COMPLIANCE

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Chers Collègues,

Chers Membres,

Nous avons le plaisir de vous adresser le nouveau numéro de notre Newsletter.

2013 s'annonce comme une année riche en nouveaux développements dans notre secteur et le projet de Circulaire "Fit & Proper". n'en est certainement pas le moindre.

Ce projet (voy. aussi EBA guidelines du 22.11.2012) a, en effet, déjà soulevé pas mal le questionnement.

Ainsi les critères pour être considéré comme "Fit" sont-ils les mêmes pour les administrateurs non-exécutifs, les membres du Comité de Direction et les responsables des fonctions de contrôle bien que ces fonctions soient en pratique très différentes et ne requièrent pas le même niveau de connaissance et d'expérience.

Le respect du droit à la vie privée mais surtout la présomption d'innocence ne semblent pas garantis. En effet, dès lors qu'une personne ferait l'objet d'une procédure pendante, les éléments qui y ont conduit devraient être pris en compte pour déterminer si elle est "proper" (d'abord par l'institution et ensuite par la BNB) alors même que ladite personne ne serait encore ni jugée, ni condamnée.

La question s'est posée de savoir si les administrateurs d'un établissement ayant bénéficié de l'aide étatique étaient encore éligibles pour de telles fonctions dès lors qu'il y aurait un "antécédent financier" indirect à sous-peser.

La Banque Nationale ne s'estime pas non plus tenue par l'agrément obtenu par le Compliance Officer auprès de la FSMA. On peut tout de même difficilement, en pratique, imaginer que celui-ci soit considéré comme qualifié pour un régulateur et non pour l'autre.

La technique de l'interview et les droits de la défense ainsi que l'absence de délais dans le chef de l'autorité pour rendre une décision ont été très largement soulignés dans les diverses consultations.

M. Swyngedouw (BNB) nous en parlera plus amplement en juin lors du Compliance Day fixé le 14 !

Dans la présente Newsletter, j'attire tout particulièrement votre attention sur les premiers résultats révélés par le mystery shopping de la FSA... Edifiant!

Bonne lecture!

Marie-France De Pover

Présidente

SWITZERLAND AND NETHERLANDS BAN INVESTMENTS IN CLUSTER MUNITION PRODUCTION

From 1 January 2013 legislation banning forms of investments in cluster munitions came into effect in Switzerland and the Netherlands.

With this new legislation, the Netherlands and Switzerland join a growing number of states in outlawing financial support for production of these banned weapons.

In the Netherlands, the Dutch Market Abuse (Financial Supervision Act) Decree was changed to include an obligation to "prevent any Dutch financial institution to directly support any national or foreign enterprise which produces, sells or distributes cluster munitions."

The legislation includes a prohibition on providing loans, acquiring or offering a financial instrument that has been issued by a company engaging in the production, selling, or distribution of cluster munitions, and acquiring non-marketable holdings in the capital of such a company.

In Switzerland, on January 1, the revised Federal Law on War Material came into force, which includes a prohibition on direct and indirect investments in the development, manufacturing or acquisition of prohibited "war material", including cluster munitions. The legislation means that it is forbidden to directly offer credits, loans and donations or comparable financial benefits in this regard. Indirect investments are forbidden "if the intention is to bypass the prohibition on direct financing".

On January 8, Swiss bank UBS, issued a statement declaring, "we have decided that we will not provide credit facilities, capital market transactions as well as buying and holding equity and/or bonds (including derivatives) of companies that are involved in the development, production or purchase of these controversial weapons".

UBS admitted having investments in 4 companies identified as cluster munition producers.

OLDEST SWISS BANK WEGELIN TO CLOSE AFTER ADMITTING AIDING US TAX EVASION

Switzerland's oldest bank is to close after pleading guilty to helping some of the US's richest people evade paying taxes on at least $1.2bn which was hidden in secret offshore accounts.

It was alleged that Wegelin's scheme involved its bankers opening secret accounts for US clients under code names and setting up sham entities to avoid detection in various tax havens, including Panama and Liechtenstein.

SwissPrivateBank.com, a website Wegelin used to attract English-speaking clients, boasted that: "Swiss bank secrecy is not lifted for tax evasion. Neither the Swiss government nor any other government can obtain information about your bank account."

The bank agreed to pay $57.8m in fines and restitution to the US authorities after admitting to conspiracy charges related to helping US taxpayers living overseas evade payments to the Internal Revenue Service (IRS) for almost a decade.

It is not yet known if the bank will be forced to hand over the names of US clients who held secret accounts at the bank

The bank, which started business 35 years before the US declaration of independence, released a statement confirming its closure.

It is the first foreign bank to close since the US authorities began a crackdown on those helping Americans dodge taxes.

"Wegelin was aware that this conduct was wrong", said Otto Bruderer, a managing partner at Wegelin

ESMA PUBLISHED REMUNERATION GUIDELINES FOR ALTERNATIVE INVESTMENT FUND MANAGERS

ESMA has published its final guidelines on remuneration of alternative investment fund managers (AIFMs). The rules will apply to managers of alternative investment funds (AIFs) including hedge funds, private equity funds and real estate funds. Non-EU AIFMs who market funds (using passport agreements) to EU investors will also be subject in full to the guidelines after a transitional period.

AIFMs will be asked to introduce sound and prudent remuneration policies and organisational structures which avoid conflicts of interest that may lead to excessive risk taking. Stronger governance of how fund managers are paid will ultimately lead to improved investor protection. The guidelines apply to identified staff whose professional activities might have a material impact on the AIF's risk profile. This includes senior management, risk takers, control functions, and any employee receiving a total remuneration that takes them into the same remuneration bracket as the aforementioned categories of staff.

For the purposes of the guidelines, remuneration consists of all forms of payments or benefits paid by the AIFM, of any amount paid by the AIF itself, including carried interest, and of any transfer of units or shares of the AIF, in exchange for professional services rendered by the identified staff.

The guidelines will be translated into the official languages of the EU. Within two months of the publication of the translations on ESMA's website, competent authorities should confirm to ESMA whether they comply or intend to comply with the guidelines by incorporating them into their supervisory practices.

Banks should never function as laundromats for mafia money, or enable the funding of terrorism

ANTI-MONEY LAUNDERING: STRONGER RULES TO RESPOND TO NEW THREATS

The Commission has adopted on February 5, 2013 two proposals to reinforce the EU's existing rules on anti-money laundering and fund transfers. The threats associated with money laundering and terrorist financing are constantly evolving, which requires regular updates of the rules.

The package, which complements other actions taken or planned by the Commission in respect of fight against crime, corruption and tax evasion, includes:

A directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

A regulation on information accompanying transfers of funds to secure "due traceability" of these transfers

Both proposals fully take into account the latest Recommendations of the Financial Action Task Force (FATF), and go further in a number of fields to promote the highest standards for anti-money laundering and counter terrorism financing.

More specifically, both proposals provide for a more targeted and focussed risk-based approach.

In particular, the new Directive:

- improves clarity and consistency of the rules across the Member States
- by providing a clear mechanism for identification of beneficial owners. In addition, companies will be required to maintain records as to the identity of those who stand behind the company in reality.
- by improving clarity and transparency of the rules on customer due diligence in order to have in place adequate controls and procedures, which ensure a better knowledge of customers and a better understanding of the nature of their business. In particular, it is important to make sure that

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ANTI-MONEY LAUNDERING: STRONGER RULES TO RESPOND TO NEW THREATS (PART II)

simplified procedures are not wrongly perceived as full exemptions from customer due diligence.

• and by expanding the provisions dealing with politically exposed persons, (i.e. people who may represent higher risk by virtue of the political positions they hold) to now also include "domestic" (those residing in EU Member States) (in addition to 'foreign') politically exposed persons and those in international organisations. This includes among others head of states, members of government, members of parliaments, judges of supreme courts.

• extends its scope to address new threats and vulnerabilities

• by ensuring for instance a coverage of the gambling sector (the former directive covered only casinos) and by including an explicit reference to tax crimes.

• promotes high standards for anti-money laundering

• by going beyond the FATF requirements in bringing within its scope all persons dealing in goods or providing services for cash payment of €7,500 or more, as there have been indications from certain stakeholders that the current €15,000 threshold was not sufficient. Such persons will now be covered by the provisions of the Directive including the need to carry out customer due diligence, maintain records, have internal controls and file suspicious transaction reports. That said, the directive provides for minimum harmonisation and Member States may decide to go below this threshold.

• strengthens the cooperation between the different national Financial Intelligence Units (FIUs) whose tasks are to receive, analyse and disseminate to competent authorities reports about suspicions of money laundering or terrorist financing.

The two proposals foresee a reinforcement of the sanctioning powers of the competent authorities by introducing for instance a set of minimum principle-based rules to strengthen administrative sanctions and a requirement for them to coordinate actions when dealing with cross-border cases.

European AML rules have to be updated to reflect recent changes in international standards

FINANCIAL TRANSACTION TAX: COMMISSION SETS OUT THE DETAILS

The details of the Financial Transaction Tax (FTT) to be implemented under enhanced cooperation have been set out in a proposal adopted by the Commission on February 14, 2013. As requested by the 11 Member States1 that will proceed with this tax, the proposed Directive mirrors the scope and objectives of the original FTT proposal put forward by the Commission in September 2011 (IP/11/1085). The approach of taxing all transactions with an established link to the FTT-zone is maintained, as are the rates of 0.1% for shares and bonds and 0.01% for derivatives.

When applied by the 11 Member States, this Financial Transaction Tax is expected to deliver revenues of 30-35 billion euros a year.

There are certain limited changes in the FTT proposal compared to the original one, to take into account the fact that the tax will be implemented on a smaller geographical scale than originally foreseen. These changes are mainly to ensure legal clarity and to reinforce anti-avoidance and anti-abuse provisions.

There are 3 core objectives to the FTT. First, it will strengthen the Single Market by reducing the number of divergent national approaches to financial transaction taxation.

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FINANCIAL TRANSACTION TAX: COMMISSION SETS OUT THE DETAILS (PART II)

Secondly, it will ensure that the financial sector makes a fair and substantial contribution to public revenues. Finally, the FTT will support regulatory measures in encouraging the financial sector to engage in more responsible activities, geared towards the real economy.

As in the original proposal, the FTT will have low rates, a wide base and safety nets against the relocation of the financial sector. As before, the "residence principle" will apply. This means that the tax will be due if any party to the transaction is established in a participating Member State, regardless of where the transaction takes place. This is the case both if a financial institution engaged in the transaction is, itself, established in the FTT-zone, or if it is acting on behalf of a party established in that jurisdiction.

As a further safeguard against avoidance of the tax, the proposal also adds the "issuance principle". This means that financial instruments issued in the 11 Member States will be taxed when traded, even if those trading them are not established within the FTT-zone. Furthermore, explicit anti-abuse provisions are now included.

As in the original proposal, the FTT will not apply to day-to-day financial activities of citizens and businesses (e.g. loans, payments, insurance, deposits etc.), in order to protect the real economy. Nor will it apply to the traditional investment banking activities in the context of the raising of capital or to financial transactions carried out as part restructuring operations.

The proposal also ring-fences refinancing activities, monetary policy and public debt management. Therefore, transactions with central banks and the ECB, with the European Financial Stability Facility and the European Stability Mechanism, and transactions with the European Union will be exempted from the tax.

Fundamental rights, democracy and the rule of law need to be protected in cyberspace

CYBER SECURITY STRATEGY OF THE EUROPEAN UNION

The cybersecurity strategy represents the EU's comprehensive vision on how best to prevent and respond to cyber disruptions and attacks. This is to further European values of freedom and democracy and ensure the digital economy can safely grow. Specific actions are aimed at enhancing cyber resilience of information systems, reducing cybercrime and strengthening EU international cyber-security policy and cyber defence.

The strategy articulates the EU's vision of cyber-security in terms of five priorities:

- Achieving cyber resilience
- Drastically reducing cybercrime
- Developing cyber defence policy and capabilities related to the Common Security and Defence Policy (CSDP)
- Developing the industrial and technological resources for cyber-security
- Establishing a coherent international cyberspace policy for the European Union and promoting core EU values

The EU international cyberspace policy promotes the respect of EU core values, defines norms for responsible behaviour, advocates the application of existing international laws in cyberspace, while assisting countries outside the EU with cyber-security capacity-building, and promoting international cooperation in cyber issues.

The EU has made key advances in better protecting citizens from online crimes, including establishing a European Cybercrime Centre , proposing legislation on attacks against information systems and the launch of a Global Alliance to fight child sexual abuse online.

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FSA PUBLISHES THE RESULTS OF A MYSTERY SHOPPING REVIEW INTO THE QUALITY OF INVESTMENT ADVICE

The Financial Services Authority (FSA) has published the results of a mystery shopping review, carried out between March and September 2012, looking into the quality of investment advice given by banks and building societies.

Mystery shopping was used to gather first-hand evidence of what someone looking for investment advice from a bank or building society might experience. The use of mystery shopping as a supervisory tool is an example of the more intrusive approach that will be used by the Financial Conduct Authority (FCA). This commitment was made in 'Journey to the FCA' which was published in October 2012.

This mystery shopping review assessed six major firms in the retail banking sector, focusing on the quality of advice given to customers looking to invest a lump-sum. In total 231 mystery shops took place. The results show that, while approximately three-quarters of customers received good advice, there were concerns with the quality of advice in the other quarter:

- In 11% of mystery shops, the evidence suggests that the adviser gave the customer unsuitable advice.
- In 15% of mystery shops, the evidence suggests that the adviser did not gather enough information to make sure their advice was suitable - so it was not possible to assess whether the customer received good or poor advice.

The main reasons for poor advice were that advisers' recommendations were not suitable for:

- the level of risk customers were willing and able to take (15% of mystery shops);
- customers' financial circumstances and needs, for example, advisers failing to recommend the repayment of unsecured debts (such as loans), where this would have been the right option for the customer (13% of mystery shops); and
- the length of time customers wanted to hold the investment (6% of mystery shops).

In response to this report, the firms involved were cooperative and agreed to take immediate action. This includes retraining advisers, making substantial changes to their advice processes and controls for new business, and undertaking past business reviews to identify historic poor advice and put this right for customers. Firms have also been required to employ an independent third party to either carry out or oversee this work. One firm has been referred to enforcement.

The FSA has also published information for consumers to explain what to expect when getting investment advice and to help them check that the advice that they are getting is suitable.

The review shows that customers are not consistently getting the quality of advice on their investments that they should expect

UNITED STATES: CONSUMERS HAVE ANOTHER CHANNEL TO MAKE COMPLAINTS

Many cities and municipalities have non-emergency "hotlines" designed to provide access to non-urgent municipal services (e.g., tree trimming, dead animal removal, sidewalk repair). This list of services has expanded to consumer questions and complaints about consumer financial products and services, at least in Newark, New Jersey. The Bureau announced that it is teaming up with the municipality to connect consumers with the Bureau's Office of Consumer Response. Newark consumers can now simply dial the local 4311 hotline and, voila!, they will be connected with the Bureau.

UBS FINED £9.45M FOR FAILINGS IN ITS SALE OF AN AIG FUND

The Financial Services Authority (FSA) has fined UBS AG (UBS) for failures in the sale of the AIG Enhanced Variable Rate Fund (the Fund). These failures led to UBS customers being exposed to an unacceptable risk of an unsuitable sale of the Fund. UBS also failed to deal properly with complaints from customers about sales of the Fund.

Between 1 December 2003 and 15 September 2008 UBS sold the Fund to 1,998 high net worth customers, with initial investments totalling approximately £3.5 billion. The Fund invested in financial and money market instruments but, unlike a standard money market fund, it sought to deliver an enhanced return by investing a material proportion of the Fund's assets in asset backed securities and floating rate notes.

During the financial crisis of 2007 and 2008, the market values of some of the assets in the Fund fell below their book values. On 15 September 2008, Lehman Brothers applied for Chapter 11 bankruptcy protection in the US and AIG's share price then fell sharply and suddenly. A large number of investors sought to withdraw their investments and there was a run on the Fund. As a result the Fund was suspended with customers prevented from immediately withdrawing all of their investment. At that point 565 UBS customers had approximately £816 million invested in the Fund.

A sample review by the FSA of sales of the Fund to 33 customers found that 19 were mis-sold and a considerable risk that 12 of the remaining 14 may have been mis-sold. The FSA also reviewed 11 complaints made by these customers and found that all 11 had been assessed unfairly. UBS has agreed to conduct a redress programme for those customers who remained invested in the Fund at the time of its suspension. It is estimated that compensation payable to customers will be around £10 million.

UBS's failings were serious and included:

- failing to carry out adequate due diligence on the Fund before selling it to customers, so UBS had an inadequate understanding of the nature of the Fund's assets and the consequent risks. In addition, UBS failed to ensure its advisers were provided with appropriate training about the Fund so could not correctly determine its suitability for customers;
- advisers recommending the Fund to some customers even though it did not provide the level of capital security that they apparently sought. Customers were not sent suitability reports when UBS sold the Fund, so customers were not given a record of why the Fund was suitable for them;
- indicating to customers that the Fund was a cash fund that invested in money market instruments. Instead a significant proportion of the Fund was invested in other assets;
- failing to respond appropriately during the 2007-08 financial crisis when UBS had concerns about the Fund and also realised that there was a greater risk of the Fund suspending redemptions and of customers suffering a loss. Although UBS took steps to improve its knowledge of the Fund, it did not take appropriate action to address its concerns and the way it sold the Fund. UBS did not review past sales to ensure that they were suitable, nor did it ensure that its advisers provided a fair and accurate explanation of the risks when reassuring existing customers;
- failing to assess customer complaints relating to sales of the Fund fairly; and
- not maintaining adequate sales records, including a record of whether a customer was sold the Fund on an advised, discretionary or non-advised basis.

UBS agreed to settle at an early stage entitling it to a 30% discount on its financial penalty of £13.5 million on UBS.

Firms such as UBS should be under no illusion about the standards expected of them

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ESMA RECOMMENDS EU CODE OF CONDUCT FOR PROXY ADVISOR INDUSTRY

The European Securities and Markets Authority (ESMA) has published its Final Report on The Proxy Advisor Industry. The report contains an analysis of the responses received to its March 2012 consultation and sets out the next steps for ESMA and the industry.

It sets out a framework for a Code, including the roles of the different stakeholder groups, the relationship with other corporate governance codes for issuers and the key principles concerning proxy advisors which ESMA would expect such a Code to cover.

ESMA has identified the following principles that are intended to offer guidance to the industry committee developing an industry-wide Code:

1. Identifying, disclosing and managing conflicts of interest principle : Proxy advisors should seek to avoid conflicts of interest with their clients. Where a conflict effectively or potentially arises the proxy advisor should adequately disclose this conflict and the steps which it has taken to mitigate the conflict, in order that the client can make a properly informed assessment of the proxy advisor's advice.

2. Fostering transparency to ensure the accuracy and reliability of the advice principle: Proxy advisors should provide investors with information on the process they have used in making their general and specific recommendations and any limitations or conditions to be taken into account on the advice provided so that investors can make appropriate use of the proxy advice.

2.1. Disclosing general voting policies and methodologies principle: Proxy advisors should, where appropriate in each context, disclose both publicly and to client investors the methodology and the nature of the specific information sources they use in making their voting recommendations, and how their voting policies and guidelines are applied to produce voting recommendations.

2.2. Considering local market conditions principle: Proxy advisors should be aware of the local market, legal and regulatory conditions to which issuers are subject, and disclose whether/how these conditions are taken into due account in the proxy advisor's advice.

2.3. Providing information on engagement with issuers principle – Proxy advisors should inform investors about their dialogue with issuers, and of the nature of that dialogue.

ESMA will facilitate the establishment of the work on a Code, but this will need to be drafted and adopted by the proxy advising industry itself.

ESMA has drafted a set of principles that offer guidance to the proxy advisory industry

COMMUNICATION OF FSMA TO INSURANCE INTERMEDIARIES ON AML LEGISLATION

The FSMA has drawn the attention of life insurance companies and insurance intermediarie on their obligations resulting from the Anti-money laundering law.

These obligations include customer identification, control of their identity, and special vigilance before and after the purchase of a life insurance contract.

To fulfill these obligations, the non-exclusive insurance intermediary must:

- designate a responsible for the prevention of money laundering and financing of terrorism;
- establish internal procedures to ensure adequate treatment of internal reports concerning operations that may be related to money laundering or terrorist financing and, where necessary, make a declaration of suspicion to the AML Authority;
- adequately train and educate staff members .

THE FSMA LAUNCHED A SAVINGS ACCOUNT SIMULATOR

One of the FSMA's key objectives is to equip consumers with information and simple tools to enable them to make informed choices that are best suited to their personal financial needs.

The savings account simulator, which provides savers with a personalized comparison online of several accounts, is available from February 2013 on wikifin.be.

After having entered certain data, in particular the initial capital to deposit, any subsequent amounts, and the investment horizon, consumers will receive a list of results that shows what return the different savings accounts will give them on their savings.

The information on these accounts has been provided by the financial institutions and will be updated by them in the event of any modifications. The banks have voluntarily acceded to a protocol for this purpose that determines which information must be provided

SEC FREEZES ASSETS IN SWISS-BASED ACCOUNT USED IN SUSPECTED INSIDER TRADING

In a complaint filed in federal court in Manhattan, the SEC alleges that prior to any public awareness that Berkshire Hathaway and 3G Capital had agreed to acquire H.J. Heinz Company in a deal valued at $28 billion, unknown traders took risky bets that Heinz's stock price would increase.

The traders purchased call options the very day before the public announcement. After the announcement, Heinz's stock rose nearly 20 percent and trading volume increased more than 1,700 percent from the prior day, placing these traders in a position to profit substantially.

The SEC alleges that the unknown traders were in possession of material nonpublic information about the impending acquisition when they purchased out-of-the-money Heinz call options the day before the announcement. The timing and size of the trades were highly suspicious because the account through which the traders purchased the options had no history of trading Heinz securities in the last six months. Overall trading activity in Heinz call options several days before the announcement had been minimal.

The emergency court order obtained by the SEC freezes the traders' assets and prohibits them from destroying any evidence.

Irregular and highly suspicious options trading is a serious red flag

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