

**Baker  
McKenzie.**

# Swiss Insurance and Reinsurance Laws



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This publication is a summary of the legal and regulatory framework for the insurance and reinsurance market in Switzerland. It is not intended to be exhaustive and specific advice should be sought in individual cases.

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# Preface

Insurance and reinsurance laws are in the focus of European legislators and regulators. The good old times with an extremely insurer friendly legislation, a relatively closed Swiss market and a very traditional regulatory approach are long gone. New laws and regulations, including the Swiss Solvency Test, were introduced or are on the horizon.

They will bring along numerous changes significantly affecting the regulatory framework for insurance and reinsurance carriers and, in particular for brokers. Given the changes to the regulatory framework, we hope that this brochure gives a useful overview over the current regulatory framework. Such overview is indispensable also to recognize the changes and opportunities which will ensure that Switzerland also in the years to come remains one of the most important places for insurance and reinsurance business in the world.

This brochure is a joint venture by those attorneys at Baker McKenzie who regularly advise in insurance and reinsurance matters.

Zurich, January 2017

**Joachim Frick**



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# List of Abbreviations

<b>AG</b>	Aktiengesellschaft (Corporation)
<b>AHV</b>	Old Age and Survivor's Insurance
<b>AML</b>	Anti Money Laundering
<b>art.</b>	Article
<b>AVO</b>	Ordinance on the Supervision of Private Insurance Companies
<b>BGE</b>	Ruling of the Federal Court of Switzerland
<b>BGer</b>	Federal Court of Switzerland
<b>BVG</b>	Swiss Federal Law on the Occupational Retirement
<b>CEO</b>	Chief Executive Officer
<b>cf.</b>	confer (lat. = compare)
<b>CHF</b>	Swiss Franc
<b>CO</b>	Swiss Code of Obligations
<b>CV</b>	Curriculum Vitae
<b>e.g.</b>	exempli gratia = for example
<b>EU</b>	European Union
<b>FATF</b>	Financial Action Task Force
<b>FINMA</b>	Swiss Financial Market Supervisory Authority
<b>FINMAG</b>	Swiss Federal Act on the Supervision of the Financial Market
<b>lit.</b>	litera = letter
<b>i.e.</b>	id est = that is
<b>ICA</b>	Insurance Contract Act
<b>ISA</b>	Swiss Federal Insurance Supervisory Act
<b>KAG</b>	Swiss Federal Act on Collective Investments
<b>KAV</b>	Ordinance of the Swiss Federal Act on Collective Investments
<b>M&amp;A</b>	Mergers and Acquisitions
<b>Para.</b>	Paragraph
<b>PEP</b>	Politically Exposed Person
<b>PILA</b>	Swiss Federal Act on International Private Law
<b>S.A.</b>	Société anonyme (Aktiengesellschaft, Corporation)
<b>SHAB</b>	Swiss Official Gazette of Commerce
<b>et seqq.</b>	and the following
<b>SMA</b>	Swiss Merger Act
<b>SRO</b>	self-regulatory organization
<b>UCA</b>	Swiss Federal Act Against Unfair Competition
<b>VUL</b>	variable universal life







# A. What we do

Baker McKenzie regularly advises Swiss and international insurance and reinsurance companies on all legal and regulatory issues that arise and affect their business activities:

## 1. General and Liability Insurance

We regularly represent insurers and reinsurers in litigious and non-litigious coverage disputes and in regulatory proceedings, conduct claims audits on behalf of insurers, and advise reinsurers in both litigation and arbitration proceedings. We regularly advise Swiss and foreign insurance carriers in corporate matters and represent them in M&A transactions and policy transfers.

## 2. Life Insurance

We regularly advise banks, intermediaries and insurance carriers on the issuance, sale and marketing of life insurance products. We advise on life insurance in wealth management, as investment tool and for tax planning purposes.

## 3. Pensions

We have specialist expertise to advise on benefit plans, pension funds and related insurance products.

## 4. Reinsurance

We often advise Swiss and off-shore reinsurance carriers on the Swiss regulatory framework, on market entry and relocation questions, and in litigious and non-litigious disputes with insurers.

## 5. Captives

We represent captives in regulatory proceedings and regularly advise on specific aspects concerning the legal regulatory and tax framework for captives.



1

# Scope of Application of Swiss Insurance Laws



## 1. Legal Framework

The legal framework for insurance and reinsurance companies as well as intermediaries consists of the Swiss Federal Insurance Supervisory Act (ISA) and the respective Ordinance, which both came into force on January 1, 2006, and the Swiss Federal Insurance Contract Act (ICA). These laws were partially revised as of January 1, 2006 and January 1, 2009, respectively, when the Swiss Federal Act on the Supervision of the Financial Market (FINMAG) entered into force. Furthermore, Swiss investment fund laws may apply to specific insurance products. This is particularly the case when an insurance or reinsurance carrier or an intermediary acts as a financial intermediary; i.e. holds assets of a third person on his/her behalf. In addition, the Swiss Anti Money Laundering Act will also be relevant.

## 2. Scope of Application of Swiss Insurance Laws

In principle, insurance activity is considered to occur in Switzerland and is subject to Swiss supervision independent of the manner and location of the conclusion of the contract, if

- ii. a natural or legal person domiciled in Switzerland is among the policy holders or the insured persons; or
- iii. assets (Sachen) located in Switzerland are insured.

Some exceptions to Swiss supervision apply to insurers domiciled abroad without a branch in Switzerland if they engage only in specific lines of business (such as marine shipping, aviation, cross-border transport, coverage of risks abroad or war risks).

These provisions apply not only to the insurance companies, but by analogy also to insurance intermediaries.

The term "intermediation" is defined very broadly and includes any form of arranging, assisting, brokering etc. with respect to the conclusion of insurance contracts.

## 3. Definition of Insurance

The notion of insurance is ambiguous.

In Switzerland, the notion of insurance is not defined by law but in rulings of the Federal Supreme Court. In its rulings, the court states five characteristics to qualify an activity as insurance.



### **(a) Risk or Danger**

The nature of insurance is risk coverage. Consequently, the subject of insurance is always a risk or danger. Thus, insurance deals with an event whose occurrence or the time thereof is uncertain. Examples for insurance with an uncertain occurrence are property insurance, liability insurance and medical expenses insurance. On the other hand, life insurance is an example where occurrence (of death) is certain, only the time of occurrence is uncertain. The insured danger or risk is not the death itself but the death within a specific period.

### **(b) Premium Payment**

The premium is the rate which is paid by the insured to the insurer for his indemnification for the insured risk in case of its occurrence. This premium does not necessarily have to be paid by the insured but may be paid by a third party – for example by an employer for his employees. With the premiums and the possible incomes of those investments, the insurer has to cover the expenses of administration and granted benefits.

### **(c) Benefit granted to Insured**

Given, the insured event sets in, the insurer has to provide benefits. Therefore, it is decisive that the insured has a claim for indemnification against the insurer. Where such a claim or obligation is absent, no insurance will be provided.

### **(d) Independence of Operation**

This criterion distinguishes insurance from other legal transactions in which the obligation to indemnify in a liability case is merely a subsidiary agreement of another contract. A part of a mixed contract may be qualified as insurance insofar as the benefits thereof are of some importance and do not only constitute a subsidiary agreement or modality of the other part of the contract. Evidence for independence of operation might be if the customer pays more for the insurance than for the product and/or if the two businesses may be performed independently from each other.

### **(e) Mathematical / Statistical Criteria**

Insurance requires that risks are covered regularly and indemnification as well as compensation is calculated based on statistical and mathematical criteria.



#### 4. Insurance vs. Capitalization and Fund Products

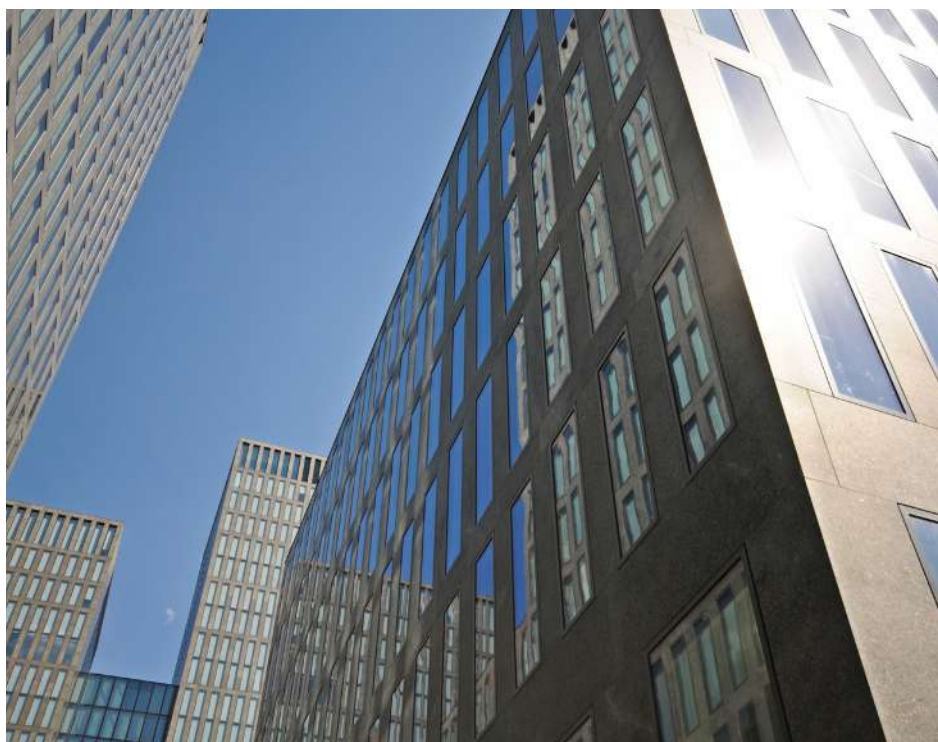
Depending on the specific life insurance products which are offered to clients, relevant products may qualify as investment products and the funds which back the policies may qualify as investment funds (i.e. mutual funds or, generally, collective investment schemes). In such cases, additional restrictions resulting from the Swiss Investment Fund Laws may be relevant for the insurer and the Swiss banks.

In case of distribution and marketing of foreign, i.e. non-Swiss based, collective investment schemes, a distribution in or from Switzerland may be subject to the KAG and KAV.

As a result, foreign investment funds may not be marketed to qualified or not qualified investors within or from Switzerland without making the requirements set forth by Swiss Collective Investment Laws.

#### 5. Sanctions

There are severe sanctions imposed on an insurance carrier or intermediary who engages in insurance activities or insurance intermediation without the required licence. Furthermore, an intermediary who fails to comply with his/her information obligations towards the insured, is subject to fines. Additional sanctions apply in case of breach of investment fund laws or other laws (such as the Swiss Penal Code or the Swiss Anti-Money Laundering Act).





A low-angle, upward-looking shot of a modern skyscraper with a glass facade. The building's structure is composed of a grid of dark metal beams and glass panels, creating a complex geometric pattern. The sky is visible through the glass, showing a light blue color with some white clouds. The perspective makes the building appear to converge towards the top of the frame.

# 2

## Setting up of Insurance and Reinsurance Carriers



### (a) Incorporation

As determined by the Swiss Federal Insurance Supervisory Act, insurance companies are only allowed to be incorporated either as corporations (Aktiengesellschaft) or as co-operative societies (Genossenschaft). Prior to starting business operations, insurance companies require a license from the Swiss Financial Market Supervisory Authority. The license will be issued when a number of financial and organizational requirements, such as minimum capital of CHF 3 – 20 million, solvency margin, technical reserves, legal form or establishment of an internal controlling are met (see below 3).

Insurance or reinsurance companies with registered offices outside Switzerland are exempt from FINMA supervision if they in Switzerland engage in reinsurance only; i.e., insurance or reinsurance companies which engage in reinsurance only in Switzerland do not require a business license for this.

### (b) Branch

A foreign insurance company which intends to engage in insurance activities in Switzerland needs to set up at least one branch (or a subsidiary) in Switzerland with a Swiss based branch manager. It has to demonstrate to the Swiss supervisory authority that it is authorized to engage in insurance activities in the state of its domicile and that it has in its state of principal registration a capital and a solvency margin at least equal to that required in Switzerland also covering business activities in Switzerland. Furthermore, it has to provide a surety in Switzerland equal to a specified percentage of the solvency margin to cover the business in Switzerland as determined by the supervisory authority. The branch manager has to be of good standing, must ensure sound commercial activities, and must have sufficient professional experience in the insurance industry.

### (c) Outsourcing

In case substantial parts of the business of an insurance company are outsourced to other persons, the respective contracts need to be approved by the supervisory authority. The person to whom important functions within the insurance company are assigned needs to meet the requirements for the managers of an insurance or branch.

A group of business professionals in a modern office setting. A large orange semi-transparent rectangle is overlaid on the left side of the image, containing the text '3 Insurance Licenses'. The background shows several people in business attire working at desks with large windows in the background.

# 3 Insurance Licenses



## (a) Business Licenses

Any insurance company that is subject to the scope of application of the Swiss insurance laws needs a license from the Swiss Financial Market Supervisory Authority (FINMA) in order to carry out insurance activities. In cases of mergers, splits or other transformations of insurance companies the license will not be automatically transferred to the new entities. Such cases have to be submitted to the FINMA for authorization.

In order to obtain a business license, insurance companies have to fulfill a number of requirements as listed in the Swiss Federal Insurance Supervisory Act (ISA) and the respective ordinances. These requirements can roughly be divided into financial requirements and organizational requirements as set forth below. In international cases these requirements may be overruled by international treaties.

### (1) Financial Requirements

The insurance companies are required to have a certain minimum capital that varies between CHF 3 and 20 million depending on the insurance classes to be operated. In extraordinary circumstances, the FINMA may require a higher minimum capital of up to CHF 20 million.

Besides the minimum capital, the insurance companies need to have adequate disposable and unencumbered capital resources available to cover their entire activities (so called solvency margin). The calculation of the solvency margin has to meet the Swiss Solvency Test (SST) and to take into account the insurance classes involved, the geographic scope, the extent of the business and the specific risks to which the respective insurance company is exposed. The details of the calculation are provided for in the Ordinance on the Supervision of Private Insurance Companies (AVO).

Finally, the insurance companies have to establish an organizational fund that shall cover, in particular, set-up and development costs or costs of an extraordinary business expansion. It may not be used for purposes other than the ones named above in the first three years after its establishment and even thereafter only with the consent of the FINMA. The exact amount to be kept in the organizational fund is determined by the FINMA in each specific case. It usually amounts to 50 % of the minimum capital.

### (2) Organizational Requirements

The insurance company has to be organized as a corporation (Aktiengesellschaft) or as a co-operative society (Genossenschaft). For foreign insurance companies, other forms of organizations may be admissible based on international treaties.

In general, insurance companies cannot operate any business that is not directly associated with the insurance business. Exceptions may

be granted by the supervisory authority if the interests of the insured are not endangered. Indirect activities by equity holdings in other companies are, in general, allowed but have to be reported beforehand to the supervisory authority if 10 % of the capital or voting rights are exceeded. The supervisory authority may forbid an acquisition or impose conditions if the insurance company or the interests of the insured are endangered thereby. The law is also built on the principle of the division between life insurance and non-life insurance: a company that is engaged in the business of direct life insurance may, besides this activity, only operate accident and health insurance, but it shall not be active in any other insurance class.

The persons responsible for direction, supervision, control and management of the insurance company shall be of good standing and have the abilities necessary to safeguard that commercial activities are sound and irreproachable. In particular, the Board of Directors of the insurance company has to be able to fulfill its tasks of surveillance and supervision and has to have the necessary knowledge about the insurance business. An accumulation of the functions of board member and management in the same person has to be avoided. The FINMA may exceptionally authorize such accumulation for justified reasons for a certain period of time. Directors have to possess the necessary knowledge with regard to the area they are responsible for. The positions of internal auditor and responsible actuaries cannot be accumulated. Each member of the management has to submit its CV to FINMA within fourteen days of his/her appointment.

The insurance companies have to establish an internal controlling that is independent from the management and reports directly to those members of the Board of Directors that do not hold an executive function. Furthermore, they need to appoint an external auditor. In order to qualify as auditor of an insurance company, the detailed requirements contained in the Ordinance on the Supervision of Private Insurance Companies have to be fulfilled. Finally, every insurance company needs to appoint an actuary who can be held accountable. The actuary has to be granted access to all commercial documents.

The insurance companies have to have an adequate risk management and have to be organized in a way to safeguard that all material risks can be identified, monitored and limited.

Insurance companies that intend to operate third party motor vehicle insurance have to become a member of the Swiss National Bureau of Insurance and the National Guarantee Fund as specified in the Federal Act on the Traffic on Roads.

### **(3) Additional Requirements for Foreign Insurance Companies**

A foreign insurance company that intends to operate insurance activities in Switzerland has to

- i. have an approval to exercise insurance activities in its country of registration;
- ii. establish a branch in Switzerland and appoint as its effective manager a person that is resident in Switzerland, has general power of attorney and represents the foreign insurance company towards the FINMA and any courts or debt enforcement authorities;
- iii. have in its country of registration a minimum capital as required under the Swiss legislation;
- iv. have in its country of registration a solvency margin as required under the Swiss legislation whereby the business in Switzerland is covered as well;
- v. establish an organizational fund in Switzerland according to the Swiss legislation; and
- vi. lodge a surety in Switzerland equal to a specified percentage of the solvency margin accruing with regard to the business in Switzerland. As a rule, this surety amounts to 10% of the respective solvency margin, but it shall not be less than a certain minimum amount that varies between CHF 40,000 and CHF 600,000 depending on the insurance class to be operated.

These rules apply only to the extent they are not overruled by international treaties. Worth mentioning is the insurance treaty with the EU. According to this treaty, insurance companies domiciled in the EU shall not be discriminated with regard to Swiss companies when establishing or taking over agencies and branches in Switzerland. However, this treaty does only apply to direct insurance against loss or damage. Further, insurance companies that are domiciled in Liechtenstein may start cross-border operations as soon as the supervisory authority of Liechtenstein has made a respective notification to the Swiss supervisory authority.





#### **(4) Application for Business License**

In order to obtain a business license, an application has to be filed with the supervisory authority together with a business plan. The Federal Act on the Supervision of Insurance Companies contains a detailed list of information to be included in and additional documents to be filed together with the business plan. The business plan has to contain in particular information on:

- i. organizational structure and the geographical scope;
- ii. financial resources and reserves;
- iii. persons that directly or indirectly hold 10% or more of the capital or voting rights of the insurance company or have a significant influence on its commercial activities;
- iv. names of the persons entrusted with direction, supervision, control and management or, for foreign insurance companies, details of the person(s) holding a general power of attorney;
- v. name of the accountable actuary;
- vi. reinsurance, plan or retrocession plan;
- vii. the insurance classes to be operated and the nature of the risks to be insured;
- viii. estimate of costs required to build up the insurance company;
- ix. details of risk identification, monitoring and limitation;
- x. if the insurance class "assistance" is included in the application, details of resources available to provide such assistance services.

The following documents have to be filed together with the business plan:

- i. Articles of Association;
- ii. annual accounts for the last three financial years or the opening balance sheet in case of a newly-established company and budget for the first three financial years consisting of balance sheet as well as profit and loss accounts;
- iii. CVs of all members of the Board of Directors, all executive directors and, in case of foreign insurance companies, of the holder(s) of the general power of attorney;
- iv. for foreign insurance companies, the general power of attorney;
- v. if the company intends to operate insurance activities abroad, the license of the respective supervisory authority or equivalent documents;

- vi. copies of the agreements relating to the outsourcing of material functions of the insurance company;
- vii. for insurance companies that intend to operate third party motor vehicle insurance, proof of membership in the Swiss National Bureau of Insurance and the National Guarantee Fund;
- viii. reinsurance plan and, if active reinsurance is included in the application, retrocession plan;
- ix. tariffs and general conditions to be used in Switzerland for the insurance of all risks of pension funds and additional health insurance.

The supervisory authority may require further information or documents if this is deemed necessary for the assessment of the application. If the legal requirements are fulfilled, the license has to be granted and published. The license is granted for one or several specific insurance classes as specified in Annex 1 to the Ordinance on the Supervision of Private Insurance Companies. The license for any such insurance class is also valid for the operation of reinsurance in the same class.

Changes to the above-mentioned elements of the business plan have to be reported to the supervisory authority and need, in certain cases, prior approval. If the requirements for the granting of the business license are no longer fulfilled, the supervisory authority has to take the necessary measures in order to safeguard the interests of the insured. If the shortfall with regard to the fulfillment of the requirements cannot be overcome, the supervisory authority can withdraw the license for the respective insurance class. The license can also be withdrawn if the company discontinues the insurance activities for more than six months.

## **(b) Insurance Intermediation License**

Art. 40 ISA defines insurance intermediaries as persons who, irrespective of their designation, offer or conclude insurance policies in the interest of an insurance company or other person. This is a very broad definition that encompasses any kind of agents and brokers even if the intermediation is only an ancillary activity and irrespective of whether any remuneration is involved. According to a bulletin of the supervisory authority, even the field staff of insurance companies and the employees of independent insurance intermediaries have to be qualified as insurance intermediaries.

The law distinguishes between independent and tied insurance intermediaries. Insurance intermediaries that are not tied to an insurance company either legally, commercially or in any other way are deemed to be independent. Intermediaries that

- i. derive at least 50% of their annual commission income from only one or two insurance companies; or
  - ii. receive compensations from one or more insurance companies that are not in accordance with the usual compensations in this business and that may influence their independence; or
  - iii. have cooperation or other agreements with insurance companies that affect their liberty to act for other insurance companies; or
  - iv. directly or indirectly hold more than 10% of the capital of an insurance company; or
  - v. have a leading position in an insurance company or in some other way exercise influence on the commercial activities of an insurance company; or
  - vi. have more than 10% of its corporate capital directly or indirectly held by an insurance company; or
  - vii. are directed or influenced in another way by an insurance company
- are deemed to be tied insurance intermediaries.

Independent insurance intermediaries need to be registered in the public register of insurance intermediaries maintained by the FINMA. Tied insurance intermediaries can register on a voluntary basis. It is possible to act as tied intermediary in one insurance class and as independent intermediary in another class and to register accordingly. It is not possible, however, to act as both tied and independent intermediary in the same insurance class.

A registration requires an adequate professional qualification and professional liability insurance with a coverage of at least CHF 2 million p.a. or equivalent financial surety. The adequate professional qualification has to be proven in a specific exam or with an equivalent certificate. The registration is denied if the applicant does not have the capability to act, has a criminal record due to activities that are not compatible with the activity as an insurance intermediary, or if there exists any certificate of unpaid debts (Verlustscheine) against the applicant. In case of legal entities, a sufficient number of employees of the intermediary has to fulfill the professional qualifications.

Upon the first contact, the insurance intermediaries have to provide the following information to the client:

- i. their name and address;
- ii. information on whether the insurance product offered in a specific



insurance class originates from one or several insurance companies and from which insurance companies;

- iii. the identity of the insurance companies they act for and the nature of their relation to these companies;
- iv. the person who is liable for negligence, errors or incorrect information with regard to their activities as intermediaries;
- v. information on the processing of personal data collected by them, in particular about the purpose, extent and recipients of the data and its safekeeping.

This information has to be provided via a permanent medium that is accessible to the client.

The insurance intermediary has to safeguard not to offer any insurance products in Switzerland which originate from insurance companies that are not licensed for insurance activities in the respective insurance class although they are subject to the Swiss Federal Insurance Supervisory Act.

To the extent Swiss mandate law applies, an insurance intermediary has to disclose to his/her clients the amount and manner of calculation of commission and retrocession payments and to obtain a respective waiver from the client. Additional disclosure obligations will apply if the planned Swiss Federal Law on Financial Services enters into force.





# 4 Insurance Contract Law

## (a) Introduction and Sources of Law

Although the insurance business has significantly evolved over the last century, the majority of the rules governing insurance contracts under Swiss law is over 100 years old. The most important source of Swiss insurance contract law is the Federal Insurance Contract Act (ICA) 1908 (as amended), which governs various aspects of the relationship between the insurer and the policyholder under private law. The ICA is complementary to general contract law set out in the Swiss Code of Obligations (CO) and provides special rules applicable to insurance contracts. These special rules of the ICA take precedence over the CO; if the ICA does not contain any specific provisions, the rules of the CO apply (art. 100 ICA).

An additional legal source is the Swiss Federal Insurance Supervisory Act (ISA), which contains certain provisions which are of relevance to the contractual relationship between the insurer and the insured. Furthermore, the jurisprudence of the Swiss courts, in particular the Swiss Federal Supreme Court (BGer), can provide important guidance in the interpretation of the law. Moreover, the Swiss Federal Act on the Supervision of the Financial Market (FINMAG) and the Ordinance on the Supervision of Private Insurance Companies (AVO), and more specifically the circulars of the Swiss Financial Market Supervisory Authority FINMA that are based on these laws, may contain rules that indirectly influence the content of private insurance contracts.

## (b) General Overview of Swiss Insurance Contract Law


### (1) Definition of Insurance and Types of Insurance Contracts

The ICA does not provide a definition of insurance contract under Swiss private law. It was therefore up to the legal practice to establish a definition. In essence, the insurance contract consists of two basic elements: (1.) a risk transfer from the insured to the insurer in consideration of (2.) an insurance premium. The insurance contract defines the modalities of the risk transfer, which includes (a.) the insured risk (=element that poses a risk), (b.) the insured interest (=element that is threatened by the risk) and (c.) the insured performance (i.e. the insured sum etc.). In summary, an insurance contract can be defined as a contract in which one party promises to the other party, against payment of a premium, a certain performance in case that a certain person, thing, or asset is affected by a certain risk.

The parties to the insurance contract are generally referred to as the policyholder (*Versicherungsnehmer*) on the one hand and the insurer (*Versicherer*) on the other hand. The policyholder is not necessarily identical with the beneficiary of the insurance (*Versicherter*).

The ICA contains certain mandatory provisions for certain types of insurance contracts (e.g., life insurance). However, rather than providing a full set of rule-based regulations, the ICA was drafted as a principle-based law and often refers to general legal principles such as good faith





and legality. The ICA neither comprehensively defines nor regulates the various types of insurance contracts nor does it prescribe a *numerus clausus* of insurance, i.e., a limitation on the admissible types of insurance contracts. Therefore, the Swiss legal framework for insurance contracts can be described as a relatively flexible and open regulation which leaves room for the development of “innovative” and non-standard insurance contracts.

A particular type of insurance is the endowment life insurance, which combines the risk transfer with a savings process. The contractual agreement can thus be separated into a risk transfer element and a savings element. The exact distinction between insurance and saving was repeatedly subject to controversy, as different economic interests manifest and conflict – for instance, the interests of tax authorities, consumers and insurance companies.

## **(2) Objectives of the ICA**

One of the primary purposes pursued by the legislator in the field of insurance contract law is the protection of customers. Accordingly, the ICA can be described as a consumer protection law that aims at balancing the negotiating powers of the parties to insurance contracts and, therefore, contains certain mandatory provisions that limit the freedom of contract. Besides providing for a protection of the insured, the ICA also provides certain flexibility to the insurer. As mentioned, the ICA is a relatively flexible law that only selectively provides for dense rule-based regulation. It leaves a large margin of discretion to the courts, which base their case-by-case decisions on the principles laid down in the ICA. Although this approach may be detrimental to legal certainty at times, it allows for a continuous development of the law. It may also be the reason why the ICA has remained substantially unaltered for more than 100 years.

## **(3) Scope of the ICA**

The ICA only provides a negative definition of its scope. Art. 100 ICA states that the CO is applicable to insurance contracts if the ICA does not provide for any specific regulations. Conversely, the ICA is applicable only to insurance contracts, which can be defined as contracts stipulating the risk transfer in consideration for the payment of a premium (see above). However, not all insurance contracts are subject to the ICA. The ICA is not applicable to (i) reinsurance contracts and (ii) insurance contracts whose provider is not subject to insurance supervision (for instance, because the provider does not ordinarily provide insurance contracts or the insurance contracts are not issued as stand-alone contracts). In these cases, the rules of the CO apply.

## **(4) Structure and Subject Matter of the ICA**

First, the ICA contains a general section (art. 1–47a) which is applicable to all types of insurance contracts. The general section is followed by the special provisions on indemnity insurance (art. 48–72) and the special provisions on personal insurance (art. 73–96). The fourth section designates the absolutely and relatively binding provisions (art. 97–98;

see below), while the fifth section contains the final provisions. It is noteworthy that the ICA's separation between indemnity insurance and personal insurance is not entirely logical – one aspect relates to the performance (compensation for damage) and the other aspects relates to the insured object (persons) – and, therefore, a clear-cut determination of the scope of specific rules may be difficult to achieve in practice. For instance, there is indemnity insurance which is also personal insurance, and there is fixed-sum insurance which does not qualify as personal insurance.

### **(5) Absolutely and Relatively Binding Provisions**

The ICA contains a list of so-called absolutely and relatively binding provisions (see art. 97 and 98, respectively). The rules enumerated in (art. 97) ICA are called absolutely binding, as they shall not be modified at all by the parties to an insurance contract. In contrast, the relatively binding rules enumerated in art. 98 ICA may be modified, but not to the detriment of the policyholder.

The system of absolutely and relatively binding provisions is generally employed by the Swiss legislator in order to balance the interests of parties who do not have the same knowledge bargaining powers. For instance, this system is also used in tenancy law and labour law. This underlines the purpose of the ICA as a law for the protection of the weaker party, which is deemed to be the policyholder. The legislator usually designates certain provisions as absolutely binding in order to ensure certain minimal public order standards or crucial ethical views, whereas the relatively binding provisions generally afford protection only to the weaker party (in the case of the ICA, the policyholder).

### **(6) Interpretation of Insurance Contracts, in Particular with Regard to Restrictions of Coverage**

As the ICA does not provide for a comprehensive regime for the interpretation of contracts, the general regime of the CO applies. A principle derived from the CO is the primacy of the subjective will of the parties. Only if the true will of the parties cannot be established, the contract is interpreted in accordance with the principle of good faith. This means that the respective declarations of the parties are to be interpreted from the point of view of a recipient acting in good faith.

While the general contract interpretation rules apply in principle, art. 33 ICA contains a special interpretation rule relating to the insurance coverage: the insurer is liable for any and all events that display the characteristics of the insured risk, except where the insurance contract specifically, precisely and unambiguously excludes certain events from the insurance. Therefore, it is important in practice to unequivocally and clearly state exclusions or restrictions on the insurance coverage. If the insurer fails to do so, the clause in question will be interpreted to the disadvantage of the insurer, i.e., the exclusion or restriction cannot be validly raised against the beneficiary.

## (7) General Policy Conditions

As in other jurisdictions, general terms and conditions (GTCs) that are repeatedly used by the insurers are common in the practice of Swiss insurance law. Certain special rules apply to GTCs of insurance contracts (also called general policy conditions). Although the freedom of contract applies in general, the courts have certain limited powers to review GTCs. There are three categories of judicial review of GTCs in general, which also apply to general policy conditions: (i) the review of validity (*Geltungskontrolle*), (ii) the review of interpretation (*Auslegungskontrolle*), and (iii) the review of content (*Inhaltskontrolle*).

First, the review of validity is concerned with whether or not the GTCs have been validly integrated into the contract. In particular, the judge would examine if the clauses contained in the GTCs are also covered by the will of the weaker party to the contract. In general, GTCs can be "globally adopted" by the counterparty (*Globalübernahme*), i.e., the GTCs become part of the contract even if the counterparty may not have taken note of the specific rules contained in the GTCs. This global adoption of GTCs applies if the user of the GTCs notifies the customer of the GTCs before the conclusion of the contract and gives the customer the reasonable possibility to take note of the GTC's content. However, this general principle is limited by the so-called doctrine of "unusualness" (*Ungewöhnlichkeitsregel*). This doctrine states that all unusual provisions in GTCs in respect to which the attention of the weaker party has not been particularly drawn are deemed not to be included in the contractual agreement. However, the doctrine of "unusualness" does not ban the adoption of unusual rules per se, as long as the attention of the other party was appropriately raised. In addition, it is noteworthy that all individual agreements between the parties supersede the rules contained in the GTCs.

The second level of review, which relates to interpretation of GTCs, in particular includes the so-called doctrine of "ambiguity" (*Unklarheitsregel*). According to the doctrine of "ambiguity", an ambiguous rule is interpreted in favour of the party which has not drafted that contract. Thus, a clause in general policy conditions with two or more possible meanings would be interpreted in the manner which is to the advantage of the policyholders to the disadvantage of the insurer.

The third level of review, the review of content, may set certain limits to the freedom of contract. While the freedom of contract is relatively extensive under Swiss law, the Federal Act against Unfair Competition (UCA) subjects GTCs, and therefore general policy conditions, to review if they are used in contracts with consumers. According to art. 8 UCA,



GTCs which provide for a significant and unjustified imbalance between contractual rights and obligations to the detriment of consumers and against the principle of good faith are deemed unfair competition and may be annulled.

### (c) Mandatory Rights and Obligations of the Parties to an Insurance Agreement under Swiss Law


As discussed above, the ICA is mainly a consumer protection law and therefore contains numerous provisions which set out obligations of insurers and limit their freedom of contract. In addition, the ICA regulates certain duties of the policyholder. Some of the more significant provisions of mandatory Swiss insurance contract law are discussed in the following paragraphs. Note that some of these provisions may be modified by contractual agreement, but not to the detriment of the insured (i.e., they are relatively binding; see above).

#### (1) Insurers' Pre-contractual Obligation to Inform

The parties to an insurance contract have a strong interest in information on the respective counterparty and other relevant circumstances. Accordingly, the ICA regulates various obligations to inform, both before and during the contractual relationship.

Art. 3 ICA sets out certain pre-contractual obligations of the insurer to inform the potential customer. In particular, the insurer is required to provide information on its identity and the essential elements of the offered insurance contract in a comprehensible way. The purpose of this pre-contractual duty to inform is to enable the potential customer to compare various insurance offers, which is only feasible if a comprehensible and reliable product description is available. More specifically, the insurer has to provide information on:

- the insured risks;
- the extent of the insurance coverage;
- the amount of the insurance premiums and the further duties of the policyholder;
- term and cancellation of the insurance contract;
- the bases of calculation as well as methods and principles of distribution in relation to surplus profits;
- surrender values and transformation values;
- processing of personal data, including purpose and method of data collections as well as recipient and storage of data.



The information described above shall be provided to the potential customer in a manner that enables the customer to take note of the information before requesting or accepting the insurance contract. In any case, the customer must have possession of the general policy conditions, if any, and the information regarding data handling and collection.

If the insurer breaches its obligation to inform according to art. 3 ICA, the policyholder has the right to rescind the insurance by written declaration (art. 3a para. 1 ICA). This right is exercisable up to four weeks after the policyholder has knowledge of the breach by the insurer.

Furthermore, it is noteworthy that the Draft Financial Services Act (Draft-FinSA), which is currently subject to approval in Parliament, provides for a special rule that derogates art. 3 ICA in the field of surrenderable life insurance containing an additional financial product. For such insurance products, the obligation to inform shall be met in the form of a basic information sheet for financial products, both for the life insurance and the financial component of the respective product.

## **(2) Policyholders' Disclosure Obligations**

Not only the (potential) policyholder, but also the insurer has a strong interest in the disclosure of relevant information concerning the counterparty. Accordingly, the ICA also regulates the disclosure obligations of the applicant for an insurance contract. Art. 4 ICA sets out that the applicant is obliged to disclose to the insurer in writing all facts within the knowledge of the applicant that are relevant for the assessment of the risk if the applicant is requested to do so by way of a written document. All the facts which may influence the decision of the insurer to conclude the contract under certain conditions (or to conclude the contract at all) are subject to disclosure by the applicant (art. 4 para. 2 ICA). Furthermore, all circumstances about which the insurer unambiguously inquires in writing are deemed relevant and, therefore, subject to disclosure (art. 4 para. 3 ICA).

The consequences of a breach of the disclosure obligation are regulated in art. 6 ICA. If the applicant fails to disclose relevant facts which he knew or should have known and with respect to which he was questioned in writing, the insurer has the right to terminate the contract by written declaration (art. 6 para. 1 ICA). This right must be exercised within four weeks after the insurer became aware of the breach (art. 6 para. 2 ICA). If the termination is exercised, the insurer's obligation to provide indemnification for damage which has already occurred expires if the occurrence or extent of the insurance claim relates to facts incorrectly disclosed by the policyholder. If the insurer has already paid the indemnification, it obtains a claim for reimbursement (art. 6 para. 3 ICA). However, certain circumstances set out in art. 8 ICA limit the insurer's right to terminate. This is, for instance, the case if the incorrectly disclosed fact ceases to exist before the insured event or if the insurer knew or should have known of the relevant fact.

### (3) Obligation to provide Certificate of Insurance (Police)

A further significant requirement is the obligation of the insurer to provide a certificate of insurance (i.e., a physically issued insurance policy) to the policyholder (art. 11 ICA). The document shall specify the rights and obligations of the parties. The principal purpose of this requirement is to put the insured in a position which allows him to respect the obligations under the insurance policy and to be in a position to make the insurance claim upon the materialisation of the relevant risk. While the exact extent of the terms that shall be specified in the certificate of insurance are not detailed in the ICA, the legal doctrine generally assumes that all terms, and not just the most significant terms, of the insurance contract must be stated in the certificate. The insurer's obligation to provide a certificate may be waived by the policyholder.

### (4) Payment of Premium

The principal duty of performance of the policyholder is the payment of the insurance premium. The ICA regulates the legal consequences in the event of a non-payment of the premium. These provisions are relatively binding, i.e., they shall not be modified to the detriment of the policyholder.

#### i. Non-Payment before Entry into Force of Insurance Agreement

A provision in an insurance policy which stipulates that the insurance only enters into force with payment of the first premium cannot be invoked by the insurer if the certificate of insurance has been handed out before the payment of this premium (art. 19 para. 2 ICA). Although such provision can be validly stipulated in the insurance agreement (which does not serve as the certificate of insurance itself), this would be rather unusual in the modern practice of Swiss insurance law.

#### ii. After Entry into Force of Insurance Agreement

If the premium has not been paid on the due date or within the period of grace granted to the policyholder, the debtor shall be prompted in writing to make payment within 14 days on pain of the consequences of failing to do so (reminder period, art. 20 para. 1 ICA). If the premium is still not paid after expiry of the reminder period, the duty of performance of the insurer is suspended as of the expiry of the reminder period (art. 20 para. 3 ICA).

If the overdue premium is not legally enforced within two months after the expiry of the deadline set out in art. 20 ICA, it is presumed that the insurer withdraws from the contract while renouncing payment of the overdue premium (art. 21 para. 1 ICA). This presumption only applies if the insurer neither confirms nor denies that it intends to continue the insurance contract. An explicit termination of the contract by the insurer remains reserved after expiry of the reminder period.

If the premium is being enforced or payment is subsequently accepted by the insurer, the duty to perform of the insurer is reinstated as of the



payment date of the overdue premium including interest and cost (art. 21 para. 2 ICA).

## **(5) Increased Risk during Term of Insurance**

### **i. On account of the insured**

If the insured has brought about a significant increase of risk during the term of the insurance, the insurer is not bound by the agreement for the remainder of the term (art. 28 para. 1 ICA). The increase in risk is deemed significant if it is based on a change of a fact relevant for the assessment of a risk whose extent the parties have assured (art. 28 para. 2 ICA). The insurance contract may set out the modalities of an obligation to notify the insurer if such risk is increased (art. 28 para. 3 ICA).

### **ii. For other reasons**

If a significant increase of risk occurred, but was not brought about by the insured, the consequences set out above (art. 28 ICA) only apply if the insured has omitted to duly report in writing the increase in risk from which he had knowledge (art. 30 para. 1 ICA).

### **iii. Inapplicability of these legal consequences**

According to art. 32 ICA, the legal consequences of increased risk (as set out above) are not applicable if:

- the increase in risk does not affect the insured event and does not affect the amount for which the insurer is liable;
- if the risk was increased with the intention of safeguarding the interest of the insurer;
- if the increase in risk was motivated by a humanitarian imperative (*Gebot der Menschlichkeit*);
- if the insurer has explicitly or implicitly waived its right to withdraw from the contract, in particular if no such notice was given to the policyholder within 14 days of the policyholder's notification regarding the increased risk.

## **(6) Duties of the Policyholder or the Insured (*Obliegenheiten*)**

Insurance contracts may set out certain duties which are incumbent on the policyholder or insured, but which cannot be legally enforced by the insurer (*Obliegenheiten*). Although not enforceable, failure to comply with such duties leads to a reduction or elimination of the insurance claim (or the beneficiary is put at a legal disadvantage in another manner). While it is admissible to stipulate such duties in insurance contracts, the ICA sets certain limits to such agreements.

Contractual agreements according to which the policyholder is required to take certain actions to diminish risks or to avoid an increase of risks are admissible. However, a clause which stipulates that the insurer is not bound to the contract if such duty is violated is void if the violation of such duty did not have an influence on the occurrence of the insured event or the amount payable by the insurer (art. 29 para. 2 ICA).

Furthermore, art. 45 para. 1 ICA states that if the policyholder or the insured is subjected to a legal disadvantage for non-compliance with a duty, the disadvantage shall not occur if the non-compliance with the duty is not to be deemed the fault of the policyholder or insured, taking into consideration the circumstances of the specific case. This rule cannot be superseded contractually. Thus, the reduction or elimination of the insurance claim due to non-compliance with a duty under the insurance agreement is only admissible if the non-compliance with that duty is the fault of the policyholder/insured. However, the non-payment of the insurance premium is in any case deemed to be the fault of the policyholder (art. 45 para. 2 ICA).

#### **(7) Extension of Contract**

A clause that stipulates that the term of an insurance contract shall be extended if no notice is given is generally admissible under the ICA. However, art. 47 ICA bans such automatic extension clauses that stipulate an extension for a term of more than one year.

#### **(8) Liability for Insurance Agents**

Under certain conditions, the insurer is liable for the behaviour of its insurance agents (art. 34 ICA). This applies to agents in the sense of (art. 418a CO), i.e., persons who permanently conduct business in the name of the insurer and on account of the insurer (Agenten), but not to brokers (Makler). If art. 34 ICA is applied, the behaviour of the insurance agent will be attributed to the insurer. Therefore, the insurer may incur liability for damages towards the client. This rule cannot be superseded by contractual stipulation. The reason for this rule is that the insurance agent acts on behalf of and in the name of the insurer and therefore creates a relationship of trust between the insurer and the policyholder.

### **(d) Formal Rules applicable to Insurance Contracts**

#### **(1) Swiss Office and Place of Performance**

Foreign insurers are obliged to designate a Swiss office where the insured may make all the notifications necessary according to the law and the insurance agreement. This Swiss office shall furthermore be indicated to the beneficiary who registers a claim in writing with the insurer (art. 44 para. 1 ICA).

The insurance premium is payable to the Swiss insurer at its domicile and to the foreign insurer at the place of its Swiss office, if the insurer has not designated a different place of performance in Switzerland (art. 22 para. 1 ICA).

## **(2) Due Date of Insurance Claims**

If no other provision was contractually adopted, the insurance claim becomes due upon the expiry of four weeks after the date on which the insurer received all information to verify the correctness of the claim (art. 41 para. 1 ICA). This rule is open for contractual modification. However, the agreement that the insurance claim is only due after the acceptance of the claim by the insurer or only after the insurer has been ordered by court for payment is void (art. 41 par. 2 ICA).

## **(3) Statute of Limitations and Place of Performance**

The ICA aims at ensuring that the insured can pursue the insurance claims effectively. Accordingly, the insurer must have enough time to file the respective information with the insurer and demand that the insured sum be paid. For this reason, the ICA provides that the stipulation of a statute of limitations shorter than two years is null and void (art. 46). If the limitation period is not contractually specified, it shall amount to two years after the occurrence of the insured event (i.e., the event which gives rise to the insurance claim).

In addition to this limitation rule, the ICA requires that the insurance claim shall be paid out at the Swiss domicile of the insured.

## **(4) Jurisdiction**

The ICA generically references general Swiss procedural law for the determination of the legal venue and does not set out a regulation of the venue itself. Accordingly, the relatively liberal regime of the Swiss Civil Procedure Code or, in the case of cross-border relationships, the Swiss Federal Act on International Private Law (PILA), or relevant international treaties may apply. In general, the venue can be selected relatively freely. One significant exception applies to cross-border consumer contracts. Both the PILA and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters set out consumer protection rules which limit the discretion in choosing the venue if the policyholder is a consumer. Under these laws, the consumer has the right to sue at his own domicile. Therefore, an insurance contract with a consumer cannot force the consumer to sue the insurer at an alien venue.

## **(e) Revision of the ICA**

As mentioned earlier, the ICA dates back to 1908 and has never been subjected to a substantial revision. A partial revision implementing some minor changes was enacted in 2006. However, a general overhaul of the ICA has been repeatedly proposed by legal scholars and has also been discussed on the political level. Such proposal of a total revision was rejected by both chambers of Parliament in 2012/13.



Following the rejection of the total revision, the Federal Council was mandated to propose a partial revision of the ICA. This proposed revision will be based on the rejected project. Although only a partial revision, the amendments to the law would be substantial. In particular the following aspects are the focus of the ongoing project:

- introduction of an appropriate right of revocation;
- regulation of interim cover;
- admission of retroactive cover;
- removal of the assumption of approval, which adversely affects consumers;
- appropriate extension of the period of limitations;
- introduction of a routine termination right.



A red life preserver is hanging on a weathered wooden post. The background is a clear blue sky. The life preserver has white rope attached to it. The text '5 Life Insurance and Annuities in Wealth Management' is overlaid on the image.

5

# Life Insurance and Annuities in Wealth Management

Life insurance continues to play an increasingly important role in wealth management because of its benefits and the favorable tax treatment in many jurisdictions. Here we outline the goals and uses of life insurance to preserve and increase the wealth as well as to pass it on to beneficiaries in a tax-efficient manner. Accordingly, we discuss below the advantages of using life insurance in the context of facilitating succession planning, prudent investment and increased access to financial markets as well as higher asset protection and efficient tax planning.

### (a) Life Insurance for Succession Planning Purposes

Life insurance should play a key role as an estate and financial planning tool to facilitate an orderly transfer of wealth to the next generation. It can help to preserve the wealth, to allocate the wealth, and/or to increase it tremendously.

In the non-business succession context, life insurance can be viewed as a vehicle to preserve and accumulate wealth to be transferred to the beneficiaries (heirs and successors) in a tax-efficient manner without the need of estate executors and administration. Therefore, life insurance provides a more cost-efficient transfer of wealth between generations that relieves the beneficiaries from dealing with a potentially complex estate and getting involved in sometimes protracted legal disputes.

Most often the policy beneficiaries are revocable, providing for flexibility, but sometimes fixing their interests can fit the long-term wishes of the policyholder. It is also possible to prolong the succession flexibility by appointing as a policy beneficiary either a private foundation or the trustee of a family trust. Such a longer-term approach of combining insurance and fiduciary structures would generally result in increased costs, know-your-customer due diligence, as well as anti-money laundering and tax compliance. Nevertheless, the facts and circumstances of the planning can justify the higher complexity.

In the business succession context, life insurance can be used (1) to provide security and liquidity for buying the business interests from the heirs and successors of a deceased business partner or (2) to allocate the wealth among the intended beneficiaries where one beneficiary receives the business and the other receives the insurance proceeds. Life insurance can also equalize distributions from the estate of the decedent for the heirs and relieve some beneficiaries from handling a complex family business and related disputes.

For example, a business enterprise owned and run by two business partners can buy two life insurance policies on the life of each of the two partners. The life insurance proceeds upon the death of one of the partners would be used to provide liquidity for the business so that the surviving partner can buy out the heirs and successors of the deceased partner at a pre-agreed price (determined under a formula). Without the life insurance policy, the business would have to liquidate assets in order to redeem the shares of the deceased partner and thus seriously disrupt



the business activities. Similarly, the business enterprise may decide to purchase life insurance on the life of key employees (e.g. CEO or CFO), again to prevent the disruption of the business activities in the event of death and for a smooth succession and transition in management.

Another example can be where the parents may wish to leave the business to a child who has been actively and successfully involved in managing the family business. In such situations, the parents could provide enough wealth through life insurance to cover the needs of the other children who would not manage and own the business. This can also include situations where there is a disabled child or there are children from a prior marriage. This strategy has the added benefits of preventing disputes regarding the correct valuation of the business for purposes of buying out the shares of other heirs. The strategy can also prevent disputes between the heirs regarding the proper management and direction of the family business.

As a succession planning tool, life insurance can serve the specific needs and intentions of the policyholder, taking into account family dynamics, and provide an adequate level of after-tax income upon the insured's death to:

- i. maintain the accustomed standard of living of the insured's family;
- ii. to cover death-generated expenses;
- iii. to satisfy mortgages and other debts;
- iv. to secure funds for health and education;
- v. to make charitable gifts; and/or
- vi. to provide for the children from a prior marriage.

In civil law jurisdictions, some financial intermediaries and wealth owners may perceive life insurance as the closest alternative to the common-law concept of a trust. Indeed there are similarities: the policy holder transfers assets to the insurer to hold and preserve them for the benefit of the policy beneficiaries; by comparison, the settlor transfers assets to the trustee to hold and preserve them for the benefit of the trust beneficiaries. However, there are important differences. For example, the trust can continue long after the settlor's death thus providing continuity while the life insurance policy terminates upon the death of the insured (who may also be the same person as the policyholder). Life insurance is widely accepted and favorably treated in many jurisdictions while trusts are not recognized by most civil law jurisdictions and can be perceived as being created for improper reasons. Therefore, as already mentioned above, in many cases a combination of these succession planning tools can be the best approach.

There are various types of life insurance products that can be customized to the specific facts and needs of the policyholder and beneficiaries. The most common types of life insurance include:

### (1) Term Life Insurance

A term life insurance is useful where there is a need for life insurance during a particular period of time, after which the coverage will no longer be needed. This insurance generally costs less because it does not have a cash surrender value at the end of the term. This insurance may be useful as an additional security against unexpected costs where an executive relocates temporarily (e.g. 3, 5 or 7 years) to a new location in another country.

### (2) Permanent ("Cash Value" or "Whole") Life Insurance

This insurance ends with the death of the insured. It is generally much more expensive than term life insurance because it has a cash surrender value. Some part of the premiums plus the growth can be received upon surrender of the policy. Consequently, the policy has a savings and investment aspect as well.

### (3) Variable Life Insurance

This is the most investment-orientated type of insurance. It allows premiums to be credited to a segregated account of the policy, providing for a variety of investment options for the underlying assets to increase. Consequently, the cash surrender value can increase with the increase of the value of the underlying assets but it can also decrease in value if the policy assets lose value.

### (4) Universal Life Insurance


This is a whole life insurance that allows payment of reduced premiums or no premium if the policy has a sufficient cash surrender value. Consequently, the costs of insurance and any fees or premiums required can be covered out of the policy's cash value. The remaining policy assets are invested to earn interest or other income.

What type of life insurance should be used depends on the amount of coverage, the cost and the reasons for purchasing it. It is possible to combine certain types of insurance in order to obtain products such as universal variable life insurance, frozen cash surrender value, or zero cash surrender value insurance.

## (b) Life Insurance as an Investment Tool

The traditional role of life insurance has been a means to provide financial stability in the event of an unexpected death. Currently, with the development of various life insurance products that have a cash surrender value, insurance is increasingly used as a unique investment alternative. When the policy has an investment component, then the policy assets are generally segregated or their value is linked to units in a dedicated fund.

The investment (savings) component that is generally represented by the policy's cash value can be customized based on the needs of the policyholder. Consequently, the policy's cash value depends on the type of life insurance product chosen.



For example, a zero cash surrender value insurance policy has monetary value only upon the death of the insured. As the time of the insured's death is unpredictable, such a policy would not be accepted as collateral by banks.

Where an insurance policy has an immediate and fixed monetary value, it can generally be used to obtain a loan at any time and serve as a security in the event of default on the loan. Such a loan can be obtained by the policyholder from the insurance company (according to the terms of the policy) or from a bank.

From an investment perspective, the policy that is most widely used is the variable universal life (VUL) insurance policy. The value of this policy follows the increases and decreases in the value of the underlying policy investments. In other words, the policy cash surrender value as well as the policy proceeds in the event of death can vary depending on the policy assets. The policyholder may choose periodically (e.g. annually) the investment strategy (conservative, aggressive, etc.). The policyholder can also determine the custodian of the policy assets.

Sometimes an investment-linked policy is called an "insurance wrapper" to highlight the significant similarities of such a policy with an investment portfolio account held for at a bank for example. In the extreme cases:

- i. The investments could be the same in the policy as in a portfolio account and the policyholder may communicate regarding their wishes on investing or disposing of specific securities within the policy.
- ii. The custodian bank and the investment manager could be the same or the policyholder could have the right to change the custodian and the investment manager in the same way that a bank account owner has.
- iii. The cash surrender value of the policy and the value of the portfolio account could be roughly the same (except for minimal insurance-related costs).
- iv. There might not be any additional amount paid as part of the insurance proceeds upon the death of the insured (i.e. no biometric risk related to death at a time different than the statistical average).

Therefore, in such extreme cases every aspect could basically be the same for an investment in the insurance policy as an investment within a portfolio bank account, except that the investment is "wrapped" in an insurance product. In other words, the underlying investments are inside the policy as an asset of the policy and the policyholder owns the policy contract and not the underlying investments. In such a case, the term "insurance wrapper" could be a proper description and the result of the investment could be the same, including the tax consequences in many jurisdictions (i.e. the "insurance wrapper" may be disregarded by the tax and regulatory authorities).



However, the term “insurance wrapper” would not be suitable to describe a VUL policy with a death benefit that includes a substantial mortality risk. In other words, the differences between the VUL policy and the investment portfolio account would be significant where the policy proceeds upon death include a substantial amount (in absolute amount and/or as a percentage of the assets at death) of death coverage in addition to the value of the policy assets at the time of death. In that case, the policyholder has effectively shifted to the insurance company the mortality risk, and the insurance company has assumed such risk with its obligation to pay the additional amount upon death. The policy may also require that the premiums are paid over a period of time rather than as a single premium, depending on the availability of financial assets to make the premium payments and/or the possibility of obtaining reinsurance coverage. The policy would also restrict the ability of the policyholder to control the policy investments, other than being able to change the investment adviser and the broadly defined investment strategy periodically. The investment in the policy assets may also be restricted to certain types of investments, such as publicly traded investment funds or products linked to such funds, or investments that are only available to one or more insurance companies. There may be a requirement of minimum diversification in the policy assets in terms of percentages or numbers of investments. In these cases (where there is a minimum death benefit, risk shift, risk diversification, asset diversification, and/or investor control restrictions), the VUL policy customized for the specific insurance needs of the policyholder would be quite different from a simple “insurance wrapper”. Then the policy becomes a unique investment vehicle with specific characteristics customized and tailored to the specific risk needs of the policyholder and beneficiaries.

In addition to the insurance policy itself being a unique investment vehicle, its cash value could be leveraged by obtaining a policy loan from the *insurance company* to the extent allowed under the policy terms. Then the loan proceeds can be further invested by the policyholder. If the loan is not repaid, then the insurance company would reduce the policy value accordingly.

Furthermore, the policy can serve as collateral on a loan *from a third party* where the loan proceeds can again be invested by the policyholder elsewhere. The collateral over the life insurance policy can be created as a pledge, an assignment, or a combination of the two. Under a pledge, the lender does *not* usually receive the right to surrender the policy or the right to designate policy beneficiaries in the event of default on the loan. Under an assignment, the lender (not the policyholder) usually has those rights. The lender would normally accept a pledge but with an assignment of the right to surrender the policy, leaving the right to designate beneficiaries to the policyholder.

Once the insurance company has been notified of the collateral over the life insurance policy, it may not make payments to the policyholder

outright but rather may have to deposit any amounts payable under the policy in escrow. An exception could be where the policyholder and the bank agree on the recipient of the payment or a court verdict is obtained. Consequently, from the point of view of the lender, the collateral agreement should include fast-track enforcement of the collateral over the policy. From the insurance company's point of view, the scope of the collateral over the policy is very important to be able to determine to whom the company has to pay the amounts due under the policy: the lender bank, the policyholder, the beneficiaries or in escrow. From the policyholder's point of view, the collateral allows access to the life insurance policy value prior to the insured's death and the opportunity to make further investments with the policy loan proceeds.

Accordingly, high net worth individuals, family offices, banks and other intermediaries would be well advised to consider the benefits that different types of insurance policies can provide as a unique risk investment tool in the modern world of sophisticated financial products.

### **(c) Life Insurance and Annuities and their Role in Asset Protection**

Asset protection can be one of the key elements when evaluating different investment alternatives. In this respect, investment in a life insurance policy should be considered more closely to ensure the desired benefits are available under the applicable laws.

As a general principle the creditor's rights prevail over the rights of the beneficiaries under the life insurance policy in case of foreclosure proceedings against the policyholder of a Swiss life insurance policy. However, there are two important exceptions to this rule that can be used for asset protection purposes.

First, the rights of an irrevocable beneficiary prevail over the claims of the policyholder's creditors. The moment the policyholder formally waives its right to revoke a beneficiary under the life insurance policy, both the policyholder's and the irrevocable beneficiary's claim against the insurer fall out of the scope of a future foreclosure against the policyholder.

Second, if the policyholder nominates its spouse and/or descendants as (revocable) beneficiaries neither their claims as beneficiaries nor the policyholder's claim against the insurer fall within the scope of a future foreclosure against the policyholder. The life insurance contract is assigned to the spouse and/or descendants as beneficiaries by operation of law the moment a certificate of unpaid debt (*Verlustschein*) against the policyholder is issued or bankruptcy proceedings against the policyholder are filed. As a consequence, the spouse and/or descendants replace the policyholder in all aspects of the life insurance contract. Due to the precautionary nature of this statutory assignment, the policyholder and the insured person must be one and the same person under the life insurance policy; if this is not

the case, then this asset protection mechanism does not work. Asset protection via nominating spouse and/or descendants is a practical approach because it can be done privately and can be reversed at any time without the consent of the spouse and/or descendants.

However, the above-mentioned asset protection methods may limit the policyholder's creditors' rights. Therefore, these methods are subject to their claw back claims. Under Swiss law, the designation of beneficiary under a life insurance policy is regarded as a donation. Consequently, it can be contested by the policyholder's creditors if donated during the one-year period prior to the filing of bankruptcy proceedings against the policyholder. If a nomination of the beneficiary as outlined above was made with the intention to financially harm the policyholder's creditors and the respective beneficiary was aware of this result, such nomination can be contested by the policyholder's creditors if done within five years of the filing of bankruptcy proceedings against the policyholder.

If creditors of a policyholder residing outside Switzerland try to attach assets to secure the claims deriving from the life insurance policy in Switzerland, no attachment in Switzerland will be possible because Swiss law allows only the securing of claims that can also be enforced in a foreclosure against the policyholder. The same is true in enforcement proceedings of a foreign judgment in Switzerland: if the enforcement of a foreign judgment would result in the foreclosure of Swiss assets that are protected under Swiss law, the Swiss court will not recognize it. Hence, the above-mentioned Swiss asset protection rules apply both to Swiss and non-Swiss residents.

However, if the policyholder resides outside Switzerland there remains a risk that the foreign court may regard the life insurance claim as "located" in the country of residence of the policyholder, even if the Swiss life insurance policy contains an explicit choice of Swiss law. This may result in ignoring of the above-mentioned asset protection mechanism and, at worst, granting the creditors a claim against the Swiss life insurance's subsidiary in the country of residence of the policyholder. Therefore, if a non-Swiss resident plans asset protection via a Swiss life insurance policy, each case should be carefully looked at under Swiss law and especially under the law of the country of residence of the policyholder.

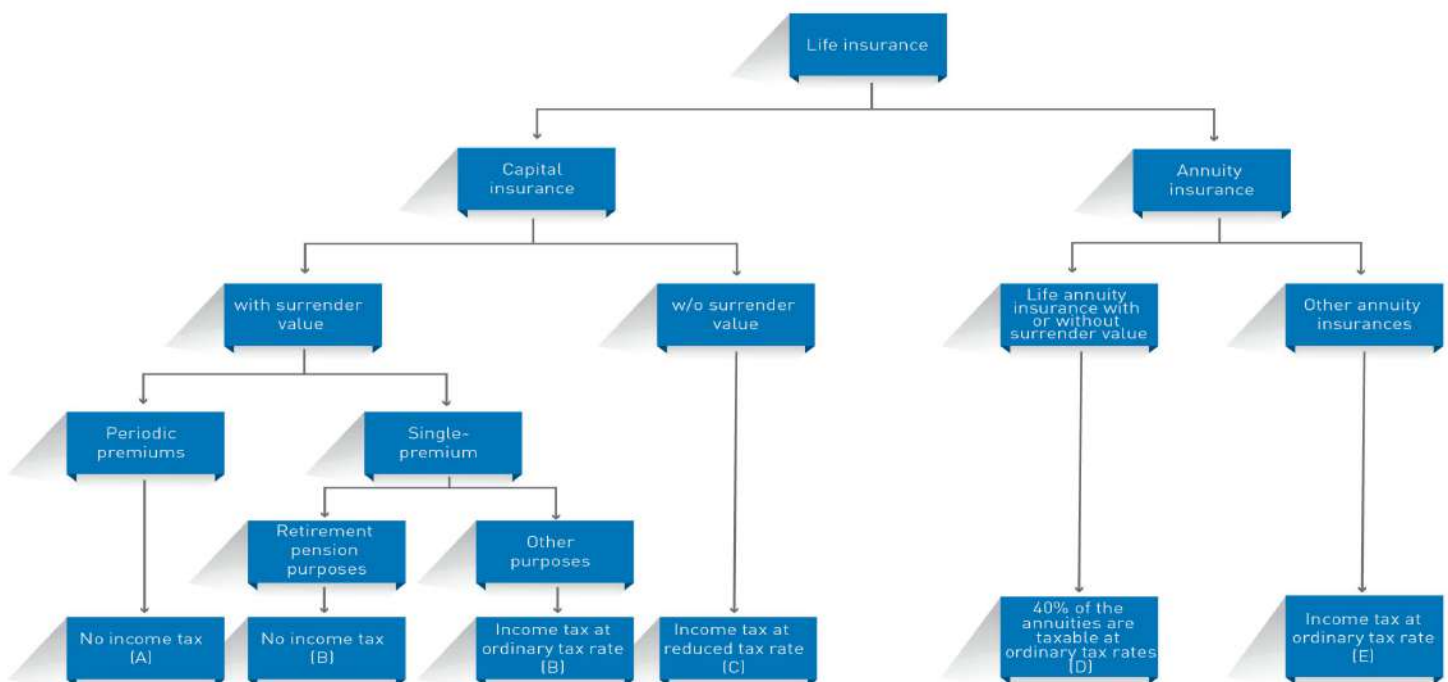
#### (d) Life Insurance and Annuities and their Tax Planning Benefits

In most jurisdictions policyholders of a life insurance policy can be individuals as well as legal entities. Thus, an underlying company forming part of a trust structure can also act as the holder of an insurance policy and this has indeed become a common practice.



Though different jurisdictions have different rules on the taxation of life insurance policies, they generally share the common feature of more favorable treatment than other planning vehicles. Provided certain requirements are met, policy assets can generate tax free income and be accessed tax free, up to a certain extent. Upon maturity, insurance proceeds can be received tax free as well.

From a Swiss tax perspective, life insurance policies may qualify as capital insurance or annuity insurance depending on the form of payment of the insurance benefits. In the case of capital insurance, the insured amount is due upon occurrence of the insured event as a capital payment. In the case of an annuity insurance, a fixed annuity is paid out from the agreed date of maturity. For Swiss tax purposes, life insurances are further subdivided into the following types:



#### (A) Capital Insurance Policies with Surrender Value

*(Rückkaufswert)* that are financed through periodic premiums:

Payments out of this type of insurance are generally not subject to income tax. In the case of fund-linked life insurance (*anteilsgebundene Lebensversicherungen*), the tax exemption is only granted if the life insurance term amounts to at least 10 years.

#### (B) Single-Premium Capital Insurance Policies with Surrender Value:

Payments out of such policies are not subject to any income taxes if they serve retirement pension purposes for which the following three conditions must be fulfilled: (i) the payment out of the insurance takes place after the 60th birthday of the policyholder, (ii) the insurance

has run for at least five years and (iii) the policy was purchased before the policyholder turned 66 years of age. Additionally, the beneficiary has to be the policyholder or his/her spouse. If these requirements are not fulfilled, the payments (less the single premium paid by the policyholder) are subject to income tax at the ordinary tax rate.

**(C) Capital Insurance Policies without Surrender Value:** Payments are subject to Swiss income tax at reduced tax rates. On a federal level, the payments are taxed separately from the other income of the beneficiary and the tax rate is reduced to one-fifth of the ordinary tax rate. A reduced tax rate is also used at cantonal level. The regulations differ from canton to canton. Some cantons apply the same mechanism as described above for the federal level, while others split up the capital payment for the purpose of the calculation of the tax rate which, due to the progressive rates, results in a lower tax rate.

**(D) Life Annuity (*Leibrenten*) with or without Surrender Value:** The annuities are subject to Swiss income tax. However, due to the fact that the insurance policy has been financed through money which have already been subject to income tax, only 40% of the income from such annuities is taxable at ordinary tax rates.

**(E) Other Annuity Policies:** Annuities from mere risk insurance are fully taxable. Payments from temporary life annuity (*Temporäre Leibrenten*) and from temporary annuity (*Zeitrenten*) are taxable at ordinary tax rates. However, Swiss income tax is levied only on the fraction of the annuity which economically constitutes interest on the capital paid into the policy, while the fraction of the annuity which constitutes a repayment of the capital is not subject to income tax.

\* \* \*

Life insurance policies without surrender value are not subject to Swiss net wealth tax, as they are pure entitlements (*Anwartschaft*). Life insurance policies with surrender value are subject to net wealth tax on such value.

If payment from a life insurance policy is made at the death of the insured, the part of the payment, which has not already been subject to income tax (see above), may under certain circumstances be subject to inheritance tax at cantonal level.





# 6 M&A Transactions

### (a) Introduction

In recent years, there has been significant M&A activity within the insurance industry. The following section provides an overview on the Swiss legal framework for M&A transactions between insurance companies. As most insurance M&A transactions involve foreign parties, it is but natural that in most cases a foreign regulatory environment will have to be closely examined as well.

In general terms, the regulatory characteristics of insurance companies set forth below require the parties involved in M&A transactions to seek advice at an early stage not only from transactional, but also from regulatory and actuarial specialists. Mergers, splits and transformations of insurance carriers require an authorization by FINMA.

### (b) Approval and Notification Requirements due to Changes to the Business Plan

Furthermore, an M&A transaction may require the insurance company to amend its business plan. Accordingly, the prior approval of certain amendments to the business plan by the FINMA is required; for some amendments, a notification to the FINMA is sufficient.

Amendments to the following elements of the business plan require prior approval by the FINMA:

- i. the articles of incorporation;
- ii. the name of the accountable actuary;
- iii. the name of the external auditors and the persons with responsibility for this mandate and, if the insurance company is part of an insurance group or insurance conglomerate, details of how the mandate entrusted to the external auditors of the insurance group or insurance conglomerate is organized;
- iv. the proposed insurance classes and the nature of the risks to be insured;
- v. the rates and general insurance conditions to be used in Switzerland for insuring all risks in occupational pension plans and in the supplementary insurance to social health insurance.


In addition to the changes to the elements of the business plan listed above, art. 5 sec. 1 ISA provides that any amendment to the business plan resulting from a merger, split or conversion of the insurance company requires prior approval by the FINMA .

Amendments regarding the following elements of the business plan require notification to the FINMA:

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Cf. I.B.6.e) below for the insurance restructuring according to the Swiss Merger Act.



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- i. details of its organizational structure and range of activities to be carried out locally by the insurance company, including, if appropriate, details of the insurance group or insurance conglomerate to which the insurance company belongs;
  - ii. if insurance activities are to be exercised outside Switzerland: the license from the competent foreign supervisory authority or an equivalent document;
  - iii. details of financial resources and reserves;
  - iv. details of persons who directly or indirectly have at least a 10% equity holding or at least 10% of votes in the insurance company or who may exercise a significant influence on its commercial activities;
  - v. the names of persons entrusted with the direction, supervision, control and management or, in case of foreign insurance companies, details of the person(s) holding a general power of attorney;
  - vi. contracts or other agreements, indicating how the principal functions of the insurance company are to be allocated;
  - vii. where applicable, a statement relating to membership of the National Bureau of Insurance (*Nationales Versicherungsbüro*) or the National Guarantee Fund (*Nationaler Garantie-fonds*);
  - viii. details of resources available to provide assistance services if application includes the insurance class "assistance";
  - ix. reinsurance plan and retrocession plan if active reinsurance is included in the application;
  - x. details of risk identification and how risks are to be limited and monitored.

The aforementioned changes which are subject to notification requirements have to be reported within 14 days of occurrence and shall be deemed approved unless the FINMA commences an examination of the changes within four weeks of notification.

Changes to the business plan are usually followed by further clarifications, such as the determination of the capital resources according to art. 9 ISA, i.e. if the insurance company has adequate disposable and unencumbered capital resources to cover its entire activities (solvency margin).

### (c) Notification of Equity Holdings by or in Insurance Companies

The ISA provides for several notification duties of equity holdings by or in Swiss insurance companies. For instance, an insurance company with a registered office in Switzerland intending to acquire a direct equity holding in another company shall notify the FINMA if the equity holding in the other company equals or exceeds 10, 20, 33 or 50% of the capital or voting rights. The ISA, however, does not explicitly provide for a notification duty in the

event of a sale of equity holdings by Swiss insurance companies or reduction of the stake below the aforementioned thresholds, unless a stake in a Swiss insurance company is concerned.

Moreover, whosoever intends to take a direct or indirect equity holding in an insurance company with its registered office in Switzerland shall notify the FINMA if the holding in that insurance company equals or exceeds 10, 20, 33 or 50% of the capital or voting rights. Furthermore, whosoever intends to reduce its equity holding in an insurance company with its registered office in Switzerland to below the thresholds or to change its holding such that the insurance company is no longer a subsidiary shall notify the FINMA of this. Public tender offers for listed Swiss insurance companies necessitate the same notification duty, as they form a special kind of stake purchase.

The FINMA may prohibit an equity holding or impose conditions if the nature or extent of the holding might endanger the insurance company or the interests of the insured. Contrary to the transfer of insurance portfolios, however, the insured in the course of a share deal are not granted a termination right. The ISA does not provide appropriate guidance on whether the described notification duty applies evenly on transactions within a group of insurance companies; therefore, the FINMA should be notified even in the event of intra-group transactions. Moreover, as the ISA does not contain any time limit for the FINMA to prohibit changes in equity holdings or to impose conditions, it is advisable to obtain a ruling from the FINMA confirming that there are and will be no opposition to the envisaged equity transaction well in advance of the transaction. The notifications according to art. 21 ISA may be made in one of the official languages or in English.

## (d) Insurance Portfolio Transfers

### (1) Voluntary Insurance Portfolio Transfer

Apart from share or asset deals as conventional structures for M&A transactions, Swiss law provides for the peculiarity of the insurance portfolio transfer. An insurance company may voluntarily transfer its Swiss insurance portfolio in full or in part to another insurance company under the terms of a contract. Such portfolio transfer requires the approval of the FINMA according to art. 62 sec. 1 ISA. The FINMA only approves the transfer if the overall interests of the insured are protected. This means, that the acquiring insurance assumes the duty to handle and close all pending insurance claims and to provide comparable guarantee for the insured on par with the transferring insurance company. With the approval, the insurance contracts are transferred *ipso iure* with all appertaining tied assets and liabilities (actuarial reserves) to the acquiring insurance company, i.e. no consent of the insured party is required for the insurance transfer. Contrary to this general principle, as reinsurances do not have to produce tied assets, portfolio transfers according to art. 62 ISA are not admissible for reinsurance contracts. This means that for the transfer of reinsurance portfolios from one reinsurer to another, the affected contracting parties have to consent to the transfer individually.

Notwithstanding the described *ipso iure* insurance portfolio transfer, the company acquiring the portfolio is obliged to inform each of the affected insured parties individually within 30 days upon approval of the transfer and their right to terminate the insurance contract. An insured may terminate the insurance contract within three months of the individual notification. The FINMA may exclude the termination right if the portfolio transfer does not lead to an economic change for the contracting party of the insured (e.g. if the insurance company spins off an insurance portfolio by transferring it to a subsidiary). Moreover, no termination right is granted to the insured if the insurance portfolio is transferred to another insurance in the context of a merger.

The FINMA's approval of the transfer of the portfolio is made public in the Swiss Official Gazette of Commerce (SHAB) and paid for by the acquiring insurance company.

Finally, when transferring insurance portfolios, the following regulatory basic principles still have to be complied with:

- i. On the one hand, insurance portfolios may generally not be transferred to non-insurances (e.g. banks, investment funds), as art. 11 ISA sets forth that apart from insurance activities, an insurance company may only operate business directly associated with those activities (although the FINMA may approve other activities if this does not endanger the interests of the insured);
- ii. On the other hand, art. 12 ISA requires a line separation of direct life insurance and other insurance classes. Hence, if an insurance company operates direct life insurance, the only other insurance classes that it may operate are accident and health insurance.

As regards the insurance portfolio transfer to a foreign insurance company, unless the acquiring entity is an EU or Liechtenstein insurance, the acquiring insurance company has to set up a branch or subsidiary in Switzerland, determine a manager with general power of attorney, have in its country of principal registration sufficient capital also covering the prospective Swiss business and lodge a surety in Switzerland. If the acquiring entity is an EU or Liechtenstein insurance company, the special treaties with these jurisdictions apply, which facilitate the procedure to some extent.

## **(2) Insurance Portfolio Transfer ordered by the FINMA**

The FINMA on its own may order an insurance portfolio transfer. In particular, this will be the case if the FINMA withdraws the approval according to art. 61 ISA or in the course of a restructuring or bankruptcy proceeding of an insurance company. In such cases, the FINMA may transfer the insurance portfolio and the associated tied assets to another insurance company subject to the latter's agreement. While the FINMA has to determine the terms and conditions of the forced insurance portfolio transfer, it is not allowed to change the terms and conditions of the transferred insurance contracts. Contrary to the voluntary insurance portfolio transfer described above, the insured do not have a termination right if the insurance portfolio transfer is ordered by the FINMA.

## (e) Restructuring of Insurance Companies according to the Swiss Merger Act

According to art. 3 sec. 2 ISA, mergers, splits and conversions of insurance companies pursuant to the Swiss Merger Act (SMA) require the prior approval of the FINMA. In such a case, the insurance contracts are transferred to the new legal entity by way of universal succession. The approval is granted if the protection of the insured is ensured, in particular with regard to the protection from the insolvency risks of the acquiring insurance and abusive behavior. The entities affected by the merger, split or conversion have to make sure that the existing insurance policies are continued without modification. However, the insured is not provided with a termination right. Mergers, splits and conversions of insurance companies may only be filed with the commercial register once the FINMA approval has been granted.

Swiss insurance supervision law does not contain any explicit provisions regarding the asset transfer according to art. 69 et seqq. SMA. It still is controversial in doctrine whether or not the asset transfer entails the automatic transfer of all contracts. Although not expressly provided in art. 62 ISA, it is assumed by the prevailing doctrine that the regulatory provisions regarding the insurance portfolio transfer apply if asset transfers according to the SMA include the transfer of an insurance portfolio. It is argued that this is the only way the FINMA can intervene for the protection of the insured, since the asset transfer pursuant to the SMA itself does not necessitate any approval requirements. In the context of the interdependence between asset transfer according to the SMA and the insurance portfolio transfer according to the SIA, the further question is whether the entry in the commercial register according to the SMA or the FINMA approval according to the SIA shall be decisive on the transfer of the insurance contracts. In practice, this factor calls for a good coordination of the transactional and regulatory procedures.

## (f) Insurance and Due Diligence

### (1) Insurance Due Diligence in general M&A Transactions

Any full-fledged legal due diligence usually includes a review of the target company's insurance policies. The main purpose of such insurance due diligence is to assess whether there is a satisfactory insurance coverage to conduct the target's business or if there is an exclusion or gap in insurance coverage the purchaser is not willing to accept. Typical information and documents to be reviewed within an insurance due diligence include:

- i. copies of the existing insurance policies (including, depending on the type of business, property damage, fire, water, theft, third party liability, product liability, business interruption, transportation, software and hardware insurances, employment-related insurances such as accident insurance for employees, salary insurance in the event of employee absence due to illness or accident, directors' & officers' liability insurances etc.), or alternatively a list of all such current insurance policies containing the date of the latest renewal, the next renewal dates, annual premiums, the amount of coverage, deductible amounts,



liability retention limits, the risk covered, the nature of the coverage and the name of the insurance company;

- ii. information on self-insurance and inter-group premium reimbursement agreements;
- iii. an overview on any claims made under insurance policies by the companies within the last three years whether paid or outstanding;
- iv. a list of cases in which insurance companies have refused to cover specific risks for the companies within the last three years with a description of the risks concerned;
- v. copies of all insurance and risk management reports conducted by or for the companies.

In some cases, it is advisable in the context of M&A transactions for the purchaser to turn to insurance specialists such as specialized insurance advisers or insurance brokers for specific insurance-related questions; moreover, the possibility of the target company's inclusion in the existing group policies may be discussed with the purchaser's group insurer prior to contract negotiations regarding the transaction agreement.

## **(2) Due Diligence Requirements in M&A Transactions involving Insurance Companies**

When acquiring an insurance company, the due diligence needs to be directed towards the insurance industry's inherent risk positions of the target insurance company. Such risk parameters pertaining to the insurance industry include in particular the actuarial reserves, the tied assets and the solvability. In case of life insurers, KYC and AML laws can be additional key issues.

Moreover, special attention has to be paid to data protection aspects, as a multitude of personal data of the insured are vested with the target. It is unclear under Swiss law whether the inspection of personal data of the insured within a due diligence process would be considered as a "permitted data processing by third parties" according to art. 10a of the Swiss Data Protection Act. In most cases, the express consent of the insured is not practicable. Therefore, the personal data of the insured are generally not to be disclosed within a due diligence or only as anonymous data within general statements about the structure of the insured (age, gender, specific risks, etc.).

## **(g) Insurance and Representations and Warranties**

After the diligent assessment of the existing insurance coverage of the target company, the due diligence findings have to be addressed in contract negotiations and reflected in the relevant transaction document.

### **(1) Insurance Representations and Warranties in M&A Transactions**

Typical representations and warranties regarding insurance contained in transaction documents include representations and warranties of the seller that

- i. all insurance policies which provide coverage to the business of the target company [are contained in Schedule XYZ] or [have been disclosed during the due diligence];
- ii. all the insurance policies are valid and in full force and provide customary insurance coverage for the business and the employees for risks normally insured against in businesses similar to the business of the target company;
- iii. as of the date of the transaction agreement, no claims other than disclosed in the due diligence exist under any such insurance policies in relation to the business of the target company or its assets; or
- iv. the policies are in full force at the closing date and that the target company has done nothing either by way of action or omission which might lead to the cancellation of such policies.

## **(2) Representations and Warranties in the Context of a Purchase of Insurance Companies**

In the context of a purchase of an insurance company, the purchaser will work towards the inclusion of insurance related representations and warranties in the relevant transaction agreement. Such representations and warranties typically refer to the actuarial reserves, the going concern assumption, and regulatory as well as money laundering compliance.

As regards the actuarial reserves, a seller of an insurance may have to represent that (i) the valuation of the actuarial reserves disclosed to the purchaser in the due diligence process has been conducted in accordance with the generally accepted actuarial principles, and/or (ii) the seller has disclosed to the purchaser all actuarial valuations which have been made by the seller or on behalf of the seller within a specified period of time prior to the transaction. As regards the compliance representations, the purchaser of an insurance company may ask the seller for a general representation regarding the compliance with all regulatory requirements applicable in the specific field of insurance as well as the adherence to money laundering provisions. Ongoing warranties regularly refer to the ability of the purchaser of an insurance business to continue the business in force without further capital injection for a specified period of time.

For the sake of completeness it has to be noted that according to art. 201 CO, the invocation of representations and warranties require the compliance with the testing and objection obligation unless this has been contractually excluded. As this statutory provision is generally not suitable for corporate transactions, purchasers of insurance companies are well-advised to exclude the testing and objection obligation in the relevant transaction document.

A photograph of a person in a red kayak on a body of water, with a child in another kayak in the background. The scene is bright and sunny, with trees on the shore. An orange semi-transparent rectangle is overlaid on the left side of the image.

7

Pensions

### (a) Swiss Social Security

The Swiss social security system covers the events of old age, death and disability in a so-called three-pillar system: The first pillar consists in the fully mandatory Old Age and Survivor's Insurance (*Alters- und Hinterlassenenversicherung; AHV*), the second pillar in the partially mandatory Occupational Benefit Plans (*Berufliche Vorsorge*) and the third pillar in the non-mandatory, i.e. optional, individual provisions. The Swiss three-pillar system is a threefold system of public, occupational and private insurance.

The first pillar aims at providing benefits intended to cover a basic living standard in the case of the occurrence of an insured event (i.e., retirement, disability, death). The first pillar is complemented by the second pillar. The aim of the second pillar is to enable the beneficiary to maintain the usual living standard to which he or she is accustomed. Consequently, the first two pillars should cover at least 60% of the beneficiary's most recent income prior to the occurrence of an insured event. In addition to the first two pillars, the third pillar contains the individual measures undertaken to provide for additional needs.

The Swiss government and, specifically, the Federal Social Insurance Office (OFAS) supervise the Old Age, survivors' and disability insurance system, seconded by a special Federal commission.

From a private insurance perspective, the focus is on the second and the third pillar, since the first pillar is mandatorily arranged by a state run carrier.

### (b) Occupational Benefit Plans in general

The Swiss Federal Law on Occupational Benefit Plans concerning Old Age, Survivors and Invalidity (BVG) and the respective ordinances provide the main legal framework for the specific aspects related to occupational benefit plans within the second pillar of Swiss social security .

The BVG sets the minimum statutory benefits. However, welfare institutions are free to establish their own regulations and exceed the statutory minimum. The BVG stipulates that persons over the age of 17 who receive an annual salary exceeding CHF 21,150 are subject to compulsory insurance against invalidity and death. Insurance against Old Age becomes compulsory at age 25.

Every employer who employs persons subject to mandatory insurance is required to either establish its own welfare institution or to join a pre-existing welfare institution. Welfare institutions providing occupational benefit plans must be organized in the form of a legal entity existing independently from the respective employer and these institutions must be registered in a register for occupational insurance. Such legal entities must either be established in the legal form of a foundation governed by

However, in the public sector, coverage with respect to the second pillar is usually provided by public carriers as well.

For the sake of comprehensibility, this text will not address other related laws such as the Swiss Federal Law on Vested Benefits in Occupational Benefit Plans concerning Old Age, Survivors and Invalidity („Freizügigkeitsgesetz“) which regulates the transfer of funds e.g. when insured employees change their employer.

As of January 1, 2015, the amount is adapted from time to time.



private law or an entity with own legal personality governed by public law; the vast majority is established in the form of a foundation.

Furthermore, it is a legal requirement that such a foundation is governed by an executive body that comprises both employees' and employers' representatives. The employees and the employers are entitled to elect an equal number of representatives to the executive body.

Capital accumulated to finance retirement benefits is called old-age assets. These assets are comprised of annual old age credits, including annual minimum interest as set by the legislator. The annual old age credits are determined as a percentage of the insured salary and in function of the age and sex of the insured person. Welfare institutions can generally freely choose the means of financing old age credits within the boundaries set forth in the BVG, which contains only few general indications. The BVG is based on the principle of collective financing. This means that the contributions of the employer must be at least equal to the sum of contributions paid by all its employees. All contributions are directly made by employers, i.e. they pay their share and the employee's share, which is deducted from the employee's salary. Furthermore, the respective ordinances to the BVG contain regulations governing the investment of the old-age assets.

Welfare institutions must ensure that they have the necessary capital to comply with statutory and contractual requirements, i.e. they must at any time have sufficient assets to be able to provide the statutory and contractual benefits when they are due. Should the actual assets be lower than these required assets, the institution faces a so-called deficient cover (*Unterdeckung*). In such cases, the law provides for several possibilities to reduce and ultimately eliminate a deficient cover. Among other things, such measures may comprise the requirement of additional employer's contributions, additional employee's contributions or cutbacks in non-statutory benefits.

### (c) Occupational Benefit Plans involving a Life Insurance

From an insurance viewpoint, employers have three options when it comes to providing an occupational benefit plan for their employees.

The first option is to set up a foundation, without the involvement of an insurance carrier. In this instance, the employer and its representatives in the executive body of such a foundation enjoy maximum flexibility and can influence the organization, administrative structure, costs and asset management with regard to the initial setup of such foundation. On the other hand the employer is liable for a deficient cover of the foundation, i.e. it faces the risk that it will have to reimburse the foundation in such situation.

Secondly, the employer may set up its own foundation as well but insure the respective risks either partially or completely, using a life insurance. These models come at the cost of a premium to be negotiated with the

For the sake of clarity, this text only relates to welfare institutions that are organized in the legal form of a foundation.

insurance carrier. The premium will burden the administrative costs of the institution and ultimately affect performance. Advantages lie in lower capital requirements and increased predictability.

Thirdly, an employer may refrain from setting up its own institution and instead seek attachment to a collective foundation (*Sammelstiftung*) or a joint foundation (*Gemeinschaftsstiftung*). In the case of the former, the institution has separate accounts and regulations for each employer attached. In contrast, a joint foundation has joint regulations and assets for all the employers attached. The benefit of these models is clearly the outsourcing of financial risks. However, by doing so, an employer ceases to have influence on the management of the foundation and reimburses the reduction of financial risks by payment of a respective premium.

In Switzerland, many collective or joint foundations are established by life insurers. The relevant risks of such collective or joint foundations are usually not borne by the foundations themselves but are rather insured by means of a collective insurance. The founding insurers themselves usually provide such insurance.

#### (d) Non-mandatory Individual Provisions

The third pillar of Swiss social security is divided into two parts: Firstly, individual provisions consisting in contributions irrevocably made to other recognized forms of benefit plans (pillar "3a") and secondly, all other individual provisions and saving in view of retirement, death and disability (pillar "3b").

This distinction between pillar 3a and 3b is based on differences in tax treatment aiming at promoting individual provisions that are irrevocably devoted to covering the risks of old age, disability or death: Contributions to a plan qualifying under pillar 3a can be deducted from taxable income up to the limits set by the legislator. Contributions made to a pillar 3a plan are blocked until an insured event occurs at which point the previously contributed funds will be taxed based on the respective benefit payments. As a consequence, the net present value of the taxes at the time the income is actually earned is significantly reduced. Furthermore, due to progressive tax rates, taxation upon payment of the benefits generally leads to a lower tax burden since the overall income after retirement is usually lower. In contrast, contributions made under pillar 3b are generally not tax deductible. However, the respective payments to the beneficiaries may be subject to tax exemptions if certain conditions are met.

Plans within pillar 3a must either be provided through so-called bank foundations ("*Bankenstiftungen*") or by insurance carriers. In contrast, within pillar 3b, individuals are free to choose as to how they are setting up provisions regarding retirement, death and disability. Hence, such provisions may as well consist partially or completely of individual life insurances.

# 8

## Swiss Anti-Money Laundering Provisions applicable to Insurance Companies





### (a) Exposure to the Risk of Money Laundering in the Insurance Industry

Swiss law criminally penalizes any person who carries out an act in Switzerland that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which the person knows or must assume originates from a crime or a qualified tax offense. The offender typically tries to "launder" money stemming from criminal offenses against "clean, legitimate" money. The insurance sector is frequently exposed to the risk of being abused to that effect: For instance, the offender may use fraud proceeds to purchase a single premium life insurance policy and shortly thereafter redeem the insurance, thereby receiving "clean" money from the insurance company. The tainted funds will then have been perfectly laundered.

In addition to the criminal provisions, financial intermediaries are subject to the regulations of the Swiss Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA). The AMLA provides specific due diligence obligations, including the identification of the contractual party, the controlling person in case the contractual party is not an individual as well as the obligation to determine the beneficial owner of the assets. In addition, financial intermediaries subject to the AMLA will need to report money laundering suspicions to the Swiss Money Laundering Reporting Office. Insurance companies who carry on business in Switzerland are financial intermediaries with respect to certain insurance products and have specific diligence obligations summarized below.

### (b) Insurers as Financial Intermediaries

Insurance companies providing insurance policies to individuals or corporates resident or domiciled in Switzerland are considered to be financial intermediaries for the purpose of the AMLA when they offer direct life insurance policies of the savings or investment type or, if they offer or distribute shares in investment funds. Insurers are not financial intermediaries with respect to mere risk life insurances without a savings element, despite the mathematical accrual over time of a premium reserve.

It is important to note that brokers who offer or distribute the life insurance policies of the savings type or investments in investment funds are as a rule not regarded as financial intermediaries and thus, do not fall within the scope of the specific regulatory diligence duties in force for financial intermediaries. An exception applies to the extent a broker relays premium payments or otherwise engages in money transfer activities. The same holds true for agents acting in the name of an insurer. The insurer remains fully responsible at all times for the conduct of his agents and brokers in respect of regulatory anti-money laundering diligence duties where the brokers or agents are not deemed financial intermediaries themselves.



Also, insurers do not qualify as financial intermediaries in respect of products relating to pension funds falling within the scope of Swiss legislation on mandatory (tax-exempt) professional providence. However, the regulatory diligence duties for financial intermediaries do apply to professional providence products beyond the mandatory scope of Swiss pension legislation (such as e.g. so-called "pillar 2" and "pillar 3a" products), as well as to sponsored welfare funds and similar structures, whose payments to beneficiaries are merely discretionary (as opposed to proper pension funds, whose beneficiaries have clearly-defined claims under relevant fund regulations).

Finally, reinsurers are not considered financial intermediaries under Swiss law.

A Swiss insurer who falls within the scope of Swiss regulation relating to financial intermediaries has to ensure enforcement of these rules globally throughout the group of companies which the insurer controls.

### **(c) Regulatory Duties of an Insurer who is a Financial Intermediary**

#### **(1) Join an SRO or get FINMA Permit**

First, an insurance company who qualifies as financial intermediary must either join a self-regulatory organization (SRO) or alternatively, seek permission from FINMA, the Swiss Financial Market Supervisory Authority, to conduct business in Switzerland as a financial intermediary. It is generally preferable to join an SRO rather than seeking a FINMA permit. The SRO will set out in a quite detailed manner relevant diligence duties binding upon its members and will audit its members from time to time. Such SRO rules represent helpful guidance for insurance businesses and their compliance teams. The FINMA provides the rules of the SRO of the Swiss Insurers' Association to be applicable to all insurance companies.

#### **(2) Identify Policy Holder**

Further, an insurance company has the duty to identify the contractual party (by means of an official identity document or any equivalent)

- i. upon concluding a life insurance agreement with a savings portion (including capitalization business) when the aggregate periodic premiums over five years exceeds CHF 25,000;
- ii. upon the deposit of more than CHF 25,000 on a premium account for the benefit of a life insurance with a savings portion, if the policy holder has not been identified yet;
- iii. whenever the insurer offers or distributes investment fund shares, if the subscription exceed the amount of CHF 25,000; or
- iv. upon conclusion of mortgage agreements in the context of the professional provision of loans.

In the case of life insurance policies, the insurance company needs to have concluded the identification when the policy is issued. In the case of a mortgage agreement, the identification needs to be concluded prior to the payment of the loan. This implies that an insurance company may refuse to conclude an insurance agreement with the potential insured person based on anti-money laundering concerns. However, if such suspicion arises even during contract negotiations, the contractual party needs to be identified in any case and the Swiss Money Laundering Reporting Office needs to be notified. An indication for such suspicion includes circumstances when the contractual party's conduct deviates from what is deemed commercially reasonable or normal. For instance, if in the course of the policy negotiations, the contractual party is concerned less about the actual benefits of the insurance product but focuses more on the conditions for its early redemption, one could reasonably raise an initial suspicion of possible money laundering.

For the calculation of the CHF 25,000 identification threshold, only the net premium including taxes is considered, i.e., possible commissions and other mark-ups and the like are excluded. The duty to identify the contractual party(s) also applies when the relevant premiums are split amongst various policies in order to remain slightly below the threshold (smurfing).

When the contractual party is an individual, the insurance company will generally need to obtain either an official identification document where there is a direct contact between the individual and the employee of the insurance company or a certified copy of the official identification document, if there is no such personal contact. In cases where a legal entity is the contractual party, the individuals acting on behalf of the legal entity must be identified as well. In these cases, it is advisable to request the individuals in question for approval of their power to represent the legal entity and also, to verify whether the conclusion of insurance policies falls within the legal entity's reasonable scope of business. In case the legal entity is publicly listed, its identification or that of the persons acting on its behalf is not necessary.

Given that a large number of life insurance products are sold through intermediaries such as agents or brokers, it is advisable for the insurance company to assign the duty to identify the contractual party to such broker agent. Such assignment is permissible and should be based on a written agreement. Given that even in case of an assignment, the insurer continues to remain fully responsible for the correct execution of the identification obligation, it is advisable for the insurer to audit his brokers or agents from time to time relating to their correct execution and as the case may be, to offer relevant training to the brokers or agents.

### **(3) Identify Beneficial Owner**

The insurance company needs to obtain a written declaration from the contractual party what individual is the beneficial owner if the contractual party itself is not the beneficial owner or if there are any doubts. This particularly applies in the following cases:

- i. The contractual party is represented by an attorney in fact.
- ii. The contractual party is a domiciliary company, i.e. a company without operative business or without premises and personnel, or a company whose personnel do not deal with operative business tasks but rather, discharge duties that are merely administrative in nature.
- iii. The commitment to be made and the financial capacity of the of the contractual party are grossly disproportionate, e.g., if a junior employee with a relatively modest salary seeks to invest CHF 200,000 by way of a single premium in a savings type life insurance.
- iv. There is no personal contact between the insurance company and the contractual party, because the business relationship was established by correspondence or telephone, etc.
- v. The contractual party is an operative legal entity. In this case, the controlling person needs to be established. Controlling persons include those individuals who effectively control, directly or indirectly, individually or in concert with third parties, at least 25 per cent of the share capital or the voting power of the entity. If these cannot be identified, the member of the managing body needs to be identified.

The insurance company will need to obtain details on the name, residence details, date of birth and nationality of the following persons:

- i. Payment by an individual: details of said individual.
- ii. Payment by a domiciliary company: details of the individual(s) to whom the assets of the domiciliary company can be attributed.
- iii. Payment by an operative company that is not listed on a stock exchange: information on the controlling persons. If there are indications suggesting that the legal entity holds the contributed assets on a fiduciary basis for a third party, details of said third party need to be obtained.
- iv. Payment by a listed, public corporation or a state-owned entity or a financial intermediary: details are limited to the name and address.

### **(4) Establish Third Party Beneficiary and Payment Recipient**

In case the contractual party appoints a third party beneficiary (i.e. a third party entitled to the product's benefits), the insurance company needs to record the name of the beneficiary. In addition, it needs to verify whether the beneficiary is a domestic or foreign politically exposed person or a politically exposed person at an intergovernmental organization.

## (5) Business Relations with PEPs

Politically exposed persons (PEPs) are high-ranking non-Swiss public officials or high-ranking officers of a non-Swiss, state-controlled entity. Business relations with PEPs are considered high-risk ones, since in quite a number of jurisdictions, PEPs are exposed to increased corruption (and other public office related crime) risks and thus, the odds to receive tainted funds in exchange for insurance products are higher than usual. Thus, an insurer has enhanced diligence duties in relation to PEPs:

- i. Each inception of a business relation with a PEP is subject to approval by either the insurance company's executive board or alternatively, an executive board member responsible according to the company's relevant internal guidelines. When deciding on the approval, not only increased money laundering risks must be taken into account but also, possibly increased reputation risks, depending on the PEP in question.
- ii. In any event, a risk profile related to the PEP must be established, and each individual transaction with the PEP must be matched against that risk profile. Apart from establishing the identity of the PEP, the PEP must also be questioned about the existence of third party beneficial owners.
- iii. The insurer must scrutinize the origin of funds involved, and the commercial background for the transaction in question. The insurer must systematically oversee the business relationship and be aware at all times of the increased anti-money laundering risk relating thereto.

## (6) Follow-Up Diligence Duties

- i. Once the insurance company has completed the identification obligations mentioned above, the insurance company is still subject to anti-money laundering obligations. It must remain alert to possible money laundering risks and suspicions that may arise subsequent to the conclusion of the insurance contract. The insurance company needs to identify the contractual party and the beneficial owner again, if doubts arise concerning: the accuracy of the information on the identity of the contractual party;
- ii. the circumstance that the contractual party of the controlling person is the beneficial owner;
- iii. the credibility of the declaration of the contractual party about the beneficial owner; or
- iv. in the event of a redemption of an insurance, the beneficial owner is not identical with the beneficial owner indicated at the time of concluding the insurance agreement.



In addition, the insurance company must verify the background and the purpose of a transaction of a business relationship if:

- i. the transaction or the business relationship appear irregular except its legality is recognizable;
- ii. there are indications that the assets originate from a crime or a qualified tax offense, are subject to the disposition of a criminal organization or serves terrorist financing;
- iii. the transaction or the business relationship is subject to an increased money laundering risk; or
- iv. there is a match or large similarity between the data provided by FINMA and the data of the contractual party, a beneficial owner or an authorized representative.

In such cases or under similarly suspicious circumstances, beyond re-establishing the information required on the identity of the policyholder, the beneficial owner etc., the insurance company must scrutinize the transaction's background, and match the information retrieved against a risk profile established simultaneously on the policyholder and, as the case may be, on third parties involved. The insurer will have to seek information encompassing e.g. the purpose of the insurance sought, the origin of the funds used to purchase the policy, the policyholder's or the beneficial owner's professional or financial activities, the beneficial owners of legal entities involved, the founders of trusts, foundations or similar vehicles without specified beneficiaries, etc.

If based on such further scrutiny the money laundering suspicion cannot be resolved, the insurer is well advised to file a money laundering suspicion report with the Swiss Money Laundering Reporting Office, and to simultaneously freeze the funds in question. In case of such a report, tipping-off of the policyholder or third parties, including the SRO, is not permissible. However, most SROs, including the SRO of the Swiss Insurers' Association, require to be informed on a no name basis of any money laundering suspicion report filed.

## **(7) Organizational Duties**

An insurance company who is subject to Swiss AML regulation, must ensure proper documentation of all operations and discharge of duties mentioned above. The documentation must be safely stored for at least 10 years and must be made available at all times to external auditors and as the case may be, prosecutorial authorities.

An insurance company must implement an AML code of conduct and appoint an AML compliance officer who oversees the above duties, enforces the code of conduct as well as implements and manages sufficient internal controls relating to AML, including AML-related internal audits.

Most importantly, an insurance company who is a financial intermediary must ensure that its entire staff attends annual training in AML matters

so as to maintain sufficient risk awareness. Although not mandatory by law, the insurance company is well-advised to maintain a whistle blowing facility where anonymous whistle blowing reports on money laundering incidents may be filed without running the risk of being subject to reprisals by the company, its officers or one's peers.

#### (8) Disclaimer

Please note that the above outline of regulatory AML duties applicable to insurance companies are a brief summary only. For details, please refer to the regulations of your SRO and where necessary, seek adhoc legal advice.

### (d) Insurance Policies with Segregated Accounts for Foreign Insurance Companies

Foreign insurance companies offering insurance policies with segregated accounts where the accounts are held by Swiss banks need to be aware that Swiss banks are subject to AML provisions and may need to obtain details on the insurance company and its controlling persons, the insurance company's customer as well as the beneficial owner of the assets deposited on the account.

#### (1) Determination of the controlling Person of the Insurance Company

As a general principle, the Swiss bank needs to determine the controlling person of its contracting party. However, financial intermediaries, including insurance companies, having their registered office or domicile in a foreign country do not have to provide a declaration regarding their controlling persons if one of the following exceptions applies:

- i. An insurance company having its registered office or domicile in a foreign country with an adequate prudential supervision and regulation with respect to combating money laundering and terrorism financing does not need to provide information on its controlling person. Adequate prudential supervision and regulation is affirmed for countries that are, inter alia, member states of the Financial Action Task Force ("FATF"). A bank can also acknowledge a foreign insurance company to be subject to an adequate prudential supervision and regulation, if it can assess and document this based on specific knowledge and clarifications.
- ii. The foreign insurance company does not have to provide information on its controlling person if it is a member of a consolidated supervised group of companies and the ultimate holding company is domiciled in a country with an adequate prudential supervision and regulation with respect to combating money laundering and terrorism financing. This applies even if the relevant foreign insurance company

belonging to such group is domiciled in a country that itself is not considered to have adequate supervision and anti-money laundering regulation.

## **(2) Identification of the Beneficial Owner of the Assets**

In addition to the information on the controlling person, if at all, the foreign insurance company as the bank's contracting party needs to provide information on the beneficial owner of the assets deposited with the bank. In the case of life insurance policies with a separate account/securities account, the insurance company will need to provide information on the premium payer and the beneficial owner, amongst others, if one of the following cases applies:

- i. the assets transferred into the insurance scheme originate from an immediately preexisting contract between the particular bank and the policy holder, from the actual premium payer or from a contracting relationship in which the premium payer was the beneficial owner;
- ii. the policy holder or actual premium payer has a power of attorney or a right of information concerning the bank account concerned;
- iii. the assets brought into the insurance policy are managed according to an investment strategy agreed between the particular bank and the policy holder or actual premium payer; or
- iv. the insurance company does not confirm that the insurance product conforms to the applicable requirements concerning life insurance at the policy holder's domicile or his residence for tax purposes, including regulations concerning biometric risks.

If the bank enters into a relationship on the basis of a confirmation of the insurance company that none of the cases as set out above apply, the confirmation of the insurance company must also contain a description of the particulars of the insurance product with respect to the above-mentioned cases. In addition, if during the individual banking relationship, the bank notices that the policy holder or actual premium payer can directly or indirectly influence individual investment decisions in any (other) way, the policy holder or actual premium payer needs to be identified in writing. Depending on the actual policyholders and beneficiaries of the insurance policy, the foreign insurance company may need to provide additional information, such as on the beneficial owner or on trusts.

### (e) Legal Duties in relation to Money Laundering applicable to Insurance Products outside the Scope of AML Regulation

It is important to point out that not only life insurance of the savings type but also other insurance products (falling outside the scope of the regulated sector) might be abused for money laundering purposes. Certainly, money laundering risks relating to life insurance products of the savings type tend to be higher than in case of other insurance products, because in the case of an investment type life insurance, it is relatively easy to exchange tainted funds against legal money, e.g., simply by early redemption of the life insurance policy. However, even a general insurance can well be abused for money laundering purposes, e.g., if the insured assets have been acquired with tainted funds and the destruction of the insured assets (and consequently, the paying out of legal money by the insurer) is arranged for, etc.

Since the prohibition of money laundering under the Swiss Penal Code applies to all those falling within the scope of Swiss jurisdiction and not only to the regulated sector, an insurer is well advised in general, to ask questions relating to the commercial background of the transaction and where necessary, refuse the business in question whenever the same lacks commercially reasonable sense or is simply unusual and hard to explain against the background of the insurance company's normal course of business. Be aware of money laundering risks also when refusing or aborting business, ensure at all times (where no AML reports are filed) that questionable funds are returned to their source through the banking system only, thereby fully preserving the paper trail, and refrain from cross-border transfers of such funds because a cross-border transfer of tainted funds while taking into account its criminal origin, might already qualify as money laundering.





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