

# BCCC

AVOCATS ATTORNEYS-AT-LAW



## Update 2013/2014 Swiss banking & financial law

*Association of International Business Lawyers (AIBL)*

31<sup>st</sup> January, 2014

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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 6<sup>th</sup> 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!
  - ✓ 1<sup>st</sup> 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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