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Switzerland

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Introduction

In the aftermath of the financial crisis of 2008/2009, Switzerland launched a massive overhaul of its financial regulations. These reforms followed several objectives. First, banking regulations were revised to ensure the stability of the financial system, in line with the recommendations of the Financial Stability Board ("**FSB**") and other international standard-setters. Second, Switzerland reacted to EU law in order to ensure equivalence and to be able to continue to access the European market as a third-party state. Therefore, the reforms also aimed to align Swiss law with EU regulations Directive 2014/65/EU on Markets in Financial Instruments II ("**MiFID II**") and Regulation (EU) No 600/2014 on Markets in Financial Instruments ("**MiFIR**") to ensure Swiss financial institutions' access to the European financial markets. Finally, the reforms were geared to revising Swiss regulations from a patchwork of sectorial rules to a consistent regulatory framework.

The core of the new Swiss banking regulation consists of the existing Federal Act on Banks and Savings Banks of 8 November 1934 ("**BankA**"), the existing Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 ("**FINMASA**"), the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 ("**FMIA**"), as well as the Federal Act on Financial Services of 15 June 2018 ("**FinSA**") and the Federal Act on Financial Institutions of 15 June 2018 ("**FinIA**"). The latter two, together with the implementing Ordinance on Financial Services of 6 November 2019 ("**FinSO**") and the Ordinance on Financial Institutions of 6 November 2019, entered into force on 1 January 2020, subject to a two- to three-year transitional period and have materially changed the Swiss regulatory landscape. The changes will affect domestic financial service providers as well as foreign providers with a physical Swiss establishment, but – in a departure from the former liberal regime – also foreign providers that pursue their Swiss business on a cross-border basis only. All of these players have to review the new regulatory requirements and adapt their business accordingly.

Banks in Switzerland have been facing pressure due to regulatory and legal developments, which have led to heavily increased reporting burdens. In addition, the tougher international capital and liquidity standards such as Basel III, issued by the Basel Committee on Banking Supervision ("**BCBS**"), or the new standards set by the FSB over the last few years, have led to increased costs of a bank's capital and long-term funding and other regulatory requirements including, *e.g.*, new standards for resolution planning.

Besides these increased burdens, the major challenges currently lie in responding to strong competitive pressure, including from new entrants coming from the technology sector, and more transparency on fees. These challenges are aggravated by the continued low (including negative) interest rates and the strong Swiss currency, which together have resulted in declining profitability.

Furthermore, the current environment has been characterised by a variety of related legal developments, particularly in international tax matters. Switzerland implemented the automatic exchange of information ("**AEOI**") based on the Organisation for Economic Co-operation and Development ("**OECD**") Common Reporting Standard ("**CRS**"). In this context, the Federal Act on the International Automatic Exchange of Information in Tax Matters of 18 December 2015 ("**AEOI-Act**") entered into force on 1 January 2017, and the Federal Tax Administration for the first time exchanged information with partner states in September 2018. In addition, in the course of the implementation of the revised recommendations of the Financial Action Task Force ("**FATF**") and the Global Forum on Transparency and Exchange of Information for Tax Purposes ("**Global Forum**"), several laws have been amended and further reforms are under way. Since 2016, aggravated tax misdemeanours constitute a predicate offence for money laundering. Furthermore, the legal framework on anti-money laundering ("**AML**") and anti-terrorism financing has also become more stringent. In addition, foreign regulations are a limiting factor for outbound Switzerland cross-border banking business.

The accumulation of these factors has forced many banks to scale back some of their activities in Switzerland and consequently led to a trend towards consolidation in the Swiss banking sector in recent years. These tendencies towards consolidation are primarily seen with small banks and Swiss subsidiaries of foreign banking groups, while the latter in particular either close down their operations in Switzerland by liquidation or sale, or try to seek a critical mass of assets under management through acquisition or merger.

Despite this currently challenging environment, Switzerland is still a very attractive financial centre, as it combines many years of accumulated expertise, particularly in private banking and wealth management. In particular, the Swiss financial centre is the global market leader in the area of assets managed outside the owner's home country, with a global market share of approx. 25% (see *Swiss Banking, Banking Barometer 2020: Economic trends in the Swiss banking industry*, September 2019, available at https://www.swissbanking.org). Professional advice, top-quality services and sophisticated banking products are the traditional strengths of Swiss financial institutions.

A good educational and training infrastructure, guaranteeing a reliable stream of qualified staff, political and economic stability, a flexible labour market and good infrastructure are also convincing arguments to build up Swiss banking presence. Moreover, the global position of Switzerland for currency trading has been further strengthened since the People's Bank of China authorised the Zurich Branch of China Construction Bank to act as a clearing bank for the Chinese currency Renminbi in November 2015.

Furthermore, Switzerland has positioned itself to become a hub for innovative financial technologies ("**Fintechs**") and projects such as Diem (formerly Libra), the envisaged global cryptocurrency, brought it into the focus of the public globally. As part of this effort, the Swiss regulatory framework is continuously being adjusted to address the needs of Fintech providers and to create a suitable environment for applications of distributed ledger technology ("**DLT**"). As a first measure, the Swiss Federal Council adopted amendments to the Federal Ordinance on Banks and Savings Banks of 30 April 2014 ("**BankO**") that entered into force on 1 August 2017 (see below). In addition, the Swiss Parliament amended the BankA with effect from 1 January 2019 to introduce a so-called Fintech licence as a new regulatory licence category geared towards limited deposit-taking activities, with less stringent requirements compared to the fully fledged banking licence. Within the regulatory framework defined by federal laws and regulations, the Swiss Financial Market Supervisory Authority ("**FINMA**") aims to take a technology-neutral approach in its practice and revised several of its circulars to remove obstacles for technology-based approaches to financial services.

On 25 September 2020, the Swiss Parliament adopted the new Federal Act on the Amendment of Federal law in light of the Developments regarding DLT. The new regulations include a number of fairly fundamental changes to federal laws, in particular the Federal Code of Obligations of 30 March 1911 ("**CO**"), the Federal Debt Enforcement and Bankruptcy Act of 11 April 1884 ("**DEBA**"), the Federal Act on the Prevention of Money Laundering and Terrorist Financing of 10 October 1997 ("**AMLA**"), and the FMIA. The changes introduce, in particular, a concept of DLT-based uncertificated securities (*DLT-Wertrechte*) into civil securities law pursuant to the CO, as well as a new stand-alone licence type under the FMIA for so-called "DLT Trading Facilities" (*DLT-Handelssysteme*), *i.e.*, institutions for multilateral trading in standardised DLT securities. On 1 February 2021, the provisions related to the introduction of the DLT-based uncertificated securities and an exemption provision related to the ombudsman's office affiliation requirement for financial service providers will enter into force. The remaining new provisions are currently expected to enter into force on 1 August 2021. On 19 October 2020, the Federal Department of Finance initiated a consultation procedure on the preliminary draft of the implementing ordinance with a deadline of 2 February 2021.

Regulatory architecture: Overview of banking regulators and key regulations

<u>Responsible bodies for banking regulation</u>

FINMA is the supervisory authority for banks, securities dealers and other financial institutions such as collective investment schemes and insurance undertakings. FINMA's primary tasks are to protect the interests of creditors, investors and policyholders and to ensure the proper functioning of financial markets. To perform its tasks, FINMA is responsible for licensing, prudential supervision, enforcement and regulation.

In parallel, the Swiss National Bank ("**SNB**"), the Swiss central bank, is responsible for monetary policy and the overall stability of the financial system. This includes the mandate to determine banks and bank functions as systemically important, in consultation with FINMA.

Under the so-called dual supervisory system in the banking regulation, FINMA largely relies on the work of recognised audit firms. As the extended arm of FINMA, these audit firms exercise direct supervision over financial institutions. They conduct regulatory audits of the banks on behalf of FINMA. In addition, FINMA may undertake targeted, on-site supervisory reviews with the aim of achieving timely and comprehensive supervision. As an exception to the dual supervisory system, FINMA has a dedicated supervisory team that is responsible for directly monitoring UBS Inc./UBS Switzerland Ltd and Credit Suisse Group Ltd/Credit Suisse (Switzerland) Ltd, the two largest Swiss banking groups. Furthermore, FINMA also increasingly performs on-site inspections and takes "deep dives" into selected financial intermediaries to get a better understanding of the inner workings of supervised entities.

<u>Key legislation or regulations applicable to banks</u>

The key legislation for Swiss banks includes the following:

- the FINMASA defines the role and powers of FINMA;
- the Federal Act on the Swiss National Bank of 3 October 2003 defines the role and powers of the SNB;

- the BankA and BankO provide for the general regulatory framework governing banks, including the banking licence requirements and accounting rules for banks;
- the FMIA and the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 ("**FMIO**") contain, among others, (i) licence requirements for stock exchanges, multilateral trading facilities, operators of organised trading facilities, central depositories, central counterparties, payment systems and trade repositories, (ii) takeover and disclosure rules referring to listed companies, and (iii) regulations on market conduct in securities and derivatives trading; and
- the FinSA and the FinSO, which is being phased-in, provide for rules of conduct for all financial service providers, including banks, as well as rules on prospectuses and key information documents for certain financial instruments.

Further important regulations are:

- the Ordinance of FINMA on Foreign Banks in Switzerland of 21 October 1996 ("**FBO-FINMA**"), which provides for additional requirements for banks controlled by foreign persons as well as branches and representative offices of banks incorporated abroad;
- the Ordinance on Capital Adequacy and Risk Diversification for Banks and Securities Dealers of 1 June 2012 ("**CAO**");
- the Ordinance on Liquidity for Banks of 30 November 2012 ("**LiqO**"), governing capital adequacy and liquidity requirements applicable to banks and securities dealers;
- the Ordinance of FINMA on the Insolvency of Banks and Securities Dealers of 30 August 2012 ("**BIO-FINMA**"), governing the resolution and recovery as well as insolvency proceedings applicable to banks and securities dealers;
- the Federal Act on Collective Investment Schemes of 23 June 2006 and the Ordinance on Collective Investment Schemes of 22 November 2006 on investment funds and companies as well as rules on distribution;
- the Federal Act on Consumer Credit of 23 March 2001; and
- the AMLA and its implementing ordinances.

In addition, FINMA specifies its practice in numerous circulars. FINMA circulars as such are, in principle, not binding for Swiss courts but constitute a mere codification by FINMA of how it interprets and applies the applicable financial laws and regulations. However, the guidance of FINMA circulars might *de facto* have a binding effect as a Swiss court might be reluctant in practice to interpret the regulation differently before having thoroughly considered the view of FINMA.

Furthermore, the Swiss financial sector has a long tradition of self-regulation by self-regulatory organisations ("**SROs**"). Against this background, FINMA has recognised several self-regulatory guidelines and agreements of SROs as minimum standards, thus incorporating them within the regulatory framework and subjecting non-compliance to enforcement action (available at https://www.finma.ch/en/documentation/self-regulation/anerkannte-selbstregulierung/). An important example of self-regulation is the agreement on the Swiss bank's code of conduct with regard to the exercise of due diligence of 2020 ("**CDB 20**") by the Swiss Bankers Association ("**SBA**"), which defines know-your-customer policies that banks and securities dealers must apply.

<u>Influence of supra-national organisations and regulatory regimes or regulatory bodies</u>

Switzerland is engaged in several international bodies, such as the FSB, the Bank of International Settlements, the BCBS and the International Organization of Securities Commissions. Furthermore, Switzerland is a member of the FATF, which sets out international standards in the area of AML, the OECD, and the Global Forum. Finally, although Switzerland is not a member of the G20, it has regularly been invited to participate in this international forum, which plays a leading role in defining international initiatives.

International standards have an increasing importance for Switzerland, as it has to ensure access for its financial institutions to foreign markets and maintain a good reputation of the Swiss financial market overall. The standards established by supra-national organisations, including, *e.g.*, the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions dated 15 October 2014, and Guidance on Arrangements to Support Operational Continuity in Resolution dated 18 August 2016, thus have a strong impact on Swiss regulation in the financial sector. As a case in point, Basel III had a significant influence on the Swiss regulatory framework, such as the capital adequacy and liquidity standards specified in the CAO and the LiqO.

The Swiss regulatory framework is particularly influenced by developments in the European Union. As an example, the European Union harmonised its capital market regulation with MiFID II and MiFIR. Consequently, the Swiss legislator is following up and voluntarily harmonising certain aspects of Switzerland's legislation with similar provisions in the FMIA and FinSA, with the aim of ensuring access to the European financial markets (which requires, among others, a regulation that is equivalent to the EU regulation). Furthermore, on 25 September 2020, the Parliament adopted the revised Federal Act on Data Protection ("**FADP**"), which is likely to have an impact on several industry sectors, including the banking sector (it is currently expected that the revised FADP will enter into force in 2022). The revision aims to harmonise the FADP with the recently revised data protection regime of the European Union, in particular the General Data Protection Regulation (EU) No 2016/679. The same also applies in the context of derivatives trading. The provisions on derivatives trading of the FMIA are significantly influenced by the respective provisions in the European Market Infrastructure Regulation (EU) No 648/2012 and by rules of other international regulatory bodies; for example, the FMIA implements the commitments assumed at the G20 summit in Pittsburgh in 2009, and adapts the Swiss regulation of the financial market infrastructures and derivatives trading to international requirements.

Restrictions on the activities of banks

A bank must obtain a licence from FINMA in order to operate in Switzerland, or from Switzerland abroad. Switzerland follows a model of universal banking. Therefore, a bank is allowed to engage in any other business in the financial industry in addition to its deposit-taking business, if it has an appropriate organisation to carry out such activity, manages the operational risks and meets the requirements for fit and proper conduct of business. There are a few exceptions where an additional licence is required (*e.g.*, if the bank acts as a depository of collective investment schemes). Moreover, a bank cannot operate a fund management company, an insurance company or a financial market infrastructure except payment systems.

A bank is required to describe in detail the scope of business (including the subject matter and geographical scope) of its activities in the licence application (and in the article of association and the organisational rules). In case of any changes (in particular, an expansion) in the scope of the business activities of a bank, a bank is respectively required to inform and obtain prior approval of FINMA. Consequently, the scope of a banking licence is *de facto* individualised and, hence, varies from case to case.

Furthermore, many larger financial groups have separate entities engaging in fund management. By contrast, financial conglomerates, including both banks and insurance undertakings, are a relatively rare occurrence in Switzerland.

Recent regulatory themes and key regulatory developments

New architecture of the Swiss regulatory framework

Under the new regulatory framework of the FinSA and FinIA that entered into force on 1 January 2020, financial institutions are to be subject to a "cross-sectorial regulation". The FinSA aims to protect customers of financial service providers. It regulates the provision of financial services by financial service providers (including banks, securities firms, *etc*., to the extent they provide financial services, but not insurance undertakings) and the offering of financial instruments. It includes, *e.g.*: regulation on client segmentation; rules of conduct; registration requirements for client advisors of financial service providers that are not subject to prudential supervision; rules on prospectuses; and information leaflet requirements for financial instruments. In addition, the FinSA introduces the concept of a mandatory affiliation with an ombudsman office (subject to exemptions). This new framework is being phased in with a transitional regime, which grants – generally speaking – financial service providers two years (*i.e.*, until 1 January 2022) to comply with the new rules of conduct and organisational duties.

The FinIA regulates the licence requirements for certain financial institutions, including securities firms, fund management companies, managers of collective assets, asset managers and trustees. In contrast, banks and Fintechs will remain subject to the regulatory requirements set out in the BankA (and BankO). Asset managers and trustees will be subject to a FINMA licence requirement but supervised by a FINMA-authorised, private supervisory body.

In the course of the new regulatory framework, FINMA adopted the Ordinance of FINMA on Financial Institutions of 4 November 2020, amended various FINMA ordinances (*inter alia*, BIO-FINMA, the Ordinance of FINMA on Prevention of Money Laundering and the Financing of Terrorism of 3 June 2015, and the Ordinance of FINMA on Collective Investment Schemes of 27 August 2014) and FINMA circulars (*inter alia*, Circular 2013/8 "Market conduct rules", Circular 2013/3 "Inspection", Circular 2015/2 "Liquidity risk – banks" ("**Circular 2015/2**"), and Circular 2017/7 "Credit risks – banks" ("**Circular 2017/7**")), and revoked three FINMA circulars (*inter alia*, Circular 2008/5 "Securities dealers"). These amendments entered into force on 1 January 2021 with transitional provisions.

The FMIA and FMIO, which entered into force on 1 January 2016, will continue to regulate financial infrastructures.

Regulation of systemically important banks

In the financial crisis of 2007/2008, the Swiss government had to bail out UBS AG, the largest Swiss bank, with a capital injection of CHF 6 billion and liquidity support from the SNB. Consequently, Switzerland decided to take a position as a forerunner in the global efforts to improve the resolution of systemically relevant financial institutions carried out under the aegis of the FSB.

The Swiss approach consists of a policy mix of stringent capital requirements, both on a risk-weighted and absolute (through a leverage ratio) basis, and liquidity ratios for systemically important banks ("**SIBs**"), as well as recovery and resolution planning by the financial institutions and FINMA, acting as a resolution authority. In addition to the standard capital requirements, Switzerland phased in the requirements regarding total loss-absorbing capacity ("**TLAC**") to ensure that sufficient capital is available to finance the resolution of SIBs.

Unlike other jurisdictions, however, the Swiss framework did not impose explicit requirements on ring-fencing or bans on proprietary trading. By contrast, it relied on a carrot-and-stick approach. The stick consisted of a regulatory requirement imposed on SIBs to ensure that they can be resolved in an orderly manner without compromising their systemically relevant functions. At the same time, the regulator was empowered to grant discounts to SIBs that take additional measures to enhance their resolvability. This led the two global SIBs ("**G-SIBs**"), UBS AG and Credit Suisse Group AG, to restructure their corporate group to be controlled by a holding company, which is to serve as a single point of entry in resolution, to carve out their domestic business in a separate financial institution, and to create dedicated service entities to ensure that the domestic business, which houses the core of the systemically relevant activity, can remain viable even if the group enters into resolution.

<u>Resolution stay and bail-in</u>

To facilitate the resolution of the SIBs, Swiss law was amended to grant FINMA the authority to order a resolution stay applying to all termination rights, and automatic termination clauses triggered by the commencement of resolution proceedings for a period of two business days (art. 30*a* BankA). To ensure the enforceability of these powers, all banks and securities dealers are required to take measures to ensure that agreements that are not subject to Swiss law and the jurisdiction of Swiss courts provide for the contractual recognition of a resolution's stay. However, whereas the resolution stay powers of FINMA extend to all agreements, FINMA determined that only certain financial arrangements needed to be covered by the contractual recognition (art. 56 BIO-FINMA).

Furthermore, FINMA was also granted the power to bail in or write off unsecured and unprivileged claims in connection with the approval of a resolution plan (art. 31 (3) BankA and art. 49 BIO-FINMA). However, unlike the resolution stay and the approach in the European Union, Swiss law does not require a contractual recognition of bail-in powers. This is testimony to the fact that FINMA relies more on capital requirements and, for SIBs, TLAC than on bail-in powers to carry out a resolution of financial institutions.

<u>Fintech</u>

To ease the Swiss regulatory regime for providers of innovative Fintech, including, *e.g.*, crowdfunding and crowdlending, electronic payment services, robo-advice, and cryptocurrencies, the regulation provides for the following measures:

- Third-party monies accepted on interest-free accounts for the purpose of settlement of customer transactions do not qualify as deposits from the public (and, therefore, do not count towards a potential banking licence requirement) if the monies are held for a maximum of 60 days (instead of only seven days, as was the case before the amendment) (art. 5 (3)(c) BankO).
- Firms accepting deposits from the public or publicly offering the acceptance of deposits are exempted from the banking licence requirement as long as: (i) the deposits accepted do not exceed CHF 1 million; (ii) no interest margin business is conducted; and (iii) depositors are informed, before making the deposit, that the firm is not supervised by FINMA and that the deposit is not covered by the depositor protection scheme (art. 6 (2) BankO). This exemption from the banking licence requirement is available to Fintechs as well as any other type of business that fulfils the requirements. It aims at creating an innovation space, a so-called "sandbox".
- The new Fintech licence – a licence with more lenient requirements compared to the fully fledged banking licence – was introduced by an amendment to the BankA with effect as of 1 January 2019. This regime applies to institutions that hold deposits of less than CHF 100 million. If the customers are protected through additional safeguards, FINMA can approve a higher deposit ceiling on a case-by-case basis. Under this licence, the deposits may not be invested and no interest may be paid on them. The

holders of a Fintech licence are not subject to the depositor protection regime. Further, they are not required to comply with the capital adequacy requirements under the CAO, but instead are subject to the minimum capital requirements under the BankO, *i.e.*, at least CHF 300,000 or 3% of the deposits taken from the public held. Accounting is carried out in accordance with the CO, which is a further relaxation compared to the rules applying to a bank. However, the requirement to be subject to the AMLA remains unchanged compared to the fully fledged banking licence.

- The new Federal Act on the Amendment of Federal law in light of the Developments regarding DLT, will introduce a new stand-alone licence type under the FMIA for so-called "DLT Trading Facilities" (*DLT-Handelssysteme*), *i.e.*, institutions for the multilateral trading in standardised DLT securities. Unlike the licences for traditional trading venues such as stock exchanges and multilateral trading facilities, the DLT Trading Facility licence will be a unified licence allowing its holder to also provide certain post-trading services that are normally reserved to other financial market infrastructures, such as central custody/depository services as well as clearing and settlement. Furthermore, DLT Trading Facilities will be allowed to also admit private individuals and unregulated legal entities to trading instead of regulated participants only.

In addition, FINMA issued several guidance papers on the use of blockchain in financial services. These set out FINMA's interpretation of the law when reviewing business models relating to digital assets or otherwise making use of blockchain technology, and provide guidelines to interested parties wishing to submit their project for review by FINMA prior to launch, often with the goal of being provided with a so-called "no-action letter" or to ascertain applicable licence requirements (see, *e.g.*, the FINMA guidance 04/2017 on the regulatory treatment of initial coin offerings ("**ICOs**") of 29 September 2017, the FINMA guidelines for enquiries regarding the regulatory framework for ICOs of 16 February 2018, an update and supplement to said guidelines focusing on issuances of "stable coins" of 11 September 2019, and the FINMA guidance 02/2019 regarding payments on the blockchain of 26 August 2019). The various guidance papers published by FINMA generally emphasise the technology-neutral and principle-based nature of Swiss financial regulation. This provides some flexibility to explore innovative business models but requires that projects be reviewed and evaluated on a case-by-case basis, often in a dialogue with the regulator. As far as projects relate to the issuance, trading, custody, or other activities relating to blockchain tokens, FINMA has provided a general classification into three categories – taking a substance-over-form approach – to enable a structured analysis of proposed business models under applicable financial regulation. Specifically, FINMA distinguishes between payment tokens (cryptocurrencies), utility tokens and asset tokens, acknowledging that hybrid forms and transformations from one category into another along the timeline are possible. See the comments on DLT regulation in the Introduction above.

<u>Implementation of the Basel III requirements</u>

Switzerland has largely implemented the core requirements of Basel III in the CAO, the LiqO and various FINMA circulars. These requirements first applied exclusively to systemically important financial institutions, and were then extended to all banks.

<u>Capital requirements</u>: On 1 July 2016, the amended CAO entered into force, implementing the adjusted regulations of Basel III on credit risk capital requirements for derivatives, fund investments and securitisations for banks. The amendments introduced definitive rules on derivative positions *vis-à-vis* central counterparties and revised the capital requirements

for all types of bank claims *vis-à-vis* all types of investment funds, as well as the capital adequacy rules on securitisation positions in the banking book. Along with the CAO, FINMA revised its Circular 2017/7 introducing the implementing provisions. Further amendments to Circular 2017/7 entered into force on 1 January 2019 with regard to the calculation of the minimum capital requirements for the default fund of central counterparties to reflect additional changes made to the CAO.

On 1 January 2018, new rules introducing a leverage ratio and a new risk diversification provision in line with Basel III were implemented in the CAO. The changes included the introduction of an unweighted capital adequacy requirement based on the leverage ratio of 3% for all non-SIBs, and up to 10% for SIBs as an additional safety net. The provisions on risk diversification stated, *inter alia*, that risk concentrations may generally only be measured according to core capital (Tier 1) and that banks are restricted in their use of models for determining risk concentrations. Further changes concerned the overrun of the upper limits enshrined in the CAO, the weighting of certain assets, as well as the adjustment of some special rules for SIBs. To reflect the changes made to the CAO, FINMA revised its Circular 2015/3 "Leverage ratio – banks" ("**Circular 2015/3**"), which entered into force on 30 June 2018, as well as its Circular 2019/1 (formerly 2008/23) "Risk diversification – banks", which entered into force on 1 January 2019 and imposes a maximum limit on the size of individual loans as well as several relaxations for smaller institutions.

On 1 January 2019, further amendments to the CAO entered into force, introducing gone-concern capital requirements for domestically focused SIBs ("**D-SIBs**": PostFinance AG; Raiffeisen; and Zürcher Kantonalbank).

On 1 January 2020, further amendments to the CAO entered into force. On the one hand, they grant relief to small, liquid and well-capitalised banks and securities dealers by introducing simplified requirements for the capital adequacy, while on the other hand they require parent entities of entities with systemically important functions (*e.g.*, Credit Suisse AG and UBS AG), and Swiss entities of SIBs that perform systemically important functions and are therefore vital for the financial group's functioning, to provide for sufficient capital available for the event of a financial crisis.

In connection with the requirements for managing interest rate risk in the banking book and standards on disclosure, FINMA further revised the following circulars: FINMA Circular 2011/2 "Capital buffer and capital planning – banks"; FINMA Circular 2013/1 "Eligible capital – banks"; Circular 2015/3; FINMA Circular 2016/1 "Disclosure – banks"; FINMA Circular 2019/2 "Interest rate risks – banks"; and Circular 2017/7. The changes introduced, *inter alia*, new disclosure tables as well as adjustments to the determination of eligible capital, which accommodate the treatment of expected credit loss provisions under International Financial Reporting Standard 9.

In the course of Basel III, FINMA is drafting a new CAO-FINMA that, among other things, will take account of the concerns regarding the correct regulatory level. At the same time, various circulars in the area of Basel III will probably be substantially shortened. According to the timetable at national level, the work should be complete by the beginning of 2023.

<u>Liquidity requirements</u>: Under the LiqO (as in force since 2013), banks have to appropriately manage and monitor liquidity risks. It was thus possible to transpose part of the international liquidity standards of Basel III into Swiss law. In a further step, the revised LiqO, which entered into force on 1 January 2015, has also adopted the new quantitative liquidity requirements in accordance with the international liquidity standards. In particular, a liquidity coverage ratio has been introduced for short-term liquidity, requiring banks to

provide for sufficient high-quality liquid assets. A bank should, *inter alia*, be able to survive for at least 30 days in the event of a liquidity stress scenario, with client deposits being withdrawn or difficulties with securing refinancing on the capital market. To reflect the changes made to the LiqO, FINMA revised its Circular 2015/2, which entered into force on 1 January 2018. Circular 2015/2 has been revised one more time and now includes provisions on the net stable funding ratio; the new provisions entered into force on 1 January 2021.

<u>Administrative assistance</u>

The implementation of the FMIA also entailed several changes in other areas, *e.g.*, with regard to administrative assistance, where FINMA is not required to inform the relevant customer prior to transmitting the information to the requesting authority if the purpose of the administrative assistance and the effective fulfilment of the requesting authority's tasks were to be jeopardised by the prior notification (art. 42*a* (4) of the revised FINMASA, which entered into force on 1 January 2016).

<u>AEOI and tax compliance</u>

In response to the criticism of the Swiss financial centre, Switzerland adopted a "White Money Strategy", which led to the adoption of the AEOI in tax matters and extended the AML framework to taxation fraud. This strategy was heavily influenced by the recommendations of the FATF and the Global Forum in connection with international AML standards, as well as the pressure of the OECD to adopt the AEOI in tax matters with countries abroad.

Against this background, a legal foundation for introducing the AEOI in Switzerland was created with the AEOI-Act that entered into force on 1 January 2017. Under the AEOI-Act, financial institutions subject to the AEOI-Act must collect specific data from 2017 onwards and submit it to the Swiss Federal Tax Administration which, in turn, exchanges the data with the tax authorities of the partner states. In view of the AEOI's activation with 38 states on 1 January 2017, Swiss financial institutions started to collect relevant data, and Switzerland exchanged data with most of the 38 partner states for the first time at the end of September 2018. In December 2017, the Swiss Parliament adopted the AEOI with 38 further partner states. As a result, Swiss financial institutions have been collecting account information referring to the further 38 partner states since 1 January 2018, and Switzerland exchanged it for the first time in September 2019. Also, in September 2019, the National Council approved the adoption of the AEOI with 19 further partner states. The exchange of account information will require the further partner states to adhere to, *inter alia*, the CRS of the OECD by the end of 2019. On 1 January 2021, new provisions of the AEOI-Act came into force to implement the recommendations of the Global Forum in Switzerland.

Furthermore, the recommendations of the FATF also influence the revision of the AMLA and prompted a first revision that came into effect on 1 January 2016, implementing, *e.g.*, new regulations in connection with business relationships and transactions with politically exposed persons. Currently, a further revision is under way, proposing, *inter alia*, to explicitly oblige and to regularly check that the information is up to date. This would create a basis for the existing practice and codify case law. Furthermore, due diligence obligations for the provision of certain services relating to the establishment, management, or administration of companies and trusts are proposed. The Swiss Parliament has not yet adopted the revised AMLA and further discussions are taking place. The revised AMLA is not expected to enter into force before 1 January 2022. The country review of the FATF also led to a revision of the Ordinance of FINMA on Combating Money Laundering and Terrorist Financing in the Financial Sector of 3 June 2015, which addresses shortcomings identified in the FATF country review. The amendments entered into force on 1 January 2020.

The Swiss Federal Council adopted the federal law on the implementation of the recommendations of the Global Forum on 21 June 2019, which entered into force on 1 November 2019. The bill aims, in addition to changes to corporate law, to facilitate the exchange of tax-related information.

Implementation of the Foreign Account Tax Compliance Act

On 2 June 2014, the agreement between Switzerland and the US on cooperation to simplify the implementation of the Foreign Account Tax Compliance Act ("**FATCA**") entered into force. Under this agreement, the implementation of the FATCA in Switzerland was based on the so-called "Model 2", which means that Swiss financial institutions disclose account details directly to the US tax authority, with the consent of the US clients concerned. However, in October 2014, the Swiss Federal Council approved a mandate for negotiations with the US on switching to "Model 1", which might lead to the application of the automatic exchange of information between Switzerland and the US. It is still unknown at the present time when there will be a corresponding agreement between Switzerland and the US. On 20 September 2019, the amendment protocol to the double taxation agreement between Switzerland and the US entered into force. Under the protocol, the US tax authority IRS can, for cases from 30 June 2014, request information in aggregated form as a group request under the FATCA on all accounts that Swiss financial institutions have reported to IRS.

Disclosure of climate-related financial risks

FINMA consultation on the partial revision of FINMA Circulars 2016/1 and 2016/2 in connection with the disclosure of climate-related financial risks will run until 19 January 2021. For financial institutions, the repercussions of climate change can entail significant longer-term financial risks. These risks do not represent a new risk category (*i.e.*, climate-related financial risks can be assigned to, and mapped in, traditional risk categories) but they are new risk drivers. In the area of disclosure of climate-related financial risks, FINMA has identified a targeted need for regulatory action in the balance sheets of its supervised entities and is setting out the corresponding regulatory detail accordingly.

Bank governance and internal controls

Key requirements for governance of banks

In order to obtain and maintain a banking licence, Swiss banks must, *inter alia*, comply with specific governance requirements as outlined in particular in the BankA and BankO, and further specified in guidelines and publications of FINMA, in particular FINMA Circular 2017/1 "Corporate governance – banks" ("**Circular 2017/1**"), which entered into force on 1 July 2017. It remains to a large extent in line with the former FINMA guidance, except for a number of changes in specific areas. A significant change introduced by Circular 2017/1 is a shift from a "comply or explain" approach to a more differentiated approach, allowing FINMA to apply the requirements of Circular 2017/1 to the extent they are proportionate. This allows FINMA to consider on a case-by-case basis the characteristics of each bank in terms of size, complexity, structure, and risk profile. On 1 January 2020, some amendments to Circular 2017/1 entered into force, providing certain relief for small banks.

Good reputation and guarantee of proper business conduct

Persons entrusted with the bank's administration and management must enjoy a good reputation and guarantee proper business conduct (art. 3 (2)(c) BankA). Furthermore, qualified shareholders of a bank (*i.e.*, persons holding at least 10% of the capital or voting rights or that otherwise have a significant influence on the bank) must guarantee that their influence will not have a negative impact on the bank's prudent and solid business activity (art. 3 (2)(c*bis*) BankA).

Separation of board of directors and executive management

The governance of Swiss banks is characterised by a strict separation between the board of directors, which is responsible for oversight, and the executive management.

A bank's board of directors as a body and each board member must meet specific conditions, including the following:

- To comply with the independence requirement, the board members have to structure their personal and business relationships in such a way as to avoid possible conflicts of interest with the bank. In particular, at least a third of the board members must be independent (Circular 2017/1 N 17 *et seq.*). FINMA may, in justified, exceptional cases, grant exceptions. This might be relevant in financial groups, in particular.
- The board of directors as a whole must have adequate management expertise and the required knowledge and experience in the banking and financial services sector. It must be sufficiently diversified to ensure that all key aspects of the business, including finance, accounting, and risk management, are adequately represented (Circular 2017/1 N 16).
- The board of directors must comprise at least three members. However, the actual number of directors required depends on the size, complexity, and risk profile of the bank (art. 11 (1) BankO and FINMA explanatory notes to the draft Circular 2017/1 N 3.2.2). In practice, a board generally has at least five members.

Committees of the board of directors

The larger and more complex banks, which belong to supervisory categories 1 to 3 (out of five), are required to establish an audit and a risk committee, irrespective of the total number of members of the board of directors. However, banks in supervisory category 3 may combine the two committees (Circular 2017/1 N 31).

A majority of the members of both committees must be independent and the chair of the board of directors may not be a member of the audit committee or chair the risk committee. Furthermore, each committee must have sufficient knowledge of and experience in the areas for which they is responsible (Circular 2017/1 N 33).

Internal audit function

The board of directors, in principle, has to establish an internal audit function that directly reports to the board or one of its committees, typically to the audit committee. The internal audit function works independently from the daily business processes and, in particular, provides an important basis for the assessment of whether the bank has implemented an adequate and effective internal control system (Circular 2017/1 N 82 *et seq.*).

Mandatory management functions

Banks in supervisory categories 1 to 3 have to implement the role of an independent chief risk officer ("**CRO**"), who has to be a member of the management body if the bank is systemically relevant. Such CRO may be responsible also for other independent control functions (*e.g.*, the compliance function) even in the case of SIBs (Circular 2017/1 N 67 *et seq*.).

Remuneration of a bank's employees

As a general rule, a bank's remuneration system must not offer any incentives for an employee to disregard the bank's internal control mechanisms. In particular, the remuneration system for employees of the internal audit, the compliance function, and the risk function may not contain incentives that could lead to a conflict of interests. Therefore, their remuneration (among others, through salaries and bonuses) may not depend on the performance of individual products and transactions.

FINMA Circular 2010/1 "Remuneration schemes" ("**Circular 2010/1**") outlines minimum standards for remuneration schemes of banks and other financial institutions. In particular, it includes the requirement of a remuneration scheme to be simple, transparent, implementable, and oriented towards the long term. Circular 2010/1 mandatorily only applies to banks of supervisory category 1 (*i.e.*, UBS and Credit Suisse) and the two largest insurance groups, being Zurich and Swiss Re (see Circular 2010/1 N 6 and 7). However, it applies as a non-binding code of best practice to all other institutions. In addition, FINMA may, in justified cases, require such other institutions to mandatorily implement Circular 2010/1 in full or in part, if appropriate in the light of the circumstances (Circular 2010/1 N 9).

On 1 January 2014, the Ordinance against Excessive Compensation of 20 November 2013 ("**OaEC**") implementing the so-called "Say-on-Pay Initiative" entered into force, toughening the formal corporate governance regime for listed companies. Among others, it prohibits severance payments (golden parachutes), advance payments, and similar extraordinary payments to directors or senior managers. Furthermore, the aggregate compensation of directors and the senior management is subject to the approval of the general meeting of shareholders. In the course of the revision of the company law, the provisions of the OaEC will be incorporated into the CO generally unchanged. This amendment is expected to enter into force in 2022.

<u>Scope and requirements for outsourcing of functions</u>

All significant functions of a bank may, in principle, be outsourced, except for the direction, supervision and control by the supreme governing body, central executive management functions, and functions that involve strategic decision-making (FINMA Circular 2018/3 "Outsourcing"). In addition, decisions on entering or terminating a business relationship may not be outsourced. Furthermore, banks of supervisory categories 1 to 3 are required to have an autonomous control body in the form of a separate risk control and compliance function. Operational risk management and compliance tasks may be outsourced by banks of all supervisory categories. The bank must keep an inventory of the outsourced functions.

Furthermore, the bank, its audit firm, and FINMA, must have the contractual right to verify the service providers' compliance by inspecting and auditing all information relating to the outsourced function at any time, unrestrictedly.

<u>Accounting rules</u>

Value adjustments for default risks in banking are to be calculated in future on the basis of expected losses. For this change, FINMA adopted a new FINMA ordinance on accounting and a revised FINMA circular (Circular 2020/1 "Accounting – banks"), which both entered into force on 1 January 2020 with transitional provisions.

Bank capital requirements

In order to obtain a banking licence from FINMA, a bank must have a fully paid-in share capital of at least CHF 10 million (art. 15 (1) BankO). However, in principle, FINMA requires a bank to have additional capital of at least CHF 10 million but usually more (which might be contributed, *e.g.*, in the form of a subordinated loan as well), depending on the intended scope of the bank's business activities.

In addition to the statutory capital requirements, banks are also subject to regulatory capital requirements based on the Basel III Framework. The CAO specifies in more detail the regulatory capital required by Swiss banks, particularly depending on the bank's size and scope of business. The required capital comprises, in principle, the following parts:

- *Minimum required capital*: A bank must hold at least 8% of the risk-weighted positions as minimum required capital, whereof at least: (i) 4.5% must be held in the form of common equity Tier 1 ("**CET 1**") capital (CET 1 ratio); and (ii) 6% must be held in the form of Tier 1 capital (Tier 1 capital ratio) (art. 42 (1) CAO).
- *Capital buffer*: A bank must, in principle, hold a capital buffer between 2.5% and 4.8% of their risk-weighted positions, in particular, in the form of CET 1 capital, depending on the supervisory category of the bank (art. 43 (1) and appendix 8 CAO; art. 2 (2) and appendix 3 BankO).
- *Countercyclical buffer*: Upon request of the SNB, the Swiss Federal Council may, if necessary, require the banks to hold a countercyclical buffer of a maximum of 2.5% of their risk-weighted positions in Switzerland in the form of CET 1 capital to: (i) enhance the banking sector's resilience against the risk of excessive credit growth; or (ii) counteract excessive credit growth (art. 44 CAO). Currently, the Swiss Federal Council has activated the countercyclical buffer to counteract the risk of a real estate bubble fuelled by cheap mortgage loans, and requires banks to hold a countercyclical buffer of 2% of their risk-weighted positions whereby a residential property in Switzerland acts as real security (in accordance with art. 72 CAO).
- *Extended countercyclical buffer*: Banks with (i) a balance sheet of at least CHF 250 billion, of which the total foreign commitment amounts to at least CHF 10 billion, or (ii) a total foreign commitment of at least CHF 25 billion, have to hold an extended countercyclical buffer in the form of CET 1 capital. This buffer amounts to the weighted average of the countercyclical buffers that apply in the member states of the BCBS where the bank's relevant receivables from the private sector originate, but in no case more than 2.5% of the risk-weighted positions (art. 44*a* CAO).
- *Additional capital*: FINMA may require a bank to hold additional capital if the *minimum required* capital and countercyclical buffer do not sufficiently cover the risks of a specific bank (art. 45 CAO).
- *Leverage ratio*: A bank must also maintain a 3% minimum leverage ratio based on the un-risk-weighted assets and Tier 1 capital (art. 46 CAO and Circular 2015/3).
- *Additional requirements for SIBs*: In addition to the above-mentioned requirements that apply to all banks, SIBs have to comply with additional requirements; *e.g.*, they must have sufficient own funds to be able to continue their business activities even in the event of major losses (going-concern capital requirements), or they have to permanently hold additional funds to ensure a possible restructuring and winding-up (gone-concern capital requirements) (art. 124 *et seq*. CAO). G-SIBs are required to hold 100% of their going-concern capital requirement as TLAC. With effect from 1 January 2019, the gone-concern capital requirements also apply to D-SIBs. The new requirements are based on the going-concern capital requirements but, unlike for G-SIBs, which need to reflect 100% of their going-concern capital, this reflection amounts to only 40% in case of D-SIBs, subject to further rebates for state-owned D-SIBs, as the domestically focused banks are less interconnected internationally and are less systemically important. The revised CAO adjusts the gone-concern capital requirements for G-SIBs: the holding company of a financial group remains required to hold 100% of their going-concern capital as gone-concern capital; however, an operative parent entity of an entity with

systemically important functions (*e.g.*, Credit Suisse AG and UBS AG) will require an additional 30% of the consolidated group going-concern capital as gone-concern capital. In contrast, the Swiss subsidiaries with systemically important functions (*i.e.*, Credit Suisse Schweiz AG and UBS Switzerland AG) will only be required to hold 62% of their going-concern capital as gone-concern capital.

Rules governing banks' relationships with their customers and other third parties

Regulations applying to the bank's dealing with third parties

Banking and securities dealer activities

In Switzerland, the primary law governing the relationship between banks or securities dealers and their clients is the private civil law laid down in the CO. In many instances, a banking or securities dealing relationship is subject to the principles of the law of mandate of the CO. Under such provisions, an agent, *inter alia*, has to act faithfully and diligently (art. 398 (2) CO).

The nature of the legal duties owed by and customs of banks have been developed through court practice and by professional standards established by recognised SROs.

The FinSA provides for rules of conduct that apply to all financial service providers. Under this new legislation, financial service providers are required to provide extensive information on themselves, the services and products they recommend, as well as the risks and costs they entail. Furthermore, depending on the type of client and service they offer, they will be subject to further requirements to ensure the suitability or appropriateness of their offering. The implementation of these rules will come together with extensive documentation and record-keeping obligations as well as organisational requirements and, unless an exemption applies, an obligation to join an ombudsman organisation. In particular, client advisors will need to have the requisite knowledge and expertise to comply with their duties under the rules of conduct and carry out their business. Furthermore, client advisors of Swiss unregulated financial service providers and foreign financial service providers who perform services in Switzerland are required to register with a register of advisors unless an exemption applies. Furthermore, rules of SROs recognised by FINMA as minimum standard requirements applicable to certain financial institutions specify these duties. These self-regulatory rules include, among others, the Code of Conduct for Securities Dealers and the Portfolio Management Guidelines of the SBA. In connection with management, sales or custody of collective investment schemes, these rules are further implemented through the self-regulatory standards set forth in the Code of Conduct of the Swiss Funds & Asset Management Association ("**SFAMA**") (SFAMA merged with Asset Management Platform Switzerland to form the new Asset Management Association Switzerland, "**AMA**"), which is also recognised by FINMA as a minimum standard requirement. In view of the new regulatory framework, AMA is currently revising all of its self-regulation materials. The revised self-regulation materials will be published not before the first quarter of 2021. All existing SFAMA model documents can continue to be used until the transitional period ends on 1 January 2022.

Rules applying to the general terms and conditions of banks

The use of general terms and conditions ("**GTC**") to govern the relationship between the bank and its clients is widespread in the Swiss banking industry. However, Swiss law does not regulate the GTC of banks specifically. Accordingly, the question of whether GTC are valid must be established on the basis of the Swiss private law, particularly the general contract law provisions of the CO and art. 8 of the Federal Act against Unfair Competition of 19 December 1986, which prohibits the use of GTC that, to the detriment of consumers and contrary to the requirement of good faith, provide for a significant and unjustified imbalance between contractual rights and contractual obligations. Furthermore, specific regulations prohibit banks from including certain terms in their GTC with customers. For example, a right to use client securities may not be included in GTC. Against this background, the use of GTC might, in a typical business-to-customer relationship, be more limited in the banking industry.

Mechanisms for addressing customer complaints against banks

General remarks

Under Swiss supervisory law, FINMA's mandate includes the protection of creditors, investors, and policyholders. However, client protection is understood collectively and, therefore, FINMA does not adjudicate or even intervene in a dispute between a client and a bank. Furthermore, there are no explicit regulatory rules on handling complaints, although arguably the appropriate internal organisation of a bank requires the implementation of a complaints procedure. Disputes between a client and a bank are thus the remit of the ordinary courts, subject to the mediation by the Swiss Banking Ombudsman if the bank is a member of the SBA. However, the FinSA aims to facilitate access to justice by clients of financial service providers, among others, by requiring financial service providers to join an ombudsman organisation.

Swiss Banking Ombudsman

As part of its self-regulatory role, the SBA established a separate and independent institution, the Swiss Banking Ombudsman. Members of the SBA are required to submit to the authority of the Swiss Banking Ombudsman.

The Swiss Banking Ombudsman is an independent and neutral mediator whose services are free of charge for the banking customer. He is competent to approach specific complaints raised by banking customers against banks based in Switzerland but has no power to decide. Consequently, he mainly acts as a mediator in disputes to avoid costly and lengthy legal proceedings. The parties are not bound by his proposal but may choose either to accept it or to take other steps, such as starting a lawsuit.

Changes of the enforcement of client's rights according to the adopted FinSA

In order to facilitate the enforcement of rights for banking clients, the FinSA will introduce several changes to the enforcement of Swiss banking clients' rights such as, among others, an extensive documentation duty that requires financial service providers to document their services in an appropriate manner, and a right of a client to request the delivery of copies of these documents free of charge.

Furthermore, financial service providers will be required to join an ombudsman's office, which will offer a simple and informal process to settle disputes between clients and financial service providers. For members of the SBA, however, this will not be a major change as the SBA is now a recognised ombudsman's office under the FinSA (see above).

Outlook

More generally, the government announced that it is generally considering introducing a scheme for collective enforcement of claims in the Swiss Civil Procedure Code. This Swiss form of class action would not be limited to suits against banks and financial institutions but should be generally available for all types of civil disputes. This would further facilitate the enforcement of clients' rights and reduce the risk of high procedural costs.

<u>Swiss depositor protection scheme</u>

Deposits of Swiss banks are, in particular, protected by the following measures:

(a) Client deposits of Swiss banks are, in principle, privileged claims in case of bankruptcy of a bank up to CHF 100,000 (art. 219 (4)(f) 2nd class DEBA in conjunction with art. 37*a* (1) and art. 37*b* (1) BankA). However, the law further distinguishes between certain types of accounts. For example, deposits for vested benefit schemes are treated separately from other bank accounts and may benefit from privileged status in an additional protected amount of up to CHF 100,000 (art. 37*a* (5) BankA).

(b) Furthermore, client deposits of a bank or securities dealer located in Switzerland are protected to a maximal amount of CHF 100,000 per depositor. This depositor's guarantee in case of bankruptcy of a bank is ensured by the Swiss depositor protection scheme ("***esisuisse***"), which requires that all Swiss banks and branches of foreign banks must have their preferential deposits protected by *esisuisse*.

(c) Finally, client custody assets of Swiss banks and securities dealers are deemed by law, in principle, as segregated client assets. Consequently, they will be segregated in case of an insolvency of a bank or securities dealer (art. 37*d* BankA in connection with art. 36*a* Stock Exchange Act).

Furthermore, the Swiss Federal Council decided in February 2017 to strengthen *esisuisse*. On 19 June 2020, the Swiss Federal Council published the draft for deliberation in Parliament. The Swiss Parliament will have the first discussions on the draft in spring 2021. In the course of this revision, the Swiss Federal Council also plans to close a gap in the regulations on investor protection: the obligation to segregate client holdings booked to client accounts from proprietary holdings shall be extended over the entire custody value chain in Switzerland.

<u>Restrictions on inbound cross-border banking activities</u>

The Swiss approach to inbound cross-border banking services is rather liberal. Banking activities on a pure cross-border basis only (*i.e.*, without any actual or deemed local physical presence) from abroad into Switzerland are, in principle, not subject to a banking licence requirement. Consequently, a foreign banking institution may, in principle, freely offer banking services to Swiss-based customers if it does not establish a physical presence in the meaning of art. 2 (1) FBO-FINMA (*i.e.*, a representative office or a branch) and does not inaccurately represent that it is based or regulated in Switzerland.

However, this changes to a certain extent under the FinSA, which extends the scope of Swiss financial market regulation to financial services carried out "for clients in Switzerland". In other words, the commercial provision of financial services to clients in Switzerland on a cross-border basis is subject to the FinSA. This will not trigger a licensing obligation, but will require, in addition to complying with the rules of conduct and organisational duties provided for by the FinSA, the client advisors of foreign service providers to register themselves with a client advisor registry and, as previously mentioned, the financial service provider to join an ombudsman organisation.

Furthermore, the public offering of shares or units of collective investment schemes, and the placement of certain financial products in Switzerland, are subject to restrictions, licence or prospectus requirements. Furthermore, certain activities in connection with the sale and purchase of interests in collective investment schemes will constitute a financial service under the FinSA, which will entail the application of the duties provided under the FinSA instead of the previous regime on the regulation of distributors.

Regulatory framework on AML

Money laundering is subject to criminal sanctions under art. 305*bis* of the Swiss Criminal Code of 21 December 1937 ("**SCC**"). Money laundering in the meaning of the SCC includes any act suitable to conceal or disguise the identification of the origin or impede the tracing or the forfeiture of assets that have been obtained through serious crimes and certain tax offences.

Prudentially supervised financial institutions, such as banks and securities dealers, as well as other persons or entities who, on a professional basis, accept or hold third-party assets or who assist in the investment or transfer of such assets, including activities such as (independent) asset management and certain types of credit/lending business, trade finance including factoring with right to recourse, payment services, trading activities, *etc*., are subject to additional regulatory requirements (art. 2 (2) and (3) AMLA). Financial intermediaries that are not otherwise regulated (*e.g.*, by FINMA through holding a banking or securities dealer licence) have to join a recognised SRO, which will review their compliance with Swiss AML rules on a regular basis (art. 14 AMLA).

A major part of the AMLA provisions deal with the due diligence duties in connection with a financial intermediary's handling of third-party assets, including the due identification of the contractual party and the due determination of a potential beneficial owner, whereas, among others, these duties are further specified in the CDB 20.

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