of Financial Account Information (MCAA)
- 19 November 2014: Federal Council approved a declaration on **Switzerland joining the multilateral agreement** on the automatic exchange of information in tax matters → collect data from 2017 and exchange it for the first time in 2018
- 14 January 2015, Federal Council opened a consultation on the OECD/Council of Europe Convention and on the MCAA
- **Open question:** with which countries will AEOI apply

Pro memoria: White money strategy

- **FINMA position paper** on risks in cross-border financial services (October 2010)
 - **call** on supervised institutions **to comply with foreign supervisory law** and define an appropriate service model for each target market
 - **breaches of foreign legislation may violate certain Swiss supervisory rules** such as the requirement to assure that business is conducted in a proper manner
- Also the **Swiss government** announces a strategic orientation in terms of "financial integrity" (in December 2009 and February 2012)
- Will it be easier to deliver information to foreign than to Swiss authorities? What will happen **within Switzerland**?



On 15 January 2015, SNB decided no longer to maintain a minimum exchange rate and introduced negative interest on accounts held with the SNB

Impact on accounts

- In the notes to the accounts as significant event occurred after the balance sheet date
- Otherwise no influence on the balance sheet as per 31 December 2014
- Exception: Going concern basis is not met

Passing on negative interest on clients

- Passing on to clients is possible as a matter of principle
- It may lead to a modification of the terms of the agreement with clients → Notice to clients (tacit consent after the acceptance period)
- Are negative interests on deposits unfair contract terms under article 8 of the unfair competition act?
 - Not for large accounts.

Summary



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