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The Swiss Banking Sector – from a legal perspective

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The Swiss finance industry is going through rather interesting and busy times. The impact of the 2007 financial crisis in many respects marked a turning point in the formerly liberal Swiss financial market regulation. In the light of the changing economic environment and political views on how to govern financial market activities, the regulatory framework is about to be amended in a fundamental and comprehensive way. The following is a selection of some significant changes of Swiss law recently incorporated or yet to come into effect in the near future.

NEW FINANCIAL MARKET ARCHITECTURE

After roughly 130 years of more or less organic growth of Swiss financial market regulation, which, as its stand today, is largely product- or sector-oriented and not well harmonized across the different sectors, it is undoubtedly time to consider a re-design of the Swiss financial market architecture. The now envisaged major reform project will be accompanied by substantial new content in certain areas, particularly in view of harmonizing Swiss regulations with existing and upcoming EU regulation, such as MiFID II, MiFIR and EMIR, to fulfil a condition necessary for the Swiss financial institutions' access to the European market (equivalency requirements under MiFID II). However, the fear remains that the new acts will provide for a supplementary Swiss finish in areas going beyond what is required under EU financial market laws. While certain product- or sector-oriented regulations will remain in place, areas suitable for harmonized regulation across different sectors will be carved out and incorporated into the new financial market acts. The future architecture will comprise different levels of regulation (product level, institution level, infrastructure level, point of sale level, supervision level, etc.) which will, for instance, facilitate subjecting certain financial service providers such as client advisors to point of sale duties, while not introducing a licensing requirement at the institution level. The following four acts will constitute the core of this new financial market architecture: the existing Financial Market Supervision Act (FINMASA), the new Financial Services Act (FINSA), the new Financial Institutions Act (FINIA), and the new Financial Market Infrastructure Act (FMIA).

In June 2014, the Swiss Federal Council launched the consultation on the draft FINSA, which, in essence, governs the relationship between financial services providers and their clients with regard to all financial instruments and particularly aims to improve client protection by levelling the playing field. The draft bill is designed to introduce a comprehensive framework for the loyal, diligent, and transparent provision of financial services and rules facilitating the enforcement of civil claims of clients against financial services providers. A code of conduct lays out various rules for financial services providers at point of sale, including information obligations, the performance of suitability and appropriateness tests, and the duty to keep written records and remit copies of documentation to clients. The financial services providers will also have to comply with organisational duties and rules regarding the avoidance of conflicts of interests. Moreover, the draft FINSA introduces registration requirements for client advisors, the regulation of cross-border activities into Switzerland, uniform prospectus requirements for financial instruments that are publicly offered or traded on a trading platform, and the publishing of an easily comprehensible key investor information document in the context of the offering of a financial instrument to private clients. In late June 2015, the Federal Council gave further guidance on where the FINSA will be heading to, inter alia, by relinquishing both previous suggestions of either a new arbitration body to deal with litigation in the financial sector or the introduction of a special fund financed by compulsory contributions from financial services providers with the purpose to support the financing of customers against them. Instead, the Federal Council suggested that, subject to certain conditions, the financial services providers should bear their own legal costs in a litigation with a client regardless of the outcome of the dispute, i.e. even if they win the case.

With the new FINIA the supervision of all financial institutions providing asset management services to third parties will be harmonized and coordinated in one single piece of legislation. The FINIA is envisaged to serve as the legal framework that will govern the licensing requirements and further organisational conditions for financial institutions. As a matter of principle, the rules applicable to financial

institutions that already operate with a license under existing laws will be adopted without material changes. The draft bill provides for different types of licensing and supervision of asset managers, i.e. the supervision by the Swiss Financial Market Supervisory Authority (FINMA) for qualified asset managers (e.g. such of collective investment schemes) and the supervision either by FINMA or by a new supervisory organisation to be created for "regular" asset managers. With its recent proposal, the Federal Council has spoken in favour of an independent supervisory body for regular asset managers, whereas such body is intended to be authorized and supervised by FINMA and to perform a risk-based supervisory activity. Mere investment advisors will not be subject to supervision as such and will therefore be entitled to operate without a license if their activities do not fall within the scope of the asset management business; however investment advisors will, as mentioned, be subject to registration requirements and rules of conduct pursuant to the FINSA. In contrast to previous expectation, the existing Banking Act will not be repealed in its entirety, but the new FINIA and the Banking Act will be reconciled.

The Swiss Federal Council decided that the dispatch for submission of the FINSA and the FINIA to the Swiss parliament will be postponed until the end of 2015 with an earliest possible entry into force of the bills in 2017. However, an entry into force in 2018 may be more likely.

The new regulatory regime on financial market infrastructures and derivatives contained in the new FMIA, which is heavily influenced by EMIR and MiFID II, is expected to come into force in the first quarter of 2016. The FMIA's scope is mainly to set forth regulations on trading venues (stock exchanges, multilateral trading facilities and organised trading facilities), central counterparties, central depositories, trade repositories, and payment systems. The four main areas of the derivatives legislation are clearing obligations, reporting obligations, risk mitigation measures for uncleared derivatives transactions, and platform trading obligations. The FMIA will also enable FINMA to provide information to foreign regulators without following the current procedures regarding the protection of confidential information and secrecy, i.e. without notifying the client if notification compromised the investigation by the foreign regulator.

IMPLEMENTATION OF THE REVISED FINANCIAL TASK FORCE RECOMMENDATIONS

In 2012 the Financial Action Task Force (FATF) revised its 40 international recommendations on combating money laundering and terrorist financing, which now are being transposed into Swiss law. The new provisions adopted by way of the Swiss Federal Act on the Implementation of the Revised Recommendation of the FATF of 2012 stipulate improved transparency in relation to legal entities and bearer shares: financial intermediaries must identify an individual as the ultimate beneficial owner of assets (and not another legal entity) and acquirers of bearer shares in a privately held Swiss stock corporation must be registered in a bearer share register, which is set up by the issuing company or in a special register held by a financial intermediary. In addition to this, an obligation to disclose the beneficial owner(s) is introduced for bearer shares as well as for registered shares if the shareholder – alone or in concert with others – has a stake of 25 percent or more of the capital or the votes of a legal entity. The new provisions also comprise the financial intermediaries' due diligence obligations with regard to the identification of the beneficial owners of legal entities, an extension of the FATF rules to politically exposed persons ("PEPs") to include domestic PEPs and PEPs of supra-national organisations or international sport associations, the extension of the scope of predicate offences for money laundering, as well as certain changes to the rules on the freezing of assets and on the prohibition to inform third parties about a report to the Money Laundering Reporting Office Switzerland (MROS). The enactment of the bill takes effect in two stages. The provisions on the transparency of legal entities and bearer shares amending the Swiss Code of Obligations, the Collective Investment Schemes Act and the Federal Intermediated Securities Act were brought into force on 1 July 2015. The other provisions amending the Swiss Civil Code, the Swiss Criminal Code, the Debt Collection and Bankruptcy Act and the Anti-Money Laundering Act will enter into force on 1 January 2016.

AUTOMATIC EXCHANGE OF INFORMATION

Switzerland's tradition of banking secrecy, which dates back to the 1930s, has come under mounting international pressure as governments around the world aim at preventing cross-border tax evasion. In July 2014, the OECD Council adopted the new global standard for the international automatic exchange of information (AEOI) in tax matters. Switzerland, among almost 100 other countries, committed itself to introducing this new global standard. In order to create the corresponding statutory basis, in January 2015, Switzerland proposed two draft laws to lift tax-related banking secrecy for offshore accounts (Swiss residents with accounts in Switzerland are not affected by the bills) and allow the automatic exchange of account holders' information with foreign tax authorities. The first draft bill is based on the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (administrative assistance convention) signed by Switzerland in 2013, while the second draft bill concerns Switzerland's participation in the Multilateral Competent Authority Agreement on the Automatic

Exchange of Financial Information (MCCA) and the Federal AEOI Implementing Act. The government launched a three-month consultation period on these bills that ran until 21 April 2015. The bills were supported by the vast majority of the cantons, political parties and interested parties and submitted to Parliament for approval at the beginning of June 2015.

On 27 May 2015, Switzerland and the EU signed an agreement regarding the introduction of the global AEOI standard. Subject to Parliament's and possibly the voters' approval, Switzerland and the EU intend to collect account data from 2017 and exchange it from 2018.

Under current law, Switzerland only shares information about foreigners holding offshore accounts in Switzerland if it receives a valid request for information from a foreign tax authority. If the government's proposals become law, Swiss authorities will be able to "spontaneously" inform foreign tax authorities if they come across information that could be of interest to them, such as e.g. property ownership. Under the spontaneous exchange of information, data is hence not transmitted following a prior request, but rather when the transmitting state suspects another state's possible interest in information. The information to be transmitted to the foreign tax authorities includes account and tax identification numbers, as well as the names, addresses and dates of birth of taxpayers abroad with an account in a country other than the country of origin, all types of income, including interest and dividend income, and account balances. The financial institutions will transmit the information to the national tax authorities, which will automatically forward the information to the tax authority in the relevant partner country once a year. The Federal Council proposed a reservation to the draft bill according to which the new statute's applicability for tax offences committed wilfully and subject to criminal sanctions should be restricted to a time period following the administrative assistance convention's signing by Switzerland in 2013.

In a nutshell, it remains to conclude that, with the various new regulations as described herein, Switzerland is excellently positioned to continue to live up to its absolute key role in cross-border wealth management and to further strengthen its increasingly important role in international institutional asset management.

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Allegra Sosso, Senior Associate, specializes in banking, corporate and commercial law as well as related litigation and proceedings. She provides a diverse array of general corporate services to banks, financial institutions, and companies engaged in various other industries. Particular areas of emphasis involve regulatory proceedings initiated by the Swiss Financial Market Supervisory Authority FINMA, foreign governmental investigations and Swiss secrecy laws. With regard to corporate law, she regularly advises companies on corporate governance issues, directors' rights and liability and shareholders proxy fights. Her litigation practice encompasses various types of complex litigation, including financial crimes, securities, post-mergers & acquisitions, insurance and other commercial litigation.

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