Banking Regulation

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2019

GETTING THE DEAL THROUGH

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Banking Regulation 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Banking Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 Sweden.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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, Richard K Kim of Wachtell, Lipton, Rosen & Katz, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Switzerland

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Lenz & Staehelin

Regulatory framework

1 What are the principal governmental and regulatory policies that govern the banking sector?

The Swiss banking sector is subject to official supervision.

From a Swiss perspective, a banking activity means the taking of deposits from the public (or by way of refinancing from other banks) for the purpose of financing a large number of persons or entities. Banking activities may only be conducted in or from Switzerland if the relevant entity has been granted a licence by the Swiss Financial Market Supervisory Authority (FINMA).

FINMA grants the licence to the legal entity pursuing the banking activities (but not to managers or shareholders). The various criteria to be complied with in order to obtain a licence are set out in the Federal Banking Act. Among other things, the applicant must establish that the persons entrusted with its management enjoy a good reputation and thereby assure the proper conduct of business operations (ie, guarantee of irreproachable activity). If, at a later stage, any of the licence requirements are no longer satisfied, FINMA may take administrative measures, including, in extreme cases, the withdrawal of the banking licence.

One of the most highly publicised aspects of Swiss banking regulation is Swiss banking secrecy. Disclosure of information pertaining to the client–bank relationship is prohibited under the Federal Banking Act. Banking secrecy rules encompass all data that pertain to the contractual relationship between the bank and its clients. Disclosure means communication to any third party, including the parent company of the bank as well as the supervisory authority of this parent company or any other affiliate. As a matter of principle, any disclosure amounts to a breach of banking secrecy and may trigger administrative and criminal sanctions, as well as civil liability, for the bank concerned. Exceptions apply under certain circumstances, for instance, in the context of consolidated supervision over an international banking group or pursuant to a formal request issued by Swiss public authorities (acting, as the case may be, based on a request for international judicial or administrative assistance issued by a non-Swiss public authority, including foreign financial intelligence units for anti-money laundering (AML) purposes). Since 1 January 2017, the situation has, however, changed with the implementation of the automatic exchange of information (see question 6).

2 Summarise the primary statutes and regulations that govern the banking industry.

The Federal Banking Act is the main statute governing the conduct of banking activities in, or from, Switzerland. The provisions of the Federal Banking Act have been detailed in several implementing ordinances issued by the Swiss government (Swiss Federal Council) and by FINMA. Furthermore, FINMA issued a series of circulars setting out its interpretation of the regulatory framework. These regulations are complemented by the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), which can be considered as a framework law governing the supervisory activities and instruments of FINMA.

As a rule, Swiss banks are also licenced as 'securities dealers'. Securities dealing activities are governed by the Swiss Federal Act on Stock Exchanges and Securities Trading (SESTA), as well as the Financial Markets Infrastructure Act (FMIA) and their respective implementing ordinances. From a Swiss perspective, 'securities dealing' refers to five broad categories of activities, namely:

- issuing houses;
- derivative suppliers;
- market makers;
- brokers operating on a short-term basis for their own accounts; and
- brokers acting in a professional manner for the account of their clients.

Swiss banks also qualify as 'financial intermediaries' within the meaning of the Swiss anti-money laundering legal framework and, as such, fall within the ambit of the Federal Anti-Money Laundering Act (AMLA) and its implementing ordinances.

A Swiss bank may also serve as custodian for collective investment schemes. This type of activity is subject to the Collective Investment Scheme Act and its implementing ordinances.

Furthermore, the organisation and operation of financial market infrastructures are governed by the Financial Market Infrastructure Act (FMIA), which also sets out the general requirements regarding market behaviour rules.

Finally, the Swiss banking sector has a long tradition of self-regulation by industry-sponsored organisations. The Swiss Bankers Association and the Swiss Funds and Asset Management Association regularly issue self-regulatory guidelines to their members, which FINMA recognises as minimum standards that need to be complied with by all Swiss banks. This is particularly true regarding the duty of due diligence in identifying the contracting party and the beneficial owner (Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence), the rules of conduct for securities dealing and the guidelines governing portfolio management.

3 Which regulatory authorities are primarily responsible for overseeing banks?

FINMA is the supervisory authority in charge of supervising, in particular:

- banks;
- securities dealers;
- collective investment schemes and their managers;
- insurance companies; and
- other financial intermediaries for anti-money laundering purposes.

Systemic risks are in turn addressed by the Swiss National Bank. FINMA and the Swiss National Bank have agreed on principles to coordinate their respective tasks.

4 Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

As a general rule, deposits with Swiss banks are not insured by any public authority in Switzerland.

Special rules apply to cantonal banks; namely, banks that are controlled by a Swiss canton (at least one-third of the capital and voting rights must be held by a Swiss canton in order for a bank to be characterised as 'cantonal'). The relevant cantonal legislation will specify to what extent the liabilities incurred by a cantonal bank are insured by the concerned canton.

In addition, the Federal Banking Act provides for a privileged deposit system in case a bank or securities dealer is declared bankrupt. Deposits totalling 100,000 Swiss francs per client are regarded as privileged deposits. Deposits held by a Swiss bank of a foreign bank are also protected by the depositor protection system. As a first step of the system, privileged deposits are immediately paid out from the remaining liquidities of the bankrupt bank. If the institution's available liquidity does not cover all privileged bank deposits, that is, 100,000 Swiss francs per client, the depositor protection scheme is used as a second step. In this context, all Swiss banks are under an obligation to participate in a deposit-protection scheme that aims at securing the payment of privileged bank deposits. Such deposits also rank in a privileged class in the bankruptcy estate of a Swiss bank. The deposit-protection scheme is limited to a maximum aggregate amount of 6 billion Swiss francs. Banks are required to secure preferential deposits by claims against third parties secured in Switzerland, or by assets in Switzerland, for a total amount corresponding to at least 125 per cent of the preferential deposits they hold. FINMA may increase this amount or grant derogations.

The Federal Banking Act includes in addition specific provisions on reorganisation procedures, prompter repayment of preferential deposits and the continuation of basic banking services during insolvency proceedings.

It should be noted that, unlike cash deposits in bank accounts, assets such as shares, units in collective investment schemes and other securities held in custodial accounts are client property, and in the event of bankruptcy of the bank, such assets are ring-fenced in their entirety and released to clients.

On 15 February 2017, the Swiss Federal Council instructed the Federal Department of Finance (FDF) to prepare a consultation draft aiming at strengthening the current deposit protection scheme on the basis of the recommendations of the group of experts on further development of financial market strategy and the ongoing discussions between the State Secretariat for International Financial Matters, FINMA and the Swiss National Bank on this issue. In this context, the Swiss Federal Council has retained a certain number of measures that are to be implemented in the proposed draft. Namely, in case of bankruptcy, Swiss banks would have to payout cash deposits within seven business days, which is in line with international standards. The consultation draft is expected to be submitted for consultation in the first quarter of 2019.

At present, FINMA considers that the two largest Swiss banks, Credit Suisse and UBS, have improved their crisis resistance over the years by establishing detailed recovery and resolution plans and implementing the necessary organisational measures. For example, both Credit Suisse and UBS now have a non-operating holding company acting as their respective group parent and have transferred their Swiss-based systematically important functions to separate subsidiaries. That said, according to FINMA, further steps are to be undertaken to reduce financial and operational dependencies that persist in the groups. Both banks have to submit for FINMA's review viable emergency plans by 2019, to address, inter alia, this issue.

5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

Swiss banking law does not provide for limitations that expressly apply to transactions between a bank and its affiliates. A bank's transactions with its affiliates may, however, fall under the general limits imposed on a bank's risk exposure towards a single counterparty (or a group of related counterparties) for diversification purposes. Risk exposure towards one single counterparty or a group of related counterparties exceeding 10 per cent of the bank's capital is to be monitored by the bank and, under certain circumstances, reported to FINMA. As a rule, such risk concentrations cannot exceed 25 per cent of the bank's overall capital. With effect from 1 January 2019, the revised Capital Adequacy Ordinance (CAO) provides that risk concentrations will be measured only according to core capital (tier 1), as supplementary capital (tier 2) will generally not be taken into account. FINMA Circular 2019/1 'Risk diversification – banks' has been revised to reflect these changes and entered into force on 1 January 2019.

Under Swiss banking laws, entities are considered 'affiliates' if they are linked through a controlling relationship (ie, directly or indirectly held with more than 50 per cent of the voting rights or capital or dominated in any other manner) or by a factual or legal obligation to assist.

It is worth noting that a financial group or conglomerate, which comprises a Swiss bank or securities dealer or is effectively managed from Switzerland, may be subject to the consolidated FINMA supervision. In this context, intra-group positions of a Swiss bank would, in principle, fall within the limits imposed on single-risk positions for diversification purposes. Only risk positions towards fully consolidated 'affiliates' may, under certain circumstances, be exempted from these limits.

In terms of capital adequacy requirements (see question 16), the Swiss Federal Council adopted in November 2018 an amendment to the CAO providing for the introduction of gone concern capital requirements for the domestically focused SIFIs (ie, PostFinance AG, Raiffeisen and Zürcher Kantonalbank). These requirements entered into force on 1 January 2019. The amended CAO also provides for new rules for the treatment of systemically important banks' stakes in their subsidiaries. In this context, the same regime now applies to domestically focused SIFIs as to Credit Suisse and UBS. This regime provides, inter alia, for an abolition of the full deduction of parent companies' positions held in subsidiaries from core equity capital and of the accompanying relief measures allowed and for their replacement with the implementation of a risk weighting with weights up to 250 per cent with respect to positions in Swiss-based subsidiaries and 400 per cent with respect to positions in foreign subsidiaries. These requirements relate to the parent companies' capital ratios only, to the exclusion of consolidated ratios.

6 What are the principal regulatory challenges facing the banking industry?

In our view, the principal regulatory challenges facing the Swiss banking industry may be summarised as follows.

Banking secrecy and administrative assistance

On 13 March 2009, the Swiss Federal Council announced that Switzerland would adopt the Organisation for Economic Cooperation and Development (OECD) standard on administrative assistance in tax matters, in accordance with article 26 of the OECD Model Tax Convention. This amendment would in turn allow the lifting of Swiss banking secrecy in situations where suspicions of tax non-compliance exist. The Swiss government, therefore, started the renegotiation of the network of double-taxation agreements to which Switzerland is a party. In June 2010, the Swiss parliament had already approved the first 10 double-taxation agreements integrating article 26 of the OECD Model Tax Convention. To date, 51 double-taxation agreements have been signed and have entered into force. As a result of this process, the distinction between tax fraud and tax evasion is no longer relevant in the context of international assistance.

In parallel, on 19 November 2014, the Swiss Federal Council approved a declaration aimed at joining the Multilateral Agreement on the Automatic Exchange of Information in Tax Matters developed by the OECD. On 5 June 2015, the Swiss Federal Council adopted the dispatches on the OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters and on the Federal Act on Automatic Exchange of Information (AEOI Act). Both drafts, as well as the Multilateral Agreement on the Automatic Exchange of Information in Tax Matters, were approved by the Swiss parliament on 18 December 2015. Following this, the Swiss Federal Council adopted the relevant implementing ordinance (AEOI Ordinance) on 23 November 2016. Both the AEOI Act and the AEOI Ordinance finally entered into force on 1 January 2017. As a result, Switzerland's first exchange of information started in 2018 regarding information from 2017 between the relevant foreign countries (including all EU member states, in accordance with the agreement of 27 May 2015 regarding the amendment to the EU Savings Tax Agreement with Switzerland).

In January 2016, FINMASA was amended to allow, under certain circumstances and under FINMA supervision, regulated entities to directly transmit non-public information to foreign financial market supervisory authorities responsible for their supervision, provided the prerequisites for granting international administrative assistance would be fulfilled and client and third-party (confidentiality and banking secrecy) rights are preserved. Following the entry into force of this revision, FINMA has enacted a new Circular 2017/6 'Direct transmission', which sets out under which criteria supervised institutions may directly transmit non-public information to foreign authorities and entities. This Circular entered into force on 1 January 2017.

Anti-money laundering regulation and implementation of the latest Financial Action Task Force recommendations

Between 2013 and 2014, the Swiss government amended AMLA with a view to adapting it to the revised Financial Action Task Force (FATF) recommendations. The entry into force of the revised AMLA took place in two stages; first in July 2015 and then in January 2016. The revision included, inter alia:

- the obligation for financial intermediaries to establish the identity of the beneficial owner(s) of unlisted operating companies (ie, individuals holding 25 per cent of the share capital or voting rights or controlling the company in any other manner) or, if no beneficial owner can be identified, the identity of the most senior member of management; and
- a two-stage mechanism following the reporting of suspicions to the Money Laundering Reporting Office (MRO) of the Swiss Federal Office of Police, which requires the monitoring of the concerned account by the financial intermediary, for a period up to 20 days during the analysis of the case by the MRO, to suspend any transaction that may result in preventing the confiscation of the concerned asset, followed, if the case is transferred to a criminal prosecution authority, by the implementation of a full freeze on the account for five days until the decision to maintain the freeze is made by the criminal authority.

In the above context, the provisions of the FINMA AML Ordinance of 8 December 2010 and the AML Ordinance of 11 November 2015 were partially revised in order to align them with the revised AMLA. The revised provisions also entered into force on 1 January 2016. In parallel, the Swiss Bankers Association published the 2016 version of its Agreement on the bank's code of conduct with regard to the exercise of due diligence (CDB), which entered into force on the same day. Finally, the revised FINMA AML Ordinance and the CDB introduced 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 entered into force on 18 March 2016. FINMA Circular 2016/7 has been partially revised on 17 July 2018 to take into account the latest developments in technology. A transitional period ending on 1 January 2020 will apply in order to grant sufficient time to market participants to adjust their processes. Generally, one of the main purposes of this circular is to clarify and facilitate video and online client identification for financial intermediaries, subject to know-your-customer duties (see Update and trends).

Following the latest FATF assessment of the Swiss AML legal framework, FINMA has decided to further revise the FINMA AML Ordinance in order to address certain remaining shortcomings identified by the FATF, as well as to implement FINMA's practice in this area. The revised FINMA AML Ordinance will enter into force on 1 January 2020 and introduces, inter alia, more detailed requirements for global monitoring of AML risks. It specifies the risk management measures that must be put in place if domiciliary companies or complex structures are used or if there are links with high-risk countries. Further, FINMA has reduced the threshold for identification measures for cash transactions from 25,000 Swiss francs to the level set by the FATF (ie, 15,000 Swiss francs). In parallel, the Swiss Bankers Association published a revised Swiss banks' code of conduct with regard to the exercise of due diligence that will come into force on 1 January 2020. This document sets out the duties of the banks relating to the identification of contracting parties as well as the identification of controlling parties or beneficial owners. The updated version will be in line with both the revised FINMA AML Ordinance and the revised FINMA Circular 2016/7 on video and online identification.

Outsourcing projects

Outsourcing by banks, securities dealers, as well as insurers will be governed from 1 April 2018 by FINMA Circular 2018/3 'Outsourcing – banks and insurers'. This new Circular 2018/3, which replaces the current FINMA Circular 2008/7, lays down the requirements applicable to the outsourcing of significant functions (ie, functions having a material effect on compliance with the aims and regulations of financial market legislation). It should be noted that FINMA has aligned this new text to reflect not only its principle-based approach, but also its technology-neutral approach enabling financial institutions to comply with outsourcing requirements, irrespective of their business model. FINMA has further clarified the rules governing the outsourcing of risk management and compliance functions. One of the main changes is that financial institutions are to maintain an inventory of all outsourced services and to assess on their own (self-assessment) whether those are linked to significant functions. Further, any outsourcing outside Switzerland requires that financial institutions make sure that all necessary data for reorganisation, resolution and liquidation purposes remain accessible in Switzerland at all times. Finally, it is worth noting that this new Circular 2018/3 partially applies to intra-group outsourcing projects. The intra-group nature of such projects is to be taken into consideration within the risk assessment to be performed by financial institutions. This new Circular provides for a transitional period up to five years.

New proposed Swiss legislation on financial services and financial institutions

On 15 June 2018, the Swiss parliament enacted the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA). Both statutes will enter into force on 1 January 2020. While the purpose of the FinIA is to provide a 'new legal framework' governing all financial institutions, the objective of the FinSA is to regulate financial services in Switzerland, whether performed in Switzerland or on a cross-border basis. On 24 October 2018, the Swiss Federal Council opened up a consultation procedure on the implementing provisions for the FinSA-FinIA, namely the Financial Services Ordinance (FinSO) and the Financial Institutions Ordinance (FinIO). The consultation was to last until 6 February 2019, after which time it is expected that FINMA will also publish implementing ordinances that will enter into force on 1 January 2020, along with the FinSA, FinIA, FinSO and FinIO.

The introduction of the new FinSA-FinIA will, inter alia, involve the following key changes to the current Swiss regulatory framework:

- under the proposed legislative framework, financial services and institutions will be governed in Switzerland by a general set of regulations on the supervision of financial services, embodied in the FinSA, the FinIA and the FMIA;
- the FinSA introduces an obligation for foreign services providers, which would be subject to an authorisation in Switzerland, to register, as a prerequisite to providing financial services in Switzerland;
- the FinSA introduces categorisation rules based on the European Union concept of 'professional clients' and 'private clients';
- the FinSA also introduces market conduct rules, including the obligation to verify the appropriateness and suitability of financial services, as well as inducements and transparency rules (integrating into the FinSA the most recent case law of the Swiss Supreme Court as regards the transparency and consent requirements for a financial institution to keep trailer fees);
- the FinSA further introduces uniform prospectus rules that generally shall apply to all securities offered publicly into or in Switzerland, as well as a change of paradigm in the enforcement of the claims of investors against financial institutions; and
- the FinIA provides that independent asset managers who are currently not subject to prudential supervision will be newly supervised. Although they will not be directly subject to FINMA supervision, their supervision will be conducted by independent supervisory organisations approved and monitored by FINMA.

Financial market infrastructure

The FMIA, including its implementing ordinances (FMIO and FMIO-FINMA), entered into force on 1 January 2016. The purpose of this statute is twofold:

- first, from a formal perspective, the FMIA aims at achieving consistency by gathering in one single statute all existing provisions related to the organisation and operation of market infrastructures, including conduct of business rules (eg, shareholding disclosures); and

- second, it aims at harmonising Swiss financial legislation with international recommendations and standards (including the EU's MiFID 2, MiFIR and EMIR), in particular, regarding the regime applicable to negotiation platforms, central counterparties, central securities depositories, payment and securities settlement systems and derivatives trading.

The introduction of the FMIA involved, inter alia, the following key changes to the Swiss regulatory framework:
- the introduction of a licensing regime similar to the one applied to stock exchanges for multilateral trading facilities and organised trading facilities;
- the introduction of a licensing obligation for central counterparties, central securities depositories and trade repositories with the application of specific additional requirements; and
- the introduction of clearing, reporting and risk-mitigation obligations for determined exchange-traded and over-the-counter derivative transactions to which a professional investment firm is party.

Following the entry into force of the new regime, financial market infrastructures and the operators of organised trading facilities were granted a one-year transitional period to comply with a certain number of new requirements (eg, pre- and post-trade transparency information duties). Moreover, participants on a trading venue and securities dealers were released from fulfilling the extended record-keeping and reporting duties regarding securities transactions until 1 January 2017. This transitional period was based on the expected date on which the corresponding provisions in MiFID II were expected to enter into force. Because this date was postponed by a year, the Swiss Federal Council extended the corresponding transitional period to 1 January 2018. As of 1 October 2018, this reporting obligation was expanded to include derivatives with an underlying asset admitted to trading on a Swiss trading venue. However, the new rules contemplate a 'backloading' period. All derivatives transactions that would be reportable under the new rules transpiring between 1 January 2018 and 30 September 2018 had to be reported by 31 December 2018. In this context, it is also worth noting that, on 14 September 2018, the Swiss Federal Council decided to further extend the transitional period for non-financial counterparties with low derivatives' trading volumes. Reporting for such small non-financial counterparties will now become mandatory on 1 January 2024 for over-the-counter derivatives' transactions and exchange-traded derivatives' transactions in cases of derivatives' transactions with foreign counterparties that do not report in accordance with FMIA. This decision is in line with international developments aiming at reducing the administrative burden to small non-financial counterparties.

In May 2018, FINMA amended the FMIO-FINMA in order to introduce a clearing obligation for certain OTC standardised interest-rate and credit derivatives listed in Annex 1 of the FMIO-FINMA. These OTC derivatives are already subject to the clearing obligation under EU regulations. The revised FMIO-FINMA entered into force on 1 September 2018 and from then on, the deadlines to implement the clearing obligations laid down in the FMIO will apply. The effective dates of the clearing obligation of each counterparty are as follows:
- 1 March 2019 for derivatives transactions which participants in an authorised or recognised central counterparty conclude anew with one another;
- 1 September 2018 for derivatives transactions that participants in an authorised or recognised central counterparty conclude anew with other financial counterparties that are not small or derivatives transactions that other financial counterparties that are not small conclude anew with one another; and
- 1 March 2020 for all other derivatives transactions concluded anew.

Finally, the FDF is planning to revise the FMIA in the future in order to take into account international developments, as well as technological developments, in particular, those of fintech companies.

Corporate governance in the banking sector

In November 2016, FINMA published its corporate governance requirements for banks by consolidating provisions of a certain number of related circulars and its relevant FAQs into a new circular, the FINMA Circular 2017/1 'Corporate governance – banks'. The revised regime entered into force in July 2017.

The purpose of Circular 2017/1 is to streamline the regulatory framework by providing for principles and guidelines in relation to corporate governance. In particular, it leaves banking institutions free to implement the requirements in question, taking into account their own business models and the specific risks associated with them. The circular sets minimum requirements, not only regarding the composition of boards and the qualifications of their members, but also for the organisation of the banks' internal control systems. Further, it details the allocation of responsibilities between the board of directors and the executive board of the banking institutions. Moreover, it provides exceptions to the rule most committee members must be independent (eg, absence of links with the institution, which may lead to a situation of conflict of interest). It is worth noting that smaller banks are now allowed to have a combined audit and risk committee, instead of two separate committees.

FATCA implementation

On 14 February 2013, the Swiss and US governments signed a cooperation agreement to facilitate the implementation of FATCA (FATCA Agreement). This agreement, which entered into force on 2 June 2014, is based on a model agreement (Model II) tailored for countries, such as Switzerland, that do not have an automatic information exchange in place with the United States. Model II allows for an aggregate reporting of pre-existing accounts in the absence of consent of the client to individual disclosure, which may give rise to a group request by the US Internal Revenue Service (IRS). In this context, the Swiss government has further worked on a federal statute dealing with the implementation of the FATCA Agreement to detail financial institutions' participation, identification and communication obligations and to frame the procedures applicable to information exchange and to the levy of a withholding tax under the agreement. On 27 September 2013, the FATCA implementing act was approved by the Swiss parliament along with the FATCA Agreement. The FATCA implementing act entered into force on 30 June 2014. Participating Swiss and deemed-compliant financial institutions were to register with the IRS by 25 April 2014. On 8 October 2014, the Swiss Federal Council adopted a specific mandate to discuss a changeover to Model I with the United States. Meanwhile, it is unknown when the new agreement introducing Model I will be implemented.

7 Are banks subject to consumer protection rules?

Generally speaking, Swiss regulatory law does not provide for a specific consumer protection legal framework. However, within a certain type of credit, Swiss financial institutions are to observe mandatory provisions that cannot be altered to the detriment of consumers. Credits granted to individuals for purposes other than business or commercial activities, in the range of 500 Swiss francs and 80,000 Swiss francs (providing that the consumer is not obliged to reimburse the credit within less than three months, are subject to the Consumer Credit Act (CCA). The CCA sets out a series of mandatory consumer protection rules, including the following:
- the consumer credit contracts must be made in writing and comply with a with a maximum rate of interest set by the authorities (ie, in principle and since 1 July 2016, 10 per cent plus the three-month Swiss franc Libor interest rate, it being specified that the maximum interest rate shall at least amount to 10 per cent);
- the consumer credit contracts must list a series of absent information null and void (eg, the right of the consumer to revoke a line of credit in writing and within seven days of sending or the delivery of the contract to the borrower); and
- the lender is to check the borrower's credit capacity and to report the granted consumer credit to the Consumer Credit Information Office.

It should be also noted that 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.

8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

According to FINMA's general strategic goals for 2017 to 2020, the following fall within its main policy challenges:
- ensuring that banks and insurance companies have strong capitalisation;
- making a sustainable, positive impact on the conduct of financial institutions;
- mitigating the 'too big to fail' issue through viable emergency plans and credible resolution strategies;
- contributing to the protection of creditors, investors and insured persons through accompanying structural change in the financial industry;
- promoting the removal of unnecessary regulatory obstacles for innovative business models;
- providing for principle-based financial market regulation and promoting equivalence with relevant international requirements; and
- keeping the cost of supervision stable and achieving further efficiency gains.

In addition, one of the main challenges for the upcoming years is the entry into force and implementation of the FinSA-FinIA, which will constitute a complete overhaul of the legal framework applicable to financial institutions and the provision of financial services in Switzerland.

In the same vein, the implementation of the automatic exchange of information will continue to have a significant impact on the Swiss banking industry. In particular, tax-related banking secrecy has been significantly weakened in relation to foreign clients.

Moreover, after the implementation in the Swiss regulatory framework, over the previous years, of a substantial part of the legal and regulatory capital adequacy requirements for banks deriving from the Basel III standards, the banks will face the comprehensive implementation of the remaining parts of those standards over the next two years (see questions 16 and 20).

Finally, FINMA intends to strengthen Switzerland's position as one of the leaders in the fintech sector. To this end, the Swiss regulator engaged in a number of international bodies to establish a framework aimed at promoting innovation, as well as the protection of customers and investors in this area. In 2016, FINMA further put in place a special fintech desk to address this sector's issues more efficiently (see Update and trends).

Supervision

9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Swiss banking supervision is based on a division of tasks between FINMA and the banks' external auditors.

Pursuant to this two-tier supervision system, the auditors conduct on-site audits, while FINMA retains responsibility for overall supervision and enforcement measures. To a certain extent, the auditors act as an extension (long arm) of FINMA, exercising direct supervision through regular audit checks.

In addition to examining the annual financial statements with an independent valuation of assets and liabilities, the auditors also review whether the banks comply with their articles of association and their organisational rules, as well as with the provisions of Swiss banking law, the circulars issued by FINMA and any applicable self-regulatory provisions.

External auditors must, on an annual basis, prepare 'long-form reports' addressed to the members of the board of directors of the bank concerned and to FINMA. These reports provide a comprehensive overview of the business activities and the internal organisation of the relevant bank. The purpose of these reports is to allow FINMA to ensure that the financial institution complies with the regulatory requirements and that the individuals entrusted with its management enjoy a good reputation and thereby assure the proper conduct of business operations (ie, guarantee of irreproachable activity). These audit reports are the main informational tools through which FINMA exercises its supervision.

In addition to the long-form reports, the auditors are obliged to inform FINMA if they suspect any breach of law or uncover other serious irregularities. FINMA then initiates investigations and takes other measures necessary to ensure compliance with the legal framework and to eliminate irregularities.

A special supervisory regime has been put in place for the largest Swiss banks, UBS, Credit Suisse, Zürcher Kantonalbank and the financial groups Raiffeisen and PostFinance AG given the systemic risk caused by the size of these institutions. In short, FINMA does not exclusively rely on the reports received from the auditors but carries out its own investigations in accordance with its risk-based supervision approach.

10 How do the regulatory authorities enforce banking laws and regulations?

The enforcement of Swiss banking laws and regulations is closely linked to the obligation for Swiss banks to ensure compliance, at all times, with the requirements for a banking licence (continuing compliance with the conditions of a banking licence).

If, at any time after the licence has been granted, any of the licence requirements are no longer satisfied, FINMA may take administrative measures aimed at ensuring the breach be remedied. FINMA may also appoint an investigator in order to clarify the factual situation and to facilitate the implementation of the measures imposed by the authority. Should the breach of the legal and regulatory framework be characterised as serious, FINMA could ultimately withdraw the banking licence, something that would trigger the forced liquidation of the bank.

11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

The most common enforcement issues encountered in the practice of FINMA may be generally summarised as follows:
- the forced liquidation of unauthorised securities dealers;
- the insolvency procedures and protective measures related to authorised and unauthorised entities;
- procedures against individuals, including entry onto a watch list (ie, a database with information on individuals whose business conduct is questionable or does not meet legal requirements) and the sending of business conduct letters whereby FINMA informs the individual of its reservations as regards the assurance of proper business conduct;
- the issues related to the compliance with the know-your-customer rules set out in the Federal Anti-Money Laundering Act and the Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence (see question 2) and the diligence requirements within the provision of cross-border financial services, as well as insider trading and market manipulation; and
- the ongoing supervision of licenced entities (especially banks and securities dealers), in particular, in order to ensure that the persons entrusted with the management of these entities fulfil on an ongoing basis the guarantee of irreproachable activity.

Since spring 2015, FINMA publishes a summary enforcement report aiming at improving the transparency of its enforcement activity and having a preventive action on the financial market. This report contains anonymised summaries of cases and includes references to court decisions and statistics on FINMA's enforcement activity.

Resolution

12 In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

Swiss law does not provide for any specific rules setting out the conditions and situations in which a Swiss banking institution may be taken over by the government or regulatory authorities. Hence, the UBS recapitalisation that took place in 2008 where the Swiss Confederation made a capital injection into UBS through the subscription of mandatory convertible bonds for 6 billion Swiss francs required the enactment of a special, urgent law, the Federal Ordinance of 15 October 2008 on the Recapitalisation of UBS AG, by the Swiss government.

By contrast, the involvement of FINMA within bank reorganisation and liquidation proceedings is now expressly provided for in the Federal Banking Act and the implementing FINMA-Bank Insolvency Ordinance (see questions 13 and 18).

13 What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

FINMA requires that Swiss banks have sound business contingency management in place to ensure that critical business functions can be maintained or restored as quickly as possible in the event of a crisis. SIFIs are, in addition, required to have contingency or recovery plans (often called 'living wills') in place. The responsibility for the establishment of such plans lies with the bank's board of directors and senior management.

Also, if a bank becomes over-indebted or experiences serious liquidity issues, FINMA can order broad and far-reaching protective measures, which may directly affect the bank's conduct of business and the role of the bank's management and directors. These protective measures may be taken independently from or in addition to the ordering of formal restructuring or liquidation proceedings. In this context, FINMA is, in particular, vested with the power to:

- give direct instructions to the bank's governing bodies;
- limit the powers of the bank's directors or managers or remove them from office;
- remove the bank's statutory audit company;
- limit the business activities of the bank;
- forbid the bank to make or accept payments or undertake securities transactions;
- order a temporary stay of a counterparty's right to enforce a debt against the bank; and
- order a temporary stay of any contractual termination or termination of a counterparty right with respect to any contracts (subject to certain conditions) (see question 18).

14 Are managers or directors personally liable in the case of a bank failure?

Swiss law does not provide for a specific liability regime applicable to directors or managers of a bank. Should the bank's failure result from an intentional or negligent breach of the directors' or managers' duties, the general rules of Swiss company law would apply to determine the managers' or directors' personal liability for the damage caused to the company, its shareholders or creditors.

This liability for mismanagement must be distinguished from the liability regime applicable to the (managing or non-managing) partners of a Swiss bank, which is set up as a partnership or a limited partnership (often referred to as a Swiss private bank). In case of bankruptcy of a Swiss private bank, the partners with unlimited liability would be jointly and severally liable with their own personal assets.

15 Describe any resolution planning or similar exercises that banks are required to conduct.

In line with international standards and as mentioned above, SIFIs are to have both a recovery and a resolution plan aimed at identifying risks with respect to the stability of the financial system owing to their systemically important nature and determining viable ways to deal with the impact of a crisis.

In accordance with the Banking Ordinance, a SIFI is to establish a recovery plan that contains the measures that it would take in case of crisis and that would allow it to pursue its activity without requiring governmental funds. Responsibility for drafting and regularly updating the recovery plan rests with the executive board level of the SIFI and must be embedded in a viable corporate governance framework. The recovery plan, as well as any amendment of it, is subject to FINMA's approval. Provided that the legal requirements are met, FINMA approves the recovery plan and then elaborates a resolution plan on its own, based on the information provided by the SIFI. Presently, FINMA considers that the two largest Swiss banks, Credit Suisse and UBS, have improved their crisis resistance over the years by establishing detailed FINMA-approved recovery plans and implementing the necessary organisational measures (see question 4). The resolution plan presents how, in concrete terms, a recovery measure or a SIFI liquidation could take place. FINMA is not obliged to disclose the resolution plan to the SIFI in question and may, in practice, deviate from the SIFI's planned strategies and measures, if it deems appropriate.

Capital requirements

16 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

The granting of a banking licence is 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. In practice, FINMA determines in each case the appropriate level of capital with regard to the scope of the contemplated activities. Capital adequacy and measurement rules are detailed in the revised CAO, the revised Liquidity Ordinance (LiqO) and the revised FINMA Circular 2015/2 'Liquidity risks – banks' (see question 20).

The current regime provides for minimum capital requirements that call at all times for an aggregate (tier 1 and tier 2) capital ratio of 8 per cent of the bank's risk-weighted assets. In addition, risk-weighted positions must be covered at a ratio of 4.5 per cent with common equity tier 1 (CET I) capital and at a ratio of 6 per cent with tier 1 capital. Furthermore, banks are to have, from 1 January 2016, a capital buffer in the form of CET I capital between 2.5 and 4.8 per cent of the risk-weighted assets. Finally, under certain circumstances, the Swiss National Bank can request that the Swiss government order that an additional countercyclical buffer of up to 2.5 per cent of all, or certain categories of the risk-weighted assets, be maintained in Switzerland in the form of CET I capital. In February 2013, such a countercyclical buffer was activated at the level of 1 per cent on loans secured against residential properties in Switzerland. On 30 June 2014, as per the request of the Swiss National Bank, the Swiss Federal Council increased the countercyclical buffer at the level of 2 per cent. From 1 July 2016, banks with total assets of at least 250 billion Swiss francs, of which the total foreign commitment amounts to at least 10 billion Swiss francs, or with a total foreign commitment of at least 25 billion Swiss francs, are required to maintain an extended countercyclical buffer in the form of common equity tier 1 capital. Finally, if FINMA deems risks not adequately covered by these capital requirements, it can order banks to maintain additional capital.

In November 2017, the Swiss Federal Council decided to revise the CAO in order to introduce, in addition to the above requirements, a leverage ratio, as well as new risk diversification provisions.

The new leverage ratio entered into force on 1 January 2018. In accordance with Basel III requirements, the revised CAO requires a risk-weighted capital ratio that rises with increasing size, as well as an unweighted capital adequacy requirement for all non-systemically important banks. A safety net in the form of a leverage ratio has been implemented with this capital adequacy requirement based on the leverage ratio. In this context, a minimum core capital (tier 1) to a total exposure ratio of 3 per cent is now required for all non-SIFIs. The revised FINMA Circular 2015/3 'Leverage ratio', which entered into force on 30 June 2018, enables banks to also apply the Basel III standard approach for derivatives when calculating the leverage ratio.

The new risk diversification provisions in the CAO entered into force on 1 January 2019. Under the new rules, risk concentrations will be measured only according to core capital (tier 1), meaning that supplementary capital (tier 2) will generally no longer be taken into account. Moreover, banks will be allowed only very restricted use of models for determining their risk concentrations, as modelling errors have a major impact when calculating these risks. Further changes concern overruns of the upper limits enshrined in the CAO (large exposures exceeding 25 per cent of core capital are generally no longer permitted), the weighting of certain assets, as well as the adjustment of some special rules for systemically important banks. The revised risk diversification provisions in the CAO are supplemented by the revised FINMA Circular 2019/1 'Risk diversification – banks'.

In February 2018, the FDF initiated a consultation on further amendments to the CAO. The Swiss Federal Council adopted these amendments to the CAO in November 2018, and they entered into force on 1 January 2019 (see question 20).

As regards quantitative liquidity requirements applied to non-systemic banks, the LiqO was first revised on 1 January 2015 in line with the Basel III requirements in order to introduce two minimum standards: a liquidity coverage ratio (LCR) and a net stable funding ratio (NSFR). The LCR was introduced to ensure that banks hold a liquidity buffer to offset increased net cash outflows under a specified 30-day stress scenario. According to the LiqO, non-systemic banks were to comply with 60 per cent of the LCR's requirements as of 1 January 2015. By each of the following three years they have to comply with an additional 10 per cent until they have complied with 90 per cent of the LCR's requirements for 2018 (phase-in until 1 January 2019). The NSFR, which requires non-systemic banks to have sufficient stable funding available to cover illiquid assets, initially had to be implemented in January 2018. However, owing to delays with the introduction of the NSFR in the European Union and the United States, the Swiss Federal Council decided in November 2017, and again In November 2018, to postpone the implementation of the NSFR. The Swiss Federal Council will reassess the situation and decide on the next steps at the end of 2019. It should be noted that the LiqO has been further revised based on practice and feedback since the implementation of the LCR requirement. Since 1 January 2018, the revised LiqO provides for a relaxation of the LCR requirements for small banks. The revised FINMA Circular 2015/2 'Liquidity risk – banks', which also entered into force on 1 January 2018, clarifies, inter alia, the regime applicable to small banks in this context.

With regard to SIFIs, the CAO sets out a specific capital adequacy regime. The latter calls for more stringent requirements as regards the bank's risk-weighted assets, which broadly comprise a basic requirement of leverage ratio of 4.5 per cent, in line with the Basel III minimum requirements applicable to all banks, an additional component of risk-weighted assets of 12.86 per cent and a surcharge. These requirements must not fall below 3 per cent with respect to the leverage ratio and 8 per cent as regards risk-weighted assets that the SIFI is to maintain at all times. With regard to the surcharge, its size is set with respect to the degree of systemic importance (ie, the total exposure and the market share of the relevant SIFI). As from 1 January 2018, SIFIs may also be subject to a total exposure ratio up to 10 per cent.

SIFIs also have to satisfy countercyclical equity buffers and leverage ratio requirements. In addition to capital, liquidity, organisational and risk diversification requirements, the applicable regime also entails provisions that allow the government to order adjustments to the remuneration system of a bank which would have to rely on government funding.

17 How are the capital adequacy guidelines enforced?

Enforcement of the capital adequacy requirements is part of the ongoing supervision process aimed at ensuring that the requirements of the banking licence are met. Compliance with capital adequacy requirements has to be reported to the Swiss National Bank on a quarterly basis and is one of the topics addressed in the long-form reports issued by the bank's external auditors on a yearly basis (see question 9).

18 What happens in the event that a bank becomes undercapitalised?

FINMA benefits from an exclusive competence to intervene in the event of a bank's undercapitalisation.

Upon the occurrence of a risk of undercapitalisation or insolvency, FINMA can take various protective measures, such as a moratorium of claims. Further, in case of need, FINMA may appoint a trustee in charge of the bank's reorganisation. The latter is then to propose to FINMA a reorganisation plan with the purpose of protecting the bank's creditors. Such a scheme generally aims to recapitalise the bank, for example, through converting debt into equity. As a result of the financial crisis, FINMA was also granted additional powers with a view to increasing the likelihood of successful restructuring of a distressed bank. FINMA may order the transfer of all, or part of the bank's activities, to a 'bridge bank', compel a conversion of certain convertible debt instruments issued by the bank (eg, contingent convertibles) or a reduction (or cancellation) of the bank's equity capital, or both, and, as an ultima ratio, order the conversion of the bank's debt obligations into equity. FINMA is also authorised to liquidate insolvent banks, in particular if no reorganisation is possible. These measures are set out in more detail in the FINMA-Bank Insolvency Ordinance.

Moreover, in the context of the entry into force of the Federal Act on Financial Market Infrastructure, the Federal Banking Act and Ordinance have been amended in order to allow FINMA to couple any protective measure or reorganisation measure with a temporary stay of any contractual termination or termination right of a counterparty with respect to any contracts or the exercise of certain netting, realisation and transfer rights (which prevail in the absence of a stay ordered by FINMA) for up to 48 hours. In this context, the Banking Ordinance generally requires, for enforceability purposes, that banks only enter into new agreements or agree to amendments to agreements, which are subject to foreign law or provide for a foreign jurisdiction, provided the counterparty acknowledges FINMA's stay right. This obligation has been further specified in the revised FINMA-Bank Insolvency Ordinance, which entered into force in April 2017. According to this revised text, agreements entered into by foreign group entities are only subject to this obligation if the respective financial contract was guaranteed or otherwise secured by a bank or securities dealer whose seat is in Switzerland.

19 What are the legal and regulatory processes in the event that a bank becomes insolvent?

FINMA benefits from the power to intervene in the event a bank becomes insolvent. See questions 13 and 18 for the intervention tools that are available to FINMA.

20 Have capital adequacy guidelines changed, or are they expected to change in the near future?

In addition to the special capital adequacy regime and the leverage ratio regime imposed on Swiss SIFIs (see question 16), FINMA implemented capital adequacy and liquidity rules in line with international standards (see question 16). In order for banks to build up the required capital and replace or phase out capital that no longer qualifies under the new rules, transitional rules provide for an implementation schedule over a time period stretching to 2019.

The evolution of the standards issued by the Basel Committee on Banking Supervision, changes to the Banking Ordinance and the CAO, as well as amended international accounting standards, have necessitated changes to a number of FINMA circulars (ie, 2008/6 'Interest rate risks – banks', 2011/2 'Capital buffer and capital planning – banks', 2013/1 'Eligible capital – banks', 2016/1 'Disclosure – banks', 2017/7 'Credit risks – banks'). A consultation was opened until the end of January 2018 for this purpose. The FINMA Circular 2008/6 'Interest rate risks – banks' has been replaced by the new FINMA Circular 2019/2 'Interest rate risks – banks', which entered into force on 1 January 2019. The FINMA Circulars 2011/2 'Capital buffer and capital planning – banks', 2013/1 'Eligible capital – banks', 2016/1 'Disclosure – banks' and 2017/7 'Credit risks – banks' were all amended in June 2018. The revised versions of these Circulars entered into force on 1 January 2019.

This revision package is one of the last steps in the national implementation of the Basel III standards. The implementation of the net stable funding ratio (NSFR) (see question 16) and the revised standards published by the Basel Committee in December 2017 are still pending. These will be handled under the lead of the FDF via amendments to the relevant Federal Council ordinances and associated FINMA circulars.

In February 2018, the FDF initiated a consultation on further amendments to the CAO. In November 2018, the Swiss Federal Council adopted the relevant amendments to the CAO, which entered into force on 1 January 2019. The revision focuses on capital requirements for any restructuring and resolution (gone concern requirements). Following the introduction of such gone concern capital requirements for UBS and Credit Suisse in 2016, these now also apply to the domestically focused systemically important banks (ie, PostFinance AG, Raiffeisen and Zürcher Kantonalbank). The amended CAO also provides for new rules for the treatment of systemically important banks' stakes in their subsidiaries (see question 5).

Ownership restrictions and implications

21 Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank. What constitutes 'control' for this purpose?

For purposes of the Federal Banking Act, a participation is deemed to be a qualified participation if it amounts to 10 per cent or more of the capital or voting rights of the bank or if the holder of the participation is otherwise in a position to significantly influence the business activities of the bank (a 'qualified participation'). In addition, as set out in FINMA's guidelines for licence applications for banks and securities

Update and trends

Since 2015, FINMA 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 banking legislation aiming at promoting innovation in the financial sector. The first two pillars of the fintech regime entered into force on 1 August 2017. The first created a sandbox innovation area where companies are allowed to accept public deposits up to a total amount of 1 million Swiss francs and without the need to apply for a banking licence, subject to certain conditions. The second one set a maximum period of 60 days (as opposed to seven days, in accordance with FINMA's previous practice) for the holding of monies on settlement accounts.

The third item, the fintech licence, entered into force on 1 January 2019, along with amendments to the Banking Ordinance adopted by the Swiss Federal Council on 30 November 2018. Under the fintech licence, financial services providers are allowed to accept public deposits provided that:

- the aggregate amount of deposits does not exceed 100 million Swiss francs;
- the deposits do not bear interest (or are not otherwise remunerated); and
- the deposits are not reinvested 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 benefiting from such a licence would have to amount to 3 per cent of the public funds and would be, in any case, above 300,000 Swiss francs. On 3 December 2018, FINMA also issued guidelines for the fintech licence, highlighting the information and documents that an applicant must submit when applying for such a licence. This namely includes a list of all participant holding a direct or indirect interest of 5 per cent in the applicant, information on the governing bodies as well as various explanations on the activities of the companies with a business plan for three financial years. It should be noted that 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 designation. In this context, the deposits are not covered by the Swiss deposit protection regime (see question 4) and the clients must be comprehensively informed in advance of this fact as well as of the risks resulting from the business model.

In parallel, FINMA has been involved in a rising tide of inquiries regarding initial coin offering (ICO). Such new forms of capital-raising are challenging for regulators across the world. To clarify the regulatory framework applicable to ICO, on 16 February 2018 FINMA issued guidelines addressing the regulatory treatment of ICO structures, anti-money laundering regulation and securities' law. Generally speaking, in assessing ICO, FINMA focuses on the economic function and purpose of the tokens. The key factors are the underlying purpose of the tokens as well as whether they are tradeable or transferable. In this context, FINMA categorises tokens into three types (although hybrid forms are frequent):

- payment tokens or cryptocurrencies that have no further functions or links to other development projects. They are generally not treated as securities but as anti-money laundering and related know-your-customer requirements must be complied with;
- utility tokens that are intended to provide digital access to an application or service. Utility tokens will generally not be treated as securities provided their sole purpose is to confer digital access rights to an application or a service and they can actually be used upon issuance for such a purpose; and
- asset tokens, which represent assets such as participations in real physical underlying companies, or earnings streams, or an entitlement to dividends or interest payments. Asset tokens are generally deemed securities to the extent they are analogous to equities, bonds or derivatives.

The classification of the tokens as securities may imply the need for the issuer to prepare a prospectus as well as a FINMA licence as securities dealers. Other financial market legislations may also be relevant such as the Collective Investment Scheme Act and the Banking Act (if the tokens amount to deposits).

Overall, the Swiss banking regulatory framework is expected to remain in a state of flux in the years ahead, with changes aimed at promoting innovation in the financial sector and strengthening client protection. In this context, the new FinSA-FinIA regime will enter into force on 1 January 2020 and will overhaul the regulatory framework applicable to the provision of financial services in Switzerland (see question 6).

dealer, FINMA requires the disclosure of participations of 5 per cent or more for its assessment of whether or not the requirements of a banking licence are continuously met.

The Federal Banking Act does not set any restrictions on the type of entities or individuals holding a controlling interest in a bank. However, one of the general requirements for a bank to obtain a licence is that individuals or legal entities holding, be it directly or indirectly, a qualified participation in a bank must ensure that their influence has no negative impact on the prudent and reliable business activities of the bank. Therefore, the bank's shareholders and their activities can be relevant for the granting and the maintenance of a banking licence.

Examples of circumstances where shareholders with a qualified participation may have a negative influence on the bank are a lack of transparency, unclear organisation or financial difficulties of financial conglomerates, as well as an influence of a criminal organisation on the shareholder. Should FINMA be of the view that the requirements for the banking licence are no longer met because of a shareholder with a qualified participation, it may suspend the voting rights in relation to such qualified participation or, if appropriate and as a measure of last resort, withdraw the licence, which would trigger a liquidation proceeding.

22 Are there any restrictions on foreign ownership of banks?

If foreign nationals with qualified participations directly or indirectly hold more than half of the voting rights of, or otherwise a controlling influence on, a bank incorporated under Swiss law, the granting of the banking licence is subject to additional requirements. In particular, the corporate name of a foreign-controlled Swiss bank must not indicate or suggest that the bank is controlled by Swiss individuals or entities and the countries where the owners of a qualified participation in a bank have their registered office or domicile must grant 'reciprocity', which is:

- Swiss residents and Swiss entities must have the possibility to operate a bank in the respective country; and
- such banks operated by Swiss residents are not subject to more restrictive provisions compared to foreign banks in Switzerland.

The reciprocity requirement is subject to any obligations to the contrary in governmental treaties and is, therefore, not applicable to World Trade Organization member states. Furthermore, FINMA may request that the bank is subject to adequate consolidated supervision by a foreign supervisory authority if the bank forms part of a group active in the financial sector.

If a bank incorporated under Swiss law becomes foreign controlled as described above or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change, a new special licence for foreign-controlled banks must be obtained prior to such event. For the purposes of the Federal Banking Act, a 'foreigner' is:

- an individual who is not a Swiss citizen and has no permanent residence permit for Switzerland; or
- a legal entity or partnership that has its registered office outside Switzerland or, if its registered office is in Switzerland, is controlled by individuals as defined above.

23 What are the legal and regulatory implications for entities that control banks?

There are no restrictions as to the business activities of the entities holding qualified participations in a bank, providing the conditions for the granting and maintenance of the licence (see question 21) are complied with. Generally, transactions between the (controlling) shareholders of a bank and the bank itself may be subject to specific requirements (eg, the granting of loans to significant shareholders must be in compliance with generally recognised principles of the banking industry).

24 What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

Each controlling shareholder has the duty to give notification of the acquisition or disposal of a qualified participation, as well as its participation reaching, exceeding or falling below certain thresholds (see question 29). Further, the holder of a qualified participation must not negatively influence the prudent and reliable business activities of the bank, otherwise the bank may lose its licence.

In cases where justified concerns exist that a bank is over indebted, no longer complies with the capital adequacy rules or has serious liquidity problems, FINMA may order certain protective measures and the establishment of a recapitalisation plan. Under a recapitalisation plan, the rights of creditors and shareholders may be impaired (see question 18).

25 What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

There are no specific implications for a controlling shareholder of a bank if the bank becomes insolvent, other than those described in question 18.

Changes in control

26 Describe the regulatory approvals needed to acquire control of a bank. How is 'control' defined for this purpose?

Even though the acquisition of a qualified participation in a bank by a Swiss individual or a Swiss entity triggers, in theory, only notification obligations (see question 29), it is necessary to seek a letter of no objection from FINMA for the account of the bank prior to an envisaged transfer of a controlling stake in a Swiss bank, since FINMA controls the continuing compliance with the conditions of a banking licence. FINMA will examine whether the influence of the new shareholder with a qualified participation would be detrimental to the prudent and reliable business activities of the bank.

27 Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

The notification requirements outlined in question 29 also apply to non-Swiss acquirers. In addition, if a foreign individual or entity acquires a qualified participation in a Swiss bank, the bank must apply to FINMA for a special licence, provided that foreign nationals with qualified participations directly or indirectly hold more than half of the votes of, or otherwise a dominant influence on, the bank. For the conditions of the additional licence, see question 22.

28 What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank?

FINMA generally considers whether the requirements for the banking licence are still met and, in particular, whether the new shareholders with a qualified participation will not negatively influence the bank's prudent and reliable business activities.

29 Describe the required filings for an acquisition of control of a bank.

Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect qualified participation in a bank organised under Swiss law. This notification duty also applies if a qualified shareholder increases or reduces its qualified participation and attains, falls below or exceeds 20, 33 or 50 per cent of the capital or voting rights in the bank. The notification must include a declaration whether the participation is held for the own account and whether any option or similar rights have been granted over the participation.

The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders once it becomes aware of such change, in any case, at least once a year.

In the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply with FINMA for a special licence. In its application, the bank has to

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demonstrate all the facts based on which FINMA may assess whether the conditions for the special permit are fulfilled.

As mentioned in question 26, it would be advisable that the bank contacts FINMA prior to a change of a holder of a qualified participation even if the bank is Swiss controlled. This would not need to be in the form of a formal application.

30 What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

Generally, the timing of the approvals or statements by FINMA largely depends on its workload. The process for a special banking licence in the case of a foreign-controlled bank may take three months. However, if the country of domicile or residence of the foreigner is not a World Trade Organization member, the process may take much longer. FINMA will have to assess whether that country grants the right of reciprocity.

If the acquirer is not a foreigner, there is no formal approval or licence required and, thus, a statement of FINMA is available within a shorter time frame.

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