NewsLetter LL

Information by the Law Offices of Lutz Rechtsanwälte

Heirs' Information Rights vis-à-vis Banks

In the course of the administration of an estate, heirs commonly run into the problem of not being able to get a clear overview of specifically those of the deceased's assets that are being held at banks. This is in particular true, if the deceased did not keep complete – or even any – records regarding his accounts, as happens frequently with persons with foreign domicile. Even banking relationships that were conducted nationally, may not always be transparent for the heirs, especially when assets are involved that were not claimed as income with the tax authorities.

Thomas Reimann

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The legitimate interest of an heir to get a comprehensive overview of the assets belonging to the estate of the deceased may be in direct conflict with the bequeather's justified interest to secrecy – however this does not include the bank's obligation to protect bank client confidentiality.

1. The Legal Basis of the Heirs' Information Rights

To begin with, there is the heirs' general right to disclosure amongst each other, as well as towards all persons and authorities engaged in the distribution of the inheritance (such as the executor of the will, the administrator, inventory authority, representatives of the heirs, official receiver etc.). All these rights of the heirs are in nature part of inheritance law and are based on art. 607 para. 3 and art. 620 para. 2 of the Swiss Civil Code (CC).

Different from this are those rights to receive information that are passed down from the deceased to the heirs through so-called universal succession. This goes for any contractual partners of the deceased, as well as for anyone else with an obligation to disclosure. Part of the first group are banks, since they were in a contractual relationship with the deceased (asset management contract or account management contract). When the bequeather dies, the legal relationship is passed down to the heirs through universal succession. This includes the bank's contractual duty of full disclosure. Even if in accordance with art. 405 para. 1 of the Swiss Code of Obligations (CO), the contract terminates with the death of the bequeather, this only relates to the ongoing execution of the contents of the contract, while the right to disclosure is passed down to the heirs.

This is in accordance with a ruling of the Swiss Federal Supreme Court dated September 10th 2007 (decision of the Swiss Federal Supreme Court BGE 133 II 664 section 2.5). It elaborates that through the nature of universal succession defined by art. 560 CC not only all rights relating to the assets of the inheritance are passed down to the heirs, but

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also all contractually based rights to disclosure and information.

2. Scope of Disclosure Rights of Heirs towards Banks

2.1. Subject Matter

2.1.1 Basic Principles

The definition of universal succession dictates that the heirs generally acquire their rights to disclosure *ipso iure* with the death of the bequeather. The obligation to disclosure [of a bank for exemple] not only includes the periodic preparation of account statements, but also any individual information requests coming from the heirs. This includes those requests that might appear insignificant to the bank. The fact that the bequeather had been informed or was himself in possession of certain information does not constitute a valid reason to refuse this very information to the heirs. This is based on the grounds that the information rights have been given additional impact in favor of heirs.

It is irrelevant that it may not be certain, whether transactions actually took place within the account, or even if the bequeather had an account at the bank in question at all. A client may have a similar interest to receive such information without an inheritance, for example as part of divorce proceedings in relation to the spouse, or towards the tax authorities (BGE 133 III 664 section 2.6).

2.1.2 Limits

Privacy rights of the bequeather: Universal Succession as defined in art. 560 CC provides that the bequeather's rights are only passed down to the heirs, insofar as they are not personal rights intrinsically tied to the very person of the deceased. This limitation stems from art. 28 CC (BGE 133 II 664, section 2.3; non-published decision of the Swiss Federal Supreme Court of May 2008, 5C.209/2006 section 4.1; Emch / Renz / Arpagaus, op. cit., N 422), dealing with the protection of a person's personal rights. In practice, the decision which data should be covered under this protective measure can prove to be very difficult.

The bequeather's legitimate interest to privacy: There is no ruling of the Swiss Federal Supreme Court on whether the bequeather's (expressed or assumed) intention to keep certain information private should be honored. Leading doctrine is in favor of this. If the deceased intended to keep his personal affairs confidential even from his heirs, that right to privacy is not passed on to them, since the deceased [client of the bank] defines the specifics of such a right. The expressed intention of the bequeather is required thereto. This includes an assumed intention to confidentiality (for example expressed through the destruction of bank records during the lifetime of the deceased). Whether in fact such an intention is given cannot be determined in abstracto, but will depend on the individual circumstances. A wish to privacy is more likely present in those cases, where the disclosure of certain facts would affect the most private aspects of someone's life.

Since this question cannot be answered by the bank in all but the most obvious cases, doctrine suggests the institution of a special examiner analogous to an independent medical examiner. This examiner is bound to protect the privacy of the deceased towards the heirs.

The wish for privacy should be disregarded in those cases, where they serve the purpose of infringing on someone's compulsory portion of the inheritance. In this case, the heir's right to disclosure based on inheritance law prevails the contractual right to disclosure [or secrecy] towards the bank. The bequeather cannot deny this right.

According to the Swiss Federal Supreme Court, the legal right to disclosure of heirs towards third parties should be treated analogous to art. 607 para. 3 and art. 610 para. 2 CC, the purpose being the creation of equal treatment of heirs and non-heirs in case of a lawsuit concerning the violation of compulsory portions of the heirs. This solution makes sense, since it closes a gap in the legislation (BGE 132 III 677 section 4.2.4).

The right to disclosure based on inheritance law is limited to its purpose. It follows thus that based on art. 607 para. 3 and para. 610 sec. 2 CC, the time frame of the right to disclosure is generally limited to five years, unless there is evidence of purposeful infringement on compulsory portions (art. 527 para. 3 and 4 CC). The requested information may only relate to those assets that may represent an infringement on someone's compulsory portion, therefore being relevant to any possible lawsuit.

Bank secrecy law: The bank secrecy law relates to the duty banks and their employees have towards a client to keep the client's business relationship confidential. This includes any insight they might have into the proprietary as well as into private matters of the client. Even the mere existence of the relationship between the bank and the client falls under this confidentiality clause. Bank client confidentiality law is not absolute and unconditional. Already in the year 1963 the Swiss Federal Supreme Court ruled that the authority to decide on confidentiality issues is passed down to the heirs through universal succession (BGE 89 II 87 section 6). In accordance with this, it verified in a ruling in 2007 that the bank cannot invoke bank client confidentiality towards the heirs, since it only applies towards third parties, however not towards the beneficial owner, nor his heirs in the context of universal succession (BGE 133 III 664 section 2.6). This opinion also finds doctrinal support.

2.2 Time Frame

Time wise and for the same reason as discussed above, the right to disclosure not only includes the status of the estate on the day of death, but also any information the bank was required to disclose towards the bequeather, including any and all information given during his lifetime. Since, in accordance with art. 962 para. 1 CO, the banks' duty to keep records is limited to ten years, this is also the time limit in relation to contractual disclosure rights, as well as those information rights based on inheritance law. The filing of a lawsuit obligates the respondent to secure any and all existing records that may extend the legally prescribed ten year period. In addition, based on art. 127 CO, the contractual right to disclosure and information expires after ten years from the date of termination of such relationship. However, the death of the bequeather does not eo ipso constitute the termination of an ongoing contractual relationship.

3. Entitlement

Each of the heirs is independently entitled to the same contractual as well as inheritance law-based rights to disclosure (BGE 89 II 87 section 6; BGE 132 III 677 section 4.2.4; BGE 133 III 664 section 2.5).

Even tentative heirs (that means those who have not yet decided whether to accept the inheritance or not) may receive information, if it serves as a basis on which to decide about accepting or refusing the inheritance. Virtual heirs (that means those, who were not included in the inheritance, even though they are legally entitled to a compulsory portion) have the same limited right of action towards third parties as they have towards fellow heirs. In order to make sure that any inquiries are in fact legitimate, the bank usually requires an official certificate verifying the status of an heir prior to providing any information. In the case of provisional heirs, it is advisable to get a simple official statement in order to avoid the inadvertent assumption of acceptance of the inheritance, since such provisional and virtual heirs are entitled to a special certificate verifying their status.

4. Conclusion

Once the heir enters into a contractual relationship with a bank through universal succession, the contractual rights to disclosure are passed down in their entirety, as long as they do not infringe on the bequeather's personal rights of privacy.

The individual heir may pursue his rights on his own and independently of the other heirs – a joint course of action of all heirs is not required. The rights to disclosure are limited to ten years by art. 962 para. 1 CO. ■

The Swiss Federal Intermediated Securities Act (FISA) – What is it about?

The federal act concerning the so-called intermediated securities became effective on January 1st 2010. The new Swiss Federal Intermediated Securities Act (FISA) will give the professional trade in securities involving intermediary custodianship a new foundation, since the developments of the past decades have shown a strong need for regulation.

Dr. Peter Lutz

1. Scope and Main Features of FISA

The FISA regulates the custody as well as the transfer of ownership of certificated and uncertificated securities that are credited to a securities account. (art. 1 para. 1 FISA). Not subject of the act are provisions regarding the registration of securities in the stock ledger, the registration by the company itself or the issuer as long as it does not act as custodian.

In accordance with art. 965 of the Swiss Code of Obligations (CO) a security is defined as a certificate that is tied to a title in such a way, that the entitlement cannot be enforced or transferred without the physical presence of the certificate. Since the professional securities trade with listed securities usually does not involve physical transfers, but rather accounting transfers between bank accounts and safe custody accounts, the original transfer function rarely comes into effect anymore. These days, securities are only very rarely safe-kept by the investor. In most cases banks or custodians take on that responsibility. Those systems for custody are referred to as mediated systems of custody.

With the creation of FISA, a new type of asset is created sui generis, the "intermediated security" (referred to here as "IS"), encompassing all the functional properties of a security. Art. 6 FISA regulates the creation of IS. Required is the deposit of securities for collective custody or the deposit of global share certificates at a custodian. Uncertificated securities or value rights need to be entered into the custodian's main register. Additionally the securities need to be credited to the account holder's account. The crediting to the securities account constitutes the completion of the transaction. Only if both actions have been completed, the FISA applies. The custodians are local institutions, as well as international financial intermediaries whose area of business encompasses the keeping of securities accounts. According to art. 16 FISA, the account holder may request an account statement from the custodian at any time – however that statement in itself is not the equivalent of a security.

2. Transfer and Issue of Securities

An IS is transferred by a written or oral order of the account holder to the custodian, to execute a transfer and a subsequent corresponding credit to the securities account of the buyer (art. 24 para. 1 FISA). It is the posting to the account that constitutes the closing of the transaction. According to art. 24 para. 4 FISA limitations regarding the transferability of IS are invalid, unless they are restricted by virtue of statutory provisions of the company at stake.

According to art. 901 para. 3 of the Swiss Civil Code (CC) the use of IS as collateral is solely regulated by the FISA. This voids any paths of recourse on the basis of pledge agreements. In regards to their use as collateral, the transfer of IS is subject to the same rules that regulate the transfer of ownership. The use of IS as collateral is regulated in art. 25 FISA. If such a transaction takes place, the account holder and the custodian irrevocably agree that the custodian is required to execute any instructions coming from the secured party without the need for consent from the account holder. In this case, the IS remain in the account holder's (assignor's) account. The collateral may be tied to certain securities, encompass all securities within the account, or a certain value quota. Interest, dividends and voting rights remain with the pledgor. In case of default, the secured party (pledgee) may dispose of the pledged securities at his own discretion and without the need for the pledgor's consent.

A right of security in favor of the custodian may be contractually agreed upon. The assignment for security purposes according to art. 164 of the Swiss Code of Obligations (CO) remains valid as an alternative to the transfer as regulated by the FISA. It is important to note that the rights of persons who acquired IS under the rules of the FISA will take precedence over the rights of an assignee, regardless of the sequence in which the transactions occurred.

3. Specific Questions

3.1 IS in Case of Compulsory Liquidation of the Custodian

Among the most important elements of legal protection within the system of IS is the guarantee of the account holder's property rights in case of bankruptcy of the custodian. Securities that are held in custody with a custodian will automatically be separated from the bankruptcy assets. The rule set forth in the FISA (art.17 et seq. FISA) largely corresponds to the rule of the Swiss Federal Banking Act. In bankruptcy proceedings of a custodian, the receiver is legally required to segregate the IS in the amount of the account holders' assets from the bankruptcy assets.

3.2 Seizure of IS

Art. 14 FISA defines the seizure of IS, as well as other preliminary measures relating to IS of an account holder, as having to take place at the location of the custodian holding the securities account concerned. Seizure of IS of an account holder that are executed at a third party custodian are null and void. This is defined in the FISA (according to the legislative commentary, BBl 2006 9315 et seq. 9358), "as a specification of art. 89 of the Swiss Federal Debt Collection and Bankruptcy Act (FDBA). The place of jurisdiction ordering the seizure is not affected by this. Similarly, preliminary measures under cantonal or federal civil procedure law can only be executed at the domicile of the custodian holding the account(s).

3.3 Securities Lending

In securities lending, the lender lends the borrower securities from his custody account against a lending fee. The borrower is obligated to return securities of the same kind and quality (art. 312 et seq. CO). For details please also read the article on securities lending by Sabine Kilgus in this newsletter. An account holder can authorize a custodian to dispose of his IS in its own name and for its own account. If the account holder is not a custodian or a qualified investor as defined by the FISA, a separate written authorization is required. This authorization must be separate from – and may not be included in – the general terms and conditions of the custodian. (art. 22 para. 2 FISA).

The IS's are to be credited into the securities account of the borrower, who generally also receives the voting rights. The act of the electronic transfer, more specifically, the crediting to the account of the borrower constitutes the legal transfer of the IS.

3.4 Need for Action Concerning Collateral

Existing contractual agreements need to be scrutinized for any possible contradiction with the new rules. The FISA neither contains any specifics on the content of any form of pledge clause, nor does it address the irrevocable agreement between account holder and custodian. This makes it imperative to check any and all security's agreements- whether they be pledge agreements or fiduciary transfer of ownership or assignments – for security purposes. Close attention needs to be paid to the rights and duties of banks in their several functions, either as pledgee or as custodian of third party pledge agreements. The liquidation of the pledged securities and their recompensation need to be clearly defined and regulated.

3.5 Need for Action Concerning Value Rights Ledger

According to art. 973c CO the issuer of value rights needs to keep a register documenting the issued securities. This is analogous to a stock ledger. It contains the amount of shares issued, as well as their denomination and the debtors.

3.6 Need for Action Concerning Bylaws and Terms of Issue

Art. 7 para. 2 FISA states that whenever securities are created through deposit of a global certificate or the entry of value rights into a main ledger, account holders holding these securities may request of the issuer of them, to issue individual certificates, if the respective bylaws so state. Terms and conditions of prospectus as well as bylaws should be checked, in order to avoid a corresponding commitment to deliver.

4. Summary

With the FISA coming into effect, the developments in the daily business of custody, transfer and collateralization of securities will be given a formal legal basis. While certain aspects and their practical application remain to be clarified, a strong foundation has been laid by the FISA. The legislative commentary concerning the FISA contains an elaborate description of the individual regulations. ■

Regulatory Standards for Securities Lending

Many customers do not realize what can happen to the assets held in safe deposit accounts with any given bank. The bankruptcy of Lehman Brothers very drastically brought the reality into consciousness that business transactions that appear rather unspectacular – and promise a seemingly secure return – can include the risk of a total loss of the investment. These transactions are called securities lending and borrowing – short securities lending. How exactly does that work?

von Sabine Kilgus

In securities lending, the lender collects a lending fee or commission for lending the borrower securities that are held in a safe custody account. The lending can encompass the entire portfolio or select titles. The lending fee – collected by the lender – serves as interest for the loan. The borrower is entitled to dispose of the securities in any way he pleases, as he becomes the de facto owner of these securities. Any possible interest or dividends, as well as voting rights connected to these securities, are transferred to the borrower, unless explicitly specified otherwise. Depending on the securities lending agreement, the lender has the right to call the loan at the end of the contract (fixed agreement) or at will in the sense of art. 404 Swiss Code of Obligations (CO). Since he lost the property right (ownership) of the securities, the lender only has a contractual right to a re-transfer of ownership of the titles or to compensation of the value equivalent. The lender therefore not only carries the market risk connected with the securities, but also the risk of default of the borrower. In case of bankruptcy of the borrower, the lender only has an unsecured claim towards him. He is, however, not entitled to segregation of the securities under custody in the sense of art. 37d Swiss Federal Banking Act (FBA), which would normally allow a depositor, to segregate the securities held in a safe custody account at that bank from the assets in bankruptcy. The claim is therefore neither privileged, nor is it secured by any form of deposit insurance.

This basic form of securities lending can be carried out in two different ways: either covered (against collateral) or naked (without collateral). In the case of covered securities lending, the lender can liquidate the backing (usually cash or other securities) in case of bankruptcy of the borrower, so the default risk is being substantially minimized.

Banks and securities dealers are involved in securities trading in a variety of roles. They can either act on their own behalf as lender or borrower (for example in the interbank market), or they can borrow their clients' securities, in order to perform other contractual obligations, to use them in other securities lending transactions, or in so called repo-transactions, i.e. sale and repurchase of securities to the Swiss National Bank for liquidity purposes.

In securities lending transactions with bank clients, the banks and securities dealers can either function as a principal, typically as a borrower of their clients' assets held in a safe custody account, or they act as agents arranging transactions between banks and/or clients against a commission. In the latter case, the client may not even know the counterparty to the transaction.

It is quite evident, that in spite of the advantages inherent in mobilizing a client's assets through securities lending transactions, the risks can be considerable. It is because of those risks, that the Swiss Financial Market Authority FINMA has published a circular, concerning the principles of pension- and securities lending transactions with securities (http://www.finma.ch). Aside from regulating the treatment by banks and securities dealers of such transactions, in relation to accounting and regulatory liquidity standards, which are of no further concern here, it stipulates contractually relevant guidelines, which have to be observed from now on, concerning securities lending involving private persons.

It bases its' opinion on art. 11 of the Swiss Federal Stock Exchange act (SESTA), which imposes on banks and securi-

ties dealers the following duties: 1. To inform the client of any inherent risks of a transaction with securities. 2. To conduct business accurately and in the best interest of the client. 3. To not allow possible conflicts of interest that my affect the customer negatively.

1. Principles for Securities Lending Transactions according to the FINMA Circular

Firstly, the Circular demands that private persons shall only be able to enter into covered securities lending transactions. The same is true anyway for insurance companies and pension funds, based on the conservative investment policies they are bound to. It should be noted, that so-called qualified investors according to art. 10 para. 3 of the Swiss Collective Investement Schemes Act (CIA) are not considered to be private persons and shall therefore be excluded from this protection. According to art. 10 para. 3 CIA in connection with art. 6 of the related ordinance the following persons are considered to be qualified investors:

- Wealthy private clients whose assets exceed CHF 2 million.
- Private clients whose assets are managed by a discretionary asset management contract.

These investors have to keep a close watch to make sure they are not entered into naked securities trading transactions, if they do not want to do so. This is especially true when signing a discretionary asset management contract with a bank or an independent asset manager.

Aside from these protective provisions for private investors, the Circular holds banks and securities dealers to certain contractually relevant provisions that are mandatory for all securities lending transactions:

As a part of this, securities lending transactions have to be entered into by means of a separate agreement in writing that is aside and on top of any other agreements or general terms with the bank. Such agreement has to stipulate the rights and duties of the parties involved and to specifically regulate the execution as well as the compensation arising from the transaction. This agreement also has to disclose the risks involved – transfer of ownership, lack of deposit protection, non existent right to segregation in case of the bank's bankruptcy. Further, the bank or the securities dealer has to inform the client, whether it acts as a principal or as an agent. It is not enough for a bank or securities dealer to include such transactions in their general terms and conditions, thereby reserving the right to conduct such transactions in advance. Such clauses in the general terms and conditions were already declared void by the predecessor supervisory authority of FINMA, the Swiss Federal Banking Commission, in 2002. On the contrary, the client shall be informed explicitly that he is about to enter into such a transaction. In addition, the banks and securities dealers are bound by the standard contractual duty, to be able to account for the lent securities at any given time (art. 400 para. 1 CO), to specifically note the loan in the reporting on the safe custody account, to periodically include it in the accounting process and to keep securities records – i.e. the stock ledger for registered shares – up to date. The client has to be given the option to selectively exclude certain securities from the lending transaction. Those transparency requirements are supposed to empower the client, in order for him to be able to adequately supervise, modify and terminate such securities lending transactions he has entered into.

2. Summary

The above discussed principles that are based on art. 11 SESTA and explicitly stated in the Circular clarify the already existing contractual rights and duties of bank customers, who choose to enter into a securities lending transaction with a bank or a securities dealer – without entirely prohibiting them.

With the strict requirement of a written agreement and the banks' duty to fully disclose the terms of any transaction, the protection – specifically of less business savvy customers – can be improved. Private persons should be especially alert, to make sure that they are not considered as being qualified investors – either because their assets exceed CHF 2 million, or because they have signed an asset management agreement – therefore being excluded from the automatic protection against naked securities lending.

These principles will take effect as of June 30, 2010. ■

Systems of Compensation in the Financial Industry and the Circular by the Swiss Financial Market Supervisory Authority (FINMA)

Even before the onset of the financial crisis, and certainly during its course, the so called "banker bonuses" were heavily criticized by media and politicians alike. It is not surprising then, that the latter group passed this hot topic straight on to the Swiss Financial Market Supervisory Authority (FINMA), demanding strong regulations for effective and sustainable systems of compensation for the industries subject to its authority (banks and insurance companies). The FINMA's Circular has recently been presented.

Stefan Schalch

1. Starting Position and Overview

Experience has taught that systems of compensation have an influence on the behavior of those concerned by them – this is in fact their inherent goal. When the taking of risks bears the promise of a high bonus, while failure bears no financial consequences, the individual will naturally tend towards high risk transactions. When a large number of individuals at any given firm risk a lot in its name, the financial exposure of this company rises. In the most extreme cases this can lead to the collapse of – or at least grave damage to – the company. The fact that these very mechanisms were partly responsible for the collapse of the house of cards that was the financial industry has been widely acknowledged.

On the topic of "fair compensation" millions (or more appropriately: "billions") of pages have been written. In Switzerland the most important of those are the „Swiss Code of Best Practice for Corporate Governance" by the economiesuisse from 2002 and the Guidelines of the SIX Swiss Exchange concerning Corporate Governance from the same year. Both prominently treat the topic of financial compensation and form a sound starting point from which to analyze it (no. 2 below).

As part of the current corporate law revision, and even more recently, as part of the so called "racketeering initiative (Abzockerinitiative)", the topic occupies a prominent place in the public debate – this is not surprising, given that politicians hope to be cast in a positive light. A few words on this will follow under no. 3 below.

The latest chapter for Swiss financial institutions and insurance companies has now been written by the FINMA. Its "Circular 10/1 remuneration schemes" of 10/21/09 was published on 11/11/09. It will be discussed under no. 4 below.

2. The Swiss Code of Best Practice for Corporate Governance and the SIX-Guideline regarding Information for Corporate Governance

The **Swiss Code** addresses best practices for publicly owned Swiss firms by way of (only) recommendation. However, other companies and organizations of impact to the Swiss economy can gather practical guidelines from the Swiss Code. On the topic of remuneration the Swiss Code recommends the following:

- Remuneration should be appropriate to the market and to the performance, in order to recruit and maintain staff of appropriate qualification and character.

- The remuneration should be comprehensible and dependent on the sustainable prosperity of the company as well as the personal contribution. False incentives should be avoided.

The **SIX-Guideline** on the other hand emphasizes transparency and hopes to curb unhealthy remuneration policies that way. As a consequence, all directly or indirectly paid forms of remuneration (namely fees, salaries, credit vouchers, bonus payments and payments in kind) to active as well as former members of the governing body

during the year past need to be itemized as part of the yearly financial report of a company.

The Swiss Code is not legally binding and the SIX-Guideline only applies within a small circle, namely regarding those issuers, whose shares are listed with the SIX Swiss Exchange and whose official place of incorporation is Switzerland. Thus the scope of application of both guidelines is very limited.

3. Swiss Corporate Law, its revision and the Public Initiative "Against Racketeering"

Swiss corporate law, in its current form, has a limited set of governing instruments regarding the issue of compensation. It heavily relies on transparency. Article 663b^{bis} CO requires publicly listed companies to disclose any direct or indirect forms of remuneration towards members of the board of directors, of senior management and of the advisory board as an addendum to the yearly financial statement. Here again, the scope of application is somewhat limited.

The draft of the new corporate law attempts to change this. One of the changes is the proposed granting of statutory authority to the annual shareholders meeting regarding the remuneration policies in general as well as specifically the actual remuneration of the senior members of management (board of directors and executive management). Furthermore, the instatement of a legal right of recourse is planned, to allow for restitution in cases where the compensation by the company retrospectively turns out to be disproportionate to the performance of the employee. Greater transparency concerning compensation within all companies is another goal. Each shareholder is meant to be given the right to request information from the board of directors regarding remuneration, loans and advances to be granted to members of senior management. At what point the new corporate law will come into effect is unknown as of yet.

Finally, the initiators of the public initiative "against racketeering" are looking to put a cap to what they perceive as excessive compensation of the senior management of publicly listed companies through the improvement of corporate governance. At the shareholders meeting shareholders should be given more influence on the remuneration policies concerning senior management, for example by:

- making the shareholders meeting vote on the total of funds assigned to the remuneration of the board of directors and the executive management;
- prohibiting golden parachutes and sign-on payments;
- making the statutes define the size of loans to and pensions of members of the governing bodies, the length of employment contracts of members of the executive management and the permissible number of external mandates a member of the governing bodies is allowed to have;
- making violations punishable under criminal law with up to three years imprisonment.

This altogether extreme proposal would hurt the free, liberal place of business that is Switzerland in ways that would be damaging to its economy.

4. The FINMA Circular "10/1 Remuneration Schemes"

The FINMA creates supervisory rules in general and regarding remuneration that are legally binding to those market-players (financial intermediaries and insurance companies) that are subjected to its authority. This binding authority has been narrowed by the FINMA itself, to include only the seven largest Swiss banks and the five largest insurance companies. According to media accounts those are BNP Paribas (Suisse), Credit Suisse, EFG International, HSBC (Suisse), Raiffeisengruppe, UBS and ZKB in the banking sector and Axa Winterthur, Bâloise, Swiss Life, Swiss Re and Zurich among the insurance companies. The rules only apply to banks with more than 2 billion Swiss francs in equity capital and insurance companies exceeding 2 billion Swiss francs in solvency. For all other banks, securities dealers, insurance companies and licensees under the Collective Investment Schemes Act, the Circular serves as a guideline for best practice. FINMA explicitly reserves the right to require individual intermediaries to comply with these rules, even if they do not reach the benchmarks, in cases where it seems appropriate based on their risk profile, bad business habits or unsuitable compensation schemes.

The primary goal of the authority is to avoid remuneration schemes that encourage excessive risk taking which can endanger the stability of financial institutions. The main focus lies on variable compensation which is considered participation in the profit of the company. It therefore has to be inseparably tied to the economic success of the institution, thereby taking into account the risk profile and sustainability aspects. In order to avoid a negative impact on competitiveness of Swiss financial institutions in their search for talent, there is no cap on the remuneration. However, the com-

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pensation needs to be incorporated into the capital- and liquidity planning of the respective intermediary. The FINMA's strategy is to allow a significant portion of variable remuneration to only be paid out, once the future development of the company is foreseeable (i.e. generally after three years). This is called deferred or risk-adjusted payment (as recently implemented by Credit Suisse). FINMA also favors clawback provisions as recently introduced by the German Commerzbank for its top management. They are tied to typical risks arising in the area of responsibility of the respective employee.

In passing, FINMA also wants to increase transparency. The board of directors needs to compile a report, detailing the remuneration policies on all different levels of an institution and make this report available to all of its shareholders (therefore practically making it public). In demanding this, the FINMA not only goes further than the existing law, but also further than the draft for the revised corporate law. The latter focuses on senior management only.

The new regulations went into effect on January 1st 2010. The FINMA is aware that the implementation will raise a number of sensitive issues concerning employment- and tax law. It passes on the implementation of those standards to the individual intermediaries. After a transition period of one year, they must be compliant with the FINMA Circular. The respective institute must report on the implementation by April 30th, 2011 with their auditors testifying that report. Although there is no formal approval of the individual compensation schemes, FINMA will closely monitor the implementation.

Conclusion

The topic of appropriate remuneration remains a hot one. With its Circular, the FINMA has brought momentum into the discussion. It remains to be seen in what way this will influence the work on the revision of corporate law. The FINMA rules seem to be rather practical, something that cannot be said about many other sets of rules. On the other hand, the FINMA seems to be going further than its European counterparts. Let's hope this will not damage Switzerland as a preferred place of business for banks and financial institutions. We'll have to wait and see. In any case, one thing remains true: The show must go on... ■

Humor

A lawyer named Strange died, and his friend asked the tombstone maker to inscribe on his tombstone, „Here lies Strange, an honest man, and a lawyer." The stonecutter insisted that such an inscription would be confusing, for passersby would tend to think that three men were buried under the stone. However he suggested an alternative: He would inscribe, „Here lies a man who was both honest and a lawyer." That way, whenever anyone walked by the tombstone and read it, they would be certain to remark: „That's Strange!"

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