

Private Banking & Wealth Management 2022

Contributing editors

Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov

Lenz & Staehelin



A woman and a man in business suits are shown in profile, looking out of a car window. The woman is on the left, and the man is on the right. They are both looking towards the left side of the frame. The background is blurred, suggesting motion.

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Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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First published 2016
Sixth edition
ISBN 978-1-83862-699-0

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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**Shelby R du Pasquier, Stefan Breitenstein and Fedor
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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Private Banking & Wealth Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Brazil.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Shelby R du Pasquier of Lenz & Staehelin, for his continued assistance with this volume.



London
July 2021

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This article was first published in July 2021
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Introduction

Shelby R du Pasquier

Lenz & Staehelin

Private banking and wealth management have been and remain crucial pillars of the banking industry. Historically, a number of jurisdictions, such as the Channel Islands, Luxembourg, Switzerland and the United Kingdom, have developed a particular expertise in that field. That said, all financial centres today have a wealth management industry that typically target their own residents. Private banking and wealth management have further evolved in parallel with international economic growth and the ensuing creation of wealth. Over the past decade, Asia, in particular, has been a booming centre for private banking, with the emergence of major financial centres such as Hong Kong and Singapore. In 2019, Switzerland, as the world's leading wealth management centre, had a 25 per cent market share of the cross-border wealth management business (equivalent to US\$2.4 trillion under management in 2019), which represents a decrease of 2 per cent from the previous year. Also, Hong Kong and Singapore have grown considerably in importance in recent years. Hong Kong has been catching up rapidly, with a market share of 19 per cent of global cross-border wealth (US\$1.9 trillion in 2019), followed by Singapore with a market share of 11.5 per cent (US\$1.1 trillion in 2019). As a result of the recent turmoil in Hong Kong, one would, however, expect the future Asian growth in wealth management to mainly favour Singapore.

Wealth management is also one area that has been in a state of flux during the past couple of years, as a result of a maelstrom of legislative, regulatory and tax reporting changes. Those changes reflect both the aftermath of the 2008 global financial crisis and international trends in a number of areas, including 'know your customer' (KYC), anti-money laundering and tax transparency. As a result, private banking has been under increasing regulatory and compliance pressure. In the past, wealth management, depending upon the way it was conducted, could be performed in a number of jurisdictions with little or no supervision. The situation has now drastically changed, with the expansion of a dense regulatory grid covering the entire banking sector, including wealth management. As a result, private bankers are now generally subject to a framework of rules covering all aspects of their organisation and management, including minimum capitalisation and equity requirements, codes of conduct and 'fit and proper' tests applicable to both management and shareholders. Certain countries (such as Switzerland until 2020) where wealth management is still only regulated from an anti-money laundering perspective are now introducing supervision of asset managers.

In parallel, the change of tack as regards taxation is particularly striking: after turning a blind eye for decades to the tax residence and status of their clients – when they were not instrumental in the structuring and administration of their undeclared financial assets – private bankers have been forced, particularly as a result of the implementation of the Financial Action Task Force recommendations with regard to the fight against money laundering, to become de facto the 'long arm' of their compliance officers and even regulators and tax authorities. As a matter of course, they now report suspicions of offences of a tax or other criminal nature that are potentially committed by their clients.

Information requests targeting financial advisers and their clients have become a routine occurrence for international financial centres. Under the unprecedented push from the Organisation for Economic Co-operation and Development, international tax treaties have been amended to facilitate the transmission of information to foreign tax authorities. This has resulted in a marked increase in the number of such requests and the speed of such transmission. Switzerland, which remains one of the world's largest wealth management jurisdictions, has thus seen a huge increase in the number of such requests. Whereas there were just a few hundred 10 years ago, more than 100,000 information requests were sent to that country between 2015 and 2020.

In addition, since the introduction in 2014 of the Foreign Account Tax Compliance Act, which focused on US taxpayers, we have seen for the past couple of years the implementation in more than 100 countries of a multilateral automatic exchange of information for tax purposes. As a result, an overwhelming flow of personal and financial information related to the clients of private bankers and asset managers has been going to the tax authorities of their clients' respective places of residence. As a result of these changes, the legal and regulatory environment within which private bankers operate has drastically changed over the past couple of years. Traditionally, banking secrecy and confidentiality were the key words that underpinned private banking and wealth management. Confidentiality remains an important consideration, except as regards tax matters, where it no longer exists. On the other hand, KYC and compliance have become increasingly critical aspects of wealth management, both at the inception of the relationship and on an ongoing basis. Compliance and tax transparency have thus become the key words of the international financial industry. Similarly, transparent client information and suitability assessments have become a key part of private bankers' jobs following the 2008 global financial crisis and the resulting regulatory initiatives (eg, the Markets in Financial Instruments Directive (Directive 2004/39/EC)).

In parallel, there has been a gradual blurring of the boundaries between 'offshore' and 'onshore' private banking. Historically, a distinction was made, theoretically based upon the country of residence of the client base, whereby offshore banking targeted non-resident clients while the onshore industry was focused on residents. In practice, the development of offshore wealth management was closely linked to confidentiality and taxation issues. With the erosion of these attributes, the historical distinction between onshore and offshore banking is disappearing. This, in turn, has had an impact on the industry itself and has fostered an international concentration trend in recent years. This is leading to the emergence of large international financial groups, such as UBS, Credit Suisse, Santander and Julius Baer, that are developing an extensive network of affiliated entities or branches onshore, whereas other groups have exited private banking altogether or in certain jurisdictions. In contrast, smaller institutions having more limited resources focus on one or several target markets. The aggressive geographical development of onshore banking in Asia is another sign of the tendency to operate in the markets where investors reside. This 'onshorisation'

process is further accentuated by the increasingly aggressive enforcement by local regulators of cross-border rules, respectively new barriers to entry and cross-border offering of certain products and services.

Last, but not least, these changes have had an important impact at the client level. Some clients have found themselves lost in the international regulatory and tax overhaul. The often long-standing relationship between bankers and their clients has been further eroded by the structural changes in the industry and its concentration, which has led to a large turnover of staff. Less obviously, it is interesting to note the evolution in the client's relationship with his or her banker, in particular as a result of the expanded role and responsibility of the banker towards local regulators and the reporting duties deriving from the ever-increasing know your customer and anti-money laundering obligations

that imply a systematic documentation of the client's transactions. The 'confidante' role historically played by private bankers with their clients is phasing out, a greater focus being put on the core tenets of wealth management, namely performance, quality of service and pricing, all of which are being put under pressure from the emergence of technology-driven products and services, spanning all aspects of the wealth management services, from robo-advisers to quantitative model trading strategies, aggregation and reporting across jurisdictions, institutions, currencies and asset classes.

The private banking and wealth management industry is certainly going through interesting times and is facing unprecedented challenges and paradigm shifts, all of which cross borders and span multiple jurisdictions.

Switzerland

Fedor Poskriakov and Coraline Jenny*

Lenz & Staehelin

PRIVATE BANKING AND WEALTH MANAGEMENT

Regulation

1 | What are the main sources of law and regulation relevant for private banking?

The Swiss legislation relevant for private banking and wealth management comprises a number of legal and regulatory instruments, the applicability of which depends on the actual services offered by the wealth manager. In terms of ranking from the least regulated to most regulated, the services may be listed as follows: advisory, portfolio management (without custody of client assets), portfolio management for collective investment schemes, securities dealing (including brokerage services) and finally banking (including custody and lending). The main statutes relevant for private banking are:

- the Banking Act;
- the Collective Investment Schemes Act;
- the Swiss Financial Market Supervisory Authority Act;
- the Anti-money Laundering Act (AMLA);
- the Financial Services Act of 2020 (FinSA); and
- the Financial Institutions Act of 2020 (FinIA).

These statutes are supplemented by ordinances enacted by the Swiss Federal Council or, as regards more technical aspects, by the Swiss Financial Market Supervisory Authority (FINMA). Their practical application is further regulated by a number of FINMA circulars.

The FinIA and the FinSA, which both entered into force on 1 January 2020, considerably overhauled the applicable legal and regulatory framework (in particular, as applicable to wealth managers) in the financial sector.

Regulatory bodies

2 | What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

Under Swiss law, banks are subject to licensing requirements and the ongoing supervision of FINMA. Since 1 January 2020, entities or individuals providing wealth management services (discretionary and non-discretionary advisory services) are newly subject to prudential supervision in Switzerland. If wealth management activities are conducted in connection with collective investment schemes, or the wealth manager offers securities dealing or brokerage services or manages assets of Swiss pension funds, such activities are further subject to specific regulations. Wealth managers that manage their clients' assets or execute investment transactions as investment advisers are also characterised as financial intermediaries and, as such, are in addition subject to the Swiss anti-money laundering regulations.

In terms of supervisory authorities, FINMA is an independent and single integrated authority for the Swiss financial markets, which is responsible for the supervision of banks, securities firms, stock exchanges and collective investment schemes. It further monitors the private insurance sector. FINMA's activities are overseen in turn by the Swiss parliament and, although it carries out its activities independently, FINMA has a duty to report to the Swiss Federal Council.

Under the FinIA, wealth managers and trustees acting in a professional capacity are now also subject to FINMA licensing and enforcement. That being said, their day-to-day supervision is entrusted to supervisory organisations (SOs) approved and monitored by FINMA. As at 18 May 2021, five SOs were licensed, namely the Organisme de Surveillance des Instituts Financiers (OSIF), the Organisation de surveillance financière, A00S – Schweizerische Aktiengesellschaft für Aufsicht, FINcontrol Suisse AG and the Supervisory Organisation for Financial Intermediaries & Trustees (SO-FIT).

Financial intermediaries subject to AMLA are required to be registered with a self-regulatory organisation (SRO) recognised by FINMA, unless they are subject to licensing and supervision directly by FINMA, such as banks and other regulated firms. With respect to wealth managers who are to be licensed under the new FinIA since 1 January 2020, those are, to pursue their activities, to be registered with an SRO, as long as they have not obtained their licence within the three-year transitional deadline. The SROs are responsible for monitoring their members as regards their compliance with their obligations under the Swiss anti-money laundering regulations. The SROs are in turn subject to FINMA authorisation and supervision.

In addition, given the high degree of self-regulation in Switzerland in the private banking and wealth management sector, the primary SROs active in those markets need to be mentioned and include: (1) the Swiss Bankers Association; (2) the Swiss Funds and Asset Management Association (SFAMA); and (3) the Swiss Asset Managers' Association. Some of the codes of conduct and guidelines issued by those bodies have been recognised by FINMA as minimum standards for the relevant industry and apply to all firms active in the relevant fields, irrespective of their membership of one of the above-named industry bodies.

Private wealth services

3 | How are private wealth services commonly provided in your jurisdiction?

In Switzerland, private wealth services are provided on a heterogeneous basis with the use of different business models. Large universal banks and wealth management banking institutions (private banks) coexist with other players such as independent asset managers, family offices and trustees. Independent asset managers represent the lion's share of the para-banking sector within the Swiss financial industry, with, until 1 January 2020, a limited level of regulatory supervision other than for anti-money laundering compliance purposes.

The entry into force of the new FinIA and FinSA had an important impact on wealth managers who had to review and adapt, as the case may be, their business model.

Definition of private banking

4 | What is the definition of private banking or similar business in your jurisdiction?

As a matter of principle, private banking and wealth management activities cover the provision of investment advice, the management of client assets and investment research in relation thereof, as well as custody and securities dealing services. Since the entry into force of the FinSA and the FinIA, those activities are all regulated or subject to conduct requirements under FinSA in Switzerland.

Licensing requirements

5 | What are the main licensing requirements for a private bank?

As mentioned above, banks (providing private banking services) are subject to licensing requirements and FINMA's ongoing supervision. Under Swiss law, banks are defined as business entities that solicit or take deposits from the public (or refinance themselves with substantial amounts from other unrelated banks) to provide financing to a large number of persons or entities. To the extent that a firm offers custody services (deposit taking), which are not limited to being used for securities transactions, it is required to be licensed as a bank.

In a nutshell, the conditions for the granting of a licence to conduct banking activities encompass financial and organisational requirements, as well as 'fit and proper' tests imposed on managers and qualified shareholders. To this end, the applicant must establish that these persons enjoy a good reputation and thereby ensure the proper conduct of business operations (ie, the guarantee of irreproachable activity).

The granting of a banking licence is further subject to a minimum equity requirement. The fully paid-up share capital of a Swiss bank must amount to a minimum of 10 million Swiss francs and must not be directly or indirectly financed by the bank, offset against claims of the bank or secured by assets of the bank. For the rest, the Swiss regulatory banks' capital and liquidity regimes reflect the Basel III recommendations with, arguably, a certain level of 'Swiss finish', with some of the requirements going beyond Basel III.

Further, applicants are to appoint a recognised auditor specifically for the authorisation procedure. They are also to appoint an external audit company supervised by the Federal Audit Oversight Authority for the purpose of their ongoing supervision. The role of such a company is to assist FINMA in its supervisory functions. In this context, FINMA requires that financial and regulatory audits be conducted separately, and, where appropriate, that these two different audits be carried out by different audit firms.

Finally, it is worth noting that banks that are directly or indirectly owned or controlled by foreign nationals are subject to additional licensing requirements.

Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

After the delivery of the banking licence, FINMA monitors compliance with licensing criteria and the applicable regulatory obligations on an ongoing basis. If, at a later stage, any of the licence requirements cease to be fulfilled or in the case of breach of regulatory obligations, FINMA may take administrative measures and, as a last resort, withdraw the banking licence. Any changes to the organisational documents or any

other conditions of the licence need to be notified to FINMA in advance and an application lodged seeking approval thereof, prior to the changes becoming effective.

Organisational forms

7 | What are the most common forms of organisation of a private bank?

The most common form of organisation of private banks is a Swiss corporation, with some notable former private bankers having restructured from a partnership into a corporation in the past years. The Association of Swiss Private Banks counts nine members, which are all Swiss banks that are privately owned and not listed entities. However, out of the nine, five banks, which also form the Swiss Private Bankers' Association, remain organised as private partnerships, with the partners having unlimited personal liability. By contrast, banks providing wealth management services as part of their broader activities (based on the model of 'universal bank') always take the form of Swiss corporations.

Foreign banks having a presence in Switzerland are required to become authorised as a branch or representative office, depending on the scope and the intensity of the activities performed on Swiss soil, as well as certain tax and operational considerations.

LICENCES

Obtaining a licence

8 | How long does it take to obtain a licence for a private bank?

The process to obtain a banking licence, as a matter of principle, takes about six to nine months from the date the application is filed with the Swiss Financial Market Supervisory Authority (FINMA). The duration may, however, vary in the presence of certain specific factors, such as the complexity of the structure or the involvement of foreign supervisory authorities in the event that the applicant has connections with foreign countries.

Licence withdrawal

9 | What are the processes and conditions for closure or withdrawal of licences?

According to article 37 Swiss Financial Market Supervisory Authority Act (FINMASA), FINMA must revoke the licence granted to a bank in the event that the latter no longer fulfils the licensing requirements or has seriously violated applicable regulatory provisions. FINMA may take this measure only in the event that it appears that the legal situation cannot be restored by means of a less restrictive measure, in accordance with the principle of proportionality. The withdrawal of a licence is not a criminal sanction, but an administrative measure whose purpose is to protect the bank's creditors. It is worth noting that the consequences of a withdrawal of a licence are the same whether the entity exercised its banking activities with or without a licence.

The withdrawal of the licence is ordered on the basis of a decision of the regulator, which triggers the winding-up of the bank. In this context, the governing bodies of the bank are no longer entitled to represent the bank, and a liquidator, supervised by FINMA, is appointed for the purpose of the liquidation procedure. For the rest, the bank is liquidated in accordance with the specific provisions of the Banking Act (BA) and the Swiss Debt Collection and Bankruptcy Act.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Since the entry into force of Financial Institutions Act (FinIA) and Financial Services Act (FinSA) on 1 January 2020, wealth management activities conducted on a professional basis are subject to supervision under the FinIA, provided that they include signature authority over clients' assets and are considered as financial services under the FinSA (including pure advisory activities). Subject to applicable grandfathering rules, wealth managers have to apply for and obtain an authorisation from FINMA and comply with rules of conduct and organisational measures. Under the new regime, foreign wealth managers with a permanent presence in Switzerland are subject to licensing as a branch or representative office.

The FinIA and its implementing ordinance (FinIO) provide for a limited number of exemptions. One of them provides that wealth managers that exclusively manage assets of persons with whom they have 'economic' or 'family' ties do not fall within the ambit of the FinIA and do not need to obtain a licence to perform their activities, subject to certain requirements.

Requirements

11 | What are the main licensing requirements for wealth management?

Under the FinIA, in addition to the 'fit and proper' tests imposed on managers and qualified shareholders, the main licensing requirements (which are to be complied with at any time) for wealth managers are the following:

- the registered office and administration of the wealth manager must be in Switzerland;
- the management is composed of at the least two people having appropriate qualifications;
- a fully paid-up minimum share capital of 100,000 Swiss francs;
- a minimum equity equivalent to one quarter of the fixed annual costs according to the latest financial statements, up to 10 million Swiss francs;
- the implementation of appropriate internal organisation, in particular as regards risk management and internal control mechanisms; and
- the conclusion of a professional indemnity insurance or the provision of sufficient financial guarantees.

According to the FinIA grandfathering rules, wealth managers that were already active prior to 1 January 2020 had to notify FINMA of their intention to apply for a licence prior to the end of June 2020 and have to request an authorisation prior to 31 December 2022. By contrast, wealth managers who started their activities after January 2020 were to immediately notify FINMA and comply with the licensing requirements. According to the FinIO, such newly established wealth managers have to register with a SO and apply for a licence with FINMA at the latest within one year after the first SO has been recognised by FINMA (ie, by July 2021, insofar as the first SOs were recognised in July 2020).

12 | What are the main ongoing conditions of a wealth management licence?

Under the FinSA, wealth managers are required, similarly to other financial service providers, inter alia, to be affiliated with a mediation body (*ombudsman*) recognised by the Swiss Federal Department of Finance (FDF) – unless they only provide services to institutional and per se professional clients – and ensure that the individuals providing financial services (the 'client advisers') have technical knowledge and follow appropriate training.

As at 18 May 2021, nine mediation bodies had been recognised by the FDF.

ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

Requirements

13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management in your jurisdiction?

The anti-money laundering and financial crime requirements imposed upon financial intermediaries within private banking are essentially know-your-customer rules and procedures, as well as certain organisational requirements (eg, internal controls, documentation and ongoing education).

In addition, a financial intermediary has a reporting duty to the regulatory body in the event that he or she is aware of, or has reasonable suspicion, as regards the criminal origin of the assets involved (eg, the assets are connected to a predicate offence of money laundering, a criminal organisation or terrorism financing activities). In case of reporting, the financial intermediary is to monitor the clients' assets for a period of up to 20 days (during which the regulatory body is to review the reporting made). If the case is transferred to a criminal prosecution authority following the reporting, the financial intermediary is to implement a full freeze on the account for up to five days until a decision to maintain the freeze is made by the criminal authority. An immediate freezing of assets is, however, required for assets connected to persons whose details were transmitted to the financial intermediary by the Swiss Financial Market Supervisory Authority (FINMA), the Federal Gaming Board or a self-regulatory organisation (SRO) due to a suspicion of being involved with or supporting terroristic activities.

Politically exposed persons

14 | What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

According to the Anti-money Laundering Act (AMLA), foreign and national PEPs are defined as persons who are or have been entrusted with leading public functions in politics, administration, the military and justice on a national level abroad, respectively, in Switzerland, as well as members of the board of directors or of the management of state-owned enterprises with national importance. This definition also covers persons who are or have been entrusted with a leading function in inter-governmental organisations or international sport associations.

Business relationships with foreign PEPs and their family members or close associates (ie, individuals who are related to them or closely connected socially or professionally) are deemed to be de facto high-risk relationships and involve increased due diligence duties. By contrast, relationships with domestic PEPs or those exposed in international organisations, as well as their family members or close associates, are deemed to present high risks only when combined with one or more further risk criteria (eg, the residence or nationality of the contracting party or the beneficial owner, the complexity of the structure, the amount of the assets etc).

The increased due diligence duties in this context presuppose that the financial intermediary performs, in a proportionate manner, further clarifications on the contracting party, the beneficial owner and the assets involved. He or she is further to implement an effective monitoring system of these relationships and to ensure the detection of high risks in this respect.

Documentation requirements

15 | What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Under the Anti-money Laundering Act (AMLA), financial intermediaries such as banks and asset managers are subject to various know-your-customer duties, which are in line with international standards.

In particular, they are required to verify, prior to entering into any business relationship, the identity of their contractual counterparties with a copy of a passport, identity card, driving licence or other similar documents. They further must record the first and last names, date of birth, nationality and address of their clients in their files. Further specific requirements apply to relationships established by correspondence or the internet. In this respect, since 1 January 2016, the Swiss legal framework provides for the possibility for financial intermediaries to on-board clients exclusively online. In this context, FINMA published a circular on video and online identification (FINMA Circular 2016/7), which was last modified on 6 May 2021. One of the main purposes of this circular is to clarify and facilitate video and online client identification for financial intermediaries subject to KYC duties. The revised circular takes into account the technological developments since its first publication (driven in particular by the covid-19 pandemic). The most recent changes authorise, inter alia, the use of chip-embedded data contained in biometric identity documents for online client identification purposes and the use of geolocalisation methods for the verification of the client's domicile. The revised circular entered into force on 1 June 2021.

Financial intermediaries are also to identify the beneficial owner of the assets involved (ie, the person who has a financial interest in such assets), as well as the persons controlling legal entities conducting business activities. Under certain circumstances (eg, the contracting party is different from the beneficial owner of the assets), financial intermediaries are to obtain a written declaration signed by the contracting party in this respect. They usually document the identity of the beneficial owner (including his or her nationality, address and date of birth) with a specific form (eg, the Form A developed by the Swiss Bankers Association).

Further, financial intermediaries are to clarify the economic background and purpose of a transaction or business relationship if: (1) it appears unusual, unless its legality is clear; or (2) there are indications that suggest the assets may be the proceeds of a crime or a qualified tax offence or are related to a criminal organisation. Enhanced due diligence obligations apply with regard to higher-risk business relationships or transactions.

In practice, in the presence of an independent asset manager, banks usually delegate their know-your customer duties to the said manager and rely on his or her indications for anti-money laundering purposes.

On 1 June 2018, the Federal Council opened up a consultation procedure on the revision of the AMLA. The purpose of this revision was to reflect the outcome of the latest FATF review of the Swiss AML framework. Among other things, the initial draft provided for the extension of due diligence obligations to advisory services related to the setting up, management and administration of offshore companies and trusts, regardless of the absence of any pure financial intermediation activity (ie, services involving financial transactions or an activity of a corporate body of an offshore company). However, such extension of the scope of AMLA obligations to client advisors was challenged in the course of the deliberations at the level of the Parliament and is no longer included in the final draft of the AMLA adopted on 19 March 2021 (due to enter into force in the second half of 2021). In a nutshell, the main changes focus, inter alia, on the verification of the information provided on the identity of the beneficial owner against reliable sources and on the requirement to

periodically review the KYC information provided by clients. Further, the final draft provides for the removal of the 20-day period during which the regulatory body is to review the reporting made by the financial intermediary and revert, as the case may be. This last point aims to allow the regulatory body to prioritise the filings and treat them in a more efficient manner. The final draft is still subject to a voluntary popular referendum period expiring on 8 July 2021. The entry into force of the revised AMLA is not expected before the end of 2021/beginning of 2022.

Tax offence

16 | Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Under Swiss law, qualified tax offences in relation to direct taxes constitute predicate offences for money laundering within the meaning of article 305-bis of the Swiss Criminal Code (SCC).

Qualified tax offences are defined as tax fraud, provided that the evaded tax amount in any given tax year exceeds 300,000 Swiss francs. The qualified tax fraud presupposes in this context the use of false, falsified or untrue official documents (such as financial statements or salary certificates). Qualified tax offences committed abroad may also be considered as predicate offences for the purposes of article 305-bis SCC, provided that these are also treated as an offence in that foreign country, and the evaded tax amount reaches the equivalent above threshold in Swiss francs.

Compliance verification

17 | What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

For a number of years, the Swiss Federal Council has been keen to implement its 'clean money strategy' through, inter alia, the introduction of enhanced due diligence requirements applicable to financial intermediaries in connection with the tax compliance of their clients. Such initiative has been subject to intense discussions and debates for years. For the time being, no specific prescriptive requirements as regards the review of the tax compliance of the clients' assets have been implemented in the Swiss legal framework.

That being said, with the revision of the AMLA, a risk-based approach is now generally applied by financial intermediaries to assess the tax compliance of clients' assets. In addition, the participation of Switzerland in the automatic exchange of information within the Organisation for Economic Co-operation and Development since 2018 alleviated to a certain degree the risks related to tax compliance. As of today, tax information about clients with residence in countries having entered into an agreement with Switzerland for this purpose are automatically transmitted to the foreign tax authority through the Swiss tax authorities. According to the Automatic Exchange of Information Act, which entered into force on 1 January 2017, financial institutions are subject to a duty to obtain from their clients opening accounts after this date a specific self-certification indicating their name, address, tax residence, tax identification number and date of birth.

Liability

18 | What is the liability for failing to comply with money laundering or financial crime rules?

Financial intermediaries may face criminal liability for failing to comply with their duty of diligence. According to article 305-ter (1) SCC, they may be sentenced to imprisonment of up to a year and to a fine (capped at 540,000 Swiss francs). In addition, in the event that they do not comply

with their reporting duty to the regulatory body, they may be subject to a fine of up to 500,000 Swiss francs under the AMLA. Finally, financial intermediaries may be subject to further fines and disciplinary measures imposed by their SROs or, for banks, the Supervisory Commission of the SBA, in case of violation of their anti-money laundering self-regulatory rules.

Clients, as well as banks' and wealth managers' employees, committing money laundering offences may be subject to criminal sanctions, including imprisonment for up to five years and a fine of up to 1.5 million Swiss francs in serious cases.

CLIENT CATEGORISATION AND PROTECTION

Types of client

19 | Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Since 1 January 2020, the Financial Services Act of 2020 introduced client segmentation – much like MiFID II – with three main segments (ie, private clients, professional clients and institutional clients). It is worth noting that the concept of qualified investors under the Collective Investment Schemes Act has not been abolished and remains relevant in the context of assessing whether a specific collective investment scheme can be offered to a particular client. Under the new regime, high net worth individuals are considered as professional clients if they have (1) a net wealth of 2 million Swiss francs or (2) financial assets exceeding 500,000 Swiss francs and have sufficient knowledge about risks of investing in financial instruments as a result of their education or professional experience and, in each case, (3) declared that they want to be treated as professional clients (opting out).

The provision of financial services, as well the offer of financial products, have been adapted to the protection needs of the respective client segment under the new legal and regulatory framework.

Client categorisation

20 | What are the consequences of client categorisation?

Under the new FinSA, the client categorisation determines, among others, the rules of conduct that the financial service providers are to apply in relation to each category of clients. Those rules of conduct include:

- an up-front obligation of information;
- an obligation to verify whether a financial instrument or service is appropriate and suitable;
- a documentation obligation and accountability requirement; and
- transparency and due diligence requirements for the execution of client orders.

Financial services providers have to perform an assessment of appropriateness when advising clients on individual transactions in the context of advisory or discretionary asset management services. By contrast, an assessment of suitability is required when providing investment advice on their entire portfolio or in case of discretionary asset management services.

In this context, no specific rules apply with respect to institutional clients (eg, financial intermediaries subject to the Banking Act (BA), Financial Institutions Act of 2020 (FinIA) and the CISA, foreign clients subject to a prudential supervision, insurance companies). Likewise, professional clients (eg, pension funds, large companies, high-net worth individuals having opted-out) have the possibility to waive certain protections as regards information and documentation reporting. Furthermore, the FinSA provides that the financial service providers may rely on the assumption that professional clients have the necessary knowledge and

experience and may assume economically the risks associated with the proposed services.

The FinSA also provides for an opting-in and out system across the different client categories. As an example, high net worth individuals and private structures created for them (without professional treasury operations) have the possibility to opt out to be considered as professional clients (instead of private clients). The opting in and out declarations are to be made in writing.

Consumer protection

21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

Generally, Swiss regulatory law does not provide for a specific consumer protection legal framework for financial services. That being said, within the provision of certain types of credit facilities, Swiss financial institutions are to observe a series of mandatory consumer protection rules that cannot be varied to the detriment of consumers.

Within national and international transactions with consumers under the Swiss Code of Civil Procedure, the Lugano Convention or the Swiss Private International Law Act, depending on the countries involved, specific consumer protection rules may apply as regards the determination of the competent jurisdiction or the applicable law.

EXCHANGE CONTROLS AND WITHDRAWALS

Exchange controls and restrictions

22 | Describe any exchange controls or restrictions on the movement of funds.

There are no foreign exchange controls applicable in Switzerland.

By contrast, certain restrictions on movements on funds are imposed by the Federal Council Ordinances implementing international, European and national sanctions taken against certain countries or targeted individuals or entities.

Withdrawal restrictions

23 | Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

In principle, there are no restrictions on (cash) withdrawals imposed by Swiss law or regulation. On the contrary, the only legal means of discharging a debt in Swiss francs is by way of legal tender (cash); any other settlement methods (wire, cheque, etc) are purely contractual. In practice, most banking institutions have in recent years included in their general terms and conditions restrictions on cash withdrawals, as well as certain other types of non-transparent transactions that otherwise would expose the banking institution to increased risks.

Indeed, in accordance with the Anti-Money Laundering (AML) regulations, in the event that a financial intermediary has made a report to the regulatory body, it is to ensure the paper trail of transactions involving substantial amounts, and therefore may be required to impose restrictions on (cash) withdrawals. Likewise, in the event that a financial intermediary terminates a suspicious relationship without having made any report (because of an absence of reasonable grounds to suspect money laundering or terrorism financing), he or she may authorise (cash) withdrawals of substantial amounts only if the paper trail is ensured. Banks are, however, free to impose further restrictions in their internal policies, based on their own assessment of the risks associated with such transactions, within the limits of the banking contractual relationship with the client.

24 | Are there any restrictions on other withdrawals from an account in your jurisdiction?

No specific restrictions apply, subject to compliance with AML regulations. In particular, specific regulatory requirements apply to transactions with cryptocurrencies, including the implementation of the 'travel rule'.

CONFIDENTIALITY

Obligations

25 | Describe the private banking confidentiality obligations.

Banks incorporated in Switzerland, as well as Swiss branches and representative offices of foreign banks, are bound by a statutory duty of confidentiality towards their clients (ie, banking secrecy). The disclosure of client information to third parties, including parent and affiliated companies, is prohibited in this context.

Banking secrecy is, however, not absolute and may be waived or does not apply under certain exceptional circumstances. In recent years, the importance and scope of Swiss banking secrecy have been subject to intense discussion following pressure from other countries. The situation has, however, changed as regards tax matters with the implementation of the automatic exchange of information.

Since the entry in force of the Financial Institutions Act of 2020 on 1 January 2020, wealth managers newly subject to supervision are to comply with a statutory duty of confidentiality (similar to banking secrecy; see above) towards their clients.

Besides the above, clients' data is also protected by the provisions of the Data Protection Act (DPA), which is generally in line with European legislation on data protection. Currently, the DPA is under revision in order – at least in theory – to harmonise it with the new data protection standards adopted by the EU (ie, the EU General Data Protection Regulation 2016/679 (GDPR) and EU Directive 2016/680). The revised DPA was adopted by the Swiss Parliament on 25 September 2020. At the time of writing, the implementing ordinances are currently being revised and the Swiss legislator has not yet published a time frame for the entry into force of the revised DPA and its implementing ordinances. It is worth noting that this reform, which will allow Switzerland to uphold its status as a country providing for an equivalent level of data protection and to be recognised as such by EU member states. The Swiss Federal Council currently anticipates an entry into force during the course of the second semester of 2022.

Scope

26 | What information and documents are within the scope of confidentiality?

Swiss banking (and professional) secrecy encompasses all information and documents that pertain to the contractual relationship between the bank (respectively the wealth manager) and its clients. That said, Swiss case law and scholars make it clear that purely internal notes and instructions of a bank (ie, not specifically relating to a client or containing client-identifying information) pertain to the bank's own private sphere and are not covered by banking secrecy.

Likewise, the contractual confidentiality provisions within asset management agreements usually cover a similar scope of information.

For the purposes of data protection, the term 'personal data' comprises any information that relates to an identified or identifiable person (ie, the data subject), it being understood that Swiss law adopts a 'relative' approach to the identification, in the sense that the ability to identify a data subject from the data is assessed relative to the person processing the data, by reference to legal means to access

other data that may be correlated to the dataset under review, and not merely based on the theoretical ability of any person to reverse engineer a dataset.

Expectations and limitations

27 | What are the exceptions and limitations to the duty of confidentiality?

Swiss banking (and professional) secrecy does not apply in certain exceptional situations. This is the case when a bank (or a regulated wealth manager) is under a disclosure of information duty to Swiss public or judicial authorities, in accordance with relevant Swiss procedural regulations. Further, communication of information for the purposes of consolidated supervision over a banking group to which a Swiss bank belongs (provided that such communication is necessary and fulfils further conditions) may be allowed despite banking secrecy. Finally, banks and other institutions subject to the FinIA are authorised to disclose client-related data provided the client has given his or her consent. To be valid, the secrecy waiver is to be expressly given in writing and the client is to be specifically informed on the consequences of such a waiver. Further, its scope is to be clearly defined.

In terms of data protection, the exceptions and limitations in relation to the processing or communication of personal data generally rely on the data subject's consent, a legal obligation or a prevailing public or private interest. Certain limitations also apply in the event of a transmission of data abroad, namely in the event that the foreign country to which the data is transmitted does not offer an adequate level of data protection.

Breach

28 | What is the liability for breach of confidentiality?

Under Swiss law, a breach of banking or professional secrecy is considered as a breach of the relationship with the client, and may give rise to criminal and civil liability.

The potential sanction for an intentional breach of banking and professional secrecy is a fine of up to 540,000 Swiss francs or a jail sentence of up to three years for the individuals involved. In cases where a pecuniary advantage was obtained for the individual involved or a third party through the breach, the potential jail sentence is up to five years or a fine. In the case of negligence, the sanction is a fine of up to 250,000 Swiss francs. Further, an intentional breach may be considered as an activity contrary to proper banking practice (article 3, paragraph 2(c) Banking Act). In practice, the Swiss bank and its management would run a risk of sanctions and may ultimately lead to the withdrawal of the Swiss banking licence, as well as personal bans from exercising any managerial roles in regulated entities for the individuals. The same considerations would apply in our view to wealth managers newly subject to supervision.

Finally, the Swiss bank or wealth manager would also incur a civil liability based on breach of contract towards its clients for any financial prejudice suffered by them as a result of the disclosure information. The extent of liability for breach of contract will depend on the terms of the contractual agreement, in particular any indemnification or limitation of liability provisions.

For the rest, the potential sanctions in the case of intentional breach of certain provisions of the DPA is a fine capped at 10,000 Swiss francs.

CROSS-BORDER SERVICES

Framework

29 | What is the general framework dealing with cross-border private banking services into your jurisdiction?

The regime for cross-border banking and wealth management activities is quite liberal in Switzerland. Foreign banks that operate on a strict cross-border basis (ie, by offering their services to Swiss clients without having a permanent presence in Switzerland) are not subject to any licensing requirements with the Swiss Financial Market Supervisory Authority (FINMA). If, however, their activities involve a physical presence in Switzerland on a permanent basis (ie, the existence of a permanent establishment in the form of a Swiss branch or Swiss representative office), this cross-border exemption is not available. In practice, FINMA considers a foreign bank to have a Swiss presence as soon as employees are hired in Switzerland. That being said, the regulator may also look at further criteria to determine whether a foreign bank has a Swiss presence.

Since 1 January 2020, the same principle as above applies to foreign independent wealth managers. The FinIA requires that foreign entities providing wealth management activities with a permanent presence in Switzerland request and obtain from FINMA a Swiss branch or representative office licence.

For the rest, the provision of wealth management services or any other financial services on a cross-border basis triggers the need to comply with the Financial Services Act of 2020 (FinSA) (and the Collective Investment Schemes Act, in the case of marketing of collective investment schemes), subject to limited exemptions for financial services provided on a reverse solicitation basis, for example.

Licensing requirements

30 | Are there any licensing requirements for cross-border private banking services into your jurisdiction?

In the event that a foreign bank (ie, an entity that: (1) benefits from a licence to conduct banking activities in its home jurisdiction; (2) uses the terms 'bank' or 'banker' in its corporate name, purpose or documentation; or (3) conducts banking activities) meets the presence test in Switzerland, it is to request, prior to exercising its activities, a licence with FINMA for the establishment of a branch or a representative office.

Among different licensing requirements, the principle of reciprocity is to be satisfied in the country in which the foreign bank has its registered office. This presupposes that a Swiss bank is entitled to establish a representative branch, office or agency in the relevant foreign country without being subject to substantially more restrictive provisions than those applicable in Switzerland.

The licensing requirements for Swiss branches or representative offices of foreign wealth managers may also include the principle of reciprocity to be satisfied, provided that FINMA requires so.

Finally, in the case of provision of financial services on a cross-border basis, the FinSA is to be complied with. In this context, client advisers (ie, individuals who actually provide financial services within a given institution or on their own) are to be registered with a specific register. This obligation also extends to client advisers of foreign financial services providers, unless a statutory exception applies. In this respect, the FinSO exempts client advisers of foreign financial institutions subject to prudential supervision in their home jurisdiction from the duty to register, provided that those target only institutional investors and/or per se professional investors (the latter excludes opted-out HNWI and private investment structures established for HNWI, which are not covered by this exemption according to the current interpretation expressed by the client advisers registers).

As at 18 May 2021, three registration bodies have been recognised by FINMA to manage the client advisers' register, namely BX Swiss AG, the Association Romande des Intermediaires Financiers and PolyReg Services GmbH.

Regulation

31 | What forms of cross-border services are regulated and how?

With the entry in force of the new FinIA and FinSA on 1 January 2020, foreign financial services providers acting on a cross-border basis in Switzerland or providing services to clients in Switzerland became subject to the rules of conduct, are to implement organisational measures and have to register client advisers in a public client advisers' registry.

Employee travel

32 | May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Employees of foreign private banking institutions or foreign wealth managers may travel to meet clients and prospective clients in Switzerland, provided this does not create a permanent presence in Switzerland and no activity of distribution of collective investment schemes is performed. In this context, certain non-regulatory restrictions, such as under immigration law, may apply.

Exchanging documents

33 | May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

No licensing or registration requirements apply as a matter of principle for the sending of documents to Swiss-resident clients, provided these do not constitute an offer or advertisement for collective investment schemes or other financial products, or the offer or provision of financial services (in which case, the FinSA provisions are to be complied with). However, pursuant to the Unfair Competition Act, commercial information sent to clients must not violate their privacy, nor use abusive, misleading or unfair methods.

TAX DISCLOSURE AND REPORTING

Taxpayer requirements

34 | What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

Swiss tax residents are to disclose to tax authorities, for the purpose of income and wealth taxes, private banking accounts both in Switzerland and abroad. The disclosure of Swiss banking accounts owned by foreign taxpayers depends on the applicable foreign tax law.

A Swiss withholding tax applies on Swiss source income (interest and dividends) payable on private banking accounts regardless of the residence of the taxpayer. Subject to certain conditions, foreign taxpayers may qualify for a partial or total exemption of such tax in application of a double tax treaty between Switzerland and their country of residence.

Reporting requirements

35 | Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Specific requirements apply to Swiss banks for US taxpayers in application of the Agreement between Switzerland and the United States for Cooperation to Facilitate the Implementation of the Foreign Account Tax Compliance Act (FATCA) and its implementing Act and Ordinance. Under this regime, banks are to report account details directly to the US tax authorities, provided the consent of the US taxpayer concerned is given (FATCA Model 2). In the absence of such consent, financial institutions are allowed to disclose data only through administrative assistance channels. On 8 October 2014, the Federal Council adopted a specific mandate to discuss with the US a changeover to Model 1 (ie, automatic exchange of information through the Swiss tax authorities). At present, it is still unknown when the new agreement introducing a Model 1 IGA arrangement will be implemented with the United States. Since 20 September 2019, group requests within the FATCA framework and with respect to facts having taken place from 30 June 2014, are now allowed under the protocol modifying the double taxation treaty between Switzerland and the United States. In this context, the Internal Revenue Service may request information on reported accounts with Swiss financial institutions in an aggregated form.

With the implementation of the automatic exchange of information, Swiss banks have become subject to new obligations imposed by the legal framework that relies on the Common Reporting and Due Diligence Standard elaborated by the Organisation for Economic Co-operation and Development, as transposed into Swiss law or in an international agreement. They are to collect and exchange foreign clients' information (ie, taxpayers' name, address, date and place of birth, account number, taxpayers' identification number and account balance or value, and information on income and the beneficial owners) with Swiss tax authorities, who in turn transmit the information to the tax authorities of the country of residence of the taxpayers, which have an agreement in place with Switzerland in this respect. To date, Switzerland has implemented the automatic exchange of information with about 100 partner states and territories, including all member states of the EU.

Finally, for the time being, no reporting or disclosure duty exists in relation to Swiss taxpayer clients of Swiss financial institutions.

Client consent on reporting

36 | Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

Under Swiss law, customer data obtained within a banking relationship (or a wealth management relationship with a regulated wealth manager) is subject to banking, respectively, professional secrecy, which prohibits, in principle, the disclosure of such data to third parties. As a result, the US taxpayer's consent is required for the disclosure of information in accordance with the FATCA regime. Under Swiss law, the consent given in this context may be revoked at any time, with only limited caveats under the FATCA implementing legislation (ie, revocation only effective for the subsequent financial reporting year). The consequence of such a revocation is that the banking institution (or the wealth manager) is no longer allowed to disclose customer data. No retroactive effect may apply in this context, unless otherwise agreed by both parties.

With the introduction of the automatic exchange of information, the scope of the Swiss banking secrecy has been further reduced in tax-related matters (tax transparency principle prevailing), insofar as

customer consent is no longer required for this purpose given that the disclosure of data to the Swiss tax authorities is provided for by law.

STRUCTURES

Asset-holding structures

37 | What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

In general, Swiss-resident clients hold individual accounts with Swiss banks. In certain cases, Swiss residents may hold their assets through a holding company in the form of a Swiss corporation. That being said, there is no particular benefit to do so under Swiss law, with the exception of certain investments, such as in the private equity sector, to benefit from some tax deferrals through such structuring.

By contrast, foreign clients usually hold their assets either through individual accounts or structure accounts. The latter comprises accounts owned by: (1) offshore private investment companies with or without an overlying foreign trust or foundation; (2) trustees (in the case of a trust); or (3) foundations. The risks associated with the holding of assets in this manner depend on the applicable foreign tax law. The costs depend on the providers offering administration services in relation to these structures.

Know-your-customer

38 | What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

If the contracting party is a domiciliary company (this term includes foundations (trustees of) trusts, fiduciary companies or similar associations that do not exercise any business activities), financial intermediaries are to identify their beneficial owners or beneficiaries. In this case, the contracting party is to confirm in writing the name, date of birth, nationality and domicile of the beneficial owner or beneficiary. As regards trusts, financial intermediaries are further to: (1) collect the same information on the settlor (effective and not fiduciary); (2) record the characteristics of the trust (eg, revocable, discretionary etc); and (3) identify the trustee and the protector of the trust. Likewise, in the event that the contracting party is a foundation, the financial intermediary is to collect the above information not only as regards the beneficiary but also in relation to the founder (effective and not fiduciary).

Following the latest Financial Action Task Force (FATF) mutual evaluation report on Switzerland, the Financial Market Supervisory Authority (FINMA) decided to further revise the FINMA AML Ordinance to eliminate certain shortcomings identified in Swiss legislation and the revised text entered into force on 1 January 2020. The revision has notably strengthened financial intermediaries due diligence duties in relation to domiciliary companies or complex structures and reduced the threshold for identification measures for cash transactions to the FATF level of 15,000 Swiss francs.

Controlling person

39 | What is the definition of controlling person in your jurisdiction?

Swiss financial intermediaries are to establish the identity of the beneficial owners of operating companies and partnerships (ie, controlling person). Under the Anti-money Laundering Act (AMLA), a controlling person is defined – in accordance with the FATF standards and recommendations – as the individual holding 25 per cent of the share capital

or voting rights or controlling the company in any other manner. In the event that no beneficial owner can be identified, the identity of the most senior member of management of the entity is to be recorded for this purpose. In this context, the contracting party of the financial intermediary is to confirm in writing the name and the address of the controlling person.

Structures listed on a stock exchange, as well as entities owned by such structures, are not subject to such identification requirements.

With respect to trusts, foundations and similar arrangements, the concept of controlling person tracks the FATF Recommendations and includes the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.

Obstacles

40 | Are there any regulatory or tax obstacles to the use of structures to hold private assets?

There are no regulatory obstacles to the use of structures to hold private assets. From an anti-money laundering perspective, the use of an offshore structure is a high-risk indicia, unless there is a clear business rationale for the recourse to such a structure.

The potential tax obstacles to this use depend on the tax legislation of the country of residence of the taxpayers, as well as of the structures. For Swiss individual taxpayers, depending on the type of private assets involved (eg, securities portfolio), the use of a holding company would typically not make sense from a pure tax perspective, given that private capital gains are not taxable in Switzerland, whereas dividends from a structure would be. However, there may be other objectives for using a structure that outweigh any tax considerations, including liability limitation (eg, venture capital investments), holding organisation and reinvestment planning, estate planning, asset protection and the like.

CONTRACT PROVISIONS

Types of contract

41 | Describe the various types of private banking and wealth management contracts and their main features.

Private banking and wealth management contracts may take different forms, depending on the activities performed by the bank or the independent asset manager.

Asset management contracts are usually defined as mandate agreements where the client grants the bank or the independent asset manager a power of attorney to manage his or her assets on a discretionary or non-discretionary basis. Such contracts, when concluded with a bank or another entity subject to supervision, are to comply with certain regulatory and self-regulatory requirements.

Independent asset managers or banks may also render purely advisory services on the basis of advisory mandate agreements (which are considered as financial services under the Financial Services Act of 2020 (FinSA)). In this context, the client is advised in his or her own investment decisions or benefits from recommendations in relation thereto. This type of agreement is not subject to specific regulatory provisions (except those contained in the FinSA) and essentially obeys to the general provisions of the Swiss Code of Obligations (SCO) applicable to mandate agreements.

In the absence of an asset management or advisory agreement, financial intermediaries usually have an execution-only relationship with their clients. Their activities are thus limited to the execution of clients' instructions.

In practice, Swiss banks and asset managers provide in their contractual documentation that the relationship is governed by Swiss law. In an international context, such a choice of law is valid under the Swiss Private International Law Act (PILA), provided that the contract is not characterised as a consumer contract (ie, a contract pertaining to goods or services of ordinary consumption intended for personal or family use that is not connected with the consumer's professional or business activity). Should this be the case, the contract must be governed by the law of the state of the consumer's habitual residence if:

- the financial intermediary has received the request as regards the conclusion of the contract in that state;
- the contract was entered into after an offer or advertising in that state and the consumer undertook the necessary steps for the conclusion of the contract in that state; or
- the consumer was solicited to go to a foreign state to conclude the contract.

Only private banking and wealth management contracts related to services of ordinary consumption may be considered as consumer contracts, which considerably limits the scope of application of the above principle. According to certain Swiss scholars, private banking and wealth management contracts do not fall within this definition.

Liability standard

42 | What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Under Swiss law, whoever causes damage, either intentionally or by negligence, may occur civil liability based on both tort or breach of contract. The claimant is to prove the existence of:

- an unlawful act, respectively, a breach of contract;
- damage;
- a causal link between the unlawful act, respectively, the breach of contract and the damage; and
- a fault of the defendant.

In the case of breach of contract, the fault of the other party is presumed and must be rebutted by the latter.

Notwithstanding the above, parties may contractually limit their civil liability within the limits set forth in article 100 SCO. Under this article, an agreement according to which liability for unlawful intent or gross negligence would be excluded is null and void. In addition, a waiver of liability for simple negligence may be considered to be null and void at the discretion of the judge if, inter alia, the liability arises out of the conduct of a business that is carried on under an official licence (eg, banking licence according to Swiss case law; which should apply in our view to wealth managers newly subject to supervision). By contrast, a bank (or a regulated wealth manager in our view) may exclude its liability in the case of simple negligence committed by its representatives or agents. As a result, banks usually provide in their general terms and conditions that they may be held personally liable only in the event of wilful misconduct or gross negligence.

Mandatory legal provisions

43 Are any mandatory provisions imposed by law or regulation in private banking or wealth management contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

From a contractual law perspective, the SCO provides for a right for either party to a mandate agreement to terminate the contractual relationship at any time with immediate effect. Such a provision is of mandatory nature may not be contractually varied.

On the topic of the retrocessions paid by third parties within asset management activities (ie, inducements), pursuant to Swiss case law, private banks and asset managers are entitled to retain retrocessions and other distribution fees they receive in connection with their mandate only on the basis of a comprehensive waiver based on an informed consent of the client. In all other circumstances, the client is entitled to such retrocessions and fees. Those principles were implemented in the new FinSA, according to which the disclosure requirement further applies irrespective of any mandate relationship (ie, including in case of 'execution only' transactions). As a result, receiving retrocessions is allowed as long as the recipient specifically discloses those retrocessions, obtains the client's consent and provides detailed information upon the client's request.

For the rest, banks are subject to the Portfolio Management Guidelines issued by the Swiss Bankers Association and recognised by the Swiss Financial Market Supervisory Authority as the minimum standard in accordance with Circular 01/2009. In a nutshell, both Guidelines:

- provide that asset management agreements are to be in writing (including any equivalent electronic form);
- impose on asset managers certain duties of care, loyalty and information in relation to their clients, as well as a duty to comply with a fit and proper test; and
- require that the agreements specify the terms of the remuneration of the service provider. In practice, the Guidelines enacted by SROs for independent asset managers contain similar provisions.

Limitation period

44 What is the applicable limitation period for claims under a private banking or wealth management contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The applicable limitation period for claims depends on the type of civil liability the bank or the independent asset manager may face.

As a rule, the general limitation period for the initiation of proceedings in contractual matters is 10 years. That being said, claims for interests are time-barred after five years. As far as asset management agreements are concerned, it worth noting that the Swiss Supreme Court has clarified that the statute of limitations applicable to claims based on the restitution of inducements is 10 years after the receipt by the service provider of the inducements in question.

With respect to tort or unlawful enrichment, the statute of limitations is one year from the date on which the concerned person gained knowledge of the damage or, respectively, of its right to ask for restitution, but, in any event, 10 years from the day when the harmful act took place.

Under Swiss law, the limitation period may be varied provided that, inter alia, a potential reduction of the period does not unfairly jeopardise the rights of the creditor. Further, subject to certain exceptions, one may waive in advance the applicable limitation period.

The running of the statute of limitations is interrupted by debt enforcement proceedings, an application for conciliation, the commencement of a court action or raising an objection before a court or arbitral

tribunal, or a petition for bankruptcy. Where a claim is interrupted, a new limitation period starts to run. By contrast, the limitation period does not start running and, if it has begun, is suspended, inter alia, for as long as the claim cannot be brought before a Swiss court.

DISPUTES

Competent authorities

45 What are the local competent authorities for dispute resolution in the private banking industry?

Civil courts are usually competent for dispute resolution in the private banking industry. The general terms and conditions of banks, as well as asset management agreements concluded with wealth managers, provide, in principle, that the civil courts of the canton where these are located are competent to review the matter. However, that consumers within the meaning of the Swiss Code of Civil Procedure, the Private International Law Act, or the Lugano Convention may bring their action before the canton or the country of their residence.

The procedure in Switzerland is governed by the Civil Code of Procedure and usually starts with a request for a conciliation hearing with the competent civil court. That being said, in the event, inter alia, the value in dispute exceeds 100,000 Swiss francs, the parties can jointly waive the conciliation proceedings and submit their dispute directly to the competent civil court.

The action before the court is open with the filing of a written statement of claim. Upon receipt of the advance on the costs, the court notifies the statement of claim to the defendant. The latter is to file a statement of defence in turn. Depending on the complexity of the matter and other criteria, hearings or other rounds of written briefs take place. In this context, the parties submit their evidence or request for evidence (eg, witness hearing). After this phase, the court renders its judgment, which is subject to appeal.

In Switzerland, clients of Swiss banks may lodge a complaint with the Swiss Banking Ombudsman, which is supported by the Swiss Banking Ombudsman Foundation, established by the Swiss Bankers Association. The Swiss Banking Ombudsman acts as a mediator with the objective to settle conflicts and avoid legal proceedings between banks and their clients. Ombudsman services are free of charge for banks' clients. Concurrently, the Ombudsman is responsible for the Central Claims Office in relation to dormant assets.

Notwithstanding the above, under the new Financial Services Act of 2020, financial service providers are to be affiliated to a mediation body. As a matter of principle, disputes with their clients are to be referred to this body for a mediation procedure (which does not preclude the parties from initiating civil proceedings). As at 18 May 2021, nine mediation bodies have been recognised by the Federal Department of Finance. Some recognition procedures are still ongoing and that it is still possible for other mediation offices to apply for recognition with the Federal Department of Finance. Financial services providers, such as wealth managers both acting in Switzerland and on a cross-border basis must have registered with a mediation body at the latest on commencing their activity, subject to exemptions.

Disclosure

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

Private banking disputes are usually disclosed in the audit reports drafted by the regulatory auditors of banks to the Financial Market Supervisory Authority (FINMA)'s attention. In addition, banks and licensed wealth managers are to report immediately to FINMA,

respectively the supervisory organisation, any incident of substantial interest, as well as any changes affecting the ongoing licensing requirements or having an impact on the fit and proper test (ie, guarantee of irreproachable activity).

Separately, a client may file a complaint with FINMA, which has full discretion as to whether to initiate a formal investigation for the purposes of its regulatory supervision. In this context, the complaining client will not be party to any administrative action that FINMA may take and such client will not have any right to be informed or take part in the proceedings (administrative enforcement case).

UPDATE AND TRENDS

Recent developments

47 Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

On 1 January 2019, a new type of licence, the 'fintech licence', was introduced into the Swiss regulatory framework for companies accepting public deposits but not using those deposits to finance a traditional banking activity (ie, lending to business). Where this is the case, the aggregate amount of public deposits is limited to 100 million Swiss francs and may neither be invested nor interest-bearing. This new fintech licence involves less stringent regulatory requirements than a full banking licence, and leaner minimal capital requirements apply. In December 2018, the Swiss Financial Market Supervisory Authority (FINMA) issued its guidelines for fintech licence applications, which highlight the information and documents that an applicant must submit when applying for such authorisation.

Over the past couple of years, FINMA has further been focusing on new forms of capital raising by start-ups in the form of initial coin offerings (ICOs), token-generating events and token sales. Due to the increase of companies using such business models, FINMA published on 16 February 2018 its guidelines for enquiries regarding the regulatory framework for initial coin offerings. The Guidelines are intended to provide more transparency regarding FINMA's practice on this topic but also to allow it to streamline enquiries as regards possible or existing ICO launches. On 11 September 2019, FINMA published a supplement to its ICO guidelines outlining the treatment of 'stable coins'. As a matter of fact, the requirements under supervisory law differ depending on which assets (eg, currencies, commodities, real estate or securities) the 'stable coin' is backed by and the legal rights of its holders.

On 25 September 2020, the Swiss Parliament adopted certain amendments to the existing Swiss legislation aiming at recognising a new type of dematerialised securities, based on distributed ledger technology or similar technologies, and at adapting the financial infrastructure laws to be compatible with such new financial instruments (the DLT Act). This DLT Act provides for the recognition of the tokenisation of assets such as shares, bonds and other financial instruments and will allow issuers to raise capital through tokenised debt or equity issuances. Further, it improves the legal certainty of the treatment of crypto-based assets in an insolvency context by providing that such assets be segregated in the event of a bankruptcy or an insolvency of intermediaries or custodians holding such assets, provided certain minimal requirements are complied with. On 1 February 2021, the parts of the DLT Act aiming at introducing the concept of DLT-based securities into Swiss law (through a revision of the Swiss Code of Obligations, the Federal Intermediated Securities Act and the Federal Act on International Private Law) entered into force. The remaining amendments affecting the financial infrastructure laws (eg, the new authorisation relating to a

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DLT trading facility, as well as improvements of client protection in the case of bankruptcy as regards crypto-assets) are set to enter into force on 1 August 2021.

Finally, it worth noting that FINMA enacted in May 2020 its Communication 05/2020 on the obligation to notify cyber-attacks. In this communication, the regulator specifies the notification duties imposed on financial intermediaries subject to its supervision with the introduction of short-term deadlines to report cyber-attacks events (as part of their duty to report significant events). This specific communication has been triggered by the 2020 pandemic crisis, which increased the number cyber-attacks in the financial sector.

The Swiss banking regulatory framework is expected to remain in a state of flux for the years to come with changes aiming at equally strengthening client protection and promoting innovation in the financial sector.

The year 2021 is also expected to lead to developments in the field of sustainable finance. On 24 June 2020, the Federal Council adopted a report and guidelines on sustainability in the financial sector aiming at strengthening Switzerland's position as a leading location for sustainable finance. Similarly, in June 2020, the Swiss Bankers Association also published guidelines for the integration of environment, social or governance (ESG) considerations into the advisory process for private clients. Although these recommendations are currently non-binding, it is expected that the coming years will see further developments in this regard under the impulse of the European Union. In this context, it is worth noting that the Federal Council announced on 11 December 2020 that the recommendations of the Task Force on Climate-related Financial Disclosures would be implemented into Swiss law in the form of binding requirements and has already recommended financial market

participants to publish methods and strategies taking into account climate and environmental risks when managing their clients' assets, in accordance with the existing legal duties of loyalty and diligence. In addition, the State Secretariat for International Finance was given the mandate to examine how to address the issue of greenwashing in the financial industry (ie, misleading statements on sustainable investments and their impact on ESG matters). Legislative proposals are expected to be presented by the end of 2021.

* *The authors gratefully acknowledge the assistance of Maria Chiriaeva with last year's chapter.*



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