

LEGAL ANALYSES

Revised Regulations for Unclaimed Assets Lying Dormant in Switzerland and New Accounting Standards for Banks—Revision of Swiss Banking Ordinance en Route

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☞ Accounting standards; Banks; Dormant accounts; Switzerland; Transfer of assets; Unclaimed moneys

Introduction

While the tax dispute between Swiss banks and the United States has been making the headlines, the Federal Department of Finance initiated consultations on the total revision of the Banking Ordinance. New accounting standards as well as new provisions for unclaimed assets lying dormant on Swiss bank accounts shall be implemented.¹ The Swiss Financial Market Supervisory Authority (FINMA) initiated parallel consultations regarding the respective accounting circular in order to be in compliance with the revised Banking Ordinance.² The entry into force is planned for January 1, 2015.

This article shall briefly outline the main changes in the accounting standards and summarise the reaction of the Swiss Bankers Association. Particular attention shall be paid to the new provisions regarding the liquidation of unclaimed assets due to its historic international relevance. Finally, the current status of the implementation of Basel III will be addressed in a short excursus.

Accounting standards for banks

Due to the recent revision of the general financial reporting provisions in the Swiss Code of Obligations, which came into force on January 1, 2013, and which have to be compellingly applied as of the business year 2015 (or 2016 for affiliated groups), the accounting standards for banks and securities dealers had to be amended in order to be compliant with the general provisions in the Swiss Code of Obligations.³ Two consultations were initiated, one by the Swiss Government and the Federal Department of Finance regarding the amended accounting standards within the Banking Ordinance and another by FINMA regarding the new circular “Accounting-banks”, which shall completely replace the current FINMA Circular 2008/2.⁴

Amended principles of the Banking Act

The financial reports of banks are in principle based on the provisions of the corporation law according to art.6 para.3 Banking Act in connection with Code of Obligations art.662, but include further provisions as detailed in the Banking Ordinance and the respective FINMA Circular.⁵ The arts 6, 6a and 6b Banking Act were introduced together with the amended provisions of the Swiss Code of Obligations and entered into force on January 1, 2013.⁶

Article 6 of the Banking Act introduced the legal duty for all institutions to prepare half-yearly interim financial statements. Banking Act art.6a now provided that while private bankers still do not have to publish the annual report and the audit reports, they have to do so (limited to the annual report) regarding the business report if creditors ask for it based on a legitimate interest according to Swiss Code of Obligations art.958e para.2.⁷ Finally, Banking Act art.6b grants the authority to the Government and to FINMA to issue the implementation rules, which have led to the current revision of the Banking Ordinance and of the FINMA Circular.

¹ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.1.

² Swiss Financial Market Supervisory Authority (FINMA), *Accounting- banks: consultation on new standards*, press release of October 29, 2013 at <http://www.finma.ch/aktuell/pages/mm-rechnungslegung-banken-anhoerung-neue-vorschriften-20131029.aspx> [Accessed December 17, 2013].

³ Swiss Financial Market Supervisory Authority (FINMA), *Accounting- banks: consultation on new standards*, press release of October 29, 2013.

⁴ Swiss Financial Market Supervisory Authority (FINMA), *Accounting- banks: consultation on new standards*, press release of October 29, 2013.

⁵ Swiss Federal Government, explanatory report *Botschaft zur Änderung des Aktienrechts*, December 21, 2007, p.1742.

⁶ BSK-BankG-Bernet/Portmann art.6/6a/6b/a, art.6 N 1c.

⁷ BSK-BankG-Bernet/Portmann art.6 N 1i; Swiss Federal Government, explanatory report *Botschaft zur Änderung des Aktienrechts*, December 21, 2007, p.1742.

Revised accounting standards in the Banking Ordinance and in the FINMA Circular

The changes in both the Banking Ordinance and the FINMA Circular are based on the recently amended legislation on financial reporting within the Swiss Code of Obligations together with the respective provisions of the Banking Act and are partly adapted to the internationally recognised accounting standards IFRS and US GAAP. While the structure of said Circular has been revised, the Banking Ordinance in its totality has been well-arranged and streamlined.⁸ The provisions regarding the structure of the financial statements have been transferred from the current banking Ordinance to the FINMA circular.⁹

Swiss banks and securities dealers will be confronted with an amended set of accounting standards covering all types of financial statements: reliable assessment statutory single-entity financial statements, true and fair view statutory single-entity financial statements, true and fair view supplementary single-entity financial statements and consolidated financial statements.¹⁰

While to date it is possible to include collective valuations not prepared according to the true and fair view principle into statutory single-entity financial statements, the new provisions provide for unrestricted individual valuation (so-called valuation item-by-item) in all types of financial statements for participations, tangible fixed assets and intangible assets.¹¹ Also, small groups are no longer exempted from consolidating their financial statements. They will have to include all significant subsidiaries, explicitly also special-purpose entities (SPE), into their consolidated financial statements. This duty to include all significant subsidiaries constitutes a novelty since it has been limited to banks, finance companies and real estate companies so far.¹² As a rule, cash flow statements shall only be required for true and fair view financial statements.¹³

Moreover, all institutions will have to prepare half-yearly interim financial statements, including a full income statement (as already provided in Banking Act art.6 para.2). This duty shall not depend on the balance sheet total anymore (heretofore minimum CHF 100 million), and, as foreseen in Banking Actv, the simplified requirements for smaller banks (shortened income

statement) shall disappear. Listed banks will have to prepare a statement of the shareholders' equity and a shortened version of the notes.¹⁴

As regards the option according to the current Banking Ordinance art.25 para.3 to set the value adjustments off against the asset position or, alternatively, to recognise them under the liabilities shall be abolished. It is now foreseen that the value adjustments must be deducted from the asset position concerned.¹⁵ Furthermore, while according to FINMA's position it has only been allowed for structured products issued by the institution itself to be recognised at fair value, it shall now be possible for financial instruments outside the trading business, subject to strict rules, though.¹⁶ Finally, s.XVII of the FINMA Circular provides for two different treatments of employee participation schemes in accordance with Swiss GAAP FER 31: it shall henceforth be distinguished between true and virtual equity instruments.

Response of the Swiss Bankers Association

The Swiss Bankers Association (SBA), which, as the leading professional organisation of the Swiss financial centre, was involved in the process of preparing this revision, published its response to the revised accounting standards on December 13, 2013.¹⁷ While it basically welcomed the revision, it disapproved of some of the provisions.¹⁸ The main disapprovals were the following:

The SBA criticised that the minimum structuring requirements shall no longer be governed at the level of a formal ordinance, but only at the level of a circular. In the SBA's opinion, this would reduce the legal and planning certainty for the banks in an undue manner. Also, the foreseen mandatory offsetting of value adjustments with the corresponding assets is not welcomed, since it would lead to excessive costs and efforts particularly for small banks, whereby no corresponding benefit may be found. Finally, the restriction regarding the application of collective valuation (i.e. the valuation item-by-item) for tangible fixed assets and intangible assets constitute an unjustified unequal treatment of banks compared to other businesses in the SBA's view.¹⁹

Unclaimed assets

Unclaimed assets lying dormant in Swiss bank accounts have been subject to various debates which have affected the country's reputation severely. After long

⁸ Swiss Financial Market Supervisory Authority (FINMA), explanatory report *Revision Rechnungslegung Banken*, October 29, 2013, p.4.

⁹ Swiss Financial Market Supervisory Authority (FINMA), *Revised accounting standards for banks, Key points*, October 29, 2013, p.2.

¹⁰ Swiss Financial Market Supervisory Authority (FINMA), *Accounting- banks: consultation on new standards*, press release of October 29, 2013 at <http://www.finma.ch/e/aktuell/pages/mm-rechnungslegung-banken-anhoerung-neue-vorschriften-20131029.aspx> [Accessed December 17, 2013].

¹¹ Swiss Financial Market Supervisory Authority (FINMA), explanatory report *Revision Rechnungslegung Banken*, October 29, 2013, p.4.

¹² Swiss Financial Market Supervisory Authority (FINMA), *Revised accounting standards for banks, Key points*, October 29, 2013, p.2.

¹³ Swiss Financial Market Supervisory Authority (FINMA), explanatory report *Revision Rechnungslegung Banken*, October 29, 2013, pp.4 and 5.

¹⁴ Swiss Financial Market Supervisory Authority (FINMA), *Revised accounting standards for banks, Key points*, October 29, 2013, p.2.

¹⁵ Swiss Financial Market Supervisory Authority (FINMA), *Revised accounting standards for banks, Key points*, October 29, 2013, p.2.

¹⁶ Swiss Financial Market Supervisory Authority (FINMA), *Revised accounting standards for banks, Key points*, October 29, 2013, p.2.

¹⁷ Swiss Bankers Association, *Revision Rechnungslegung Banken—Anhörung Bankenverordnung und FINMA-Rundschreiben 2008/2* at http://www.swissbanking.org/it/20131213-3060-ver-rechnungslegung_inkl_anhang_final-slo.pdf [Accessed on December 17, 2013].

¹⁸ Swiss Bankers Association, *Revision Rechnungslegung Banken—Anhörung Bankenverordnung und FINMA-Rundschreiben 2008/2*.

¹⁹ Swiss Bankers Association, *Revision Rechnungslegung Banken—Anhörung Bankenverordnung und FINMA-Rundschreiben 2008/2*.

parliamentary deliberations, a new deadline of maximum 62 years in total for the recovery of unclaimed assets, which are estimated to amount to approximately CHF 600 million,²⁰ was set and provisions were included to the revised Banking Ordinance.

Historical background

In autumn 1996, an international debate regarding the responsibilities for activities during World War II started, whereby gold and dormant accounts became a symbol of the suffering of the victims. The international focus was on Switzerland and its financial centre as the hub of those transactions.²¹ More than 50,000 wartime accounts were identified as probably belonging to European Jews.²² A class action suit filed by Jewish organisations against Swiss banks led to a global settlement of USD 1.25 billion, which was to be administered by a particular tribunal, wrapping up its operations in 2012.²³ Despite the historic dimension and the particular importance for the image of the Swiss financial centre, Swiss parliament decided only in March 2013 after years of debates to set a deadline for clients to claim dormant assets in Swiss banks.²⁴

New liquidation provision in the Banking Act

The new Banking Act art.37m para.1 provides that banks shall liquidate unclaimed assets after 50 years, if the entitled person did not report based on an foregoing publication. Together with other deadlines as provided in the Banking Ordinance (ten years until being considered as unclaimed and then a one year period for the first and eventually second publication), the total period of time increases to maximum 62 years. Unclaimed assets in the maximum amount of CHF 500 may be liquidated without any previous publication. It is further foreseen in Banking Act art.37m para.2 that the entitled person loses his/her title with the liquidation. Finally, Banking Act art.37m para.3 provides that any proceeds of the liquidation belong to the federal government.

Procedure according to the revised Banking Ordinance

The new art.37m of the Banking Act was approved by the competent parliamentary commission only after being aware of the revised Banking Ordinance's wording.²⁵ Hence, the provisions in the Banking Act as well as in the respective Ordinance may well be deemed as a legislative-administrative package of measures.

Although no publication is foreseen according to Banking Act art.37m para.1 for unclaimed assets below CHF 500 (i.e. the total amount of the unclaimed assets held by the same entitled person with one bank), the arts 54–57 of the Banking Ordinance shall be applied similarly according to Banking Ordinance art.59.

Definition of the Term (art.45)

Assets may be deemed as unclaimed if a bank reportedly has not been able to establish any contact for a period of ten years, whereby the bank has the burden of proof. For the purpose of the transfer of assets, they may be deemed as unclaimed even before the term of ten years if they are transferred to another bank and if the former may provide evidence of having taken all necessary steps to contact the entitled person. FINMA shall, together with the banks, substantiate the definition and the administration of the assets and set the minimal standards for self-regulation.

Transfer of the Assets and the Banks' Duties (arts 46–48)

The transfer of unclaimed assets between banks requires a written agreement which includes together with the listing of the assets to be transferred the name of the entitled person or at least information in order to identify this person. Documents referring to the contractual relationship between the transferring bank and the entitled person shall also be transmitted, together with the evidence of the last contact with this person. The costs of the transfer shall not be borne by the entitled person, particularly since the transferring bank is interested in this transfer.²⁶ The receiving bank will have to check whether the assets are indeed unclaimed and will have to list them in a way that the assets may be assigned at any time, whereby unclaimed assets from one person may be merged. A first time receiving bank also needs to notify FINMA. Finally, the transferring bank has the duty to refer any person claiming these assets to the receiving bank.

Publication (arts 49–53)

The banks shall make the names of the entitled persons, whose assets have been unclaimed for a period of 50 years after being considered as such (i.e. a total of 60 years), public and ask them to file their entitlements within one year. The announcement shall be published in the *Swiss Official Gazette of Commerce* (SHAB) and in any other appropriate media based on the circumstances of the case (e.g. last domicile known). If there are new findings due

²⁰ International Service of the Swiss Broadcasting Corporation (swissinfo.ch), *Deadline agreed for unclaimed bank assets*, March 5, 2013 at http://www.swissinfo.ch/eng/swiss_news/Deadline_agreed_for_unclaimed_bank_assets.html?cid=35146574 [Accessed December 17, 2013].

²¹ Independent Commission of Experts "Switzerland—Second World War", *Switzerland and Gold Transactions in the Second World War*, Interim Report, 2002, p.1.

²² *TIME Magazine*, A New Lease on Life for the Mysterious Lost Bank Accounts of Switzerland, March 21, 2013 at <http://world.time.com/2013/03/21/a-new-lease-on-life-for-the-mysterious-lost-bank-accounts-of-switzerland/> [Accessed December 17, 2013].

²³ *TIME Magazine*, A New Lease on Life for the Mysterious Lost Bank Accounts of Switzerland, March 21, 2013.

²⁴ International Service of the Swiss Broadcasting Corporation (swissinfo.ch), *Deadline agreed for unclaimed bank assets*, March 5, 2013 at http://www.swissinfo.ch/eng/swiss_news/Deadline_agreed_for_unclaimed_bank_assets.html?cid=35146574 [Accessed December 17, 2013].

²⁵ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.3.

²⁶ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.6.

to the first publication, a second publication shall be made, whereby another notification period of one year is foreseen. The result of the examination by the bank shall be comprehensible and documented. Should, however, a claim be deemed as legitimate, the assets are not deemed unclaimed anymore. Interestingly, the reasonable and proportionate costs for the publication shall be paid out of the unclaimed assets, unlike the costs regarding the transfer of assets.²⁷ For assets, which have already remained unclaimed for a period of more than 50 years as per the entry in force of the revision, the publication period is 5 year.

Liquidation (arts 54–59)

The banks shall liquidate unclaimed assets: the latest after two years if no claims were received; or if claims were submitted, the latest two years after it was held that these claims were not legitimate.

A bank's decision to liquidate unclaimed assets shall be protocolled and include the examination documents, a list of the unclaimed assets and details of the liquidation procedure. Also, the liquidation shall be protocolled, including details of the liquidation procedure, the proceeds and the costs involved. The costs shall be paid out of the liquidation proceeds. The net liquidation proceeds shall be transferred to the Federal Finance Administration (FFA), whereby the complete files remain with the bank.

Excursus: Capital Adequacy Ordinance

In May 2013, FINMA informed that an independent review by the Basel Committee on Banking Supervision, as part of its ongoing regulatory consistency assessment programme (RCAP), which aims to secure the implementation of the Basel III framework at the international level, concluded that the Swiss banking

regulation was compliant with the international Basel III rules.²⁸ However, the Swiss standards deviated from them in some areas.²⁹

While the Swiss regulation appeared to be fully compliant with Basel II in 11 of 14 areas, some inconsistencies were found regarding the definition of capital, the internal ratings-based approach (IRB) and the disclosure.³⁰ FINMA already published the details of the respective amendments regarding the individual rules on eligible capital and the IRB on May 10, 2013.³¹ A particular focus was given to the ascertainment of the Common Equity Tier 1 (CET 1).³²

FINMA submitted a request to the Swiss Government regarding a small number of amendments to the Capital Adequacy Ordinance (CAO) in order to eliminate these discrepancies.³³ The revised CAO has been included in the explanatory report on the total revision of the Banking Ordinance.³⁴ The entry into force is also planned for January 1, 2015.

Concluding observations

Despite the tax dispute between Swiss banks and the United States, the legislative and regulatory world keeps on turning. And thereby, it reminds us of another highly delicate matter, which shocked the Swiss financial centre in the 90-ies, but has literally been dormant lately—the unclaimed assets lying dormant on Swiss accounts. The reform and the deadlines set in the Banking Act and the respective Ordinance appear to be rather fair and sufficiently far-reaching.

As regards the revised accounting standards for banks and the amendments to the Capital Adequacy Ordinance, it reminds us of the recent financial crisis and the subsequent call for deeper regulation.

“What is past is prologue”—William Shakespeare (1564–1616).

²⁷ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.9.

²⁸ Swiss Financial Market Supervisory Authority (FINMA), *Positive assessment of Swiss financial market regulation*, press release of June 25, 2013 at <http://www.finma.ch/e/aktuell/Documents/mm-rcap-20130625-e.pdf> [Accessed December 17, 2013].

²⁹ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.12.

³⁰ Swiss Financial Market Supervisory Authority (FINMA), *Positive assessment of Swiss financial market regulation*, press release of June 25, 2013 at <http://www.finma.ch/e/aktuell/Documents/mm-rcap-20130625-e.pdf> [Accessed December 17, 2013].

³¹ Swiss Financial Market Supervisory Authority (FINMA), *Positive assessment of Swiss financial market regulation*, press release of June 25, 2013.

³² Basel Committee on Banking Supervision, *Regulatory Consistency Assessment Programme—Assessment of Basel III regulations—Switzerland*, June 25, 2013, p.11 ss.

³³ Swiss Financial Market Supervisory Authority (FINMA), *FAQ Basel III* at <http://www.finma.ch/d/faq/beaufsichtigte/seiten/basel-iii.aspx> [Accessed December 17, 2013].

³⁴ Federal Department of Finance (FDF), explanatory report *Erläuterungsbericht zur Totalrevision der Bankenverordnung*, October 29, 2013, p.3.