



Memorandum

Banking in China and Switzerland

-- A legal comparison of associations, supervisions, secrecy, and anti-money laundering

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14.07.2011

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I. CHINA BANKING ASSOCIATION

1 Portrait

China Banking Association (the „CBA“) was established in May 2000 as a self-disciplined organization for China banking. For example, it stipulates self-regulations, such as Self-disciplinary Convention for China Banking Factoring Business, and if any member or the observer violates the CBA's self-regulations or Articles of Association, CBA can give warning, circular a notice of criticism, suspend its membership or right of an observer for 1-6 months, or cancel its membership or observer qualification. Until May 2011, CBA has 1 observer, the China Unionpay, and 149 members which include strategic banks, state-owned commercial banks, commercial banks limited by shares, urban commercial banks, assets management companies, China Central Depository & Clearing Co., Ltd., Postal Serving Bank of China, rural commercial banks, rural cooperative banks, rural credit cooperatives association, foreign-funded banks, provincial local banking associations, financial lease companies, and money broking companies.

The highest power organ of CBA is the General Assembly composed of all the members. Its executive organ is the council, which is responsible to the General Assembly, and leads CBA on daily operation during the intersession of the General Assembly meeting. General council performs council's function during the intersession of the council's meeting. The daily operating organ of CBA is its secretariat. Based on the necessity of operation, CBA sets up 11 special committees including legal work, self-discipline work, qualification attestation for banking practitioners, rural cooperative financial work, loan and transaction of bank consortium, foreign-funded bank, entrustment business, factoring business, financial lease, bank card, and trade development.

2 Duties

Pursuant to CBA's Articles of Association (AOA), CBA mainly has four obligations:

- 1) Independent management over banking trade: to stipulate relevant self-regulations, to organize qualification test for banking practitioners, to punish organizations or persons who violate self-regulation, and to report to China Banking Regulatory Commission (the „CBRC“) any violation of laws as well as to assist CBRC during the inspection of those violation.
- 2) Protection of rights of banking financial organization: to protect legal rights of banking trade, to attend and raise suggestion in stipulating policy on banking trade, to communicate with relevant authority and reflect issues hindering the development of banking, and to enhancing the risk management.
- 3) Performance liability of inter-trade coordination: to coordinate the relationship between members and governmental authorities, among members, between members and public, and to enhance the communication with media.

- 4) Provision of services: to provide various pieces of information to members, to organize international cooperation, to communicate and coordinate with security and insurance trades, and to intensify the mutual knowledge among members.

3 Membership

Upon the acknowledgement of CBA's AOA, any organization satisfying following requirements is entitled to apply for the membership:

- 1) Any banking financial organization as approved by China Banking Regulatory Commission (the „CBRC“) for its establishment and has independent legal status (including foreign-funded banking financial organization within China, such as Deutsche Bank (China) Co., Ltd. and Standardchartered Bank (China) Co., Ltd., but not representative offices or branches in China);
- 2) Any provincial banking association as approved by relevant supervision authority for its establishment, having independent legal status, and registered at civil administration department.

In addition to the membership, if any representative office or branch of a foreign bank, which does not have independent legal status established upon the approval of relevant regulatory commission, acknowledges CBA's AOA, such institution may apply to become an observer. However, till now, the only observer is the China Unionpay

4 Comparison to the Swiss situation

The Swiss Bankers Association (“SBA”) is the leading professional organization of the Swiss financial centre. It was founded in 1912 in Basel as a trade association and today has nearly 355 institutional members and approximately 16'800 individual members. 11 commissions and associated working groups deal with key issues affecting the industry. Some 583 representatives of various banking groups as well as specialists from the SBA are working in these commissions.

SBA's main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both at home and abroad. SBA promotes as its mission:

- to represent the interests of the banks in dealings with the authorities in Switzerland and abroad.
- to promote Switzerland's image as a financial centre throughout the world.
- to foster an open dialogue with a critical public in Switzerland and worldwide.
- to develop the system of self-regulation in consultation with regulatory bodies.
- to support the training of junior staff and established executives in the banking industry

- to facilitate the exchange of information and knowledge between banks and bank employees.
- to advise its members.
- to coordinate joint projects undertaken by the Swiss banks.

Licensed banks, securities dealers, auditing companies (that audit banks and securities dealers) who are active in Switzerland and Liechtenstein, as well as associations and the banks' joint utility providers (Gemeinschaftswerke) can become "Institutional Members" of the SBA. Furthermore, Chairmen, Vice-Chairmen, Members of the Executive Board as well as Members of Senior Management of Institutional Members are entitled to become individual members. Individual Members can exercise voting rights at the SBA's General Assembly. Membership for individuals is requested by the individual's respective Institutional Member. Individual members are also entitled to take advantage of the various services of the Swiss Bankers' Club.

(Source: <http://www.swissbanking.org/en/home/portrait.htm>)

With regard to self-regulation, probably the most important code of conduct of the SBA is the Agreement on the Swiss bank's code of conduct with regard to the exercise of due diligence (Agreement on Due Diligence [CDB 08]). To our understanding the self-regulations of the CBA have not yet reached the same importance in the Chinese banking industry.

II. SUPERVISION ORGANIZATIONS IN THE FINANCIAL INDUSTRY

China does not have one supervisor authority in the financial industry, but rather 3 different supervision commissions for banking, securities and insurance. Apart from the three below introduced three commissions, People's Bank of China (the „PBC“) also assumes some supervision duties.

1 China Banking Regulatory Commission

According to Article 2 of the Banking Supervision Law of the PRC (the „Banking Supervision Law“), the banking supervision institution of the State Council which is the China Banking Regulatory Commission (the „CBRC“) shall be responsible for the supervision over the nationwide banking financial institutions and operations. The term "banking financial institutions" includes: the commercial banks, urban credit cooperatives, rural credit cooperatives, and other financial institutions and policy banks established within China or abroad and engaged in taking in deposits of the general public. In addition to the banking financial institutions, the provisions also apply to the following organizations: financial assets management companies, trust investment companies, financial companies and the financial lease companies established within China or abroad, and other financial institutions established within China or abroad upon approval of the banking supervision institution of the State Council. Moreover, pursuant to Article 8 of the same law, the CBRC may set up dispatched institutions in light of the needs for exercising their duties. The CBRC shall practice

unified leadership and management to the institutions dispatched by it. According to Chapter 3 of the Banking Supervision Law, the main duties of the CBRC is to stipulate rules based on relevant laws to regulate the operation of banking financial organizations, to check background of certain shareholders, and to approve the establishment of banking financial organization.

Prior to the setting up of CBRC, PBC took the duties currently born by CBRC. After the establishment of CBRC, PBC's duties have mainly turned to formulate and implement monetary policies, prevent and dissolve financial risks, and maintain the stability of banking industry in the country under the leadership of the State Council. Those duties, including without limitation, are to formulate and implement monetary policies, to issue RMB and to control its circulation, to supervise anti-money laundering activities, to manage state treasury, and to supervise gold market.

2 China Security Regulatory Commission

According to Article 7 of Security Law of the PRC, the securities regulatory authority under the State Council, the China Security Regulatory Commission (the „CSRC“), shall carry out centralized and unified supervision and administration of the national securities market. The securities regulatory authority under the State Council may, according to the relevant requirements, establish dispatched offices, which shall perform their duties and functions of supervision and administration according to their authorization. Pursuant to Article 2, the CSRC supervises the issuance and trading of stocks, corporate bonds as well as any other securities as lawfully recognized by the State Council within China, any listed trading of government bonds and share of securities investment funds, unless otherwise provided in any other laws.

3 China Insurance Regulatory Commission

According to Article 9 of the Insurance Law of the PRC, the insurance regulatory authority under the State Council, the China Insurance Regulatory Commission (the „CIRC“), shall be responsible for the supervision and administration of the insurance sector according to the law. The insurance regulatory body under the State Council shall set up dispatched offices according to its needs for performing duties. The dispatched offices shall perform the duties of supervision and administration as authorized by the insurance regulatory body under the State Council. The CIRC is entitled to approve the establishment of insurance companies, to qualify insurance practitioners, to stipulate detailed rules to regulate this trade, to approve insurance products, and other supervision works.

4 Comparison to the Swiss situation

In Switzerland, the Swiss Financial Market Supervisory Authority (“FINMA”) is an independent supervisory authority and protects the clients of financial markets, namely creditors, investors and insured persons, thereby strengthens confidence in the smooth functioning, competitiveness and integrity of Switzerland's financial centre.

Article 5 of the Financial Market Supervisory Act (FINMASA) defines FINMA's goals as follows: "In accordance with the financial market acts, financial market supervision has the objectives of protecting creditors, investors, and policy holders as well as ensuring the smooth functioning of the financial markets. It thus contributes to sustaining the reputation and competitiveness of Switzerland's financial centre."

In its role as state regulator, FINMA is endowed with sovereign authority over banks, insurances companies, stock exchanges, securities firms and collective investment schemes. It is responsible for fighting against money laundering, and where necessary, conducts financial restructuring and bankruptcy proceedings. FINMA grants operating licenses for companies.

As supervisor, FINMA also ensures that the supervised institutions comply with the requisite laws, ordinances, directives and regulations, and continue at all times to fulfil the licensing requirements. It imposes sanctions and provides administrative assistance to the extent permissible by law.

Finally, FINMA also acts as a regulatory body: it participates in legislative procedures, issues its own rulings and circulars and is responsible for the recognition of self-regulatory standards. In relation to public takeover bids for listed companies, FINMA also has supervisory powers in respect of the disclosure of holdings and acts as the authority to hear appeals against decisions of the Takeover Board.

(Source: <http://www.finma.ch/e/finma/Pages/Ziele.aspx>).

III. CHINESE BANKING SECRECY

1 Criminal liability

Under current PRC criminal law, there is no provision specifically protecting the banking secrecy, but a broader provision for the protection of private information. Pursuant to Article 7¹ of the

¹ Article 7 of Amendment to the Criminal Law of the PRC (VII), An Article is inserted after Article 253 of the Criminal Law as Article 253 (A):

„Where any staff member of a state organ or an entity in such a field as finance, telecommunications, transportation, education or medical treatment, in violation of the state provisions, sells or illegally provides personal information on citizens, which is obtained during the organ's or entity's performance of duties or provision of services, to others shall, if the circumstances are serious, be sentenced to fixed-term imprisonment not more than three years or criminal detention, and/or be fined.

Whoever illegally obtains the aforesaid information by stealing or any other means shall, if the circumstances are serious, be punished under the preceding paragraph.

Where any entity commits either of the crimes as described in the preceding two paragraphs, it shall be fined, and the direct liable person in charge and other directly liable persons shall be punished under the applicable paragraph.”

Amendment to the Criminal Law of the PRC (VII), if any staff member of a state organ or an entity in such a field as finance, telecommunications, transportation, education or medical treatment, in violation of the state provisions, sells or illegally provides personal information on citizens, which is obtained during the organ's or entity's performance of duties or provision of services, to others shall, if the circumstances are serious, be sentenced to fixed-term imprisonment not more than three years or criminal detention, and/or be fined (crime name: „Selling or illegally providing personal information of citizens“). Whoever illegally obtains the aforesaid information by stealing or any other means shall, if the circumstances are serious, be punished under the preceding paragraph (crime name: „Illegally obtaining personal information of citizens“).

Article 7 of the Amendment to the Criminal Law of the PRC does not directly specify when the provision of the information is illegal. Basis of such illegality can be found in Article 5 and 32 Regulations on the Administration of Savings and Article 29 Commercial Banks Law of the PRC.

2 Civil and administrative liability

Article 5² and Article 32³ of Regulations on the Administration of Savings, dated 1992, provide that savings institutions and their personnel shall have an obligation to keep secret the depositors' savings and relevant information, and shall not inquire into, freeze or allocate savings deposits on behalf of any unit or individual, unless otherwise provided for by laws and administrative regulations of the State.

According to Article 34 of this regulation, if any savings institution discloses information concerning a depositor's savings, or inquires into, freezing or allocating savings deposits on others' behalf without completing legal procedures, the People's Bank of China (the „PBC“) or one of its branches shall order it or him to make corrections, and may impose a fine, or order it or him to suspend business operations for rectification, or revoke the Permit for Financial Business according to the

² Article 5 of the Regulations on the Administration of Savings:

The State protects the ownership, other legitimate rights and interests over legal savings deposits of individuals and encourages individuals' participation in savings.

In handling savings businesses, savings institutions shall observe the principles of voluntariness in depositing, freedom of withdrawal, interest on every deposit and keeping secret for depositors.

³ Article 32 of the Regulations on the Administration of Savings:

Savings institutions and their personnel shall have an obligation to keep secret the depositors' savings and relevant information.

Savings institutions shall not inquire into, freeze or allocate savings deposits on behalf of any unit or individual, unless otherwise provided for by laws and administrative regulations of the State.

seriousness of the circumstances. If the circumstances are serious enough to constitute a crime, the offender shall be investigated for criminal liability.

Furthermore, According to Article 29⁴ of the Commercial Banks Law of the PRC dated 1995 and amended in 2003, commercial banks shall keep secret for depositors in handling individual savings deposits.

Article 29 para 2 provides that Commercial banks have the right - but according to the strict wording not the obligation - to refuse any entity or individual to inquire about, freeze or deduct individual savings accounts, unless it is otherwise provided by laws.

According to the Notice of the People's Bank of China on Promulgating the Provisions on the Administration of Financial Institutions' Assistance in the Inquiry, Freeze or Deduction of Deposits, people's court, taxation authority, and customs have the full right to inquire about, freeze or deduct entity and individual's accounts.

Moreover, according to Article 73⁵ of the Commercial Banks Law, if the commercial bank violates the present law and causes loss of depositors or other clients, the commercial bank shall bear civil liability, and the CBRC is entitled to order the commercial banks to correct, and confiscate the illegal gains if any, or impose a fine on this commercial bank. However, as the wording of Article 29

⁴ Article 29 of the Commercial Banks Law:

Commercial banks shall follow the principles of voluntary deposit and free withdrawal, paying interest to depositors and keeping secret for depositors in handling individual savings deposits.

Commercial banks have the right to refuse any entity or individual to inquire about, freeze or deduct individual savings accounts, unless it is otherwise prescribed by laws.

⁵ Article 73 of the Commercial Banks Law:

In any of the following circumstances, a commercial bank shall undertake to pay interests for the deferred payment and other civil legal liabilities to the property losses of depositors or other clients:

1. Delaying or refusing to pay the principal and interest of deposits without reason;
2. Failing to cash in instrument or record receipts and payments into account books in violation of the provisions on bill acceptance and other provisions on settlement business, holding down bills or instruments or returning the instruments in violation of the regulations;
3. Illegally inquiring about, freezing, or deducting personal savings deposit account or entity deposit account;
- or
4. Other acts in violation of the provisions of this Law, which do harm to the depositors or other clients.

In the circumstances as prescribed in the preceding paragraph, the banking regulatory organ of the State Council shall order the commercial banks to correct, and confiscate the illegal gains if any, or impose a fine of one time up to five times the illegal gains if the illegal gains are more than RMB 50,000 Yuan; if there are no illegal gains or the illegal gains are less than RMB 50,000 Yuan, a fine of RMB 50,000 Yuan up to RMB 500,000 Yuan shall be imposed.

Commercial Banks Law of the PRC provides, the commercial banks do not have a duty not to divulge information about its clients.

3 Comparison to the Swiss situation

In Switzerland, the protection of the bank secrecy (SBA uses the term “bank-client confidentiality”) has its legal basis in the constitutional right to privacy, private law, i.e. contractual obligation of the bank to keep the bank-client relationship confidential, and the criminal law.

Article 47 of the Federal Act on Banks and Savings Banks, which came into force on 8 November 1934, stipulates that anyone acting in his/her capacity as member of a banking body, as a bank employee, agent or liquidator, or as a member of a body or an employee belonging to an accredited auditing institution, is not permitted to divulge information entrusted to him/her or of which he/she has been apprised because of his/her position. The same applies to stock exchanges and securities dealers pursuant to Article 43 of the Federal Act on Stock Exchanges and Securities Trading of 24 March 1995.

Any intentional violation of bank-client confidentiality is punishable by a prison sentence of up to three years or by a fine. The violation by negligence can be fined up to CHF 250,000. Violation of bank-client confidentiality remains a punishable offence even after the relationship with the client has come to an end or the banker has ceased his/her professional activity. The same applies to stock exchanges and securities dealers.

A banker's obligation to respect his/her clients' privacy is not absolute. There is a duty for banks to provide information under some circumstances. In particular:

- **civil proceedings** (f.i. inheritance or divorce);
- **debt recovery and bankruptcy proceedings** (f.i. attachment);
- **criminal proceedings** (money laundering, association with a criminal organization, theft, tax fraud, blackmail, etc.). If circumstantial evidence gives rise to a suspicion that the financial assets are the proceeds of a crime, then financial institutions may inform the authorities without thereby breaching bank-client confidentiality; if the suspicion is well-founded, they must inform the Money Laundering Reporting Office;
- **international administrative and judicial assistance proceedings**

(Source: <http://www.swissbanking.org/en/home/dossier-bankkundengeheimnis/dossier-bankkundengeheimnis-themen-geheimnis.htm>).

IV. ANTI-MONEY LAUNDERING

1 Legal framework

Criminal Law of the PRC (Article 16 Amendment of Criminal Law (VI)) and Anti-money Laundering Law of the PRC are two major laws to regulate anti-money laundering activities. Based on those two laws, the PBC has stipulated Provisions on Anti-money Laundering through Financial Institutions. Three supervision organizations of financial institutions (CBRC/PBC, CSRC, and CIRC) have also promulgated relevant regulations or rules to regulate their own industries, for example, Measures for the Anti-money Laundering Work in the Securities and Futures Sectors by CSRC, Notice of China Insurance Regulatory Commission on Strengthening the Anti-money Laundering Work in the Insurance Sector by CIRC, and Provisions on the On-line Verification of Citizens' Identity Information by Banking Financial Institutions (for Trial Implementation) by PBC.

2 Definition of money laundering

According to Article 16 of the Amendment of Criminal Law (VI) and Article 2 of the Anti-money Laundering Law, money laundering refers to activity for the purpose of concealing or disguising, by all means, the sources and nature of criminal proceeds generated from any drug-related crime, organized crime, terrorist crime, crime of smuggling, crime of corruption or bribery, crime of disrupting the financial management order, crime of financial fraud, etc.. Such activities, including without limitation, are: providing any capital account, assisting the transfer of property into cash, financial instruments, or negotiable securities, assisting the transfer of capital by means of transfer accounts or any other means of settlement, assisting the remit of funds to overseas, and disguising or concealing the origin or nature of any crime-related income or the proceeds generated therefrom by any other means.

3 Scope of application

Pursuant to Anti-money Laundering Law, financial institutions shall perform their anti-money laundering obligations. Furthermore, according to Article 2 of the Provisions on Anti-money Laundering through Financial Institutions, the term of „financial institutions“ refers to following institutions:

- 1) commercial banks, urban credit cooperatives, rural credit cooperatives, postal savings institutions, policy banks;
- 2) securities companies, futures brokerage companies, fund management companies;
- 3) insurance companies, insurance asset management companies;
- 4) trust & investment companies, financial asset management companies, finance companies, financial lease companies, auto financing companies, currency brokerage companies;
- 5) other financial institutions determined and announced by the People's Bank of China;

- 6) the institutions engaging in businesses of foreign exchange, payment and settlement, and sale of funds.

According to Article 5 of this regulation, PBC is the anti-money laundering administrative department of the State Council.

4 Duties of financial institutions

Pursuant to Article 9 to 17, financial institutions bear following liabilities in anti-money laundering:

- 4.1 To set up and implement a client identity identification system; (Article 9)
- 4.2 To properly keep records of transactions; (Article 10)
- 4.3 To report to China Anti-money Laundering Monitoring and Analyzing Center any large-sum transaction and suspicious transactions, or to report to the local branch of PBC and local public security department any suspected crimes; (Article 11 and 13)
- 4.4 To cooperate with judicial and administrative institutions to crack money laundering activities; (Article 14)
- 4.5 To keep confidential information of clients obtained during the procedure of anti-money laundering activities; (Article 15⁶)
- 4.6 To submit to People's Bank of China anti-money laundering statistical statements, information materials, as well as the anti-money laundering contents in the audit reports. (Article 17)

5 Comparison to the Swiss situation

In Switzerland, money laundering is the expression applied to the act of concealing the origins of money earned through criminal activities and of releasing it unnoticed into legitimate business activities. Money laundering is very often associated with drug trafficking. However, any number of criminal activities may give rise to money laundering, e.g. embezzlement, corruption, blackmail, and trafficking in people.

⁶ Article 15 of Provisions on Anti-money Laundering through Financial Institutions:

A financial institution and its staff members shall keep confidential the client identity materials and transaction information that they have access to during the course of performing the anti-money laundering obligation. None of the materials or transaction information may be provided to any entity or individual unless it is so provided for in any law.

A financial institution and its staff members shall keep confidential the anti-money laundering information about reporting doubtful transactions and helping the PBC to investigate doubtful transactions. None of them may provide such information to its clients or any other person by violating the present provisions.

The Swiss Money Laundering Act (in force since 1998) obliges all financial intermediaries (not only banks) to identify all clients and to ascertain the beneficial owners of the assets ("know your customer"). In addition, they must report any justified suspicion of money laundering to the authorities and freeze the suspicious assets. Finally, banks in Switzerland observe the "Due Diligence Agreement" which contains the "know your customer" rules. The Due Diligence Agreement was a key point of reference when the Money Laundering Law was being established.

Further rules and regulations against money laundering are laid down in the Swiss Criminal Code and the FINMA guidelines. Furthermore, the two major Swiss banks, together with nine other international banks, have committed themselves to applying global due diligence standards within the framework of the "Wolfsberg Anti-Money Laundering Principles".

(Source: <http://www.swissbanking.org/en/home/dossier-geldwaescherei/dossier-geldwaescherei-faq-geldwaescherei.htm>).
