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Law and Practice

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1. Fintech Market

1.1 Evolution of the Fintech Market

The market conditions in Switzerland for fintech offerings are generally considered as favourable, in particular based on broad access to credit and venture capital, the available human know-how (number of graduates in science and technology) as well as the access to, and use of, information and communication technology. Fintech market growth (value chain share) and expansion (range of products and services) have accelerated in Switzerland from an already relatively high level. According to the Swiss Venture Capital Report 2019, the total amount of money invested in the fintech industry rose sharply compared to the previous year, reaching CHF187.9 million, whereby 15% of total invested capital in start-ups now flows into the fintech industry. For the fintech industry, the decisive considerations remain financing and fundraising. Since 2015, the legislature's focus has been on adapting the applicable legal and regulatory framework to the needs of the fintech sector (see **2.4 Variations Between the Regulation of Fintech and Legacy Players**), which has contributed to the increasingly dynamic Swiss fintech sector. Further legislation is planned, in particular in the blockchain area (see **12.2 Local Regulators' Approach to Blockchain**).

2. Fintech Business Models and Regulation in General

2.1 Predominant Business Models

The Swiss fintech landscape has evolved significantly over the past few years. Switzerland remains an attractive base for innovators in the financial sector. There are currently more than 200 active players (both emerging and incumbent) in Switzerland's fintech ecosystem, whilst the total number of fintech-related businesses is much higher. Most of their business models focus on the financial market sector (notably payment services, investment management, banking infrastructure, deposits and lending, distributed ledger technology and analytics). A considerable number of these businesses offer their products and services to incumbent financial institutions and/or offer co-operation opportunities with respect to digitalisation projects.

The fintech market in Switzerland is dominated by start-ups that are mainly financed through venture capital. A co-operation strategy between established providers of financial services and emerging players is frequent in Switzerland. While no general displacement trends can be identified at present, it is apparent that the value chain of established providers of financial services is under scrutiny and subject to (internal and/or external) challenges, including those based on technology-driven new products and services developed by emerging companies that have the potential to disrupt the value chain of many established players. Established financial service providers generally have the financial and organisational resources required to adapt their business processes gradually to avoid this displacement and get high market visibility. Conversely, only a relatively small number of emerging companies can rely on a trusted brand or a financial market licence (eg, as a bank).

2.2 Regulatory Regime

Swiss law is generally technology neutral and principle based. Accordingly, fintech companies based in Switzerland generally have considerable regulatory latitude compared with other jurisdictions. The Swiss Financial Market Supervisory Authority (FINMA) has initiated regulatory changes allowing fintech companies to further develop, thereby contributing to an even more fintech-friendly legal environment. The risk-based and technology-neutral amendments are designed to lower market entry barriers. Recent legislative projects, including the implementation of a new regulatory licence type, commonly referred to as a "fintech licence" or a "banking licence light", have created an adequate, technology-neutral regulatory framework for any business that needs to accept deposits up to CHF100 million from the public without engaging in typical commercial banking activities (see **2.5 Regulatory Sandbox**).

Alongside these specific fintech-dedicated measures, the general applicable legal and regulatory framework applies to fintech companies and is summarised below (see also **2.9 Implications of Additional Regulation**).

Banking Legislation

The solicitation and acceptance of deposits from the public on a professional basis is, as a matter of principle, an activity restricted to Swiss banks and triggers the obligation to obtain a full-fledged banking licence from FINMA. Under the Banking Act, the term "deposit" broadly encompasses any undertaking for own account to repay a certain amount. Deposits are deemed to be "public" as soon as: (i) funds are solicited from the "public" (as opposed to being solicited from banks or professional financial intermediaries, institutional investors, shareholders, employees or other related persons); or (ii) as soon as funds from more than 20 depositors are accepted. As a result of this approach, most business models relied upon by, for instance, payment systems, payment services providers, crowdfunding or crowdlending platforms are considered to involve the solicitation and acceptance of deposits and may fall within the scope of the Banking Act and, therefore, trigger licensing requirements.

That being said, in the event that deposits of not more than CHF1 million (see **2.5 Regulatory Sandbox**) are held by a fintech company, no banking licence will be needed. Similarly, if the deposits are held for less than 60 days on a settlement

account (without any limitation in terms of amounts), no banking licence will be needed. All other deposit-taking activities require either a fintech licence for deposit-taking activity not exceeding CHF100 million or a full-fledged banking licence. It is also worth noting that funds linked to means of payment, or to a payment system, are exempted from the qualification as deposits, provided that:

- the funds serve the purpose of purchasing goods or services;
- no interest is paid on them; and
- the funds remain below a threshold of CHF3,000 per customer and per issuer of a payment instrument or operator.

Although this exemption may provide some relief to card payment services and online or mobile payment services, it requires a model strictly tailored in a way that ensures any funds stored on user accounts are limited to the purchase of goods and services (as opposed to allowing peer to peer transfers, withdrawals, transfers to the user's bank account, etc) and never exceed CHF3,000 per customer.

Swiss Financial Services Act, Swiss Financial Institutions Act

The new Swiss Financial Services Act (FinSA) and Swiss Financial Institutions Act (FinIA) entered into force on 1 January 2020. Whilst the purpose of the FinIA is to provide a new legal framework governing most financial institutions (ie, asset managers, trustees, managers of collective assets, fund managers and securities firms), the objective of the FinSA is to regulate financial services in Switzerland, whether provided by a Swiss-based business or on a cross-border basis in Switzerland or to clients in Switzerland. The rules are largely based on EU directives – the Markets in Financial Instruments Directive (MiFID II), the Prospectus Directive and Packaged Retail Investment and Insurance-Based Products (PRIIPs) – with adjustments made to reflect specific Swiss circumstances. In a nutshell, as regards fintech, the new legal framework may involve additional regulatory requirements to the extent that fintech companies provide financial services in Switzerland or to Swiss clients (application of FinSA) or provide asset management services or other regulated services (application of FinIA and new licensing requirements).

2.3 Compensation Models

There are no specific rules on the level of fees that may be charged by fintech companies to their customers. However, Swiss law provides, with respect to financial services, for a number of disclosure obligations in relation to fees, including the following:

- Retrocessions, kick-backs, rebates and similar payments or financial benefits need to be disclosed (including payments received from other group companies) prior to entering into a contract/transaction; the disclosure has to be specific and, where the exact fees cannot be calculated at the outset of the transaction, the fee disclosure has to include the relevant percentages and calculation methodologies.
- Unless a client has specifically and expressly waived its rights, retrocessions, kick-backs and similar payments need to be handed over in full to the customer.
- In cases where a key information document (KID) needs to be prepared and handed over to Swiss Private Clients (ie, with respect to collective investment schemes, structured products etc), a detailed fee disclosure will have to be included in the KID.

For the sake of completeness, we note that the FinSA also provides for certain rules against abusive conduct by financial service providers (such as third-party distributors of the products) that are relevant in the context of fees. For example, a financial service provider may not invoice a price that differs from the effective execution price when processing client orders.

2.4 Variations Between the Regulation of Fintech and Legacy Players

Since 2015, the legislator's focus has been on adapting the applicable legal and regulatory framework to the needs of the fintech sector. In this context, the Swiss legislator introduced three measures within Swiss banking legislation aiming at promoting innovation in the financial sector:

- the introduction of a maximum period of 60 days (as opposed to seven days, in accordance with FINMA's prior practice) for the holding of monies on settlement accounts (eg, for crowdfunding projects), without any limitation in terms of amounts;
- the creation of an innovation area (a so-called sandbox), where companies are allowed to accept public deposits up to a total amount of CHF1 million without the need to apply for a banking or fintech licence, subject to certain conditions, such as disclosures and prohibitions against investing those deposits; and
- the introduction of a new fintech licence suitable for businesses whose activity involves some form of deposit-taking, but without any lending activities involving maturity transformation (see **2.5 Regulatory Sandbox**).

2.5 Regulatory Sandbox

Switzerland recently introduced a regulatory sandbox (see **2.4 Variations Between the Regulation of Fintech and Legacy Players**). Furthermore, under the fintech licence, financial services providers are allowed to accept public deposits provided that:

- the aggregate amount of deposits does not exceed CHF100 million;
- the deposits do not bear interest (or are not otherwise remunerated); and
- the deposits are not re-invested by the company (ie, they are not used for on-lending purposes).

This new fintech licence involves less stringent regulatory requirements than a banking licence. Strict banking equity ratio requirements, as well as the liquidity requirements, do not apply. In addition, leaner minimal capital requirements apply. In this context, the minimum equity capital of companies benefitting from such a licence has to amount to 3% of the public funds (deposits) and must, in any case, reach a minimum of CHF300,000. On 3 December 2018, FINMA issued guidelines for the fintech licence, highlighting the information and documentation that an applicant must submit when applying for such a licence. This includes a list of all participants holding a direct or indirect interest of 5% in the applicant, information on the governing bodies as well as various explanations of the activities of the company with a business plan for three financial years. To be clear, the fintech licence is not a banking licence and companies operating under such a licence do not qualify as a banking institution and may not use such a designation. In this context, the client deposits are not covered by the Swiss deposit protection regime and the clients must be comprehensively informed in advance of this fact, as well as of the risks resulting from the business model.

2.6 Jurisdiction of Regulators

FINMA is responsible for the authorisation, supervision, enforcement and documentation of all activities that require an approval (generally financial service providers). This includes the supervision of outsourcing arrangements (see **2.7 Outsourcing of Regulated Functions**). The supervision is risk based, which means examinations depend on the risk posed by the respective financial market participant. The applicable laws are enforced by FINMA making use of the administrative measures under supervisory law where necessary. FINMA's powers include precautionary measures or measures to restore compliance with the law, withdrawing authorisation, liquidating unauthorised companies, issuing industry bans and ordering the disgorgement of profits generated illegally. It can also publish final decisions naming those involved. Since naming companies or individuals is restricted by law, FINMA generally only publishes information on ongoing or completed enforcement proceedings if there is a particular public interest, for instance to protect investors, creditors or policyholders.

Besides FINMA, criminal prosecution authorities and self-regulatory organisations are also involved in enforcing financial market laws. Where irregularities fall under criminal law, FINMA may file a complaint with the competent authorities (Federal Department of Finance, Office of the Attorney General and cantonal prosecutors). There are other authorities such as the Competition Commission the Federal Data Protection and Information Commissioner which may also enforce the relevant laws.

2.7 Outsourcing of Regulated Functions

The outsourcing of significant business areas of regulated entities is subject to certain requirements. In essence, Swiss financial market law sets forth three different outsourcing regimes:

- The outsourcing of a significant business area by a bank (including holders of the fintech licence, see **2.5 Regulatory Sandbox**) does not require FINMA approval provided the requirements of the FINMA Outsourcing Circular (see below) and applicable data protection legislation are complied with; courtesy notifications to FINMA should be considered for material outsourcing transactions.
- Under the FinIA, financial institutions (eg, asset managers, trustees, securities firms, fund managers) have to reflect the functions to be outsourced as well as the possibility of sub-outsourcing in their organisational regulations; the organisational regulations are subject to FINMA approval.
- The outsourcing of core functions or other principal functions of insurance or reinsurance companies with domicile in Switzerland (or Swiss branches of foreign insurance companies) constitutes a business plan change which must be notified to FINMA; notification must be made within 14 days after the signing date of the outsourcing agreement and is deemed to be approved by FINMA unless an investigation is opened within four weeks after notification has been made.

Each entity subject to one of the above outsourcing regimes continues to bear responsibility for the outsourced business areas, so it must ensure the proper selection, instruction and control of the supplier. Further, it is a common requirement in all outsourcing regimes to conclude a written contract with the supplier which sets out, among other things, clearly allocated responsibilities as well as audit and inspection rights. If a significant function is outsourced, the service provider is subject to information and reporting duties to, and audits by, FINMA.

Regulated entities subject to FINMA Circular 2018/3 Outsourcing – Banks and Insurers (Outsourcing Circular) must comply with the detailed measures set out in the Outsourcing Circular, including:

- the obligation to keep an inventory of all outsourced services (which must include proper descriptions of the outsourced function, the name of the service provider and

any subcontractors, the service recipient and the person or department responsible within the company);
- conclusion of a written contract with the supplier setting out, among others, security and business continuity requirements;
- if outsourcing to a foreign supplier, the company must ensure that restructuring or resolving the company in Switzerland remains possible and that the information required for this purpose is accessible in Switzerland at all times.

Regulated entities subject to the FinIA may only delegate tasks to third parties who have the necessary skills, knowledge, experience and authorisations to perform that task. A separate consultation process with regard to the regulations to be enacted at the level of FINMA (circulars, ordinances) was initiated by FINMA in February 2020. Most importantly, FINMA plans to extend the application of the Outsourcing Circular also to certain institutions subject to the FinIA – ie, managers of collective assets, fund managers and securities firms.

2.8 Significant Enforcement Actions

FINMA has executed several enforcement proceedings in the fintech industry, in particular in the case of initial coin offerings (ICOs) that were suspected of acting as a bank without being authorised to do so (ie, accepting deposits from the public without a banking licence, see **2.2 Regulatory Regime**). According to the most recent annual report of FINMA, 78 investigations in the ICO arena have been opened and 45 proceedings thereof have been closed. According to FINMA, in several cases the issuer of the ICO amended their terms, applied for the relevant licence or abstained from the ICO altogether. In some cases, FINMA has also initiated criminal proceedings with the competent prosecution authorities. Only in very few cases did FINMA make individual enforcement cases public:

- In September 2017 FINMA ruled that the “E-Coin” issued by QUID PRO QUO Association with the involvement of DIGITAL TRADING AG and Marcelco Group AG constituted a cryptocurrency in appearance only; in addition, FINMA ruled that the E-Coin constituted the acceptance of deposits from the public for which the issuer was not authorised (all three entities involved with the E-Coin were liquidated).
- In March 2019 FINMA ruled that the EVN-Token issued by envion AG, which, inter alia, offered a repayment claim after 30 years, constitutes the acceptance of deposits from the public for which the issuer was not authorised; envion AG had accepted deposits in an amount exceeding CHF90 million from at least 37,000 investors and was already in liquidation prior to FINMA’s order due to violation of corporate law requirements.

FINMA also maintains a warning list on its website of individuals and entities who are presumed to carry out unauthorised activities under the financial market regulations.

2.9 Implications of Additional Regulation

Anti-money Laundering Legislation

Under Swiss law, any natural or legal person accepting or holding deposit assets belonging to others, or assisting in the investment or transfer of such assets, qualifies as an intermediary according to the Federal Anti-money Laundering Act (AMLA). This includes persons who carry out credit transactions (in particular in relation to consumer loans or mortgages, factoring, commercial financing or financial leasing) and who provide services related to payment transactions. This applies to many upcoming business models, such as those involving mobile payment, blockchain and related applications, cryptocurrencies, automated investment advice, crowdfunding or peer-to-peer lending. Based on this broad scope, many, if not most, fintech companies qualify as financial intermediaries and are generally subject to anti-money laundering obligations, including compliance with know your customer (KYC) rules.

A fintech company that is subject to AMLA is required to join a self-regulatory organisation (unless otherwise supervised by FINMA – eg, as a bank). Compliance with Swiss anti-money laundering regulations is relatively easy to achieve and should not represent a significant entry barrier. However, dealing with the associated costs (which can be substantial and, hence, a key aspect with respect to certain business models) requires careful planning and, possibly, the adaptation of envisaged business models. This applies, in particular, to fintech companies providing alternative finance (eg, crowd investment) platforms, payment services and the professional purchase and sale of virtual currencies.

Data Protection

The processing of personal data by private persons and federal bodies is regulated in particular by the Data Protection Act and the Data Protection Ordinance, which apply, with some exceptions, to the processing of data relating to natural persons as well as (contrary to most other jurisdictions) legal entities. Personal data must be protected against unauthorised processing by appropriate technical and organisational measures. Such protection has been specified with respect to the storing, processing and transferring of client data in the banking sector (Annex 3 to FINMA Circular 2008/21 Operational Risks). It should be noted that Swiss data protection law is currently being amended. While the technical requirements are likely to remain unchanged, there are considerable organisational and administrative requirements, as well as significant sanctions, foreseen. However, the particulars of the amendments and the

timeline with respect to the entering into force of such amendments are not yet determined.

As regards cybersecurity, non-binding guidelines with respect to minimum security requirements for telecommunications services have been issued by the competent regulator, the Federal Office of Communications (OFCOM). However, there is no cross-sector cybersecurity legislation in Switzerland that would generally be applicable to fintech companies.

Other Relevant Legislation

Other legislation may apply to fintech companies. As an example, under the Swiss Consumer Credit Act (CCA), only authorised lenders are entitled to provide consumer credit. Registration must be obtained from the lender's Swiss Canton of establishment or, if the activity is conducted on a cross-border basis by a foreign lender, with the Swiss Canton in which the lender intends to perform its services. In the course of the amendment of the Banking Act, to introduce the new fintech licence category (see above), the CCA was also amended. In this context, consumer loans that are obtained through a crowdlending platform need to comply with the same consumer protection afforded by the law as those extended by a professional lender.

In addition, further licensing and supervisory requirements from the Swiss National Bank may be required for payment systems with payment settlement levels in excess of CHF25 billion (gross) per financial year, as well as for Swiss and foreign payment systems that are classified as "systemically relevant".

2.10 Regulation of Social Media and Similar Tools

There is no specific regulation of social media in Swiss financial market law. For the sake of completeness, regulation on, inter alia, advertising for financial products applies to social media in the same way as it does to other communication channels.

2.11 Review of Industry Participants by Parties Other Than Regulators

Most notably, the following additional actors are foreseen in Swiss financial market regulation:

- Financial intermediaries operating on a commercial basis are subject to the AMLA (see **2.9 Implications of Additional Regulation**) and must, unless otherwise supervised by FINMA (eg, as a bank) become a member of a self-regulatory organisation (SRO) recognised by FINMA; while having limited enforcement powers, SROs are responsible for supervising compliance with the due diligence obligations of the financial intermediaries, FINMA, in turn, actively supervises the SROs.
- Banks, insurers, managers of collective assets, fund managers and securities firms are required by financial market regulation to mandate an independent audit firm supervised by the Federal Audit Oversight Authority (FAOA) as statutory auditor.
- Asset managers and trustees are, under the new FinIA, required to associate themselves with an independent, privately organised supervisory organisation (SO); while FINMA retains the competence to authorise asset managers and trustees as well as to conduct any respective enforcement proceedings, the ongoing supervision of asset managers and trustees is delegated to the SO, which, in turn, must obtain authorisation from FINMA and is itself supervised by FINMA.

Furthermore, there are many private for-profit and not-for-profit organisations active in the fintech industry, eg, to define standards. Most notably, the Swiss Bankers Association has defined several standards applied by banks, eg, on opening corporate accounts for distributed ledger technology (DLT) companies.

2.12 Conjunction of Unregulated and Regulated Products and Services

Although no specific rules on the conjunction of unregulated and regulated products and services apply, financial services providers are required to take appropriate measures to avoid conflicts of interest. In addition, as a general principle, most regulated entities (eg, asset managers, managers of collective assets, insurers) are required by law to pursue only activities related to their respective regulatory status. FINMA may however grant exemptions subject to applicable laws.

3. Robo-Advisers

3.1 Requirement for Different Business Models

In Switzerland, financial advisors that provide financial advice or investment management online, so-called "robo-advisors", are growing in popularity. In particular, millennials between the ages of 24 and 35 are expected to constitute the customer base of online investment solutions, since they often adopt new technologies quickly and prefer self-service approaches. There are several companies that pursue a robo-advisor business model, and are hence based on mathematical rules or algorithms that allocate, manage and optimise clients' assents.

On automated investment advice, there are no specific applicable rules or regulations. As mentioned above, Swiss law is generally technology neutral and principle based. FINMA actively contributes to a fintech-friendly legal environment. FINMA regards innovation as key to Switzerland's competitiveness as a financial centre but adopts an essentially neutral approach to certain business models and technologies. FINMA has there-

fore been enhancing the regulatory framework to facilitate client onboarding via digital channels and reviewed whether specific provisions in its ordinances and circulars disadvantaged some technologies and concluded that very few such obstacles existed. Therefore, FINMA has adopted its guidelines for asset management and has removed the requirement that asset management agreements have to be concluded in writing. Also, FINMA has eased the rules on the onboarding process for new businesses via digital channels.

3.2 Legacy Players' Implementation of Solutions Introduced by Robo-Advisers

See **3.1 Requirement for Different Business Models**.

3.3 Issues Relating to Best Execution of Customer Trades

Under the new FinSA, financial services providers need to ensure that client orders are always executed in the best possible way regarding financial terms, timing of execution as well as other terms and conditions. Providers define, in a best execution policy to be reviewed annually, the criteria necessary for the execution of client orders, including the price, costs, timeliness and probability of execution and settlement. Upon the request of the client, the financial services provider evidences that the respective customer trades have been executed in compliance with these criteria. Regulatory best execution requirements do not apply in relation to institutional clients.

4. Online Lenders

4.1 Differences in the Business or Regulation of Loans Provided to Different Entities

Crowdlending refers to loans for funding companies or individuals, which are consequently categorised as borrowed capital. Crowdlending is also known as peer-to-peer (P2P) or social lending because funding is provided by individuals or companies that are not financial institutions or financial intermediaries. Referring to the distinguishing criterion mentioned above to differentiate sub-types of crowdfunding, participants (funding providers) receive a payment in return for their funding made available to the project developer (borrower), typically in the form of interest, although participating loans or bond/note issuances are also possible. The amount of the interest or return payment varies depending on the risk of the project and borrower, but typically represents a lower interest charge for the borrower that traditional bank lending.

There are a number of crowdlending based businesses in Switzerland which provide loans for both private persons and companies. Currently, the Swiss regulatory framework for financial activities does not contain any specific rules regarding crowdlending activities. Furthermore, with Swiss financial regulation typically being principle based, there is no focus on detailed specific prescriptions for each possible existing business model for each type of regulated activity. Rather, Swiss law enacts general principles aiming at protecting financial markets and consumers/investors, respectively. Hence, the regulatory implications for each of the actors involved – namely the platform operator, the project developer and the funding provider – must be assessed under the ordinary principles governing the provision of financial services in Switzerland. Whilst this section presents the general principles, each business model must be assessed individually, to the extent that arguably small changes to the way a crowdlending business operates can trigger significant implications from a Swiss regulatory perspective.

In addition, amended consumer credit legislation came into force on 1 April 2019. Consumer loans that are obtained through a crowdlending platform are now required to comply with the same consumer protection afforded by the law as if they were extended by a professional lender. Certain implementing provisions in the Consumer Credit Ordinance have also been adopted, such as access to consumer credit information systems and professional indemnity insurance requirements for crowdlending platforms.

4.2 Underwriting Processes

See **4.1 Differences in the Business or Regulation of Loans Provided to Different Entities**.

4.3 Sources of Funds for Loans

See **4.1 Differences in the Business or Regulation of Loans Provided to Different Entities**.

4.4 Syndication of Loans

As regards loans and loan syndication, it is predominantly banks that are active in the relevant market in Switzerland. There are a number of reasons for this, one being the Swiss tax law rules commonly referred to as the "Swiss non-bank rules". The background to these rules is that under Swiss domestic tax law, payments by a Swiss borrower under a bilateral or syndicated financing are, as a rule, not subject to Swiss withholding tax. This, however, requires compliance with the Swiss non-bank rules. In a nutshell, these rules require that:

- a syndicate does not consist of more than ten lenders which are not licensed as banks, if there is a Swiss obligor (the ten non-bank rule);
- a Swiss obligor does not, on an aggregate level (ie, not on a transaction-specific level), have more than 20 lenders that are not licensed as banks (the 20 non-bank rule); and
- a Swiss obligor does not, on an aggregate level (ie, not on a transaction-specific level), have more than 100 creditors that

are not licensed as banks, under financings that qualify as deposits within the meaning of the relevant rules (the 100 non-bank rule).

To ensure compliance with the Swiss non-bank rules, a number of provisions are included in facility agreements with Swiss borrowers, guarantors or security providers, including, depending upon the structure, assignment and transfer restrictions that limit the ability of the lenders to sell down the facilities to more than a specified number of non-bank lenders.

5. Payment Processors

5.1 Payment Processors' Use of Payment Rails

In Switzerland, the payment market has changed remarkably during the last few years. Since the first market entry of a mobile payment app, the Swiss market has seen several market entries and a rapid consolidation process. There are many electronic payment systems which are at least partially based on classic credit or debit card payment schemes, adding technology to facilitate payments at the point of sale, in the context of e-commerce, or in some cases between individuals (P2P). In addition to credit and debit card-based payments, some payment apps can be linked to traditional bank accounts with partnering banks. While the user experience is similar, the payment is in this case executed as a bank transfer – ie, the payor allows the payment service provider to deduct the relevant amount from the payor's bank account and to transfer a corresponding amount to the recipient's bank account (often routed via a bank account of the payment service provider, subject to a fee). These systems are often bank-operated or bank-sponsored and may therefore be less constrained in regulatory matters.

5.2 Regulation of Cross-border Payments and Remittances

New legislation came into force on 1 January 2020 that provides, inter alia, that a non-Swiss financial services provider acting on a cross-border basis is subject to Swiss rules of conduct, as well as, under certain circumstances, registration requirements in Switzerland for its client advisors. Client advisors of foreign-based financial services providers are required to register in a Client Advisors Register in Switzerland, prior to being able to offer financial services or products in Switzerland. In this context, the registration requirement does not apply at the level of the financial services provider, but at the level of the individuals qualifying as "client advisors" of that financial services provider.

As regards anti-money laundering obligations, the Swiss regime (see **2.9 Implications of Additional Regulation**) only applies to financial intermediaries that have a "physical presence" in Switzerland and, as a rule, does not extend to foreign institutions active on a purely cross-border basis. As an example, payment service providers conducting their activity exclusively via electronic channels or the internet, for instance, are typically not subject to AMLA. That being said, irrespective of the application of AMLA, the general prohibition against money laundering under criminal law remains applicable.

6. Fund Administrators

6.1 Regulation of Fund Administrators

The authorisation or licensing process for investment funds differs depending on whether Swiss or foreign investment funds are concerned. As regards Swiss investment funds, it is further relevant how the investment fund is structured.

In essence, the Swiss regulatory regime distinguishes between open-ended and closed-ended collective investment schemes. The main differences between open-ended and closed-ended collective investment schemes are the different rules regarding the redemption of shares/units of collective investment schemes and different legal structures. Open-ended collective investment schemes must be established in the form of either a contractual fund or an investment company with variable capital (SICAV). On the other hand, closed-ended collective investment schemes may only be set up as either a limited partnership for collective investments (LP) or an investment company with fixed capital (SICAF). The CISA further distinguishes open-ended funds based on the type of investments. Accordingly, securities funds, real estate funds, other traditional investment funds and alternative investment funds each follow a different set of rules regarding investment policy and permitted investment techniques.

Both the limited partnership for collective investment schemes and the SICAF must have obtained the relevant licence from FINMA. In doing so, both the limited partnership agreement of the limited partnership for collective investment schemes and the articles of association and the investment regulations of the SICAF are subject to FINMA's approval.

In addition, fund managers also require FINMA's authorisation under the new FinIA (see **2.2 Regulatory Regime**).

6.2 Contractual Terms

See **6.1 Regulation of Fund Administrators**.

6.3 Fund Administrators as "Gatekeepers"

As a general principle, FINMA and the other supervisory authorities are responsible for enforcing compliance with laws while private actors such as fund managers are required to be compliant with laws themselves. Nonetheless, under the new

FinIA, fund managers as regulated entities, as well as the persons responsible for their management, must provide guarantees of irreproachable business conduct. Furthermore, fund managers as regulated entities, as well as its statutory auditors, are required to notify FINMA of any events that are of material relevance to FINMA's supervision. Therefore, to a certain extent, fund managers also act as gatekeepers.

7. Marketplaces, Exchanges and Trading Platforms

7.1 Permissible Trading Platforms
Marketplaces and trading platforms are regulated by the Financial Markets Infrastructure Act (FMIA). Under the FMIA, organised trading facilities for the multilateral trading of securities and other financial instruments require authorisation by FINMA. Trading facilities can seek authorisation as either a stock exchange or a multilateral trading facility. Further, authorised banks and securities firms may also operate an organised trading facility without additional authorisation.

In addition, payment systems are also regulated by the FMIA. Payment systems, however, are not subject to authorisation by FINMA, unless the authorisation of the payment system is necessary for the proper functioning of the financial market or the protection of financial market participants.

With respect to the trading of digital assets, the Federal Council has proposed the introduction of an additional regulatory status as part of its larger DLT/blockchain legislation (see **12.2 Local Regulators' Approach to Blockchain**). As the main difference to current regulation, the new authorisation as a DLT-trading facility would allow individuals to participate in such a trading facility without an intermediary.

7.2 Regulation of Different Asset Classes
The FMIA differentiates between, in essence, two asset classes:

- derivatives or derivatives transactions – financial contracts whose value depends on one or several underlying assets and which are not cash transactions; and
- securities – standardised certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading.

With respect to derivatives, the FMIA foresees additional obligations such as on the clearing via a central counterparty, the use of authorised trading facilities and, in the case of commodity derivatives, position limits.

7.3 Impact of the Emergence of Cryptocurrency Exchanges
By definition, decentralised systems are particularly vulnerable to anonymity risks. Indeed, in contrast to traditional financial services, virtual currency users' identities are generally unknown, although in most cases they are only pseudonymous, and there is no regulated intermediary which may serve as gatekeeper for the mitigation of money laundering and financing of terrorism risks. The majority of virtual currencies, such as Bitcoin or Ether, have anonymity or pseudonymity by design, meaning that an individual user's identity is not linked to a certain wallet or transaction. However, while a user's identity is not visible on the relevant distributed ledger underpinning the virtual currency infrastructure, information on transactions – such as dates, value and the counterparties' addresses – are publicly recorded and available to anyone. For the purposes of their investigation and prosecution work, enforcement authorities are therefore able to track transactions to a point where the identity may have been linked to an account or address (such as wallet providers or exchange platforms).

Swiss AML legislation does not provide for a definition of virtual currencies. However, since the revision of the FINMA AML Ordinance in 2015, exchange activities in relation to virtual currencies, such as money transmitting (ie, money transmission with a conversion of virtual currencies between two parties), are subject to AML rules.

7.4 Listing Standards
The FMIA requires authorised stock exchanges and multilateral trading facilities to implement appropriate self-regulation, which is binding on the respective participants. SIX Swiss Exchange, as the dominant stock exchange, issues respective Listing Rules which have been amended as per 1 January 2020 to reflect the new financial market regulation (see also **2.2 Regulatory Regime**).

7.5 Order Handling Rules
The FMIA requires authorised stock exchanges and multilateral trading facilities to implement rules on orderly and transparent trading and to monitor trading in order to detect violations of statutory and regulatory provisions. The detailed rules are thus issued by the relevant trading facility, eg, SIX Swiss Exchange. Further, best execution rules apply (see **3.3 Issues Relating to Best Execution of Customer Trades**).

7.6 Rise of Peer-to-Peer Trading Platforms
Under the FMIA, organised trading facilities for trading securities and other financial instruments require the respective FINMA authorisation (see **7.1 Permissible Trading Platforms**), which includes strict limitations – eg, on authorised participants in such a trading facility. The proposed DLT trading facil-

ity would, to a certain extent, allow for peer-to-peer-trading of digital assets (see **7.1 Permissible Trading Platforms**).

7.7 Issues Relating to Best Execution of Customer Trades

See **3.3 Issues Relating to Best Execution of Customer Trades**.

7.8 Rules of Payment for Order Flow

The rules on best execution (see **3.3 Issues Relating to Best Execution of Customer Trades**) as well as the general principles on fees apply (see **2.3 Compensation Models**).

8. High-Frequency and Algorithmic Trading

8.1 Creation and Usage Regulations

Algorithmic trading is based on computer algorithms which automatically determine the triggering and the individual parameters of an order (such as time, price or quantity). High frequency trading is a subcase of algorithmic trading and has very low delays in order transmission and a usually short-term trading strategy. Its distinctive feature is a high number of order entries, changes or deletions within microseconds.

With the Financial Market Infrastructure Act (FMIA), which came into force on 1 January 2016, and the associated implementing ordinance of the Federal Council, the Financial Market Infrastructure Ordinance (FMIO), the necessary measures were taken in Switzerland to counter the negative effects of algorithmic trading and high-frequency trading. The regulation created complies with international standards and is based on EU law.

Specifically, stock exchanges, multilateral trading systems and organised trading systems must ensure orderly trading. In particular, they must ensure that their trading systems are in a position to temporarily suspend or restrict trading if there is a significant price movement in the short term as a result of an effect on this market or a neighbouring market (so-called circuit breakers). It must also be possible to identify orders generated by algorithmic trading.

In addition, traders who engage in algorithmic trading and high-frequency trading are subject to various obligations. In particular, they must ensure that their systems do not cause any disruption to the trading venue and are subject to appropriate testing of algorithms and control mechanisms. Further, certain transparency requirements apply (see **8.3 Requirement to Register as Market Makers When Functioning in a Principal Capacity**). Finally, it should be emphasised that higher fees may be charged for typical high-frequency trading techniques.

8.2 Exchange-like Platform Participants

See **8.1 Creation and Usage Regulations**.

8.3 Requirement to Register as Market Makers When Functioning in a Principal Capacity

Pursuant to the FMIO, authorised trading facilities are required to impose upon all participants an obligation to notify, to the trading facility, the use of algorithmic trading and to flag all orders made by algorithmic trading.

In addition, a market participant requires authorisation as a securities firm by FINMA pursuant to the FinIA if:

- it trades in securities in its own name for the account of clients;
- it trades in securities for its own account on a short-term basis and publicly quotes prices for individual securities upon request or on an ongoing basis; or
- it trades in securities for its own account on a short-term basis, operates primarily on the financial market and is a member of a trading facility.

8.4 Issues Relating to the Best Execution of Trades

See **3.3 Issues Relating to Best Execution of Customer Trades**.

8.5 Regulatory Distinction Between Funds and Dealers

The transparency requirements in relation to algorithmic trading apply to all market participants alike (see **8.3 Requirement to Register as Market Makers When Functioning in a Principal Capacity**). In addition, funds and fund managers are subject to the respective regulatory regime (see **6. Fund Administrators**), while dealers may qualify as securities firms (see **8.3 Requirement to Register as Market Makers When Functioning in a Principal Capacity**). The FinIA foresees that authorisation as either a securities firm or as a fund manager is, in principle, alternative in nature.

8.6 Rules of Payment for Order Flow

The rules on best execution (see **3.3 Issues Relating to Best Execution of Customer Trades**) as well as the general principles on fees apply (see **2.3 Compensation Models**).

9. Financial Research Platforms

9.1 Registration

Under Swiss law, which is generally technology neutral and principle based, there is no legislation specifically referring to financial research platforms. Accordingly, financial research platforms based in Switzerland have considerable regulatory latitude compared with other jurisdictions. Hence, regulatory

implications, if any, for specific financial research platforms must be assessed under the ordinary principles governing the provision of services, including financial services, in Switzerland.

9.2 Regulation of Unverified Information
See **9.1 Registration**.

9.3 Conversation Curation
See **9.1 Registration**.

9.4 Platform Providers as "Gatekeepers"
See **9.1 Registration**.

10. Insurtech

10.1 Underwriting Processes
The insurtech market in Switzerland is growing rapidly, including due to organisations pursuing business models that are based on general challenges faced by incumbent insurance institutions (eg, new regulatory frameworks, the inflow of alternative capital, and the ongoing low interest rate environment). In general, incumbent insurance institutions have lower barriers when entering the insurtech market as they already have the corresponding licences and are able to focus on the development of the technology.

To date, there is no legislation specifically referring to insurtech business models. Hence, regulatory implications, if any, for specific insurtech business models must be assessed under the ordinary principles governing the provision of insurance services, in particular as regards maintaining the protection objectives of insurance supervision by FINMA.

10.2 Treatment of Different Types of Insurance
Swiss insurance supervisory law contains specific provisions for different types of insurance in several aspects. Under the Insurance Supervisory Act (ISA), three categories of insurance are differentiated: life insurance, indemnity/non-life insurance and reinsurance. Most importantly, insurers providing life insurance are not allowed to provide any other insurance except for casualty and sickness insurance. Different rules also apply as regards capital requirements. Further, a completely different regulatory regime applies to insurers providing mandatory sickness insurance pursuant to Swiss law. While FINMA is the competent supervisory authority under the ISA, the Federal Office of Public Health supervises insurers providing mandatory sickness insurance.

11. Regtech

11.1 Regulation of Regtech Providers
Regtech is a subset of fintech focusing on technologies that may facilitate the delivery of regulatory requirements in a cost-effective and comprehensive way. Regtech refers to technology and software created to address regulatory requirements and help companies stay compliant, including by leveraging software and automation to close compliance gaps and to monitor and detect risks on a permanent basis.

To date, there is no legislation specifically referring to regtech. FINMA has generally been welcoming to technology applications that support supervised entities in complying with regulatory requirements. It is expected that, once and where there is a market need, FINMA may define technical standards and formats.

11.2 Contractual Terms to Assure Performance and Accuracy
The use of regtech providers by (regulated) financial services firms is subject to the general requirements on outsourcing (see **2.7 Outsourcing of Regulated Functions**). In addition to terms required by outsourcing regulation, a regtech provider would, depending on the specific services involved, be required to comply with a service level agreement, provide for service credit payments and other remedies in order for the customer to assure and enforce performance and accuracy.

11.3 Regtech Providers as "Gatekeepers"
As a general principle, FINMA and the other supervisory authorities are responsible for enforcing compliance with laws while private actors such as regtech providers are required to be compliant with the laws themselves. Since regtech providers would customarily be non-regulated entities, no specific rules apply to detect unlawful behaviour.

12. Blockchain

12.1 Use of Blockchain in the Financial Services Industry
Distributed ledger technologies (DLT) such as various blockchain implementations have been the focus of many public and private initiatives. First, traditional fundraising techniques and processes have been challenged in the last couple of years by the emergence of a new form of capital raising by start-ups in the form of initial coin offerings (ICOs) or token-generating events based on DLT. With the advance of this technology, the focus is now shifting on tokenising more traditional assets such as shares and other securities. In this respect, at least two Swiss companies have already issued shares on the blockchain and

FINMA has granted the first two banking and securities firms licences to blockchain service-providers Seba and Sygnum. Driven by the fast-moving industry, traditional players such as banks are also increasingly offering services in relation to digital assets and blockchain related businesses. Several players such as the Swiss Bankers Association, Crypto Valley Association and the Capital Market and Technology Association promote the growing blockchain based business model for traditional and new players alike.

12.2 Local Regulators' Approach to Blockchain

In Switzerland, no specific regulation in relation to DLT or blockchain has so far been implemented. Thus, the general rules apply, including as regards risks, liability, intellectual property, anti-money laundering and data privacy. As regard the application of the existing regulations on ICOs, FINMA published corresponding guidelines on 16 February 2018. Generally, FINMA focuses on the economic function and purpose of the tokens, as well as whether they are tradeable or transferable, in order to classify the tokens broadly into three "archetypes" which are payment tokens (which include cryptocurrencies), utility tokens or asset tokens. The classification of the tokens has an impact on the applicable legal and regulatory framework (see **12.3 Classification of Blockchain Assets**). Since then, FINMA has issued further guidelines on money laundering on the blockchain and, most recently, also on stable coins.

Whilst the Swiss legislature is aware that the possibilities offered by DLT/blockchain go far beyond its application in the financial sector, there is currently a legislative focus on this sector. The Swiss Federal Council published, in December 2018, a report on the legal framework for blockchain and distributed ledger technology in the financial sector. The report noted that the Swiss legal framework is in principle well suited to deal with new technologies. Thereupon, on 22 March 2019, the Federal Council initiated a consultation process on few selective adjustments of federal law to adapt for developments in distributed ledger technology.

On 27 November 2019, the Federal Council proposed draft legislations to the parliament in order to increase legal certainty by removing hurdles for DLT-based applications and limiting risks of misuse. In a nutshell, the legislative amendments proposed include:

- a civil law change aimed at increasing the legal certainty in the transfer of DLT-based assets;
- the possibility of segregation of crypto-based assets in the event of bankruptcy; and
- a new authorisation category called DLT Trading Facilities, which DLT Trading Facilities may provide services in the areas of trading, clearing, settlement and custody with DLT-based assets (see also **7.1 Permissible Trading Platforms**).

Overall, these legislative amendments are expected to increase market access to fintech companies in the DLT/blockchain field by improving legal certainty and removing certain regulatory barriers.

12.3 Classification of Blockchain Assets

According to FINMA's own guidelines, the following three tokens can be differentiated:

- Payment tokens are synonymous with cryptocurrencies and offer no further functions or links to projects; they may, in some cases, only gain the necessary functionality and become accepted as a means of payment over a period of time – FINMA requires compliance with anti-money laundering regulations but does not treat such tokens as securities.
- Utility tokens are tokens which are intended to provide access to a digital functionality or a service; they do not qualify as securities, unless they function, at least partially, as an investment in economic terms.
- Asset tokens represent assets such as participation in real physical underlyings, companies, or earnings streams, or an entitlement to dividends or interest payments; their economic function is, dependent on its terms, analogous to equities, bonds or derivatives – FINMA generally considers asset tokens as securities.

Other players have used other classifications adapted to the particular case at hand.

12.4 Regulation of "Issuers" of Blockchain Assets

See **12.2 Local Regulators' Approach to Blockchain**.

12.5 Regulation of Blockchain Asset Trading Platforms

Currently no specific rules on the trading of digital assets apply, but the Federal Council has proposed to establish a new licence for DLT trading facilities (see **7.1 Permissible Trading Platforms**).

12.6 Regulation of Invested Funds

Since there is no specific regulation, the general regulation of funds applies (see **6. Fund Administrators**).

12.7 Virtual Currencies

Transactions in cryptocurrencies may be carried out on an anonymous basis and related money laundering risks are accentuated by the speed and mobility of the transactions made possible by the underlying technology. The Know Your Customer

(KYC) principle is the cornerstone of the anti-money laundering (AML) and combating the financing of terrorism (CFT) due diligence requirements that are generally imposed on financial institutions whose AML/CFT legislation is aligned with international standards (see **2. Fintech Business Models and Regulation in General**). KYC requires that financial institutions duly identify (and verify) their contracting parties (ie, customers) and the beneficial owners (namely when their contracting parties are not natural persons) of such assets as well as their origin. Together with transaction monitoring, KYC ensures the traceability of assets (ie, paper trail) and allows the identification of money laundering and financing of terrorism indicia. With respect to DLT/blockchain applications, one of the challenges is that KYC and other AML/CFT requirements are designed for a centralised intermediated financial system, in which regulatory requirements and sanctions can be imposed by each jurisdiction at the level of financial intermediaries operating on its territory (ie, acting as gatekeepers). By contrast, virtual currency payment products and services rely on a set of decentralised cross-border virtual protocols and infrastructure elements, neither of which has a sufficient degree of control over, or access to, the underlying value (asset) and/or information, meaning that identifying a touch-point for implementing and enforcing compliance with AML/CFT requirements is challenging.

12.8 Impact of Privacy Regulation on Blockchain

Although the data stored on a public blockchain is usually encrypted, personal data can still be generated by linking further information, enabling it to be assigned to a natural person. If this is the case, the transparency and immutability of the information documented on the blockchain are not compatible with the basic principles of data protection. Participation in a blockchain platform would to some extent be tantamount to giving up informational self-determination (consent) as the data has been entered voluntarily into the system. While encryption technology and digital signatures fundamentally increase data security, effective protection against loss or theft also depends to a large extent on the management of private keys. For example, several of the major thefts of tokens can be traced back to the improper management of private keys. For this reason, great importance must be attached to the safekeeping of private keys.

13. Open Banking

13.1 Regulation of Open Banking

Banks in Switzerland have embraced the open banking concept and innovative business models are being implemented, notably as regards relevant banking infrastructure. Such infrastructure may include open banking interfaces (APIs), identity and security management, information and transaction platforms, finance management systems, and financial compliance systems. To date, there is no legislation specifically referring to open banking. Hence, regulatory implications for specific open banking applications must be assessed under the ordinary principles governing the provision of financial services, in particular as regards maintaining the protection objectives of the supervision of financial institutions by FINMA.

Given the importance of the digital transformation for banks and the size of the established financial sector in Switzerland, Fintech organisations in the field of banking infrastructure can draw on a large pool of potential customers. The challenge of meeting customer expectations as well as its financial aspects (in terms of revenue increases and reduction of operational costs) has accelerated the implementation of open banking, including based on Bank as a Platform (BaaP) solutions.

13.2 Concerns Raised by Open Banking

Open banking raises several concerns, inter alia, in the areas of data protection, IT security and Swiss banking secrecy. The success of open banking in Switzerland will thus be highly dependent on transparent information for clients, obtaining the relevant consents and waivers as well as adhering to the highest standards in IT security. Swiss banking secrecy and the lack of a common standard for open banking may be reasons for the slow adoption of open banking in Switzerland despite an increasing number of open banking initiatives by several private actors.

Lenz & Staehelin provides tailored services through a dedicated and multidisciplinary fintech team to clients operating and investing in all areas of fintech. The fintech professionals have a deep understanding of the business models and underlying technologies on top of legal expertise in a wide range of areas, including regulatory, corporate and investment, financing, technology-enabled innovation, and data exploitation. The firm advises start-ups, investors, technology companies and established financial institutions. Its team covers the full range of relevant legal services while navigating the regulatory environment with close contacts to regulators, including banking and finance, TMT and outsourcing, corporate and M&A, commercial and contracts, competition, tax and employment. The firm's activities include regulatory and compliance; corporate and investment; financing; IP creation and protection; product and technology development; licensing and distribution; joint ventures, strategic co-operations and (out)sourcing; distributed ledger (blockchain); smart contracts; regtech, insurtech; data protection, data-based services and data analytics; trade secrets and business models; financial products; crowdfunding and peer-to-peer lending; mobile payment, trading systems; robo-advisers, wealth management applications; competition law; and tax.

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