Private Banking & Wealth Management 2020

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov
Lenz & Staehelin

LEXOLOGY®
Getting The Deal Through

LENZ & STAEHELIN

© Law Business Research 2019

LENZ & STAEHELIN

The world's Swiss law firm

www.lenzstaehelin.com

© Law Business Research 2019

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between June and August 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019
No photocopying without a CLA licence.
First published 2016
Fourth edition
ISBN 978-1-83862-150-6

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

Private Banking & Wealth Management 2020

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov
Lenz & Staehelin

Lexology Getting The Deal Through is delighted to publish the fourth 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. Lexology 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.lexology.com/gtdt.

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 editors, Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov of Lenz & Staehelin, for their continued assistance with this volume.

London
August 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2019
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2019

Contents

Introduction 3
Shelby R du Pasquier
Lenz & Staehelin

China 5
Hao Wang
RayYin & Partners

France 11
Jérôme Barré
Franklin

Germany 19
Andreas Richter, Sebastian Käpplinger and Stephan Hamacher
P+P Pöllath + Partners

Hong Kong 26
Vivien Teu
Vivien Teu & Co LLP

Israel 36
Alon Kaplan
Alon Kaplan, Advocate & Notary
Lyat Eyal
Aronson, Ronkin-Noor, Eyal Law Firm
Meytal Liberman
Herzog, Fox & Neeman, Law Office

Liechtenstein 47
Hannes Arnold, Pia Summer and Christina Preiner
Gasser Partner Attorneys at Law

Monaco 54
Olivier Marquet and Michael Dearden
CMS Pasquier Ciulla Marquet & Pastor

Singapore 64
Lim Pek Bur, Loong Tse Chuan, Francis Mok and Edward Tiong
Allen & Gledhill LLP

Switzerland 74
Fedor Poskriakov and Maria Chiriaeva
Lenz & Staehelin

United Kingdom 85
Richard Small and William Robertson
Addleshaw Goddard LLP

United States 93
Marc R Cohen, Thomas J Delaney and Matthew G Bisanz
Mayer Brown LLP

© Law Business Research 2019

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 2017, Switzerland, as the world's leading wealth management centre, had a 21 per cent market share of the wealth management business, which represents a decrease of 4 per cent from the previous year. In contrast, Hong Kong and Singapore have grown considerably in importance in recent years. Hong Kong increased its market share by 127.1 per cent between 2010 and 2017 (9 per cent in 2017) and Singapore by 7.2 per cent (5 per cent in 2017).

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, 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 4,700 information requests were sent to that country in 2018, coming mainly from European countries.

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.

© Law Business Research 2019

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 anti-money laundering obligations. 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.

LENZ & STAEHELIN

Shelby R du Pasquier
shelby.dupasquier@lenzstaehelin.com

Route de Chêne 30
1211 Geneva 6
Tel: +41 58 450 70 00
Fax:+41 58 450 70 01

Brandschenkestrasse 24
8027 Zurich
Tel: +41 58 450 80 00
Fax:+41 58 450 80 01

Avenue de Rhodanie 58
1007 Lausanne
Tel: +41 58 450 70 00
Fax:+41 58 450 70 01

www.lenzstaehelin.com

© Law Business Research 2019

Switzerland

Fedor Poskriakov and Maria Chiriaeva
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
- banking (including custody and lending).

The main statutes relevant for private banking are:

- the Federal Banking Act of 1934 (BA);
- the Federal Stock Exchanges and Securities Trading Act of 1995 (SESTA);
- the Federal Collective Investment Schemes Act of 2006 (CISA);
- the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA); and
- the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector of 1997 (AMLA).

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.

It is expected that, as of January 2020, two new statutes will supplement and, in part, revise the current legislative framework, namely:

- the Financial Institutions Act (FinIA); and
- the Financial Services Act (FinSA)

See question 47.

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. In contrast, entities or individuals providing exclusively wealth management services (discretionary and non-discretionary advisory services) are not, as a matter of principle and until the entry into force of FinIA and FinSA, subject to prudential supervision in Switzerland, unless these 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. Wealth managers that manage their clients' assets or execute investment transactions as investment advisers are characterised as financial intermediaries and, as such, are only subject to the Swiss anti-money laundering (AML) regulations. Investment advisory services without any transaction execution are not subject, in the current state of legislation, to any supervision or similar regulatory requirements at all.

In terms of supervisory authorities, FINMA is an independent and single integrated authority for the Swiss markets, which is responsible for the supervision of banks, securities dealers, stock exchanges and collective investment schemes. It further monitors the private insurance sector, as well as certain financial intermediaries, for the purpose of combating money laundering and terrorist financing. 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.

Financial intermediaries subject to the AMLA are required to be registered, at their preference, either with a self-regulatory organisation (SRO) recognised by FINMA or FINMA itself (banks and other regulated firms are automatically subject to FINMA's supervision in respect to AML requirements). The SROs are responsible for monitoring their members as regards their compliance with their obligations under the Swiss AML 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:

- the Swiss Bankers Association (SBA);
- the Swiss Funds and Asset Management Association (SFAMA); and
- the Swiss Asset Managers' Association (ASG).

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.

Under the new FinIA and FinSA, wealth managers acting in a professional capacity will be newly supervised and will become subject to rules of conduct and organisational measures. Those will be directly subject to FINMA supervision (including authorisation process and enforcement proceedings). That being said, their day-to-day supervision will be entrusted to supervisory organisations (yet to be established) which will be approved and monitored by FINMA (SOs). In this context, wealth managers will also cease to be under the direct supervision of FINMA as regards compliance with AMLA. Further, all financial services providers (eg, advisers) will, although they will not become regulated under FinIA, be subject to certain rules of conduct and organisational requirements under FinSA.

© Law Business Research 2019

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 trust companies. Independent asset managers represent the lion's share of the para-banking sector within the Swiss financial industry, with a limited level of regulatory oversight for the time being. That being said, the entry into force of the new FinIA and FinSA will have an important impact on the organisation and costs related to the provision of services by the wealth managers who will have 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. These activities, if not carried out by banks, are not regulated in Switzerland until the entry into force of FinIA and FinSA expected on 1 January 2020 (with the exception of AMLA regulations), provided these are limited to investment management, to the exclusion of the management or distribution or collective investment schemes, the management of Swiss pension funds or the performance of securities dealing activities.

Licensing requirements

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

As mentioned in question 2, 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, which are not limited to being used for securities transactions, it is required to be licensed as a bank.

Simply, 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 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, six 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 to set up a subsidiary or a branch, 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 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 of 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

© Law Business Research 2019

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 BA and the Swiss Debt Collection and Bankruptcy Act.

Wealth management licensing

10 | Is wealth management subject to supervision or licensing?

Wealth management activities (ie, the provision of investment advice, the management of client assets and research), provided they do not include client money custody, distribution or the management of collective investment schemes, the management of the assets of Swiss pension funds, or securities dealing activities, are not subject, for the time being, to supervision or licensing requirements, to the exclusion of compliance with Swiss AML regulations.

As of the entry in force of FinIA and FinSA, which is expected on 1 January 2020, wealth management activities conducted on a professional basis will be subject to supervision under FinIA (provided they include control over the clients' assets) and be considered as financial services under FinSA. In this context, wealth managers will have to require and obtain an authorisation from FINMA and comply with rules of conduct and organisational measures. It is also worth noting that under the new regime, wealth managers with a permanent presence in Switzerland will have to set up a subsidiary or a branch (see question 7) to perform their activities and therefore obtain an authorisation from FINMA.

It should be noted that FinIA and its draft 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 FinIA and do not need to obtain a licence to perform their activities.

Requirements

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

For the time being, there are no ongoing licensing requirements for wealth management, as defined in question 10, other than registration with an SRO or FINMA for Swiss AML compliance purposes, which is not per se a licence (ie, no continuing prudential supervision, capital or equity requirements or rules of conduct).

Under the new regime that is expected to enter into force in January 2020, in addition to the 'fit and proper' tests imposed on managers and qualified shareholders, the main licensing requirements for wealth managers that will become newly supervised will be 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 FinIA grandfathering rules, wealth managers that are already active are to notify FINMA of their intention to apply for a licence prior to July 2020 and request an authorisation prior to January 2023. By contrast, wealth managers starting their activities after January 2020 will have to immediately notify FINMA and comply with the licensing requirements. According to the draft FinIO, wealth managers will, however, have to register with a SO and apply for a licence with FINMA within one year after an SO has been recognised by FINMA.

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

See question 11.

Under the new regime expected to enter in force on 1 January 2020, wealth managers will have, inter alia, to be affiliated with a mediation body (ombudsman) and ensure that the individuals providing financial services ('client advisers') have technical knowledge and follow appropriate training.

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 AML and financial crime requirements imposed upon financial intermediaries within private banking are essentially know-your-customer (KYC) 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 FINMA, the Federal Gaming Board or an 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 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 intergovernmental 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

© Law Business Research 2019

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 AMLA, financial intermediaries such as banks and asset managers are subject to various KYC 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, it worth noting that, 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) that entered into force on 18 March 2016 and has been revised on 1 August 2018. 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. Financial intermediaries will have to comply with the revised circular by 1 January 2020.

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 SBA).

Further, financial intermediaries are to clarify the economic background and purpose of a transaction or business relationship if:

- it appears unusual, unless its legality is clear; or
- there are indications that suggest the assets may be the proceeds of a crime or a qualified tax offence (see question 16) 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 KYC duties to the said manager and rely on his or her indications for AML purposes.

It is worth noting that on 1 June 2018, the Federal Council opened up a consultation procedure on the revision of the AMLA. The purpose of this revision is to reflect the outcome of the latest Financial Action Task Force (FATF) review of the Swiss AML framework. Among other things, the draft provides 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). The draft further 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. According to the Federal Council, this would allow the regulatory body to prioritise the filings and treat them in a more efficient manner. The entry into force of the revised AMLA is not expected before 2020.

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 a particular tax period 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 (OECD) 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.

© Law Business Research 2019

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 AML self-regulatory rules.

Clients, as well as the employees of banks and wealth managers, 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.

CLIENT SEGMENTATION AND PROTECTION

Types of client

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

For the time being, the Swiss legal framework applicable to private banking does not provide for any structured uniform client segmentation per se. Typically, the concept of high-net-worth individuals (HNWIs) is only relevant for the purpose of the distribution of collective investment schemes or structured products in Switzerland, which are not addressed here. In terms of securities and brokerage services, the concepts of 'clients' and 'public' do not comprise regulated financial services providers, as well institutional investors with professional treasury management.

The situation will change with the entry into force of FinIA and FinSA, which is expected from 1 January 2020. FinSA will introduce 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 CISA will not be abolished and will remain relevant in the context of assessing whether a specific collective investment scheme can be offered. Under the new regime, HNWIs will be considered as professional clients if they have:

- a net wealth of 2 million Swiss francs;
- financial assets exceeding 500,000 Swiss francs and have sufficient knowledge about risks of investment as a result of their education or professional experience; and
- opted out (see question 20).

The provision of financial services, as well the offered financial products, will be adapted to the protection needs of the respective client segment.

Client segmentation

20 | What are the consequences of client segmentation?

See question 19.

Under the new FinSA, which is expected to enter into force on 1 January 2020, the client categorisation will determine, among others, the rules of conduct that the financial service providers are to apply in relation to each category of client. Those rules of conduct will include:

- an upfront 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.

It should be noted that financial services providers will 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 will be required when providing investment advice on their entire portfolio or in case of discretionary asset management services.

In this context, no specific rules will apply with respect to institutional clients (eg, financial intermediaries subject to the BA, FinIA, CISA, foreign clients subject to a prudential supervision and insurance companies). Likewise, professional clients (eg, pension funds, large companies and HNWIs having opted out) will have the possibility to waive certain protection as regards information and documentation reporting. Furthermore, FinSA provides that the financial service providers may rely on the assumption that professional clients have necessary knowledge and experience and may assume economically the risks associated with the proposed services.

FinSA will also provide for an opting-in and out system across the different client categories. For example, HNWIs and private structures created for them (without professional treasury operations) will 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 speaking, Swiss regulatory law does not provide for a specific consumer protection legal framework. 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 (PILA), 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 Union 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 cash; any other settlement methods (wire, cheque, etc) are purely contractual. In practice,

© Law Business Research 2019

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 which otherwise would expose the banking institution to increased risks.

Indeed, in accordance with the AMLA 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?

The same regime as described in question 23 applies to other withdrawals.

CROSS-BORDER SERVICES

Framework

25 | 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 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.

For the rest, wealth management services (to the exclusion of the distribution and management of collective investment schemes, the management of assets of Swiss pension funds, as well as securities dealing activities) may be freely carried out by independent wealth managers on a cross-border basis in Switzerland, irrespective of the presence test (see question 27 regarding the new regime).

Licensing requirements

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

As mentioned in question 25, in the event that a foreign bank (ie, an entity that benefits from a licence to conduct banking activities in its home jurisdiction, uses the terms 'bank' or 'banker' in its corporate name, purpose or documentation or 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.

Regulation

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

Wealth management, advisory and banking services rendered purely on a cross-border basis are not regulated in Switzerland at the time of writing, provided these do not comprise the distribution of collective investment schemes, the management of assets of Swiss pension funds or securities dealing activities. With the entry in force of the new FinIA and FinSA expected on 1 January 2020, the situation will, however, change. Foreign financial services providers acting on a cross-border basis in Switzerland or providing services to clients in Switzerland will become subject to the rules of conduct (see questions 19 and 20) and will have to register client advisers in a public client advisers' registry (subject to potential exemptions for regulated financial services providers, which may be provided for in the final implementing ordinances).

Employee travel

28 | 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 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 (see question 27).

Exchanging documents

29 | 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 for the sending of documents to Swiss-resident clients, provided these do not constitute distribution of collective investment schemes (or assimilated investment products). 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

30 | 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.

© Law Business Research 2019

Reporting requirements

31 | 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 United States 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 inter-governmental agreement arrangement will be implemented with the United States.

With the implementation of the automatic exchange of information, Swiss banks have become subject to new obligations imposed by the legal framework which relies on the Common Reporting and Due Diligence Standard elaborated by the OECD, 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, which 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 more than 50 partner states and territories, including the European Union.

At present, no reporting or disclosure duty exists in relation to Swiss taxpayer clients.

Client consent on reporting

32 | 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 is subject to banking secrecy, which prohibits, in principle, the disclosure of such data to third parties (see questions 41 et seq for further details). As a result, and as mentioned in question 31, 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. The consequence of such a revocation is that the banking institution 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

33 | 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.

By contrast, foreign clients usually hold their assets either through individual accounts or structure accounts. The latter comprises accounts owned by:

- offshore private investment companies with or without an overlying foreign trust or foundation;
- trustees (in case of a trust); or
- 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

34 | 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?

In the event that 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, which may differ from the definition of controlling person in question 35. 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:

- collect the same information on the settlor (effective and not fiduciary);
- record the characteristics of the trust (eg, revocable, discretionary etc); and
- 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). With respect to operating companies, see question 35.

Controlling person

35 | 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 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.

© Law Business Research 2019

It is worth noting that 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, trustees, protector (if any), 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

36 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 AML 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 individual Swiss 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

37 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 FINMA supervision, are to comply with certain regulatory and self-regulatory requirements (see question 39).

Independent asset managers or banks may also render purely advisory services on the basis of advisory mandate agreements. 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 per se and essentially obeys to the general provisions of the Swiss Code of Obligations applicable to mandate agreements.

In the absence of an asset management or advisory agreement, banks 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 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

38 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 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 of the Swiss Code of Obligations. 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). By contrast, a bank 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

39 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 Swiss Code of Obligations 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), the Swiss Supreme Court held, in a landmark decision in 2006, that inducements are subject to a statutory restitution duty and are, as a matter of principle, payable to the client of the receiving financial intermediary. Nonetheless, an arrangement whereby the client agrees that a financial intermediary may retain inducements is valid, provided the client was duly informed of the

© Law Business Research 2019

existence and calculation formula of such retrocessions, and the client expressly waived his or her statutory restitution claim. In a subsequent decision rendered on 30 October 2012, the Swiss Supreme Court ruled that the distribution fees that the promoter of a financial product pays to the distributor could be characterised as retrocessions, and therefore be subject to the same legal regime. As a result, banks and independent asset managers intending to retain inducements received from third parties are to ensure that the contractual documentation governing its client relationships meets the requirements set forth by the Swiss Supreme Court. In this context, and from a regulatory perspective, the level of information (ex ante disclosure) that needs to be provided to clients is detailed in FINMA Circular 01/2009 on 'Guidelines on asset management' and in the guidelines of the relevant professional organisations. Asset managers must typically advise their customers of any conflicts of interest that might arise as a result of accepting third-party inducements. Among other duties, they are to inform their clients of the calculation parameters, as well as of the spread of inducements they might receive from third parties (prospective information duty), and of the amounts of any inducements effectively received in the past (retrospective reporting, upon request of the client). It is worth noting that the above case law principles will be included in the new FinSA. Under the new regime, the disclosure duty will apply irrespective of the presence of a mandate relationship (ie, including in case of execution-only transaction).

For the rest, banks are subject to the Portfolio Management Guidelines issued by the SBA and recognised by FINMA as the minimum standard in accordance with Circular 01/2009. Simply, 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

40 | 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 (see question 39) 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.

CONFIDENTIALITY

Obligations

41 | 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 has 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 (see question 31).

In principle, clients of independent asset managers do not benefit from the protection of the banking secrecy that applies to relationships entered into with banks and securities dealers within the meaning of the BA and SESTA. As a result, specific confidentiality provisions are usually incorporated in the contractual documentation in this respect. However, when FinIA and FinSA are expected to enter into force on 1 January 2020, wealth managers newly subject to supervision will have to comply with a statutory duty of confidentiality (similar to banking secrecy (see above)) towards their clients.

Moreover, clients' data is also protected by the provisions of the Data Protection Act (DPA), which is generally in line with EU 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 European Union (ie, Regulation (EU) No. 2016/679 (repealing Directive 95/46/EC on General Data Protection (GDPR)) and Directive 2016/680/EU). At the time of writing, the Swiss legislator has not yet published a timeframe for 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.

Scope

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

Swiss banking secrecy encompasses all information and documents that pertain to the contractual relationship between the bank 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 relating 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

© Law Business Research 2019

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.

Exceptions and limitations

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

As mentioned in question 42, Swiss banking secrecy does not apply in certain exceptional situations. This is the case when a bank 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 are authorised to disclose client-related data provided the client has given his or her consent. To be valid, the banking 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.

The exceptions and limitations to the contractual confidentiality duty in asset management agreements with independent asset managers depend on the terms of the contractual provisions. In any event, such confidentiality duty would not apply if the independent asset manager is under a disclosure obligation to a Swiss public or judicial authority, as per the relevant procedural regulations.

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

44 | What is the liability for breach of confidentiality?

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

The potential sanction for an intentional breach of banking secrecy is a fine of up to 540,000 Swiss francs or a prison 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 prison sentence is up to five years or a fine. In 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) of the BA). 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.

Finally, the Swiss bank 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.

As regards the confidentiality duty provided contractually with independent asset managers, in addition to civil liability as described above, the latter may incur criminal liability. Article 162 of the SCC provides that any person who discloses a manufacturing or business secret which that person was legally or contractually bound to maintain commits a criminal offence. This offence is punishable by imprisonment for up to three years or a fine capped at 540,000 Swiss francs. As indicated in question 41, wealth managers subject to FinIA will be, as of January 2020, under a statutory duty of confidentiality. The potential sanctions for an intentional breach will be the same as for a breach of banking secrecy (see above).

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

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 independent asset managers, provide in principle that the civil courts of the canton where these are located are competent to review the matter. It should be noted, however, that consumers within the meaning of the Swiss Code of Civil Procedure, the PILA 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 justice of peace. However, 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 SBA. 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.

It is worth noting that, under the new FinSA, financial service providers will have to be affiliated to a mediation body. As a matter of principle, disputes with their clients will have to be referred to this body (which has not been set up yet) for a mediation procedure.

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 FINMA's attention (see question 5). In addition, banks are to report immediately to FINMA 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 whether to initiate a formal investigation for the purposes of

© Law Business Research 2019

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 and fintech

47 Describe the most relevant recent developments affecting private banking in your jurisdiction. How is fintech affecting private banking and wealth management services in your jurisdictions?

In November 2015, the Swiss Federal Council published two new drafts of FinSA and FinIA. While the purpose of FinIA is to provide for a 'new legal framework' governing all financial institutions, the objective of FinSA is to regulate the provision of financial services, on a professional basis, whether performed in Switzerland or on a cross-border basis. Within the debates in parliament, the draft FinSA and FinIA initially published by the Federal Council were subject to intense discussions and were amended in various respects. On 15 June 2018, parliament finally agreed on all provisions of FinSA and FinIA. The new legislation is now considered as final. Its expected date of entry into force (including the relevant implementing ordinances) is 1 January 2020.

As mentioned above, according to FinIA, asset managers, as well as trustees, who are currently not subject to any ongoing prudential supervision, will be newly supervised. In addition, under the new FinSA, wealth managers will become subject to specific rules of conduct and, as the case may be, their client advisers (ie, individuals providing financial services) will have to register with a client advisers' register. This new legislation will overhaul the regulatory framework for financial services providers, especially wealth managers in Switzerland and those acting on a cross-border basis.

Since 2015, FINMA focus has been on adapting the applicable legal and regulatory framework to the needs of the fintech sector. In this context, on 1 February 2017, the Federal Council proposed to implement into Swiss banking legislation the following three main measures:

- the introduction of a maximum period of 60 days (as opposed to seven days, in accordance with FINMA's current practice) for the holding of monies on settlement accounts (eg, for crowdfunding projects), without any limitation in terms of amounts;
- the creation of 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, such as disclosures, prohibition to invest deposits, etc; and
- the introduction of a new fintech licence granted to institutions whose activities are limited to deposit-taking activities, to the exclusion of lending activities involving maturity transformation. In such cases, the total amount of the deposits would not exceed 100 million Swiss francs. Moreover, the minimum equity capital of companies benefitting from such a licence would have to amount to 5 per cent of the deposits and would be, in any case, above 300,000 Swiss francs (minimum capital).

The first two 'pillars' of the fintech sandbox entered into force on 1 August 2017. With respect to the third item, the 'fintech licence', this entered into force on 1 January 2019. In addition to a prohibition of lending, as well as investment activities, holders of such licence are subject to a certain number of (relaxed) requirements in terms of organisation, risk management, compliance, financial resources and audit. The provisions of the BA and the Banking Ordinance apply to them by analogy and to the extent that this is necessary.

LENZ & STAEHELIN

Fedor Poskriakov
fedor.poskriakov@lenzstaehelin.com

Maria Chiriaeva
maria.chiriaeva@lenzstaehelin.com

Route de Chêne 30
1211 Geneva 6
Tel: +41 58 450 70 00
Fax:+41 58 450 70 01

Brandschenkestrasse 24
8027 Zurich
Tel: +41 58 450 80 00
Fax:+41 58 450 80 01

Avenue de Rhodanie 58
1007 Lausanne
Tel: +41 58 450 70 00
Fax:+41 58 450 70 01

www.lenzstaehelin.com

In December 2019, FINMA issued its guidelines for fintech licence applications, which highlight the information and documents that an applicant must submit when applying for such authorisation. Furthermore, in order to reflect the changes introduced by this new licence, as well as to provide for concrete examples of application of the sandbox regime, FINMA has further revised its circulars 2008/3 'Public deposits with non-banks' and 2013/3 'Audit activities', which entered into force on 1 July 2019.

During the past couple of years, FINMA has also focused on new forms of capital raising by start-ups in the form of initial coin offerings (ICOs), token-generating events and token sales. Owing to the increase of companies using such business models, FINMA published its guidelines for enquiries regarding the regulatory framework for ICOs on 16 February 2018. 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. It worth noting that FINMA has already initiated a certain number of investigations against several ICOs with a view of determining the existence of potential breaches of supervisory law. In specific instances, FINMA decided to close down a certain number of cryptocurrency providers. It worth noting that, in December 2018, the Swiss Federal Council published a report on the legal framework for blockchain and distributed ledger technology in the financial sector. This report underlines that the Swiss legal framework is generally well prepared to deal with new technologies, while certain adjustments are expected to be implemented in the coming years.

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

© Law Business Research 2019

The laws related to specialist industries demand one thing. A specialist lawyer.

LENZ & STAEHELIN

The world's Swiss law firm

www.lenzstaehelin.com

© Law Business Research 2019

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-150-6

© Law Business Research 2019