

NewsLetter

No. 51 July 2004

New Swiss Law on Bank Restructuring and Deposit Insurance

As of 1 July 2004, a comprehensive revision of the Swiss Federal Law on Banks and Savings Banks (*Bundesgesetz über die Banken und Sparkassen*; "Bank Law") on restructuring and liquidation of banks and securities dealers (collectively referred to in this NewsLetter as "banks") will become effective. The revision also introduces mandatory deposit insurance, essentially based on a self-regulatory regime under the supervision of the Federal Banking Commission ("FBC"). The new law is a direct result of the 1991 collapse of the *Spar- und Leihkasse Thun (SLT)*, which clearly showed the need for a comprehensive revision of bank restructuring and liquidation laws.

Protective Measures

A bank which no longer fulfils the licensing requirements or violates its legal obligations risks the withdrawal of its banking licence, which inevitably results in the liquidation of the bank. In these situations, or if the bank is threatened by insolvency, the FBC has authority



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under the revised Banking Law to order far-reaching protective measures or the restructuring of the bank. The list of possible protective measures in the law is not conclusive. If necessary, the FBC is entitled to inform operators of cash and securities settlement systems of measures it has imposed. The law

also ensures that the finality and irrevocability of deliveries made within such systems, as well as set-off and collateral arrangements, are not adversely affected.

Investigator

One possible protective measure is the appointment by the FBC of an independent expert investigator (*Untersuchungsbeauftragter*) to examine certain matters within the bank or monitor the implementation of measures imposed by the FBC. The investigator's powers are determined by the FBC and include

the power to alter the operating authority of the bank's management. The investigator replaces the "observer" (*Beobachter*) in the prior law, who had no management powers and merely supervised the bank and reported to the FBC. Although the investigator (and the restructuring administrator and liquidator, both discussed below) is supervised by the FBC, the investigator is subject to the same liability provisions applicable to directors and executives of non-regulated corporations.

Restructuring

If the FBC concludes that the bank can be restructured, it is authorised to appoint a restructuring administrator (*Sanierungsbeauftragter*) to establish a restructuring plan. The restructuring administrator is supervised by the FBC and is required to carry out the restructuring in accordance with the terms of its appointment. The goal of the restructuring plan is to (a) eliminate organizational weaknesses and (b) protect the financial condition of the bank (e.g., by temporarily prohibiting certain payments).

The restructuring plan must be approved by the FBC. Approval will be denied if the restructuring plan is unlikely to ensure the bank's future compliance with all relevant laws within a reasonable period of time. Creditors and shareholders of the bank can object to the restructuring plan if it adversely affects their rights. If no restructuring plan can be established, for example because chances for a successful restructuring seem remote or if the restructuring plan is opposed by creditors representing the majority, by amount, of all non-privileged claims, the FBC must order the liquidation of the bank.

Liquidation

In an order for liquidation, the FBC appoints a liquidator to perform the liquidation under its supervision. The liquidation procedures applicable to banks rely, by reference, on the procedures set forth in the Federal

Debt Collection and Bankruptcy Act (*Bundesgesetz über Schuldbetreibung und Konkurs*; "DCBA"), but there are important differences. There are normally no creditors' meetings (*Gläubigerversammlungen*) and the FBC is authorised to deviate from provisions of the DCBA if it deems it appropriate. The liquidation order has the same effect as an adjudication of bankruptcy under the DCBA. The list of all filed and admitted claims (*Kollokationsplan*) is, due to banking secrecy requirements, only disclosed to persons who can prove a legitimate interest in such disclosure, in particular the need to receive information in order to enforce their own rights. A distribution list (*Verteilungsliste*) is not made available to creditors.

Privileged Deposits

As under current law, in effect until 30 June 2004, the maximum amount of "privileged" deposits is CHF 30,000 for each depositor. The privilege provides for the payment of such depositor claims from the proceeds of the liquidation as second-class claims prior to any distribution to non-privileged creditors (ranking in the third class). Only accounts which received recurring deposits, such as wages, rents, alimony etc., qualify as "privileged" deposits under the Bank Law. The revision provides that all deposits which are not in bearer form benefit from the privilege. These privileged claims rank junior only to secured claims and certain other claims ranking in the first class, such as employee claims for non-paid wages.

A noteworthy improvement is the provision providing for the payment of the "smallest" deposits of CHF 5,000 or less (*Kleinsteinlagen*) as quickly as possible and without regard to the usual creditor classifications. This will spare such depositors a cumbersome and lengthy procedure and contribute to a more efficient liquidation by significantly reducing the number of creditors participating in the liquidation procedure.

Deposit Insurance

Current law does not provide deposit insurance for privileged deposits, but such insurance was established on a voluntary basis by Swiss banks. The revision will make this deposit insurance mandatory and it will be provided by a FBC-approved self-regulatory institution established by the Swiss banks.

The deposit insurance is required to cover a maximum total amount of CHF 4 billion per institution (the limit for the voluntary deposit insurance was CHF 1 billion). In addition to other legal liquidity requirements, each

bank will be obliged to permanently hold half of its potential contribution obligation in cash or cash-equivalents. Cantonal banks that traditionally benefited from a the guarantee of the sponsoring canton now also will be subject to the mandatory deposit insurance requirement. Foreign branches or subsidiaries of Swiss banks are subject to foreign, rather than Swiss, supervision and may be obliged to comply with local deposit insurance requirements.

Preliminary Assessment

The revision grants the FBC an enormous amount of discretion and flexibility. The FBC will largely have to rely on third parties such as consulting firms or lawyers to act as an investigator, restructuring administrator or liquidator. These parties will need time to understand the situation of a distressed bank and the new procedures may not be applied quickly in each case. The wide array of potential protective and other measures at the FBC's disposal will make it difficult to anticipate what the likely procedures in a specific case will be. A number of issues remain somewhat open for the time being. For example, a creditor's or shareholder's right to file a liability claim against an investigator, restructuring administrator or liquidator after a restructuring plan has been approved is not entirely clear (new Article 32 paragraph 4 and Article 39 Bank Law).

NewsLetter

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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