

# Private Banking & Wealth Management

*Contributing editors*

Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov



2019

GETTING THE  
DEAL THROUGH

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# Private Banking & Wealth Management 2019

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

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# Preface

## Private Banking & Wealth Management 2019

Third edition

**Getting the Deal Through** is delighted to publish the third edition of *Private Banking & Wealth Management*, which is available in print, as an e-book, and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Hong Kong.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

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

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov of Lenz & Staehelin, for their continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
August 2018

# Introduction

Shelby R du Pasquier

Lenz & Staehelin

Private banking and wealth management have been and remain main 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 targets 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 has thus been a particularly 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 over the last few 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 in 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 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 full banking sector, including wealth management. As a result, private bankers are now generally subject to a corset 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 (FATF) 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, 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 OECD, 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 18,000 information requests were sent to that country in 2017, coming mainly from European countries.

In addition, after the introduction in 2014 of the Foreign Account Tax Compliance Act (FATCA), which focused on US taxpayers, 2017 and 2018 are seeing the implementation in more than 100 countries of a multilateral automatic exchange of information for tax purposes. As a result, one expects an overwhelming flow of personal and financial information related to the clients of private bankers and asset managers 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 financial crisis and the resulting regulatory initiatives (eg, Markets in Financial Instruments Directive (MiFID)).

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

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

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# Bahamas

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## Private banking and wealth management

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

Private banking in the Commonwealth of The Bahamas (The Bahamas) is primarily governed by the Banks and Trust Companies Regulations 2000, Chapter 316 (BTCRA). The BTCRA requires that any entity that wishes to engage in banking business must obtain a licence from the Central Bank of The Bahamas (CBB), where banking business is defined to encompass all aspects of commercial banking.

The services offered by private banks may also require that they obtain a licence from the Securities Commission of The Bahamas (SCB) under the Securities Industry Act 2011 (SIA), in order to deal in, arrange deals in, advise on or manage securities ('securities business').

Private banks are also subject to financial transactions regulations, being financial institutions under the Financial Transactions Reporting Act 2000, Ch 368 (FTRA) and the Financial Intelligence Unit Act 2000, Ch 367 (FIUA).

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

The CBB and the SCB are the main regulatory bodies relevant for private banking and wealth management. The CBB is primarily responsible for the governance of banks, trust companies, private trust companies and money transmission services. The SCB governs securities dealers and advisers, fund managers and administrators and financial and corporate service providers. Additionally, the Financial Intelligence Unit is responsible for ensuring compliance with the financial transactions regulations.

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

Private wealth services are not restricted in The Bahamas to private banks, but include trust companies, multi-family offices, securities investment advisers and managers, investment fund administrators and financial and corporate service providers.

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

There is no distinct definition of private banking in The Bahamas. The key feature of private banking in The Bahamas, as espoused by The Bahamas Financial Services Board, a public-private initiative that promotes the financial services industry of The Bahamas, is a personal relationship with a private banker that will provide expert advice and stewardship of all of a client's financial affairs. Private banking is said to work one-on-one with clients who may be dealing with multiple income streams and business interests that require complex solutions.

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

In licensing a private bank, the CBB will look at a variety of factors; chief among them is the fitness and propriety of the applicant, minimum capitalisation requirements and the three-year business plan. The considerations made by the CBB also include the nature and sufficiency of the financial resources, the soundness and feasibility of the business plan and the business record and experience of those who will operate the private bank.

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

Private banks in The Bahamas are subject to five main types of ongoing conditions. These can be separated into capital adequacy requirements, physical presence requirements, corporate governance requirements, information sharing requirements and requirements to maintain policies and procedures. The application of the ongoing conditions may differ depending on whether the private bank is a branch or subsidiary of an existing foreign bank or whether the private bank is a standalone institution. The minimum requirements that are generally applied to all banking institutions are summarised below.

#### Capital adequacy

A private bank must maintain a capital adequacy ratio of at least 8 per cent at all times, at least three-quarters of which (ie, 6 per cent) must take the form of Tier 1 capital, unless it is a branch of an existing foreign bank or a managed branch. Additionally, a private bank's Tier 1 capital must be predominantly comprised of common equity; therefore, each bank must maintain a minimum of 4.5 per cent of risk-weighted exposures consisting of Common Equity Tier 1.

#### Physical presence

Private banks are required to maintain a minimum physical presence in The Bahamas at all time. Physical presence does not require that the bank maintains a physical premises in The Bahamas, as Bahamian regulations allow a bank to be managed by a third-party managing agent in The Bahamas, but the bank must meet certain conditions that demarcate a physical presence in The Bahamas.

#### Corporate governance

The CBB regulations prescribe the corporate governance requirements of private banks and private banks are required to certify their compliance with corporate governance requirements to the CBB within 120 days of the end of each calendar year.

#### Information sharing

Private banks are also required to periodically share certain other information about their business to the CBB, where applicable, including publishing a yearly statement of their accounts; notifying and obtaining approval from the CBB in respect of any outsourcing of material functions by the bank; making disclosures with respect to remuneration, risk management and financial statements; and, generally, notifying the CBB of any changes or proposed changes to their business, operations, shareholders or corporate information.

#### Policies and procedures

Private banks are required by the CBB to maintain policies and procedures in respect of certain key aspects of its business, including, but not limited to, anti-money laundering and the countering of terrorist financing, internal assessments of capital adequacy and management of certain types of risks.

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

The majority of private banks in The Bahamas are subsidiaries of existing foreign banks. There are also branches of foreign private banks operating in The Bahamas. Less frequent are standalone private banks that operate exclusively from within The Bahamas.

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

It can take between three and six months to obtain a licence to conduct private banking business in The Bahamas.

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

A private bank that wants to surrender its banking licence must obtain the prior approval of the CBB. Such approval would be sought by the bank writing to the CBB outlining its plan for the closure of accounts and custody of assets with respect to non-responsive account holders. The private bank will then have to submit to a termination audit to confirm that there are no outstanding liabilities prior to the surrender of its licence. Following the termination audit, the CBB may sanction the surrender of the licence or impose additional requirements on the bank's dealings with accounts.

The process of a voluntary surrender of a securities business licence requires that formal notification in writing of surrender, setting out the reasons or circumstances for the surrender, is given to the SCB. The notification must be accompanied by the original licence or registration certificate for cancellation. The surrender of the licence or registration will take effect on the later of (i) 21 days after receipt of the original licence or certificate for cancellation; and (ii) all debts owed to the SCB and all matters outstanding (including disciplinary actions) before the SCB having been satisfied and properly concluded. In particular, if there are any financial filings that are outstanding these would need to be submitted.

### 10 Is wealth management subject to supervision or licensing?

Wealth management services will generally involve managing or advising on securities; both activities require a licence to engage in securities business from the SCB.

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

Applicants for a licence to engage in securities business must submit an application in the form prescribed by the SCB. Applicants are required to meet tests of fitness and propriety, financial resources and capital adequacy, banking, clearing and custody arrangements, internal controls and risk management systems, policies and procedures and arrangements made for the execution and settlement of securities transactions on behalf of customers.

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

#### Physical presence

Individual wealth managers are required to reside in The Bahamas. Where the wealth manager is a company, it is required to maintain a minimum physical presence in The Bahamas at all times. Physical presence does not require that a physical premises is maintained in The Bahamas, as Bahamian regulations allow a wealth manager to be managed by a third-party managing representative in The Bahamas, but the wealth managers must meet certain conditions that demarcate a physical presence in The Bahamas.

#### Corporate governance

Among other requirements, the board of directors of wealth managers should comprise (except where specific exemption has been granted) both executive and non-executive members, as appropriate to the organisation's needs, who are able to act independently of undue influence from internal and external sources, and the roles of chairman of the board and the chief executive officer should be separated.

#### Information sharing

Licensees are required to periodically share certain other information about their business to the SCB, including publishing yearly statements

of their accounts; notifying and obtaining approval from the SCB in respect of any outsourcing of material functions by the bank; updating the SCB annually with information on their operations and their key personnel, shareholders and service providers; and, generally, notifying the SCB of any changes or proposed changes to their business, operations, shareholders or corporate information.

## Anti-money laundering and financial crime prevention

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

All banking institutions are required to adhere to the CBB Guidelines for Licensees on the Prevention of Money Laundering and Countering the Financing of Terrorism (the AML Guidelines). Similarly, securities industry licensees are required to adhere to the Securities Industry (Anti-Money Laundering and Countering the Financing of Terrorism) Rules, 2015 (the AML Rules). The AML Guidelines and the AML Rules each incorporate the mandatory minimum requirements of Bahamian law as they relate to anti-money laundering and countering the financing of terrorism (AML/CFT), which are promulgated by the Proceeds of Crime Act 2000, Ch 93 (POCA), the Anti-Terrorism Act 2004, Chapter 107, the FIUA and the FTRA (collectively, the AML/CFT Laws), and the Regulations (the AML/CFT Regs) made thereunder, as well as guidance on industry best practices.

Among other things, the AML Guidelines and the AML Rules each require that banking institutions and securities industry licensees, respectively:

- establish clear responsibilities and accountabilities to ensure that policies, procedures and controls that deter criminals from using their facilities for money laundering or the financing of terrorism are implemented and maintained, and that sufficient controls and monitoring systems are in place for timely detection and reporting of suspicious activity;
- appoint a money laundering reporting officer (MLRO) to report to the Financial Intelligence Unit the suspicions of their staff regarding money laundering or terrorist financing and a compliance officer (who may be the same person as the MLRO) who shall ensure full compliance with the AML/CFT Laws and AML/CFT Regs;
- develop and implement a risk rating framework that is approved by its board of directors as being appropriate for the type of products offered by the bank or wealth manager and capable of assessing the level of potential risk that each client relationship poses to the bank or wealth manager;
- identify customers and verify customers' identity using reliable, independent source documents, data or information;
- verify that any person purporting to act on behalf of the customer is so authorised, and identify and verify the identity of that person; and
- record the purpose and reason for establishing the relationship with the customer and the anticipated level and nature of the activity to be undertaken.

### 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?

A PEP is defined as a natural person who is or has, in the preceding year, been entrusted within or outside The Bahamas with 'prominent public functions' or is or has been entrusted with prominent public functions in an entity established by formal political agreements between member countries that have the status of international treaties, whose existence is recognised by law in member countries and which is not treated as a resident institutional unit of the country in which it is located. Prominent public functions include the roles held by a head of state, a head of government, senior officials in the executive, legislative, administrative, military or judicial branches of a government (whether elected or not), senior officials of major political parties, senior executives of government-owned corporations and senior management of international organisations (eg, director, deputy directors and members of the board or equivalent functions), but shall not include middle-ranking or more junior officials.

Given the risks associated with doing business with PEPs, private banks are required to:



- have appropriate risk management systems in place to determine whether the customer or a beneficial owner of the customer is a PEP; and
- have developed a clear policy and internal guidelines, procedures and controls regarding such business relationships.

Licenses who establish or maintain business relationships with PEPs and other related parties (eg, immediate family members, close associates or related companies) are required to perform additional due diligence procedures, using a risk-sensitive approach, prior to establishing a private banking relationship for a PEP.

When establishing a private banking relationship with a PEP, or determining whether to continue business relationships with customers who are found to be or who subsequently become PEPs, a bank should:

- obtain senior management approval for the commencement or continuation of business relationships with such customers;
- take reasonable measures to establish the source of wealth and source of funds of the customer and the beneficial owner of the customer; and
- conduct enhanced monitoring of the business relations with and transactions for the customer, in order to detect any changes so that consideration can be given as to whether such changes appear unusual or suspicious.

**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.**

As a minimum, banks and wealth managers are required to obtain (i) the full and correct name of the individual; (ii) their address; (iii) their date and place of birth; and (iv) the purpose of the account and the nature of the business relationship. In The Bahamas, the AML/CFT Laws and AML/CFT Regs take a risk-based approach to identity verification, which may be satisfied by means of such documentary or other evidence as is reasonably capable of establishing the identity of that person.

Typically, banks require that a potential customer provide:

- one of the following to verify name and nationality: (i) current valid passport; (ii) driver's licence bearing the photograph and signature of the applicant; (iii) voter's card; or (iv) national identity card;
- a recent utility bill, tax assessment or bank or credit union statement containing details of the address to confirm address; and
- a statement of source of income.

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

Tax offences are not predicate offences for money laundering.

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

Bahamian law does not require financial intermediaries to verify tax compliance by clients. However, it is typical for financial intermediaries operating from The Bahamas to require clients to confirm tax compliance, particularly following the imposition of the US Foreign Accounts Tax Compliance Act (FATCA) and the imminent implementation of the OECD's Common Reporting Standard (CRS) in The Bahamas.

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

Under the applicable anti-money laundering laws and the AML Regs, a person convicted of money laundering can face an unlimited fine and up to 20 years in prison. Where a person fails to disclose knowledge or suspicion of money laundering to the Financial Intelligence Unit or a police officer, that person could face an unlimited fine and up to 10 years in prison. Where an offence is committed by an entity, as opposed to an individual, and that offence is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, that individual, as well as the body corporate, shall be guilty of that offence and could face the relevant penalty.

**Client segmentation and protection**

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

Bahamian laws generally do not apply differently depending on the characteristics of the client, although Bahamian law does provide that the requirement to file a prospectus does not apply to a distribution of securities of an issuer if the purchaser is an accredited investor. The term 'accredited investor', in the context of private banking, includes:

- any individual whose individual net worth, or joint net worth with that person's spouse, at the time of the purchase exceeds B\$1 million;
- any individual who had an individual income in excess of B\$200,000 in each of the two most recent years, or joint income with that person's spouse in excess of B\$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year;
- any person, other than an individual, with total assets in excess of B\$5 million not formed for the specific purpose of acquiring the securities offered;
- any entity in which all of the equity owners are accredited investors; or
- any person residing outside of The Bahamas who qualifies as an accredited investor, however defined, or has similar status, under the securities legislation of that person's country of residence, or who meets the criteria specified in (i) or (ii) above and is otherwise lawfully entitled to purchase the securities under the securities laws applicable to such purchase.

**20 What are the consequences of client segmentation?**

See question 19.

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

There is no general consumer protection or similar legislation relevant to private banking in The Bahamas. With respect to wealth management, however, the SIA prescribes the duties that persons licensed to engage in securities business owe to clients. These include duties to:

- act honestly and fairly in conducting their business activities in the best interests of their clients and the integrity of the market; and
- act with due skill, care and diligence, in the best interests of their clients and the integrity of the market.

**Exchange controls and withdrawals**

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

The Exchange Controls Regulations Act 1952, Ch 360 (ECRA) and corresponding regulations regulate the movement of funds, including any documents intended to facilitate the movement of funds (traveller's cheques, drafts etc), in The Bahamas through controlling and regulating gold, currency, securities and foreign exchange. Foreign exchange constitutes any currency that is not the Bahamian dollar, which is pegged to the US dollar at par.

Gold or foreign currency may only be dealt with (bought, borrowed, sold or lent) in The Bahamas by authorised dealers or by persons who have obtained permission from the CBB.

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

The ECRA imposes restrictions on the ability of a person resident in The Bahamas for exchange control purposes (exchange control residents) to withdraw foreign currency in The Bahamas. For exchange control residents, foreign currency may only be obtained from an authorised dealer or by a person who has obtained permission from the CBB. There are no similar legal restrictions on cash withdrawals of Bahamian dollars.

The restrictions on foreign currency withdrawals only apply to persons who are deemed exchange control residents. As clients of private banking institutions in The Bahamas, including the Bahamian entities

typically used to hold accounts with private banks, are invariably not exchange control residents, the ECRA does not operate to restrict the ability of such private banking clients to withdraw foreign currency in The Bahamas.

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

Yes. Any document or instrument utilised with the effect of an exchange control resident receiving foreign currency in The Bahamas is restricted. This includes cheques, bullion, securities, drafts or letters of credit. This does not apply to the typical private banking client that is not an exchange control resident.

**Cross-border services**

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

Bahamian law does not apply to private banking services offered on a purely cross-border basis (ie, via telephone, post, email or other electronic means from a foreign location), and there are no generalised marketing events in connection with any service or product offering within the jurisdiction.

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

Where private banking services are provided on a cross-border basis, local laws and regulations would not impose any licensing requirement on the private bank where services or products are provided to its clients in The Bahamas.

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

Cross-border services are generally not regulated by Bahamian law.

**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 enter The Bahamas to meet with clients or prospective clients without being licensed in The Bahamas. However, it is generally advised that foreign wealth managers are cautious when doing so, to ensure that what they are doing does not amount to the offering of securities in The Bahamas, which is subject to regulation. In particular, Bahamian law prohibits the marketing, promotion or offering of financial instruments to the public, the solicitation of funds from the public and mass communication by any means, including random cold calls, unless the person engaging in such activity is licensed to do so. Moreover, an employee should not represent or hold the foreign private banking institution out as providing services from within The Bahamas.

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

A foreign private banking institution may provide documents to clients and prospective clients in The Bahamas without triggering any licensing or registration requirements. It is advised, however, that clients or prospective clients do not execute the documentation for the purpose of effecting a purchase or sale of securities at a meeting with an employee of the foreign private banking institution that takes place in The Bahamas.

**Tax disclosure and reporting**

**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?**

There are no income, capital gains or corporation taxes imposed on individuals that are resident in The Bahamas for tax purposes. Consequently, there are no obligations placed on Bahamian taxpayers under law to disclose or establish tax compliance of private banking accounts to Bahamian authorities.

As a result of international obligations with regard to the automatic exchange of tax information, such as FATCA and the CRS, private banks operating from with The Bahamas have made it a policy to require clients to confirm their tax compliance. While this is not a requirement under Bahamian law, private banking institutions regularly include a compliance certification in self-certification documentation used for the purpose of FATCA and the CRS to protect themselves from liability.

**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?**

Owing to the lack of direct taxation of Bahamian taxpayers, there are no reporting requirements imposed on financial intermediaries in respect of Bahamian clients. In relation to international clients, however, financial intermediaries (inclusive of private banks) are required to report information for tax purposes on their non-resident clients and US citizen clients in compliance with CRS and FATCA, respectively.

Information is required to be reported in respect of all client accounts held by US citizens (except those that have a balance that does not exceed US\$50,000 and those that are deemed excluded, which includes retirement and pension accounts, non-retirement savings accounts, certain term life insurance contracts, accounts maintained in The Bahamas that are held solely by an estate (if the documentation for such account includes a copy of the deceased's will or death certificate) and escrow accounts) and persons tax-resident in jurisdictions that are 'Reportable Jurisdictions' under Bahamian law for the purposes of CRS. All reporting by Bahamian financial institutions is made to the Ministry of Finance of The Bahamas, which relays such information, where appropriate, to the relevant jurisdiction.

The information required to be reported includes the following:

- the name, address, tax residency, tax identification number and date and place of birth;
- the account number (or functional equivalent in the absence of an account number);
- the account balance or value as of the end of the relevant reporting period (ie, end of calendar year); and
- the total amount of interest or dividend or other amount (depending on the nature of the account), paid in or credited to the account in the relevant reporting period.

Reporting under FATCA is ongoing. The first reports in respect of CRS will occur in 2018 with respect to all relevant accounts in existence as at 1 July 2017.

**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?**

Client consent is not required to permit reporting under FATCA or the CRS, as such reporting is authorised by legislation. Nevertheless, it is customary for financial intermediaries to obtain clients' consent via waivers. Under FATCA and CRS, the reporting of client information to the relevant authority does not constitute a breach of confidentiality, as The Bahamas And The United States Of America Foreign Account Tax Compliance Agreement Act 2015 and the Automatic Exchange of Financial Account Information Act 2016, respectively, absolves a financial intermediary or private bank from liability for disclosing information required to be disclosed under FATCA and CRS. Furthermore, the BTCRA, which imposes a duty of banking secrecy, absolves financial intermediaries from liability if disclosure of information enables the bank (or its agents) to perform its duties or exercise its functions under applicable laws or regulations.

If consent is obtained and revoked, disclosure of information under FATCA and CRS would not result in the financial intermediary or private bank being subject to liability to the client.

**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.**

The most common legal structure for holding private assets in The Bahamas is the international business company (IBC). An IBC is a

limited liability company incorporated under the International Business Companies Act, 2000. IBCs are flexible structures that offer separate legal personality and confidentiality. An IBC can be established in as little as 24 hours and generally costs between US\$2,000 and US\$2,500 to incorporate. There is also an annual fee payable to the Registrar General of The Bahamas and the IBC's Registered Agent, which, together, can range between US\$1,000 and US\$1,500.

**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?**

Where the private banking relationship is established where assets are held in the name of a legal structure, private banks in The Bahamas are required to obtain the following information:

- a certified copy of the company's certificate of incorporation;
- a resolution of the board of directors of the company, authorising the opening of the account and conferring authority on the person or persons who will operate the account;
- the KYC information indicated above in question 15 with respect to each person authorised to operate the account;
- confirmation that the corporate entity has not been struck off the register or is not in the process of being wound up; and
- names and addresses of the beneficial owners of the entity that have controlling interests.

**35 What is the definition of controlling person in your jurisdiction?**

The concept of controlling person in The Bahamas is only relevant for corporate entities. For corporate entities, KYC is only required in respect of beneficial owners that have a controlling interest. For entities other than corporate entities, KYC is required on all beneficial owners.

A controlling person of a corporate entity is a person that has an interest of 10 per cent or more in a corporate entity's voting shares.

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

There are no Bahamian regulatory or tax obstacles to using structures to hold private assets.

**Contract provisions**

**37 Describe the various types of private banking and wealth management contracts and their main features.**

The relationship between private banks or wealth managers in The Bahamas and their clients is generally governed by the banks' or wealth managers' general terms and conditions. The general terms and conditions of both Bahamian private banks and Bahamian wealth managers typically include provisions regarding:

- the manner and means of instructions given to the bank and other correspondence, including the bank's liability (or lack thereof) for failing to act on such instructions or correspondence;
- the manner for dealing with complaints and disputes – banks generally include an exclusive jurisdiction clause of The Bahamas, with governing law being Bahamian law; and
- confidentiality and data protection clauses.

The general terms and conditions may be supplemented by special contracts which are entered into pursuant to the provision of special services to the customer or special transactions not covered by the general terms and conditions.

**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?**

In The Bahamas, the relationship between bank and customer is a contractual relationship. The standard of liability will therefore be that contracted between the private bank and its clients. As there are few restrictions on the freedom of contract between bankers and their customers in The Bahamas, private banking institutions generally restrict their liability to acts of gross negligence, wilful default and fraud.

**Update and trends**

With the first report under the Common Reporting Standard (CRS) occurring in 2018, much of the private banking and wealth management industry had been looking backward to ensure that they and their clients were able to comply with the CRS reporting obligations. Now that the first year of CRS reporting is out of the way, we expect the industry to refocus on providing innovative client solutions. The Bahamas Government has been promoting the establishment of The Bahamas as a fintech hub and hosted the first Bahamas Blockchain and Cryptocurrency Conference in Freeport, Grand Bahama, in June 2018. There are already a number of private banks looking to roll out fintech products and platforms. We expect fintech to play an ever expanding role in the private banking and wealth management industry in The Bahamas in the near future.

**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?**

Bahamian laws and regulations do not mandate any provisions or requirements with respect to private banking or wealth management contracts with clients.

**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 statute of limitation under a private banking or wealth management contract is six years from the date the cause of action arises. The limitation period is suspended in the case of fraud, mistake or concealment; in which case the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. The limitation period may be waived altogether if agreed to between the bank or wealth manager and the client.

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

Confidentiality obligations are imposed on private banks via statute and common law. As indicated above, the BTCRA imposes a duty of banking secrecy upon entities licensed as banks and trusts. A duty of banking secrecy is also imposed by Bahamian common law. Bahamian banking secrecy mandates that banks and their officers, directors, employees and other related parties maintain the confidentiality of client information, unless the express or implied consent of the client is given authorising such disclosure except in certain circumstances.

Under the Data Protection (Privacy of Personal Information) Act 2003, Ch 324A (DPA), persons or entities that are in possession of personal information are prohibited from disclosing such information except under certain prescribed circumstances. Furthermore, data controllers are obligated to lawfully and fairly collect information, ensuring that the information is both accurate and kept up to date and that the collected information is relevant and not excessive. The information collected should only be kept for lawful purposes and not for longer than necessary. Proper security measures to protect the information should also be in place.

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

Information and documents within the scope of bank secrecy include those relating to the identity, assets, liabilities, transactions or accounts of the client. For the purpose of the DPA the relevant information is data relating to a living individual who can be identified from the data.

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

Exceptions to the duty of confidentiality are provided for in both statute and common law. The BTCRA provides that disclosure of confidential information can be done without liability if it is disclosed to perform

legally imposed duties or duties within the scope of employment; enables or assists the CBB to exercise its functions; or provides information with a view to instituting criminal or disciplinary proceedings in specified instances.

Under the common law, banks may disclose confidential information if they are under compulsion of the law, owe a duty to the public or the disclosure is in the interests of the bank. Further, there may be disclosure where the client has given express or implied consent. There is substantial case law on this subject.

The DPA allows disclosure where disclosure is made to or on behalf of the affected individual or where it is required to safeguard the security or protect international relations of The Bahamas, to prevent, detect or investigate an offence, to apprehend or prosecute an offender, to prevent injury or death to a person or serious loss or damage to property, by law or court order or in the course of legal proceedings.

#### 44 What is the liability for breach of confidentiality?

Liability for a breach of confidentiality can result in a maximum fine of B\$25,000, a maximum of two years in prison, or both, in addition to any damage that a customer can prove as a result of the breach of confidentiality.

## Disputes

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

Unless otherwise provided (ie, an arbitration clause) in the contract governing the relationship between the private bank and the customer, disputes with private banks are dealt with by the Common Law and Equity Division of the Supreme Court of The Bahamas.

The Supreme Court of The Bahamas is the second highest court in The Bahamas, with power to oversee civil and criminal matters. Proceedings in the Supreme Court are initiated by filing a writ of summons, which may or may not be accompanied by a particulars of claim, summarising the claim and setting out the remedies being pursued.

#### 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?

There are no formal procedures pursuant to which a client of a private banking institution can lodge a complaint with a local regulator. Notwithstanding this, if a client of a private banking institution were to lodge a complaint with the CBB or the SCB, each regulator would have the authority to investigate the matter and sanction the private banking institution if it is in breach of any applicable laws or regulations.



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# Brazil

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## Private banking and wealth management

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

Banking activities in Brazil are subject to extensive and detailed regulations issued mainly by the Central Bank of Brazil. Currently, however, there are no specific regulations concerning private banking activities per se.

The Brazilian Association of Financial and Capital Markets Entities (ANBIMA), a private self-regulatory association dedicated to improving the standards and best practices in the Brazilian financial and capital markets, coordinated the preparation of a code to be observed by participants when conducting private banking activities (ANBIMA Private Banking Code).

It is also worth mentioning that other regulations issued by the Central Bank of Brazil and the Brazilian Securities Commission (CVM) should be observed by market participants involved with private banking and wealth management activities, as applicable. Such specific regulations are detailed herein where appropriate.

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

The Central Bank of Brazil is responsible for authorising and supervising the activities conducted by Brazilian financial institutions.

In addition, all entities carrying out discretionary asset management activities or non-discretionary securities advisory activities are subject to accreditation with and supervision by the CVM.

The main self-regulatory body in respect to private banking and wealth management activities is ANBIMA.

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

Private wealth services are typically performed either by specific departments of Brazilian financial institutions or by independent asset management entities.

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

There is no specific definition of private banking under Brazilian law; however, the ANBIMA Private Banking Code sets forth that private banking activities primarily consist of:

- providing banking, financial or credit services;
- providing services related to consulting on allocation and reallocation of financial investments;
- maintaining discussions with clients regarding their net worth, investment profile and financial goals, liquidity needs, investment capabilities and acceptable risk levels, in order to establish a set of expectations of risk and return, within the standards established by each institution;
- performance of transactions pursuant to the client's determined objectives; and
- providing information in order to assist clients on their decision-making process.

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

There are no specific licensing requirements related to private banking activities under Brazilian regulation. Nevertheless, financial institutions carrying out private banking activities are subject to authorisation from the Central Bank of Brazil in order to operate. The main general requirements for obtaining the relevant licence from the Central Bank of Brazil are:

- filing of an authorisation request accompanied by the proper documentation and information, including, among others, a draft statement of intent, an executive summary of the business plan, the identification of the institution's controlling and economic group, statements and documents evidencing that the members of the controlling group have sufficient knowledge regarding the type of business and the sector in which the institution intends to operate, as well as the identification of the origin of the resources to be used in the institution's incorporation;
- a technical interview between the controlling shareholders and the Central Bank of Brazil, if applicable;
- evidence of economic and financial capacity compatible with the size, nature and purpose of the enterprise, to be met by the controlling group or, individually, by each of the members of the controlling group;
- evidence of the absence of impairments or restrictions;
- inspection of the institution by the Central Bank of Brazil; and
- issuance of a Presidential Decree, in case of the organisation of a financial institution controlled by foreign capital.

In addition, it is worth highlighting that the ANBIMA Private Banking Code also sets forth minimum requirements for the performance of private banking activities, including requirements related to the structure and personnel dedicated to such activities within the institution, as well as the adoption of certain policies and manuals.

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

Financial institutions must meet the requirements for obtaining the licence, as well as meet on an ongoing basis several other requirements imposed by the Central Bank of Brazil under sparse regulations, including, for example, those related to governance, internal controls, accounting and reporting requirements.

Furthermore, all corporate documents, amendments to the bylaws, capital increases and other non-routine corporate acts of financial institutions must be previously approved by the Central Bank of Brazil.

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

Private banks are typically organised under the form of specific departments within Brazilian financial institutions designated to cater to the financial needs of wealthier individuals.

Brazilian financial institutions may be generally organised in the form of commercial banks; investment banks; multiservice banks; foreign exchange banks; credit, financing and investment companies; securities dealerships; and brokerage companies.

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

There are no specific licences for purposes of private banking. The licence for a financial institution may take from one to two years to be granted.

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

The cancellation of the licence of a financial institution may generally occur in the following scenarios:

- winding-up or amendment to the company's corporate purpose;
- formal request by the company through a proceeding with the Central Bank of Brazil; or
- if the Central Bank of Brazil verifies the existence of certain conditions, such as the company's inactivity or breach of its business plan.

## 10 Is wealth management subject to supervision or licensing?

The performance of securities portfolio management activities and non-discretionary securities advisory activities are subject to licensing and supervision by the CVM.

Under Brazilian regulation, securities portfolio management activities are distinguished between (i) fiduciary administration, consisting of the direct or indirect responsibility for custody and controllership of assets and liabilities and, generally, for supervision of the markets healthiness; and (ii) discretionary asset management, consisting of the investment decision-making activities. Consequently, it is possible to seek a licence to carry out fiduciary administration, discretionary asset management or both.

It should be noted that individuals or entities accredited as discretionary asset managers are automatically authorised to perform non-discretionary securities advisory services, thus not requiring a specific authorisation from the CVM for such purposes.

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

The main requirements for an entity seeking a discretionary asset management licence with the CVM are:

- be duly organised and headquartered in Brazil;
- engage primarily in securities portfolio management activities;
- entrust the responsibility for securities portfolio management to one or more executive officers individually licensed with the CVM to carry out asset management activities;
- entrust the responsibility for compliance and risk management to one or more executive officers, who shall not be the same individuals responsible for the asset management activities of the company;
- have its direct or indirect controlling partners satisfy certain good standing requirements;
- set up and maintain human and IT resources at a level that is consistent with the entity's size and field of business; and
- prepare a reference form, which is a document similar to the prospectus of a listed company.

As of this moment, there is no specific regulation in force dealing with the requirements for obtaining and maintaining a non-discretionary securities advisory licence.

Nevertheless, the CVM has set for public hearing a proposed regulation with the purpose of extending to non-discretionary securities advisers similar standards to those applicable to discretionary asset managers. The criteria for obtaining such a licence shall be clarified once the CVM effectively issues the definitive regulation.

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

The conditions required for obtaining the asset management licence must be met on an ongoing basis. In addition, asset management entities shall file updated versions of their reference forms with the CVM annually.

Moreover, asset management entities must prepare policies and manuals as required under Brazilian regulation. The reference form and such policies and manuals must be kept up to date and made available on the entity's website.

## Anti-money laundering and financial crime prevention

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

There are no specific anti-money laundering and financial crime prevention requirements for private banking and wealth management, but rather for financial institutions in general. Similar requirements also exist for asset managers and securities advisers.

Such requirements are mainly the following:

- identification of clients and know your client procedures;
- keeping of updated client records, which allow the identification of compatibility between the transactions, the economic activity and financial capacity of its client, the origin of the funds, and the final beneficiaries of transactions;
- keeping of records of any transactions exceeding the limits set forth under Brazilian regulation;
- adoption of policies, internal procedures and controls adequate to the amount and volume of the transactions entered; and
- reporting of suspicious transactions to the Council for Financial Activities Control (COAF).

### 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?

In summary, politically exposed persons (PEP) are defined under Brazilian law as any government officials who have held or been entrusted with, during the previous five years, in Brazil or in foreign countries, territories and jurisdictions, any prominent government position, employment or function, as well as their representatives, relatives and close associates.

Whenever dealing with PEPs, financial institutions shall adopt enhanced due diligence procedures, which encompass the following measures:

- ongoing enhanced monitoring by adopting more stringent procedures to investigate into suspicious activities;
- analysis to verify the need of reporting suspicious transactions pursuant to the Brazilian regulations; and
- assessment by senior management regarding the interest in initiating or maintaining a customer relationship.

### 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.

Financial institutions are required to collect and keep up-to-date record data on their ongoing customers, including, among others:

- full client identification;
- complete residential and business addresses;
- telephone number;
- monthly income and wealth (for individuals) and average monthly revenues for the past 12-month period (for legal entities); and
- a signed statement regarding the purposes and type of the business relationship with the institution in question.

Asset managers and securities advisers are also required to keep records of customer data, which shall contain customers' full identification and appropriate documents.

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

Brazilian legislation establishes tax fraud and money laundering as different criminal offences.

The characterisation of a tax fraud depends on the wilful act of evading taxes through false statements, omission of information, falsification of documents and other similar procedures.

On the other hand, money laundering crimes are verified upon the concealment or dissimulation as to the true nature, origin, location, availability, transaction or ownership of assets, rights or valuables that are connected to any criminal activity.

Individuals involved in tax fraud are subject to the penalty of imprisonment from two to five years, plus a fine. In the case of money

laundering crimes, the penalty is of imprisonment from three to ten years, plus a fine. Given that these are separate crimes under Brazilian law, the penalties may be aggregated.

In the case of tax fraud, it is also worth mentioning that the Brazilian tax authorities may initiate an administrative proceeding leading to a tax assessment of the uncollected tax increased by fine of up to 150 per cent plus interest.

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

As a general rule, financial intermediaries are required to maintain proper identification of their clients and to adopt adequate and updated record keeping systems for such client information, as well as afford special attention to transactions that may serve as substantial indicia of crimes.

Considering the recent attention to private banking transactions with non-declared funds by Brazilian residents, it is advisable that financial institutions also request to their clients proper documentation evidencing that the client funds are in compliance with tax reporting obligations.

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

Noncompliance with Brazilian anti-money laundering rules may generally be subject to the following penalties, to be assessed on a case-by-case basis:

- warning;
- a variable fine not exceeding: (i) twice the transaction value, (ii) twice the actual profit obtained or conceivably obtainable from the transaction or (iii) 20 million reais;
- temporary disqualification of the involved officers and employees of the company for a period of up to ten years; and
- cancellation or suspension of the authorisation or licence to operate.

#### **Client segmentation and protection**

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

There are no legal distinctions in Brazil between types of client for private banking purposes. In any event, CVM regulations establish three categories of investors for purposes of the Brazilian financial and capital markets in general.

The CVM rules set forth the criteria for the characterisation of qualified and professional investors, being retail investors understood as those that do not fall under the previous categories.

The following are considered professions investors under Brazilian regulation:

- financial institutions and other entities authorised to operate by the Central Bank of Brazil;
- insurance companies and capitalisation societies;
- open and closed-ended pension funds;
- individuals or legal entities that hold financial investments in an amount in excess of 10 million reais;
- investment funds;
- investment clubs managed by a professional manager;
- portfolio administrators and securities consultants authorised by the CVM, in relation to their own monies; and
- non-resident investors.

Likewise, qualified investors are defined as follows:

- professional investors;
- individuals or legal entities that hold financial investments in an amount in excess of 1 million reais;
- individuals that have been approved in specific certification exams; and
- investment clubs managed by quota holders.

Pursuant to the ANBIMA Private Banking Code, however, regardless of how clients are categorised by the institutions, in order to be eligible to have access to private banking services, such client must meet the minimum investment capability of the equivalent to 1 million reais.

#### **20 What are the consequences of client segmentation?**

The main consequences of the regulatory client segmentation are applicable to the Brazil investment fund industry. Even though there are no carve-outs for HNWI's in connection with private banking, such segmentation may be useful for purposes of compliance with suitability rules.

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

All services rendered on the Brazilian market are governed by the Brazilian Consumer Protection Code, including those of banking, financial, credit and securities nature. Therefore, consumer authorities are likely to understand that the Brazilian consumer laws also govern private banking and wealth management relationships.

However, the Brazilian Consumer Protection Code does not contain any specific provisions concerning financial services or products. It provides, on the other hand, for general and broad principles that apply to any products and services offered in the consumer market. As a general rule, these provisions are based on the assumption that consumer is always the weaker party in the relationship.

Notwithstanding the above, given that private banking and wealth management activities usually engage only very experienced and sophisticated investors, there are good arguments to sustain that such overqualified investors are not subject to the protection of Brazilian consumer rules.

Assuming that Brazilian consumer rules do indeed govern private and wealth management banking relationships, it should be stressed that agreements must be written in Portuguese and worded in a way that makes it easy for investors to understand its content. Any provision limiting investors' rights or creating obligations should be highlighted and printed in bold or capital letters. In case of any ambiguity, the relevant provision would be interpreted in favour of the investors. The Brazilian Consumer Protection Code also provides that contractual provisions are not binding to consumers in case they are not aware of such provisions before entering into the agreements. Therefore, all risks related to the product or service must be clearly and fully disclosed. Any provisions limiting the institution's liability would be considered null and void.

#### **Exchange controls and withdrawals**

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

There are strict foreign exchange controls on the inflow or outflow of funds into or out of Brazil. Under Brazilian regulations all foreign exchange transactions must be carried out by a local financial institution authorised by the Central Bank of Brazil to deal in exchange, and a relevant foreign exchange contract must be signed.

Therefore, the Brazilian real is not a freely exchangeable or convertible currency within the international financial market. Furthermore, Brazilian individuals and legal entities are generally not permitted to hold foreign currency in Brazil.

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

Brazilian law does not generally impose any restriction on cash withdrawals. There are, however, strict foreign exchange regulations in place that may impact withdrawals in foreign currencies.

Notwithstanding the above, Brazilian banks customarily impose restrictions on account withdrawals for security reasons. In addition, withdrawals in unusual amounts may be subject to reporting to COAF.

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

Brazilian law does not generally impose any restriction on other withdrawals.

### Update and trends

The Brazilian wealth management regulatory framework has been subject to significant modernisation and will likely to lead to significant development of the industry.

On the other hand, even though financial institutions are extensively regulated and supervised by the Central Bank of Brazil, there are no specific rules governing this type of business, which creates several uncertainties for market participants, especially with regard to assisting private banking clients with offshore investments.

Finally, we note that Brazil has recently developed stricter rules for the development of other activities, such as investment advisory and discretionary asset management. In our opinion, the trend towards tighter regulations in other sectors, such as private banking, may follow.

### Cross-border services

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

Cross-border private banking services are not subject to regulation under Brazilian law, since they are carried out outside of Brazil. Brazilian law does, however, contemplate the concept of 'doing business in Brazil' from a tax and banking perspectives.

In that regard, an entity carrying out cross-border private banking services into Brazil should be careful whenever marketing and conducting its activities in the country in order to avoid being viewed as carrying out banking activities in the country without the proper licence from the Central Bank of Brazil.

In addition, foreign securities are subject to regulation that affects the possibility of their offering in Brazil. Under Brazilian law, it is necessary to obtain a registration with the CVM for purposes of conducting a public offering in the country. Given the fact that foreign securities are generally not eligible for registration in Brazil, there are no Brazilian registration requirements or licences that could be obtained in order to offer such securities publicly in Brazil.

As a result, foreign securities can only be marketed and sold in Brazil on a private placement basis. Brazilian law, however, does not provide a definition of what constitutes a private placement of securities. In other words, there is no 'safe harbour rule' as to what constitutes a private placement in Brazil.

Consequently, the concept of private placement is based on what would not constitute a public offering under Brazilian law and, therefore, would not require registration with the CVM. Any party intending to market and sell unregistered securities in Brazil on a private basis should, thus, be very careful about the means and methods to be used in connection with such activities in order to mitigate the risk of questioning by the CVM. In summary, any contact or communication with investors in Brazil should be made on an individual one-to-one basis.

The same applies, by analogy, to the offering of wealth management services to Brazilian residents by foreign entities.

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

There are no licensing requirements for cross-border private banking services into Brazil; see question 25.

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

There are no forms of cross-border services regulated under Brazilian law; see question 25.

#### 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 Brazil provided any contact is made on a strictly private basis, as explained in question 25 above. There are no licensing or registration requirements for such purposes.

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

Foreign private banking institutions may send documents to clients and prospective clients in Brazil provided they are individually sent to investors following an initial contact. This means that documents should not be sent indiscriminately to a number of investors on a mass distribution basis. There are no licensing or registration requirements for such purposes.

### Tax disclosure and reporting

#### 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?

Individuals considered as Brazilian residents for tax purposes are currently required to file, on an annual basis, an income tax return to the Brazilian tax authorities between March and April of every year. In such ancillary tax return, the Brazilian individual will have to disclose the income ascertained during the calendar year of reference as well as all the assets, rights and liabilities held by the taxpayer at the end of the calendar year, including assets and rights located abroad.

Specifically for offshore investments, Brazilian individuals with investments abroad in excess of the equivalent of US\$100,000 are also required to file, on an annual basis, a declaration to the Central Bank of Brazil reporting all assets and rights held abroad with the respective investment market value. However, if the individual maintains investments abroad on a total amount in excess of the equivalent of US\$100 million, the investor must file the Central Bank declaration on a quarterly basis.

#### 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?

Brazilian financial institutions are generally required to file, on a biannual basis, an ancillary tax return (e-financeira) with information on their clients, both domestic and international. The required tax information shall comprise, among others, the client's identification information, the final balance of the investment accounts and the income ascertained during the period.

It is worth mentioning that financial institutions will only have to disclose such information if the total amount negotiated by the client each month or if each monthly balance of the investment exceeds 2,000 reais for individuals or 6,000 reais for legal entities. The threshold mentioned above shall be considered separately for each kind of investment held by the client.

#### 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?

No. Brazilian tax legislation provides that financial institutions must disclose the required tax information about their clients, regardless of any consent.

### 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.

There are no typical legal structures designed for holding private assets in Brazil. Private assets are generally held directly by individuals, which, as a general rule, are also subject to lower tax rates than legal entities in the country.

Notwithstanding the above, in the case of professional investors, it is possible to hold private assets through exclusive investment funds, that is, investment funds with a sole shareholder, or through closed-ended investment funds. Such structures commonly represent higher costs for investors; however, they provide the possibility of deferring the payment of taxes until the redemption or amortisation of fund shares.



**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?**

For purposes of establishing a private banking relationship in Brazil with any structure, Brazilian KYC standards generally require (i) the identification of individuals authorised to represent the structure, as well as the ownership up to the ultimate beneficial owner, and (ii) the name, identification and tax ID of the structure.

Also required are:

- adoption of control measures in order to confirm their clients' registry information, so as to avoid the use of the account by third parties and identify the final beneficiaries of the transactions;
- identification of persons considered politically exposed;
- more rigorous supervision of the business relationship maintained with the politically exposed person;
- dedication of special attention to proposals of relationship initiation and the transactions executed with politically exposed persons from countries with which Brazil has a high number of financial and commercial transactions, common borders or ethnic, linguistic or political proximity; and
- adoption of rules, procedures and controls in order to identify the origin of the funds involved in transactions carried out by clients and beneficiaries identified as politically exposed.

**35 What is the definition of controlling person in your jurisdiction?**

The Brazilian Corporation Law defines a controlling shareholder as an individual or legal entity, or a group of persons bound by a voting agreement or under common control, which: (i) holds shareholder rights ensuring, on a permanent basis, the majority of votes in general meeting resolutions, as well as the power to elect the majority of the company's management; and (ii) effectively uses its power to direct the company's activities, as well as to guide the operations of the company's bodies.

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

Brazilian investment funds are subject to registration with the CVM and generally require a fiduciary administrator, a discretionary asset manager and a custodian, among other service providers, in order to operate.

**Contract provisions**

**37 Describe the various types of private banking and wealth management contracts and their main features.**

Private banking and wealth management contracts are not specifically regulated by local legislation. Therefore, they may typically assume the form of investment advisory agreements, bank account agreements and asset management agreements.

Brazilian law provides, as a general rule, that obligations arising from acts of the parties are governed by the law of the country in which they are created. Nevertheless, the parties are generally free to choose another law to govern their relationship, to the extent that such choice of law does not violate Brazilian national sovereignty, public policy or good morals. For example, local courts could consider the choice of law clause null and void if they understand that the Brazilian Consumer Protection Code should govern the relationship.

**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 Brazilian law, the general liability standard of individuals and entities depends on the evidence of: (i) that the act or omission has been carried out negligently or maliciously; (ii) a loss actually suffered by a third party; and (iii) the causal relation between such act or omission and the actual losses suffered by the third party and its extension.

The burden of proof shall fall upon the victim of the loss, who must evidence the relation between the fact and the damage suffered. Nevertheless, the burden of proof is inverted in the case of a consumer relationship, thus falling upon the alleged faulty party.

Provided the contract is not governed by the Brazilian Consumer Protection Code, parties may generally be free to vary the liability standards by contract.

**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?**

There are no mandatory provisions imposed by law or regulation with regard to private banking and wealth management contracts. Such contracts may, however, be affected by sparse regulations from the Central Bank of Brazil applicable to banking contracts in general.

**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 statute of limitations for civil liability for claims in connection with contracts in general is of three years. This period cannot be varied contractually or waived.

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

The Brazilian Federal Constitution ensures the inviolability of one's privacy, private life, honour and image. The Brazilian Civil Code provides for a general protection of privacy as well, by determining that the privacy of individuals is inviolable.

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Banking secrecy is also specifically contemplated under Brazilian legislation, pursuant to which financial institutions must keep confidential all of their credit and debit transactions, as well as the services rendered thereby.

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

Client's personal data and documents, as well as their financial information and services rendered.

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

Banking secrecy can be lifted either through the client's specific consent, or in the case of: (i) exchange of information between financial institutions or ancillary entities for credit protection; (ii) disclosures determined by law or ordered by a competent authority; and (iii) disclosures authorised by the interested parties.

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**44 What is the liability for breach of confidentiality?**

Breach of banking secrecy may subject financial institutions to penalties in the civil and administrative spheres, in addition to their directors, officers or similar managers, as well as its audit committee members, who may also be held criminally liable for their actions.

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**Disputes**

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

The ordinary judicial courts are the legal competent authorities for resolving disputes related to private banking relationships. Parties may also elect to resolve disputes via arbitration.

In any event, it is worth mentioning that the Central Bank of Brazil and the CVM may, as a result of complaints received or ex-officio, investigate potential malpractices. In these cases, an administrative proceeding would be initiated with the purpose of sanctioning the regulated entity. Both agencies may also cooperate with Brazilian courts in judicial proceedings involving matters of relevance.

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**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?**

As mentioned above, even though private banking disputes are not subject to disclosure with local regulators, it is possible for a client to lodge a complaint with the Central Bank of Brazil or the CVM, as applicable. Regulators may initiate an investigation either ex-officio or based on complaints received from the public.

The investigation may lead to an administrative proceeding initiated against the regulated entity, the decision of which is appealable at the regulator level, as well as with the judicial courts.

# China

Hao Wang

RayYin & Partners

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## Private banking and wealth management

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

The following are the main sources of law and regulation relevant for private banking in China:

- the General Principles of the Civil Law;
- the Property Law;
- the Contract Law;
- the Partnership Law;
- the Business Law;
- the Securities Law;
- the Insurance Law;
- the Trust Law;
- the Marriage Law;
- the Law of Succession;
- the Law on Commercial Banks;
- the Law of the PRC on Supervision over the Banking Industry;
- the Interim Administrative Measures for Commercial Banks to Provide Overseas Financial Management Services;
- the Interim Measures for the Administration of Commercial Banks' Personal Financial Management Services;
- the Measures for Pilot Assets Management for Specific Clients by Fund Management Companies;
- the Measures on the Administration and Due Diligence Procedures for Non-Residents' Financial Accounts Information Relating to Tax Matter;
- the Measure for Punishment of Illegal Financial Acts;
- the Guiding Opinions on Regulating Asset Management Business of Financial Institutions; and
- the Notice of the China Banking Regulatory Commission on Promulgation of the Administrative Measures on Trust Registration.

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

The banking and insurance industries are supervised by the China Banking and Insurance Regulatory Commission (CBIRC). The securities industry is supervised by the China Securities Regulatory Commission (CSRC).

Foreign currency and tax issues are regulated by State Administration of Exchange Control (SAEC) and the State Administration of Taxation (SAT), respectively.

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

In mainland China, financial institutions such as banks, trust companies, securities, funds, futures, insurance asset management institutions and financial asset investment companies usually provide personal asset management services entrusted by investors in the form of private banking, asset management and contract funds. Multi-family offices are not yet as developed.

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

According to the Notice of Interim Measures for the Administration of Commercial Banks' Personal Financial Management Services, private banking is a kind of comprehensive entrusted investment service in which a commercial bank establishes an agreement with a client which stipulates that the client entrusts the commercial bank with investing and managing the client's wealth, on their behalf, according to the investment plan, investment scope and methods of investment provided in the agreement.

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

There are no relevant laws or regulations about licensing requirements.

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

There are no relevant laws or regulations about ongoing conditions of a licence.

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

Bank departments are the most common form.

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

There are no relevant laws or regulations about the timescale for obtaining a licence for a private bank, as no licence is required to operate a private bank in China.

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

There are no relevant laws or regulations about the processes and conditions for closure or withdrawal of licences.

### 10 Is wealth management subject to supervision or licensing?

There are no special laws or regulations on wealth management.

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

There are no relevant laws or regulations on wealth management.

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

There are no relevant laws or regulations about ongoing conditions of wealth management licences.

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## Anti-money laundering and financial crime prevention

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

Financial institutions must report to the People's Bank of China on the following aspects:

- an overall summary of the conditions of the work of the anti-money laundering department;

- conditions of the mechanisms in place;
- the degree to which they are fulfilling anti-money laundering obligations;
- the department's anti-money laundering results; and
- other situations, questions and suggestions relating to anti-money laundering.

If a financial institution has overseas branches, its headquarters must report to People's Bank of China or the anti-money laundering authority of the place where the branch is located, on behalf of the branch.

A financial institution shall, according to the Law of the PRC on Anti-money Laundering, establish and improve its internal control system of anti-money laundering, set up a clients' identity identification system and not provide any service to or have trade with any client who cannot clarify his or her identity or establish any anonymous or pseudonymous account therefor. A financial institution shall establish a special institution of anti-money laundering or designate an internal department to take charge of anti-money laundering.

Where any single transaction handled by a financial institution or the accumulated transaction within a prescribed time limit goes beyond the prescribed sum or where any doubtful transaction is found, it shall be reported to the Anti-money Laundering Information Centre immediately.

A financial institution shall, according to the requirements for anti-money laundering prevention and supervision, conduct anti-money laundering training and publicity.

**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?**

There is no definition of a PEP.

**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.**

Apart from checking identity documents, such as identification cards, passports or other documents that can certify the identification of a person, financial institutions can use one or more of the following methods to verify the identification of clients:

- requiring clients to provide other identification documents;
- rechecking the clients;
- investigating the clients on the spot;
- verifying the clients' identification through the Public Security Bureau or Administration of Industry and Commerce; or
- another legal method.

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

Tax offences are not predicate offences for money laundering. The predicate offences for money laundering include drug crime, gang crime, terrorist crime, smuggling crime, bribery crime, offences against the financial order and the crime of financial fraud.

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

In accordance with the Measures on the Administration and Due Diligence Procedures for Non-Residents' Financial Accounts Information Relating to Tax Matters, for new accounts opened from 1 January 2017, financial institutions are required to identify the tax residency status of the account holder by obtaining a signed standard statement on tax residency status and verifying the reasonableness of the statement. If the account holder is identified as a non-resident individual, the financial institution will collect and report all necessary information.

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

According to the Anti-Money Laundering Law, if financial institutions do not, as the laws and regulations stipulate, set up internal regulation

for anti-money laundering, set up departments or designate a special department to take responsibility for anti-money laundering or training of its employees in anti-money laundering procedures, they would be ordered to make amends, and in serious cases the person who is directly in charge would be given disciplinary punishment by the anti-laundering authority.

Financial institutions may be ordered to make amends, or be fined, with the person who is responsible being directly fined, given a disciplinary punishment or discharged, if any of the following circumstances occur:

- they do not, as the laws and regulation stipulate, verify the identities of clients;
- they do not, as the laws and regulation stipulate, keep the identification material and transaction records of clients;
- they do not, as the laws and regulation stipulate, report on transactions involving large sums of money and dubious transactions;
- they have any transactions with a client whose identity is unclear, or establish an anonymous or pseudonymous account for a client;
- they violate the laws and regulations concerning confidentiality;
- they reject or block any investigations concerning anti-money laundering; or
- they do not provide all relevant documents for investigation.

**Client segmentation and protection**

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

According to the relevant laws, a private banking client is one who has a net worth of at least 6 million yuan.

A high net worth individual (HNWI) is a person who satisfies one of the following conditions:

- a person who purchases a financial product for no less than 1 million yuan;
- the individual or family net worth is more than 1 million yuan and they can provide the relevant certification when purchasing a finance product; or
- the individual's income is more than 200,000 yuan each year for the last three years, or the family income is more than 300,000 yuan each year for the last three years.

However, in practice, the above requirements may be adjusted by different financial institutions.

**20 What are the consequences of client segmentation?**

First, for HNWI's who have relevant experience in investment, and in a high risk-bearing capacity, commercial banks can satisfy their needs for investment through providing a private banking service. Contrary to finance products for the general investor, private banking products may invest in stock transacted in secondary markets and relevant security investment funds, new stocks and equity of non-listed companies and non-public placement securities or non-public transaction securities of listed companies.

Secondly, compared to a common principal-protected financing product, commercial banks have no obligation to report to the CBRC when the principal-protected financing product is customised for private banking clients.

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

Currently, the following legislation with respect to consumer protection for private banking is in place:

- the Law of the PRC on Supervision over the Banking Industry;
- the Measure for Punishment of Illegal Financial Acts;
- the Interim Measures for the Administration of Commercial Banks' Personal Financial Management Services;
- Guiding Opinions on Regulating Asset Management Business of Financial Institutions;
- the Contract Law;
- the Trust Law; and
- the Insurance Law.

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**Exchange controls and withdrawals**


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

A commercial bank shall, when intending to provide overseas financial management services, apply to the CBRC for approval.

A person cannot purchase foreign currency exceeding US\$50,000 per year. There is no limitation on the kind of foreign currency withdrawn, but not all banks have all kinds of foreign currency.

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

No laws or regulations restrict the withdrawal of yuan in China, but due to foreign exchange controls, a person cannot withdraw cash in foreign currency of more than US\$50,000 a year. In addition, since 1 January 2016, a person cannot withdraw cash exceeding the amount equivalent of 100,000 yuan in overseas countries on a cumulative basis each year under the same bank account.

Since 1 July 2017, a financial institution shall report large-sum transactions for cash deposit, cash withdrawal, foreign exchange settlement and sales in cash, exchange of foreign currencies in cash, cash remittance, payment of cash bills and other forms of cash receipts and payments whose transaction value reaches or exceeds 50,000 yuan or foreign currency equivalent of US\$10,000 on a per-transaction or cumulative basis on a given day

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

When using a cash cheque to withdraw money, the maximum amount is 50,000 yuan. If the amount exceeds 50,000 yuan, it must be reported to the bank in advance, with the aim of preventing money laundering.

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**Cross-border services**


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

Because of the restrictions on foreign currency, there are actually no cross-border private banking services. If private banking clients need cross-border services, the foreign currency would reach the limit of the amount permitted by the SAEC.

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

There are no relevant laws or regulations about licensing requirements for cross-border private banking services.

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

Not applicable.

**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?**

Meeting clients is permitted, but they must register in China to provide material service.

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

Foreign banking institutions are not allowed to do business without approval to establish a branch in PRC. Generally speaking, it is not prohibited to send documents to clients or prospective clients.

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**Tax disclosure and reporting**


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**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?**

Under any of the following circumstances a taxpayer shall file tax returns and pay tax to the competent tax authority in accordance with the relevant provisions:

- its annual income exceeds 120,000 yuan;
- its income of wage or salary is derived from two or more sources inside China;
- its income is derived from sources outside China;
- its taxable income is derived without withholding agents; or
- other circumstances specified by the State Council.

A taxpayer with an annual income exceeding 120,000 yuan shall, within three months after the end of the year, file tax returns with and pay tax to the competent tax authority.

**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?**

When an individual opens an account, the financial institution shall obtain the tax resident status declaration documents signed by the account holder to identify whether the account holder is a non-resident individual. Where the account holder is identified as a non-resident individual, the financial institution shall collect and record the information required and report to SAT by 31 May of each year as required.

**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?**

Client consent is not required. Some financial institutions may withhold and remit tax.

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**Structures**


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**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.**

- held by company:
  - cost: the cost of establishing and running the company;
  - advantage: has limited liability; and
  - risk: inheritance issues can occur when the shareholders pass away;
- held by insurance:
  - cost: no cost;
  - advantage: the policy can be pledged to ensure financial liquidity; and
  - risk: the policy holder cannot control the arrangement of the beneficiaries at his or her full discretion;
- held by family trust:
  - cost: the cost for establishing and running the trust;
  - advantage: separate from the risk of settlor, trustee and beneficiary; and
  - risk: the settlor cannot control the trust at his or her full discretion;
- held by funds:
  - cost: fund management fees;
  - advantage: higher interest; and
  - risk: information asymmetry.

**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?**

Private banking institutions will investigate the client's asset scale, job and income. In addition, the institution will estimate the risk-bearing capacity and introduce appropriate financial products to clients according to the investigation and estimation.

### Update and trends

On 27 April 2018, the People's Bank of China, the China Banking and Insurance Regulatory Commission, the China Securities Regulatory Commission and the State Administration of Foreign Exchange promulgated Guiding Opinions on Regulating Asset Management Business of Financial Institutions. This provides principles for regulating the asset management business of financial institutions. The focus will be on issues of the asset management business, such as multi-level nesting, leverage opacity, serious regulatory arbitrage and frequent speculation, to establish a unified standard system. Comprehensive and dynamic regulation of the issuance, sales, investment and redemption of asset management products shall be carried out with a comprehensive statistical system. Many financial institutions are facing new challenges.

China's HNWI population exceeded one million in 2014. The population of HNWIs has been increasing at a healthy pace in recent years, at a compound annual rate of 21 per cent. There are seven provinces in China with more than 50,000 HNWIs: Guangdong, Shanghai, Beijing, Jiangsu, Zhejiang, Shandong and Sichuan. The Chinese private wealth market will see a further boom in 2019, with the total investable assets expected to reach 188 trillion yuan (\$27.5 trillion), but the growth rate is likely to slow down from previous years. The China Industrial Bank recently published the China Private Banking Development Report, pointing out that wealth inheritance and wealth preservation will remain the top wealth management objectives in the coming years. Meanwhile, domestic investment has gained popularity among the

new rich, with a 35 per cent growth rate, contributed by new investment areas, such as private funds, asset management products and financial technology (fintech).

Fintech refers to the application of technology within the financial services industry. The sector covers a wide range of activities, from financial data and analysis to financial software, digitised processes and, perhaps best known to the wider public, payment platforms, aiming to make financial services more efficient, which can be applied to the private banking industry and wealth management services, helping bankers and clients save time. China is emerging as a leading fintech market, not just in Asia-Pacific but globally.

To meet demand from a growing generation of consumers for a richer landscape of investment vehicles, wealth management firms are launching smartphone apps to appeal to this younger, new-rich demographic. Meanwhile, an even newer digital tool introduced in mid-2016 by digital wealth management firms provides sophisticated automated online platforms. These internet financing platforms are using robo-advisors which provide automated, algorithm-driven financial planning services with little to no human supervision and reduce the need for face-to-face interaction. Robo-advisors could well reshape the future of China's wealth management business. Which players succeed will depend on them developing clever partnerships with global peers. They will also need a breadth and depth of asset offerings, portfolio allocation and technological superiority in big data analytics and machine learning.

For the purpose of Guiding Opinions on Regulating Asset Management Business of Financial Institutions, when issuing and selling asset management products, financial institutions shall adhere to the business philosophy of 'knowing your products' and 'knowing your customers', strengthen investor appropriateness management, and sell asset management products appropriate to investors' risk identification capabilities and risk-bearing capacities. It is prohibited to carry out fraudulent behaviours or to mislead investors to purchase asset management products that do not match their risk-bearing capacities. Financial institutions may not, by splitting asset management products, sell asset management products to investors whose risk identification capabilities and risk-bearing capacities are lower than the product risk levels. Financial institutions shall strengthen education on investors, continuously raise investors' financial knowledge level and awareness of risks, and break rigid payment.

### 35 What is the definition of controlling person in your jurisdiction?

For the purpose of the Measures on the Administration and Due Diligence Procedures for Non-Residents' Financial Accounts Information Relating to Tax Matters, a controlling person refers to an individual who controls an institution. The controller of a company shall be determined pursuant to the following rules:

- an individual who, directly or indirectly, holds over 25 per cent of the company's equities or voting rights;
- an individual who controls the company via personnel or financial arrangements or other means; or
- a senior management person of the company.

The controller of a partnership enterprise shall refer to an individual who owns over 25 per cent of the rights and interests in the partnership.

The controller of a trust shall refer to the settlor, trustee or beneficiary of the trust, or any other individual who exercises ultimate and effective control of the trust.

The controller of a fund shall refer to an individual who owns over 25 per cent of the equity units of the fund or any other individual who controls the fund.

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

If a trust holds private assets, it must transfer the ownership of property to the name of the trust company. There are transfer taxes if the settlor puts trust assets which need title transfer. If private assets are held by a fund, its investment scope is limited to securities.

### Contract provisions

#### 37 Describe the various types of private banking and wealth management contracts and their main features.

There are many different types of private banking contract, so it is difficult to describe them one by one. However, all are governed by Chinese laws and regulations.

#### 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?

This is governed by the Contract Law of the People's Republic of China. The doctrine of liability fixation consists of the fault principle and the criterion of strict liability. The criterion of strict liability is that the party who breaks the contract bears the liability even if the party had no intention of breaking the contract. The fault principle indicates that the degree to which there was fault determines the extent to which one party is liable.

#### 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?

In accordance with Guiding Opinions on Regulating Asset Management Business of Financial Institutions (Guiding Opinions), financial institutions shall not promise to guarantee principal or income in developing asset management business. In the case of difficulties in redemption, financial institutions shall not redeem with advance funds in any form, nor shall they carry out balance sheet asset management business. This is just a general principle, and the implementation regulations for the Guiding Opinions have not yet been promulgated.

#### 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 limitation period cannot be varied contractually.

According to the relevant laws, in most cases, the time limitation of action regarding applications to a people's court for protection of civil rights is three years. A limitation of action begins when the entitled person knows or should know that his or her rights have been infringed upon. The people's court will not protect a person's rights if 20 years have passed since the infringement. However, under special circumstances, the people's court may extend the limitation of action.

A limitation of action shall be suspended during the last six months of the limitation if the plaintiff cannot exercise his or her right of claim because of force majeure or any other obstacles. The limitation shall resume on the day when the grounds for the suspension are eliminated.

A limitation of action shall be discontinued if a suit is brought, or if one party makes a claim for, or agrees to the fulfilment of obligations. A new limitation shall begin from the time of the discontinuance.

## Confidentiality

### 41 Describe the private banking confidentiality obligations.

The Law on Commercial Banks provides that commercial banks establish regulations concerning information management and confidentiality, and prevent the client's information from being used improperly. The Measures for the Administration of Bank Card Business stipulate that a card-issuing bank shall be responsible for keeping secret the credit information of the cardholders. In addition, the Measures for the Administration of Renminbi Bank Settlement Accounts stipulates that banks shall ensure the confidentiality of information about depositors' bank settlement accounts. Banks shall have the right to decline any inquiries by institutions or individuals on deposits and other relevant information on bank settlement accounts for institutions or individuals, unless stipulated otherwise by the laws and administrative regulations. However, these rules are abstract and are not specific, which makes them hard to implement. Some important issues have not been solved. For example, banks may disclose clients' information in a lawsuit in order to protect the public interest. In the current situation, HNWI's may have reservations when handing over assets to financial institutions. In addition, some financial institutions have not recognised the importance of information protection, do not take measures to protect the clients' information and have little knowledge of the relevant laws and regulations.

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

It varies depending on the specific agreement, but usually includes personal information and asset information.

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

There are laws for financial institutions detailing their responsibility to protect information, but many exceptions are provided for the needs of the judicial and law enforcement departments, including the public security authority, procuratorate, courts, security bureau, customs, tax authorities and the People's Bank of China (PBC). In practice, many of the aforementioned departments and other special organisations may also obtain clients' information from financial institutions.

### 44 What is the liability for breach of confidentiality?

First, there is civil liability, including liability for breach of contract and infringement liability. The Contract Law stipulates that if a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures, or to compensate for losses. Thus, if a bank violates the confidentiality agreement and infringes the private rights of clients, the bank must bear the responsibility for stopping the infringement, compensating the loss, extending a formal apology, eliminating the adverse effects and restoring reputation.

Second, there is administrative liability, which includes two aspects. The first is for financial institutions, including confiscation of illegal gains, fines, suspending operation for rectification and revocation of the business licence. The second aspect relates to the person who has direct liability, including fines, removal from the office held and of qualifications, and prohibiting them from future work in financial institutions.

Third, there is criminal liability. According to Amendment (VII) of the Criminal Law, whoever sells or provides any citizen's personal information in violation of the relevant provisions of the state shall, in serious circumstances, be sentenced to imprisonment of not more than three years or criminal detention, in addition to a fine, or be given a fine only; in especially serious circumstances the person may be sentenced to imprisonment of not less than three years but not more than seven years in addition to a fine.

## Disputes

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

The party can complain to the CBRC or the PBC. They also can bring a lawsuit to a people's court to protect their rights.

### 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?

According to the relevant laws and regulations, the commercial bank must report to the CBRC or the resident agencies of the commission, if any of the following situations arise:

- if mass social unrest, protest or riots or major complaints occur;
- if they divert their clients' funds or assets; or
- if the counterparty or another related party has a serious credit crisis, which may lead to a significant loss to the financial product.

Depending on the type of complaint, clients can appeal to the CBRC or PBC.



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# France

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## Private banking and wealth management

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

The main sources of law and regulation regarding private banking in France are described below.

#### French banking legislation

The primary laws are set out in the Monetary and Financial Code promulgated in December 2000, which comprises a number of laws, in particular the Banking Act of 24 January 1984, which provides for the ordinary legal status of credit institutions and their supervision, and the Financial Act of 2 July 1996, which concerns not only investment firms, but also credit institutions in their activities constituting investment services.

In addition, the ordinance of 23 June 2016 implemented the EU Directive No. 2014/65 (MiFID 2) while the ordinance of 1 December 2016 and the law of 9 December 2016 (Loi Sapin 2) reinforced anti-money laundering and anti-corruption rules.

#### French banking legislation supplemented by European Union Law

Most EU directives are directly applicable in France. EU law includes the CRD IV package, which became applicable in France in 2014 and which dictates the global standards for banks, the conditions governing the access and conduct of the business of banks, the rules on freedom of establishment and freedom to provide services, and the principles and technical instruments for prudential supervision and information and all prudential requirements. In particular, we can find Directive No. 2013/36 on capital requirements, Regulation No. 575/2013 on prudential requirements for credit institutions and investment firms and Regulation No. 1024/2013 of 15 October 2013, which entrusted the European Central Bank (ECB) with the prudential supervision of credit institutions in the euro area member states.

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

The power to regulate the banking and financial sector is now shared between the European legislature, the Financial Markets Authority (AMF) and the Minister of Economy and Finance, assisted by a consultative authority, the Advisory Committee on Financial Legislation and Regulation.

#### Prudential and Resolution Control Authority (ACPR)

Until the law of 20 January 2017, the prudential control and resolution authority was qualified as an independent administrative authority. It now appears as an ad hoc entity without any legal personality, operated under the supervision of the French Central Bank.

The ACPR has a supervisory and control mission that has two objectives: the preservation of the stability of the financial system and the protection of clients, policyholders, participants and beneficiaries of persons under its control. Thus, it is responsible for supervising and controlling the financial system and granting and withdrawing licences for banking activities.

#### Financial Markets Authority

The AMF, an independent public authority with legal personality, 'comprises a college, a sanctions commission and, where appropriate, specialised commissions and advisory commissions'. It is responsible for ensuring the protection of savings, investor information and the proper functioning of financial instruments markets, and is vested with several powers with regard to markets, professionals intervening in them and, more generally, all participants, issuers and investors. It has regulatory power, supervisory power concerning the regularity of transactions and compliance with professional obligations, power of injunction, direct and indirect power of sanction, both administrative and disciplinary, and power of administrative composition, which is a power of transaction. The AMF thus has complete power: it is a legislator, a judge and a police officer.

#### Minister of Economy and Finance

The minister has exclusive jurisdiction in respect of general conditions governing the relationships of credit institutions with customers, instruments and credit rules.

#### European Central Bank

The ECB supervises all banks in the euro area, in the framework of the single supervisory mechanism (SSM). It is responsible for ensuring appropriate monitoring of all those banks' performance under supervisory tasks. The ECB has a responsibility in particular for direct supervision of banks:

- having assets of more than €30 billion or constituting at least 20 per cent of their home country's GDP; and
- which have requested or received direct public financial assistance from the European Financial Stability Facility or the European Stability Mechanism.

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

Private wealth services are provided by banks and asset management companies, but they are also provided by family offices: organisations specialising in the administrative and financial management of important assets.

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

There is no legal definition of a private bank: it is a specialised financial institution which may be an independent bank or a bank tied to a banking network. All the major banks have their own private banking centres, either set up by themselves or acquired as an existing family establishment.

A private bank will offer financial and portfolio management services, sometimes including real estate investments, in addition to personalised services tailored to the client's situation or wishes.

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

Private banking activities are not specifically regulated. These activities, which combine the performance of credit activities and the performance of investment activities, require an investment services licence and a banking licence. The French legal framework does not set out



specific licensing requirements for the provision of private banking and wealth management services. The relevant licensing requirements are those imposed on banks when they apply for their authorisation.

Applications for bank licences must be presented to the ACPR under the conditions below:

- suitability of the legal form for the proposed activity;
- minimum paid-up capital;
- programme of operations, technical and financial resources and organisation;
- identity and status of capital contributors, and where applicable, of their guarantors, and the size of their holding;
- central administration located in the same national territory as the registered office;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as must their availability; these persons should also meet the propriety requirements for their position;
- members of the governing body must meet knowledge, experience, fitness and propriety requirements, assessed both individually and collectively, and also satisfy the availability and propriety requirements for their position;
- managers of key functions must meet propriety, knowledge, experience and fitness requirements; and
- assets must exceed liabilities by an amount that is at least equal to the minimum capital requirement.

While the ACPR is involved in the authorisation decision and its preparation, the decision on authorisation now rests with the ECB. The ACPR still remains competent:

- for decisions to refuse authorisation; and
- for licensing branches of banks in third countries.

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

The ACPR must be informed if there are changes to the credit institutions that may affect one of the conditions above necessary for licence authorisation.

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

While a credit institution cannot be constituted as a personal business, no particular legal form is required by the French Code. However, this freedom to choose the form is not absolute: not only must specific legal statutes be taken into account, but also the form chosen must be adapted to the activity of banks.

In practice, the most common form or organisation for a private bank is a French Société Anonyme (limited company).

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

All applications for accreditation must be submitted to the ACPR. The Commission examines whether the application meets all the requirements of French law. If this is the case, it shall, within the period prescribed by French law, adopt a draft decision proposing to the ECB that authorisation be granted. The draft shall be notified to the ECB and to the applicant. If the application does not meet the requirements, it shall reject the application for authorisation. The ECB must act within the time limit set by national law: six months in principle, the maximum period being 12 months.

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

Both the ECB and the ACPR have the right to initiate the withdrawal of a banking licence in certain circumstances. A licence will be withdrawn:

- at the request of credit institutions; or
- automatically:
  - if the establishment no longer meets the conditions or commitments to which its approval was subject;
  - if the establishment has not made use of its approval within 12 months; or
  - if the establishment has not operated for at least six months.

Decisions refusing approval may be appealed in the following circumstances:

- if the ECB has decided to reject the application, the appeal must be lodged with the European courts; or
- if the refusal has been decided by the ACPR, an action for annulment must be brought before the Council of State.

## 10 Is wealth management subject to supervision or licensing?

The following financial activities are subject to licensing:

- order reception and transmission for third parties;
- order execution for third parties;
- proprietary trading;
- portfolio management for third parties;
- investment advice;
- underwriting;
- guaranteed placement;
- non-guaranteed placement; and
- operation of a multilateral trading facility.

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

In order to obtain a licence authorising the financial activities mentioned in question 10, a licence application for investment services must be sent to the ACPR and shall fulfil the following conditions:

- registered office located and business effectively run in France;
- sufficient initial capital and appropriate financial resources for the proposed activities;
- identity and status of direct and indirect shareholders, and the size of their holding;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as must their availability; these persons should also meet the propriety requirements for their position;
- members of the governing body must meet propriety, knowledge, experience and fitness requirements, both individually and collectively, and also satisfy availability requirements;
- managers of key functions must meet propriety, knowledge, experience and fitness requirements;
- suitability of the legal form for the proposed activity; and
- a programme of operations for each of the proposed services, and, where applicable, a programme of operations for the portfolio management or investment advice activity approved by the AMF.

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

The requirements for granting the licence must be maintained on an ongoing basis.

## Anti-money laundering and financial crime prevention

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

Some obligations are applicable to entities regulated by the AMF.

#### Obligation of vigilance

This implies maintaining updated identification of clients, including occasional clients and effective beneficiaries of 'legal personality' clients. The level of vigilance depends on the level of risk incurred. This obligation requires professionals to perform their own classification of the risks and to implement a formalised control system for their activity developed in accordance with the AMF guidelines specifying certain provisions on the prevention of money laundering and the fight against the financing of terrorism.

#### Obligation to report any suspicions to TRACFIN

TRACFIN handles the processing of information and action against illegal financial circuits and is the French anti-money laundering unit. The obligation to report any suspicions is based on a money laundering risk analysis and applies to any suspicion of tax fraud or breaches of ordinary law punishable by a prison sentence of more than one year. In 2017, 71,000 reports were received by the department in charge of the fight against money laundering and terrorist financing.

**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?**

The 4th Anti-Money Laundering Directive and the provisions of Article L. 561-10, paragraph 2 and 3 define PEPs as follows:

*The client, where applicable his beneficial owner, the beneficiary of a life insurance or capitalisation contract, where applicable his beneficial owner, is a person who is exposed to specific risks because of the political, judicial or administrative functions he or she exercises or has exercised on behalf of another country or those exercised currently or in the past by direct family members or persons known to be closely associated with him or her in the course of a business relationship.*

*The product or operation presents, by its nature, a particular risk of money laundering or terrorist financing, in particular when they promote anonymity.*

The nature of the additional vigilance to be implemented with respect to business relationships with PEPs is specified within the organisation's internal procedures. The measures implemented are based on objective elements according to the risk profile of each of the business relationships with PEPs.

**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.**

The bank has obligations in terms of customer knowledge, particularly in the context of the fight against money laundering and terrorist financing. These obligations begin before entering into a business relationship with the client. As such, before opening an account a number of verifications must be carried out:

- ensuring the identity of the applicant:
  - for an individual, by the production of a valid official document carrying his or her photograph (national identity card or passport generally); and
  - for a legal person, by the production of any act or official register extract dating from less than three months prior (KBis);
- checking the applicant's home address using a recent proof of address, such as a rental contract, telephone or electricity bill, rent receipt or insurance certificate;
- asking about the purpose and nature of the business relationship and any other relevant information about this customer; and
- requesting a specimen of the applicant's signature.

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

Regarding the general offence of money laundering, any misdemeanour or felony can constitute a predicate offence, including a tax or an embargo offence, if the perpetrator of the predicate offence results in a profit or receives an asset from that offence. The offence of money laundering is independent of the predicate offence. Therefore, French courts could consider that, under certain circumstances, a predicate offence exists even if:

- it falls outside the territorial scope of French criminal law, as it was committed entirely abroad;
- the perpetrator of the predicate offence was not charged or even prosecuted;
- the statute of limitations applicable to the predicate offence has expired;
- the perpetrator of the predicate offence is immune to prosecution; or
- the circumstances of the predicate offence are not fully established.

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

The new Article 1740 A-bis of the General Tax Code provides that where the tax authorities impose an increase of 80 per cent on the taxpayer (in the event of abuse of rights or fraudulent practices), any

natural or legal person who, in the exercise of a professional advisory activity of a legal nature, financial or accounting or holding property or funds on behalf of a third party, intentionally provided that taxpayer with a benefit directly enabling the commission of the sanctioned conduct, is liable to a fine of €10,000, which may be increased to 50 per cent of the income derived from the benefit provided to the taxpayer.

Moreover, on 13 March 2018, EU economic and financial affairs ministers adopted the European Commission's June 2017 proposal on new transparency rules for intermediaries designing or selling potentially harmful tax regimes.

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

Disregard of professional obligations is punished by the ACPR, usually by a reprimand, a financial penalty and public notification, the extent of the penalty depending on the number of grievances and breaches against the credit institution. However, disciplinary liability is not the only one that can be applied: so can civil and criminal liability.

**Client segmentation and protection**

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

There are three types of client:

- non-professional client: any client who does not fall into either of the other two categories, or who optionally applies to be recognised as a non-professional client;
- professional client: a client with the experience, knowledge and expertise to make his or her own investment decisions and properly assess the risks involved. They are classified by both nature and size; and
- eligible counterparties: professional legal persons authorised or regulated to operate on the financial markets.

**20 What are the consequences of client segmentation?**

The purpose of client categorisation is to establish different levels of client protection based on their knowledge of financial instruments and services and their ability to bear the risks involved. The highest level of protection is granted to non-professional clients. In particular, they should benefit from services whose adequacy and appropriateness must first be assessed on the basis of their profile and more complete information. Accordingly, the lowest level of protection is reserved for eligible counterparties, who, for example, are the only ones that do not benefit from the best protection obligation. This categorisation applies to all clients, regardless of nationality.

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

It is the purpose of customer protection rules and the duty of each professional to reduce this asymmetry of information so that each customer can be offered products adapted to his or her needs and expectations in order for him to make his or her purchase or subscription decision in an informed manner. This is crucial for public confidence in the financial sector. The role of the ACPR is to promote fair business conduct and practices among professionals, taking into account the interests of clients, limiting risks to clients and preventing conflicts of interest to the detriment of clients.

Some principles can be identified in terms of good business conduct and customer protection:

- to ensure that the client is properly informed and that explanations are given fairly, including on costs and risks;
- ensuring that the client's interests are taken into account in all circumstances and that excessive risks are not transferred to the client; and
- beyond the necessary compliance with regulations, these principles of clarity and loyalty towards customers must govern the conduct of companies and their staff.

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**Exchange controls and withdrawals**


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

The freedom of transfer of funds presupposes not only that they are not subject to prior authorisation, but also that the operations at their origin are not either. Otherwise, this authorisation indirectly limits the said transfers. With certain exceptions, transfers of funds – known as investments – are not subject to prior authorisation and are themselves free: individuals and companies are free to open foreign accounts and foreign currency accounts in France; and credit institutions may grant loans to non-residents. However, this is a freedom supervised by the public authorities: the transfer of funds generates an obligation of information, at the expense of both banking institutions and non-banking agents. These obligations are imposed for monetary, fiscal or anti-money laundering reasons without being considered as obstacles to the freedom of cross-border transfers.

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

Credit institutions are covered by article R. 152-1, I, of the Monetary and Financial Code. According to this article, these institutions

*are required to draw up monthly statistical returns relating to payments between residents and non-residents, made in France and exceeding 12,500 euros, on the basis of information communicated to them by the residents who are the authors or beneficiaries of these payments.*

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

French law does not prescribe any other restrictions.

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**Cross-border services**


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

A service provider authorised in France that intends to do business in another EU country must notify the French regulatory authority before starting its activities. Depending on the intent to create an establishment or to exercise the freedom to provide services across the EU, a specific notification form should be sent to the regulatory authority. Once it has given its decision, services authorised in France can be provided across the EU. Moreover, the French service provider must appoint a senior manager for the new European branch. Before the appointment can be effective, the French authority must be notified in order to give its approval.

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

Banking or financial institutions with a registered office in France can benefit from the European passport if the following conditions are met:

- the institution is a subsidiary of one or more Etablissements de Crédit (ECs) approved in France and holding at least 90 per cent of the voting rights attached to its shares;
- the parent undertaking or undertakings shall justify the prudent management of the financial institution and declare, with the agreement of the ACPR, that they are jointly and severally liable for the commitments entered into by the financial institution; and
- the financial institution effectively provides banking services of the same kind on the territory of the French Republic and is included, in particular for those activities, in the supervision on a consolidated basis to which its parent undertaking or each of its parent undertakings is subject.

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

See questions 25 and 26.

**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?**

The European passport enables banking institutions, having obtained authorisation from the authority of their country of origin, to operate throughout the EU or in a state party to the Agreement on the European Economic Area (EEA). If a banking institution in another member state wishes to provide its services in France, the term ‘passport in’ is used; if a French management company wishes to provide its services in the EU or in another state party to the EEA Agreement, the term ‘passport out’ is used.

The AMF ensures that branches established in France under cover of the European passport comply with the laws and regulations applicable to them. A regularly updated list of foreign management companies holding the European passport in France and the associated valid services and activities is available on the GECO database.

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

Sending documents relating to banking or regulated financial activities in France and their acceptance by clients or prospective clients may be considered as conclusion of underlying operations and could fall under the banking or financial activities licensing requirements.

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**Tax disclosure and reporting**


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**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?**

France has imposed a requirement to disclose any foreign bank accounts.

Moreover, until December 2017 France allowed taxpayers to voluntarily repatriate their assets, subject to less heavy penalties than during a tax audit and control. This ‘Service de traitement des déclarations rectificatives’ (STDR) has generated nearly €7 billion in revenue in three years.

**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?**

Institutions that pay interest, dividends, income or other income from transferable securities (the ‘paying institutions’) are required to submit an annual summary declaration, known as the Imprimé Fiscal Unique (IFU), to the French Tax authorities no later than 15 February following the year in which they made these payments.

In banking institutions, failure to comply with this obligation may lead to:

- commercial difficulties, with payment recipients needing these elements to prepare and verify (pre-filled returns) their own tax returns; and
- tax penalties, the amounts of which may prove significant in the event of repeated infringements (a fine equal to 50 per cent of the sums not declared).

Sending accurate and complete IFUs is therefore a major annual challenge for banks. Thus, the IFU can no longer be considered a simple formal obligation to limit the risks of non-reporting of income by customers. In just a few years, this declaration has become a strategic subject, in terms of both taxation and commercial and marketing responsibility.

**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?**

No consent is required.

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**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.**
**Insurance policies**

Life insurance may be the preferred investment for French people. First, life insurance is a savings product whose gains on withdrawal or surrender are taxed less the longer the contract is held (for gains from premiums paid before 27 September 2017). It is important to know this so as to optimise the management of these policies. Life insurance benefits from a specific civil regime in terms of transmission: the sums paid to the beneficiaries of the contract at the time of the insured's death are paid out outside the estate. These sums are transferred without tax to the beneficiary, up to €152,500 per person, if they come from premiums paid by the subscriber before the age of 70.

Consequently, life insurance is the ideal investment to meet three objectives: to enhance the value of capital; to receive additional low tax income, immediately or in retirement; and to optimise the transfer of assets.

**Civil companies**

A société civile (SC) is an entity with civil activity that does not correspond to a business entity for which the law assigns a commercial nature as a result of its form (ie, type of entity) or purpose.

They are subject to the tax treatment of partnerships which is characterised by the taxation of profits, not in the name of the legal entity, but in the personal name of each of the partners for the fraction corresponding to his or her rights.

A société civile immobilière (SCI) can be an ideal tool to make many real estate investments that could not have been made by one person alone. It makes it possible to raise capital in order to increase the financial capacity of the partners and to facilitate the obtaining of external financing (in particular bank loans), with a view to purchasing a property complex or a rental property portfolio (furnished rental SCI). An SCI also makes it possible to pool (share) the expenses and costs related to the holding of real estate. The civil real estate company of attribution makes it possible to prepare the division between the partners of a real estate property.

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**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 order to establish a banking relationship with a structure, the following information is required:

- name of the structure;
- legal form;
- names of the members of the representative body;
- registration numbers;
- activity of the company;
- address, phone number and email address; and
- an extract from the register.

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**35 What is the definition of controlling person in your jurisdiction?**

A 'controlling person' or 'beneficial owner' is defined as the individual who directly or indirectly owns or controls the company. Under no circumstances may it be a legal person. The beneficial owner is:

- an individual holding, directly or indirectly, more than 25 per cent of the capital or voting rights of the company;
- an the individual who exercises, by other means, a power of control over the management, administrative or management bodies of the company or over the general meeting of its members or shareholders; or
- only in the absence of identification of an ultimate beneficiary, according to the two preceding criteria, the individual who directly or indirectly occupies (through one or more legal persons) the position of legal representative of the company.

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

No.

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**Contract provisions**
**37 Describe the various types of private banking and wealth management contracts and their main features.**

There are several types of private banking contract: there are typically investment advisory agreements, bank account agreements and asset management agreements. These contracts are usually accompanied by a general private banking framework describing the features of the new relationship between the individual and the private bank.

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**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?**

The sanctions incurred by credit institutions are various: they may be professional, criminal or civil. The most general sanction remains the civil liability of credit institutions, which obeys the rules of ordinary law: it is tortious towards third parties and contractual in the relations of credit institutions with their customers.

Credit institutions generally incur liability in tort for their personal acts and for the acts of their employees, whereas the extent of the contractual liability depends on the obligations stipulated by the contracts binding them to their customers. However, this responsibility is sometimes difficult to retain because many contracts are only verbal, which makes it difficult to prove the content of the obligations. Even if this proof is provided, compensation may only be partial, or even excluded, if clauses lightening liability have been stipulated, which is common in banking matters.

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**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?**

There are no specific mandatory provisions or requirements imposed by law or regulation with respect to private banking. Nevertheless, according to the MiFID 2 Regulations, a written framework agreement between the financial institution and its private client is required.

This cannot be satisfied by a simple discussion between the private banker and his or her client, however thorough and regular it may be. The client must systematically and periodically answer long and precise questionnaires.

MiFID 2 also requires banks always to have their customers sign a contract. Until now, some forms of advice were given without a contract.

In order to guarantee maximum transparency, banks will have to send information very regularly to their customers about the validity of what is offered to them, the characteristics of the products purchased and on the fees they are charged.

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**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 under a private banking contract is the ordinary five-year limitation period. Since this limitation is provided by law, it is not possible for parties to waive or alter it.

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**Confidentiality**
**41 Describe the private banking confidentiality obligations.**

For a long time, no text expressly provided banking secrecy. If it was recognised that the banker was bound by a civilly sanctioned duty of discretion, there was discussion as to whether this secrecy should be sanctioned criminally. The Banking Act of 24 January 1984 removed all uncertainty by referring to the Criminal Code. It is therefore clear that bankers must refrain from disclosing information about their clients, under penalty of civil and criminal sanctions.

Based on respect for private life, confidentiality obligations are simply about protecting the customer – more generally the persons concerned by confidential information – so that they can waive secrecy and thus authorise the banker to communicate the said information. In the absence of such authorisation, banking secrecy precludes any communication; it is said to be enforceable against third parties.

Persons liable for the obligation to secrecy are defined in article L. 511-33, I, of the Monetary and Financial Code. These are all those who, in any capacity, participate in the management or direction of a credit institution or who are employed by it. In addition to this first circle of debtors, a second circle includes persons who, in the course of their duties, may obtain access to confidential information held by credit institutions. Thus, for example, all persons participating in the supervisory tasks entrusted to the ACPR are bound by professional secrecy.

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

Banking secrecy covers only confidential information. The banker is therefore prohibited from disclosing to third parties the amount of an account balance or the amount of credit granted to a customer. However, general information that may be given by a banker to a third party who inquires about the creditworthiness of one of his or her clients is not confidential. This information is of such a nature if the banker merely indicates that due dates are difficult or that payments are regular.

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

Exceptions to banking secrecy are tending to increase. The causes of this are various: among them are the control of the administrative authorities over credit institutions, the controls exercised over customers, internal cooperation between the various financial authorities and European cooperation. Because of the basis of banking secrecy, namely the protection of customers, these derogations are strictly interpreted. Thus, there is a limited series of exemptions:

- direct exemptions: according to article L. 511-33, paragraph 2, I, of the Monetary and Financial Code, 'in addition to cases where the law so provides, professional secrecy may not be invoked against the Autorité de contrôle prudentiel et de résolution, the Banque de France, the judicial authority acting in criminal proceedings or committees of inquiry'; and
- indirect exemptions: where persons to whom banking secrecy cannot be invoked are authorised to communicate information of which they have knowledge. In principle, these persons are themselves bound by professional secrecy. However, the Monetary and Financial Code provides for cases where communication may take place.

#### 44 What is the liability for breach of confidentiality?

According to article L. 511-33 of the Monetary and Financial Code, any person who does not comply with this obligation can face tortious or criminal liability. The disclosure of information subject to banking confidentiality is punishable by up to five years' imprisonment and a €300,000 fine (article 226-16 French Penal code).

#### Disputes

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

French private courts such as Tribunal de Grande Instance, Court of Appeals and the Court de Cassation are competent to rule on disputes relating to banking and financial services.

#### 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?

There is no general obligation to disclose the outcome of private banking disputes to such authorities.

The ACPR has no jurisdiction to settle any dispute. However, the ACPR can provide the client with general information on the regulations and to whom the client can address his or her complaint.

In addition, sending a copy of the complaint that the client sent to the professional to the ACPR is useful in order to be informed of areas of dissatisfaction and to detect the worst practices.



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## Private banking and wealth management

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

The main sources of law and regulation relevant for private banking are the German Banking Act, the German Securities Trading Act and the German Civil Code.

The German Banking Act is particularly concerned with the licence requirements for private banking activities. The German Securities Trading Act is particularly relevant to private banking due to its rules of good conduct towards clients. The German Civil Code is the basis for the contractual relationship between the banker and the client.

The aforementioned sources of law are supplemented by European Union law, such as the EU Capital Requirements Rules and the MiFID II Rules.

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

The main government bodies relevant for private banking and wealth management are the German Financial Supervisory Authority (BaFin) and the German Federal Bank (Deutsche Bundesbank). BaFin is responsible for the day-to-day supervision of banks and wealth managers. The Deutsche Bundesbank is in particular concerned with reporting and data gathering from private banks and other financial institutions. The supervisory function is shared with regard to larger credit institutions with the European Central Bank.

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

Private wealth services are typically provided by private banks or by banks with a private client department. Single- or multi-family offices are also a significant player in the area of providing services to high net worth individuals (HNWIs).

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

There is no specific definition of private banking. Rather, private banking is understood as banking or wealth management services tailored to the financial needs of wealthier individuals.

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

The main licensing requirements for private banking services depend on the type of services. If the private bank also offers deposit-taking services, the main licence requirements are:

- initial capital of €5 million;
- at least two managing directors;
- sufficient good repute, sufficient knowledge, skills and experience as well as availability of the managing directors;
- sufficient suitability of shareholders holding 10 per cent or more in the institution;
- a head office in Germany; and
- a sufficient business plan providing information on the intended organisational structure, compliance measures and projected business development.

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

The requirements for granting the licence must be maintained on an ongoing basis. This applies in particular to the required capital and the sufficient compliance structures. As additional ongoing requirements, banks are subject to several regular and ad hoc reporting obligations to their supervisory authorities. Furthermore, banks are required to finance a deposit guarantee scheme.

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

The most common form of organisation of a private bank is an entity, often as a subsidiary of a German bank or of a foreign bank. The entity is typically a German limited liability company or a German stock corporation. There are also some branches of foreign banks.

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

It should take at least six to eight months to obtain a licence for a private bank.

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

As a general rule, BaFin may withdraw a licence if the institute no longer meets the licence requirements or if the institute violates the German Banking Act or related laws on a sustained basis. BaFin may also withdraw the licence if there is a risk that the institute will no longer be able to meet its obligations.

The withdrawal of a licence is a last resort. BaFin may instead request the resignation of the managing directors or it may order any organisational issues to be rectified. In addition, BaFin can take additional measures in special situations, such as closure of the institute if there is a risk that the institute can no longer meet its obligations.

In practice, issues between BaFin and institutes are typically solved on an informal basis between BaFin and the institute.

### 10 Is wealth management subject to supervision or licensing?

Wealth management is subject to both licensing and ongoing supervision. This applies to both discretionary management and non-discretionary advice. Single-family offices, though, are typically exempt from a licence requirement and ongoing supervision.

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

The main licensing requirements for wealth management depend on the type of services offered. If wealth management is restricted to financial advisory and discretionary individual portfolio management services without holding clients' monies or securities, the main licence requirements are:

- initial capital of €50,000;
- ongoing capital of at least one-quarter of projected overhead costs;
- sufficient good repute, sufficient knowledge, skills and experience as well as availability of the managing director or directors;
- sufficient suitability of shareholders holding 10 per cent or more in the institution;
- a head office in Germany; and

- a sufficient business plan providing information on the intended organisational structure, compliance measures and projected business development.

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

The requirements for granting the licence must be maintained on an ongoing basis. This applies in particular to the required capital and sufficient compliance structures. As additional ongoing requirements, wealth managers are subject to several regular and ad hoc reporting obligations to BaFin or Deutsche Bundesbank, or both. Furthermore, wealth managers are required to finance an investor protection scheme.

### Anti-money laundering and financial crime prevention

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

The main anti-money laundering and financial crime prevention requirements for private banks are twofold:

- banks and other financial institutions must have organisational procedures and functions in place to avoid money laundering and financial crimes. This includes the appointment of an anti-money laundering officer within the financial institution; and
- in addition, financial institutions must identify their customers and verify the customer's identity. This includes identifying beneficial owners. The law also requires an ongoing monitoring of the business relationship with the customer.

Since the last amendment dated 26 June 2017, German anti-money laundering and financial crime prevention requirements are based on the Fourth Anti-Money Laundering Directive (EU Directive 2015/849).

## 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?

A PEP is basically an individual who is or has been entrusted with prominent public functions, such as heads of state, ministers and members of parliament, as well as certain relatives. The specifics of the definition essentially follow the PEP definition in EU Directive 2015/849.

If there is a PEP involved, senior management needs to approve the business relationship with the customer. In addition, the institution must take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction with the PEP. Furthermore, the relationship must be put under enhanced ongoing monitoring.

## 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.

Customers must be identified on the basis of official ID documents, such as an ID card or passport. In practice, institutes make a copy of the ID document for their records and check whether the likeness of the customer resembles the photograph on the ID document.

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

Generally, tax evasion is not a basis for a money laundering offence. The bases for the money laundering offence are only crimes (ie, an illegal activity with a minimum sentence of one year's imprisonment) and certain enumerated offences, such as drug-related offences.

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

There are no express verification requirements for financial intermediaries in connection with tax compliance of clients. However, a bank employee will be charged with abetment of tax evasion if the employee (i) incites the tax evasion of the client or (ii) encourages or assists the tax evasion of the client. In addition, the bank employee abetting tax

evasion is liable for the non-payment of evaded taxes plus interest thereon. There is no clear line between acts by an employee that are still legal and acts that already abet tax evasion. The line to a criminal act will likely be crossed if it is obvious to the bank employee that the client wants to open the account to evade taxes.

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

Non-compliance with money laundering crime rules by an institution can be fined up to €5 million or 10 per cent of its revenue in cases of serious, repeated or systematic infringements. In other cases, non-compliance by an institution can be fined up to €100,000. In addition, the employee can be charged with the criminal offence of money laundering. This can also lead to an additional fine against the financial institution of up to €1 million. The client itself may be charged with the criminal offence of money laundering (depending on the circumstances).

### Client segmentation and protection

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

German regulatory law follows the client categorisation of MiFID II (Directive 2014/65/EU) (ie, retail clients, professional clients and eligible counterparties). The definition of each client category is in accordance with MiFID II. Germany did not use the option under MiFID II to introduce special criteria for municipalities and local public authorities.

HNWIs and sophisticated clients do in principle qualify as retail clients, unless they agree to be opted-up to a professional client. The opt-up procedure is similar to the opt-up procedure described in Annex II of MiFID II.

## 20 What are the consequences of client segmentation?

There are no specific carveouts for HNWIs. Private banks and financial managers must qualify a HNWI under one of the three client categories (retail client, professional client or eligible counterparty).

The qualification of a HNWI as a professional client means fewer duties from a regulatory perspective. In particular, when providing investment advice or other financial services, the financial institution can assume that the HNWI has the necessary knowledge and experience with regard to the service. This is in line with MiFID II. In addition, there is no need to hand out a key investor information document and a suitability protocol when providing investment advice to professional clients.

A qualification as a professional investor may also extend the product categories a financial institution can offer to the client. The prospectus rules of the EU Prospectus Directive do not apply if the financial product is offered only to professional clients (and other qualified investors). The marketing of non-EU investment funds in Germany is also easier if restricted to professional clients or professional investors. As a consequence, such products can be offered in the German market with more ease on the part of the issuer or offeror than a full-blown retail product.

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

The European consumer protection laws apply (in particular Directive 2011/83/EU). The consumer protection laws are difficult to navigate when providing investment products to clients. Even if HNWIs qualify as professional clients under MiFID, they might still qualify as consumers. Product offerings in Germany should take this into account.

### Exchange controls and withdrawals

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

In general, there are no restrictions on movements of funds. However, the payment service provider of the payer has to transmit the personal data of the payer to the payment service provider of the payee. Personal data means any information concerning personal or material circumstances of an identified or identifiable individual.

Furthermore, customers with residence or habitual abode within Germany have the obligation to inform the Deutsche Bundesbank if they remit an amount of more than €12,500 to a foreigner or receive such an amount from such a person.

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

There are no restrictions on cash withdrawals imposed by law or regulation and it does not matter in which currency the cash is withdrawn. However, banks customarily impose restrictions on account withdrawals so that account holders are only allowed to withdraw a certain amount of money per day or per month, or both.

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

See question 23.

**Cross-border services**

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

Providing cross-border private banking services into Germany is within the regulatory reach of the German Banking Act and the Securities Trading Act.

The German Banking Act and Securities Trading Act apply if the foreign financial institution actively targets the German market (eg, sending letters to potential clients, making phone calls to clients, setting up meetings with clients, having a website targeted at a German audience). In contrast, approaches at the initiative of the client are not subject to the German Bank Act and the Securities Trading Act. This concept of market access was retained even after the implementation of MiFID II in Germany.

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

Actively targeting the German market requires a licence under the German Banking Act or the use of a EU-MiFID or EU-CRD passport. Therefore, non-EU financial institutions (eg, in Switzerland or in the United States) need in principle a licensed subsidiary or branch office in Germany.

The German regulator offers also the possibility of an exemption from the German Banking Act if the financial institution complies with a set of requirements (such as sufficient supervisory oversight in its home country). This is in effect almost like a mini-MiFID passport for Germany. However, the exemption approval process is lengthy and the financial institution is restricted to offering its services only to institutional investors. Under MiFID II, this exemption will continue to exist on a German level for the foreseeable future.

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

Wealth management, advisory and banking services are regulated if they are targeted at the German market.

**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?**

If there is an existing customer relationship, employees may meet such a client in Germany (but new categories of products can only be introduced at the sole initiative of the existing client). With regard to prospective clients, the situation is different: employees may only travel to meet prospective clients if the approach was set up at the initiative of the German client. Otherwise, the institution is required to have a licence.

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

Foreign private banking institutions and other financial institutions may send documents to existing clients (but new categories of products can only be introduced at the sole initiative of the existing client). With regard to prospective clients it is again different: documents may

only be sent if the approach was set up at the initiative of the German client. Otherwise, the institution is required to have a licence.

**Tax disclosure and reporting**

**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?**

The typical scenario is that a German bank must deduct and withhold German income tax on German accounts. With such withholding, the income tax on the banking account is already accounted for. As a result, there are no further requirements on individual taxpayers to establish tax-compliant status with regard to such accounts to the tax authorities. If no German tax is deducted and withheld at source, the taxpayers will have to disclose their income in their yearly tax returns.

Branches of foreign banks are subject to the same withholding regime as German banks with regard to their German accounts. However, foreign banks without a German branch will in general not be subject to the withholding obligations of German banks. As result, the taxpayers must disclose income on these foreign accounts in their German tax returns in order to establish tax-compliant status.

**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?**

In general, private banks or financial intermediaries must communicate the name, identification number, date of birth and address of any creditor of capital gains to the Federal Central Tax Office.

If no tax is deducted and withheld due to a *Freistellungsauftrag* (exemption order for capital gains) or a *Nichtveranlagungsbescheinigung* (certificate confirming non-assessment) the banks must also report the amount of capital income.

Furthermore, if their clients die the banks are obliged to report the account balance to the tax authorities.

**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?**

In order to meet the reporting requirements as described above, no client consent is necessary. Furthermore, the banks' general terms and conditions typically specify that disclosures under the reporting obligations are not an infringement of bank secrecy.

**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.**

A common legal structure for holding private assets in an HNWI environment is a GmbH & Co KG. The GmbH & Co KG is a limited partnership with a general partner and with one or more limited partners. In general, the limited partners are only liable up to the registered amount of their liability contribution. Beyond that contribution amount, the liability of the limited partner ceases.

Since the GmbH & Co KG is tax transparent for German income tax purposes, the partners in general can offset losses of the GmbH & Co KG against their further income. Also, income tax at the level of the GmbH & Co KG is avoided (however, depending on the tax status, trade tax might accrue at the level of the GmbH & Co KG).

Furthermore, the limited partnership agreement of GmbH & Co KG is very flexible and can accommodate individual arrangements. Amendments to the limited partnership agreement can be easily made among the partners without having to obey formal requirements.

However, in comparison to other structures, the costs of a GmbH & Co KG are generally higher. In order to establish a GmbH & Co KG, a GmbH must first be set up. This causes additional costs for the notarisation and the payment of the initial contribution of the GmbH. Also, the partnership expenses are higher since yearly tax returns have to be filed for both the GmbH & Co KG and for the GmbH. Furthermore,



the financial statements for both the GmbH & Co KG and the GmbH must be published, which engenders further costs.

Another common legal structure for holding private assets is a GmbH. A GmbH is a limited liability company. Compared to the GmbH & Co KG, the GmbH is not tax transparent. Further, entering into the articles of association and amending such articles requires a higher degree of formalities (notarisation and registration). Unlike for the GmbH & Co KG, the articles of association of the GmbH are publicly accessible.

A family foundation is a rather rare structure for holding private assets. It is not tax transparent and is rather costly and cumbersome to establish.

#### **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 order to establish a banking relationship with a structure, the following data and information are required:

- name of the structure;
- legal form;
- registration number (where available);
- tax ID;
- address of principal office;
- names of the members of the representative body;
- if a member of the representative body is a corporation, its firm, name or description, registration number (where available) and names of members of the representative body is also necessary; and
- the identity of beneficial owners.

In order to prove identity, an extract of the register or a comparable evidential document is required.

In order to verify the details of the beneficial owners, banks can now use a special transparency register which was established following the Fourth Anti-Money Laundering Directive (EU Directive 2015/849). However, banks cannot solely rely on the entries contained in this register, but must check the information provided therein by additional risk-appropriate measures.

#### **35 What is the definition of controlling person in your jurisdiction?**

According to the Money Laundering Act, a controlling person or beneficial owner means the natural person who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction is ultimately carried out or a business relationship is ultimately established. A controlling person or a beneficial owner is in particular the following:

- in the case of entities or partnerships:
  - any natural person who directly or indirectly holds more than 25 per cent of the capital stock or controls more than 25 per cent of the voting rights or controls the entity or partnership in a comparable way; and
- in the case of foundations or trusts:
  - any natural person acting as settlor, trustee or protector (if available);
  - any natural person who is board member of the foundation;
  - any natural person who has been designated as the beneficiary;
  - where the natural person intended to be the beneficiary of the managed assets or property is yet to be designated, the group of natural persons for whose benefit the assets or property are primarily intended to be managed or distributed; or
  - any natural person who otherwise directly or indirectly exercises a controlling influence on the management of assets or property or the distribution of income.

In the case of a party acting on behalf of another, the other person is regarded as the controlling person.

#### **36 Are there any regulatory or tax obstacles to the use of structures to hold private assets?**

The use of structures to hold private assets is, under regulatory law, generally not problematic in a family members context. If the structure is

#### **Update and trends**

Private banking and wealth management, as well as the German regulator, are still adapting their procedures and internal rules to the complicated MiFID II regime introduced in 2018. Fintech poses another challenge for established players, in particular at the entry level of private banking and wealth management services.

used for pooling the assets of non-family members, the structure might become an investment fund and might therefore be subject to regulatory approval and oversight under the German implementation of the EU Directive on Alternative Investment Fund Managers (AIFMD).

German structures are also required to notify the structure's controlling persons (as defined above) to the new transparency register.

The tax obstacles to the use of structures very much depend on the specific tax needs and can be difficult to navigate (eg, estate tax, need to avoid business income). For instance, a GmbH & Co KG can be considered to be in a trade or business due to its structure ('deemed business' concept) or due to its activities or investments. Depending on the relevant asset class, there are specific criteria developed by courts and in decrees of the German tax authorities to distinguish business activities from mere asset-management activities (eg, with respect to private equity funds, real estate and traded securities).

#### **Contract provisions**

#### **37 Describe the various types of private banking and wealth management contracts and their main features.**

There are several different types of private banking contracts. The types prevalent for private banking are typically investment advisory agreements, bank account agreements and asset management agreements. The agreements are often accompanied by a general framework agreement (such as the General Terms and Conditions of Private Banks). The general framework agreement specifies general aspects of the banking relationship, in particular the duty to secrecy and the bank's security interests in bank accounts. The main features of the other types of contract are in line with their names (ie, investment advice for investment advisory agreements etc).

The contracts are governed by the German Civil Code and, where relevant, supplemented by the German Securities Trading Act. Whether a client can ask for variations of the contracts is a matter of negotiation strength rather than mandatory law.

#### **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?**

The default liability standard provided for by law is liability for every negligent breach of contract. The default liability can be varied if individually negotiated. If the liability is not individually negotiated, banks may deviate from the default standard only to a very limited extent. For instance, the General Terms and Conditions of the Private Banks provide for the default liability standard, but exclude liability in the case of force majeure.

#### **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?**

In general, there are no mandatory provisions or requirements imposed by law or regulation specifically with regard to the contents of private banking contracts.

However, private banking contracts are supplemented, where relevant, by the ancillary duties imposed by the German Securities Trading Act and the MiFID II Regulations. These duties require, for instance, a written framework agreement between the financial institution and its private client. The framework agreement must set out the main duties and rights of the parties. Furthermore, financial institutions are obliged to provide certain mandatory information to their clients when opening a business relationship (such as a general overview on the financial institution, types of financial instruments and costs associated with the offered financial services).

**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 under a private banking contract is three years. The period can be varied in individual negotiations or waived.

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

Although bank secrecy is not regulated by law, the existence of bank secrecy is generally accepted by the courts. Banking secrecy provisions are an important part of the General Terms and Conditions of Private Banks. Furthermore, the banks must fulfil the confidentiality obligation according to the Federal Data Protection Act and the General Data Protection Regulation (GDPR) (EU Regulation 2016/679).

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

Bank secrecy forbids the bank from disclosing customer-related facts; for instance, the existence of agreements between bank and customer or the assessment of the financial status of the customer by the bank.

The Federal Data Protection Act and GDPR protect the personal data of customers. The collection, storage, modification or transfer of personal data or their use as a means of fulfilling one's own business purposes is possible only under the requirements of the Federal Data Protection Act and GDPR.

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

There are several exceptions and limitations to the duty of confidentiality, for instance:

- if a bank employee is questioned by a court as a witness in a criminal case in which the customer is the defendant, the employee cannot refuse to answer because of bank secrecy;
- under certain circumstances, the bank has to disclose account information such as the account number as well as the name and the date of birth of the account holder to the tax authorities, to BaFin or to other state authorities;
- if the client dies, the asset manager has the obligation to report the account balance to the tax authorities; and
- there is no obligation of confidentiality in legal proceedings of the bank against the customer.

**44 What is the liability for breach of confidentiality?**

In case of an infringement of bank secrecy, the Federal Data Protection Act or the GDPR, the customer is generally entitled to damages. However, the customer will not typically be able to prove that the breach caused damage. This means that the breach of confidentiality is more a reputational risk for the bank.

In general, breach of bank secrecy by an employee of the bank is not an administrative or criminal offence. However, the employee of the bank may commit an administrative or criminal offence by breaching the obligations due to the Data Protection Act or GDPR.

**Disputes**

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

In general, the local competent authorities for dispute resolution are the ordinary courts. Under certain conditions, special departments of the regional courts with a special competence for commercial law may be in charge to resolve disputes between bank and customer.

However, private clients generally have the chance to lodge a complaint with a banking ombudsman, too. The ombudsman procedure is free of charge, but the customer must pay his or her own expenses. Up to a complaint in the amount of €10,000, the decision of the ombudsman is binding. However, in most cases the bank accepts the decision of the ombudsman even if the subject of the complaint increases the amount over €10,000 and the decision is not in favour of the bank.

**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?**

There is no general obligation to report private banking disputes to BaFin as the local regulator. However, a client can lodge a complaint with BaFin. BaFin will forward the complaint to the bank and request the bank's opinion on it. The bank must give a detailed answer and explain the reasons for its behaviour. On the basis of the complaint and the answer of the bank, BaFin will decide whether further action is necessary.

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# Hong Kong

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## Private banking and wealth management

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

Within the realm of private banking and wealth management businesses, there are two main sources of law and regulation. The conduct of banking and deposit-taking business in Hong Kong is under supervision and regulation by the Hong Kong Monetary Authority (HKMA), and subject to the Banking Ordinance (BO). On the other hand, the conduct of securities and futures business in Hong Kong is primarily regulated under the Securities and Futures Ordinance (SFO), subject to supervision and regulation by the Securities and Futures Commission (SFC).

A bank, restricted licence bank or a deposit-taking company engaged in banking and deposit-taking business would need to be an authorised institution under the BO ('authorised financial institution'). Where an authorised financial institution carries on a business of regulated activity in securities and futures or actively markets to the public, whether by itself or another person on its behalf and whether in Hong Kong or from a place outside Hong Kong, any services it provides, which would constitute a regulated activity if provided in Hong Kong, such authorised financial institution will need to be a registered institution with the SFC to conduct the relevant regulated activity (other than Type 3 and Type 8 as referred to below, and unless any relevant exemption applies).

Currently there are the following types of regulated activities: dealing in securities (Type 1), dealing in futures contracts (Type 2), leveraged foreign exchange trading (Type 3), advising on securities (Type 4), advising on futures contracts (Type 5), advising on corporate finance (Type 6), providing automated trading services (Type 7), providing securities margin financing (Type 8), asset management (Type 9) and providing credit rating services (Type 10). Persons engaged in the business of conducting regulated activities would need to be licensed by or registered with (in the case of authorised financial institutions) the SFC, unless any relevant exemption applies.

Besides the BO and SFO respectively, the HKMA and the SFC issue various circulars, handbooks, codes, guidelines or FAQs containing additional requirements and expected standards of conduct that licensed corporations and registered intermediaries or market participants are subject to, including in particular the SFC Code of Conduct for Persons Licensed by or Register with the Securities and Futures Commission (SFC Code of Conduct), which are relevant to the conduct of wealth management services relating to securities and futures businesses.

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

The HKMA is the main prudential and supervisory regulator for banks, while the SFO empowers the SFC as the primary regulator for the securities and futures market and the conduct of securities and futures businesses in Hong Kong, which would encompass private banking and wealth management financial services.

Authorised financial institutions should also observe the Code of Banking Practice issued by The Hong Kong Association of Banks and the DTC Association, as endorsed by the HKMA, in providing banking services such as current accounts, saving and other deposit accounts,

loans and overdrafts, card services, electronic banking services and stored value card services.

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

Private wealth services are commonly provided in Hong Kong by private banks, investment managers or advisers, securities brokers, multi-family offices or trust companies providing private trust services.

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

In section 1, schedule 14 of the BO, private banking in relation to an authorised institution is defined as:

*the provision by the institution of banking or other financial services to individuals who are considered by the institution to be of high net worth, but does not include such services so provided as part of the institution's retail banking*

The term is generally understood to refer to the provision of banking and wealth management services to high net worth clients, covering general banking, asset management or other investment products or services, and also private wealth or trust services. The HKMA and SFC do consider the conduct of private banking as a specific type of business that are under certain additional regulatory considerations or requirements.

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

A private bank must be authorised by the HKMA in conducting banking business, and it may be one of the following forms of authorised financial institutions under Hong Kong's three-tier system: licensed banks, which may operate current and savings accounts and accept deposits of any size and maturity from the public and pay or collect cheques drawn by or paid in by customers; restricted licence banks, which may take deposits of any maturity of HK\$500,000 and above and principally engaged in merchant banking and capital market activities; and deposit-taking companies, which may take deposits of HK\$100,000 or above with an original term of maturity of at least three months and which may engage in specialised activities such as consumer finance and securities business.

The HKMA has a general discretion whether to approve or refuse an application for authorisation, and certain requirements and minimum criteria set forth in the BO and as clarified by HKMA must be met, failing which the HKMA will refuse to grant authorisation. The requirements for authorisation and to maintain authorisation include applicable minimum capital for the relevant forms of authorised financial institutions, adequate financial resources and capital adequacy, fitness and propriety of the directors, controllers, chief executives and executive officers of the applicant, adequacy of home supervision where the applicant is a bank incorporated outside Hong Kong, adequate accounting system and systems of control, and adequate disclosure of information.

A private bank must also be a registered institution with the SFC in order to conduct business in securities and futures regulated activities of offering asset management, wealth management or other

investment products or services, which may fall under one or more types of regulated activities as mentioned in question 1.

To apply to the SFC and qualify for registration, a private bank must appoint not less than two executive officers responsible for directly supervising the conduct of each regulated activity, with at least one executive officer available at all times to supervise the business. The executive officers are expected to meet certain competence requirements and should obtain the consent of the HKMA to act in such capacity under the BO. The SFC further requires the substantial shareholders, directors, chief executive, managers, executive officers and any other person who will be acting for or on behalf of the private bank in relation to the regulated activity to be fit and proper.

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

As noted in question 5, the requirements for authorisation and to maintain authorisation as a private bank include applicable minimum capital for the relevant forms of authorised financial institutions, adequate financial resources and capital adequacy, fitness and propriety of the directors, controllers, chief executives and executive officers of the applicant, adequacy of home supervision where the applicant is a bank incorporated outside Hong Kong, an adequate accounting system and systems of control, and adequate disclosure of information.

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

The licensed banks or restricted licence banks that operate private banking business may be locally incorporated (such as a subsidiary of a foreign bank) or be a branch of a bank incorporated outside Hong Kong which the HKMA is satisfied is adequately supervised by the relevant banking supervisory authority.

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

A private bank would first need to obtain authorisation from the HKMA. The process of preparing an application involves preparing a business plan and providing relevant information on the applicant and its controllers, chief executive, directors or executive officers as required. If the applicant is a bank incorporated outside Hong Kong seeking to establish a subsidiary or branch in Hong Kong, the application process involves the HKMA consulting with the relevant overseas banking supervisory authority to confirm its approval for the proposed Hong Kong setup. The time to obtain authorisation from the HKMA will depend on the circumstances of each application, including the completeness of information and quality of documents submitted, and, in the case of overseas applicants, the time taken by the relevant banking supervisory authority to respond to the enquiries of the HKMA in respect of the overseas bank.

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

The HKMA may revoke its authorisation of an authorised institution on any one or more grounds specified in Schedule 8 of the BO, such as where the criteria for authorisation is no longer satisfied, on an insolvency or winding up or inability of the institution to meet its obligations, failure to provide the HKMA with information of a material nature or provision of materially false, misleading or inaccurate information to the HKMA, contravention of a condition of authorisation, the cessation of banking business or business of taking deposits, or engaging in prohibited business practices. Other grounds relating to having a controller objected by HKMA or the appointment of executive officers or directors without the consent of the HKMA or in breach of any condition imposed by HKMA may also result in revocation of authorisation. An institution may make a request in writing to the HKMA to voluntarily revoke its authorisation, which the HKMA may approve if satisfied that the interests of depositors are or will be adequately safeguarded.

If the HKMA shall revoke the authorisation of an authorised institution, the HKMA shall first consult with the Financial Secretary and serve a notice in writing to the authorised institution on its intention to revoke the authorisation, and inform the institution of the grounds for the proposed revocation and providing the institution with an opportunity of being heard and to appear against such a proposed revocation if desired. The HKMA may specify by notice in writing to the authorised

institution the effective date of revocation when the appeal procedures are exhausted or if the institution has waived its right of appeal.

If an authorised institution shall cease to carry on any regulated activity, the institution should notify the SFC for cancellation of its registration, as soon as reasonably practicable and not later than seven business days before such intended cessation.

#### **10 Is wealth management subject to supervision or licensing?**

Wealth management services that involve the conduct of regulated activities (such as those referred to in question 1) may be subject to licensing requirements by the SFC that would require the relevant corporation or institution to be licensed by or registered with the SFC and subject to regulatory supervision by the SFC.

Common forms of wealth management services that constitute regulated activities include securities dealing services (Type 1 regulated activity) and incidental discretionary account management services, dealing in futures contracts (Type 2), advising on securities (Type 4) or asset management (Type 9) (including discretionary management of a portfolio of securities or futures contracts). It should be noted that 'securities' is very broadly defined under the SFO to cover various forms of equity and debt instruments, collective investment schemes and other investment instruments or products.

#### **11 What are the main licensing requirements for wealth management?**

See question 10.

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

The most important ongoing condition of holding a relevant wealth management licence (namely registration with the SFC to engage in relevant regulated activities) is to remain fit and proper, including compliance with all applicable provisions of the SFO and other regulatory requirements, codes and guidelines (and in the case of private banking, as supplanted by such requirements of the HKMA).

#### **Anti-money laundering and financial crime prevention**

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

The following key legislation in Hong Kong deals with anti-money laundering and financial crime prevention:

- Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap.615) (AMLO);
- Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405);
- Organized and Serious Crimes Ordinance (Cap.455); and
- United Nations (Anti-Terrorism Measures) Ordinance (Cap.575).

Pursuant to the AMLO, a 'financial institution' includes: (i) an authorised institution (as defined in the BO); (ii) a licensed corporation (which is granted a licence by the SFC); and (iii) an authorised insurer.

A private bank that is an authorised institution shall comply with the legal and supervisory requirements set forth in AMLO and the Guideline on Anti-Money Laundering and Counter-Terrorist Financing (HKMA Guideline) issued by the HKMA.

The HKMA has also issued additional guidelines, frequently asked questions and guidance papers to which authorised institutions should give full consideration:

- Guideline on Exercising Power to Impose Pecuniary Penalty;
- Frequently Asked Questions on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance;
- Guidance Paper on Transaction Screening, Transaction Monitoring and Suspicious Transaction Reporting;
- Guidance Paper on Anti-Money Laundering Controls over Tax Evasion; and
- Frequently Asked Questions on Customer Due Diligence.

An SFC licensed corporation shall comply with the legal and supervisory requirements set out in the AMLO and the requirements of the Guideline on Anti-Money Laundering and Counter-Terrorist Financing issued by the SFC (SFC Guideline).

The SFC has also issued the following guidelines and frequently asked questions, to which licensed corporations should give full consideration:

- Prevention of Money Laundering and Terrorist Financing Guideline issued by the Securities and Futures Commission for Associated Entities;
- SFC Disciplinary Fining Guidelines issued under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance; and
- FAQs on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

**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?**

Under the AMLO, a politically exposed person (PEP) is defined as:

- (a) an individual who is or has been entrusted with a prominent public function in a place outside the People’s Republic of China and:
  - (i) includes a head of state, head of government, senior politician, senior government, judicial or military official, senior executive or a state-owned corporation and an important political party official; but
  - (ii) does not include a middle-ranking or more junior official of any of the categories mentioned in subparagraph (i);
- (b) a spouse, a partner, a child or a parent of an individual falling within paragraph (a), or a spouse or a partner of a child of such an individual; or
- (c) a close associate of an individual falling within paragraph (a).

*Notes:*

- For the purpose of paragraph (b) of the definition of a PEP, the AMLO also defines a ‘partner of an individual’ as: ‘if the person is considered by the law of the place where the person and the individual live together as equivalent to spouse of the individual’.
- For the purpose of paragraph (c) of the definition of PEP, the AMLO defines a ‘close associate of an individual’ as:
  - ‘an individual who has close business relations with the first-mentioned individual, including an individual who is a beneficial owner of a legal person or trust of which the first-mentioned individual is also a beneficial owner’; or
  - ‘an individual who is the beneficial owner of a legal person or trust that is set up for the benefit of the first-mentioned individual’.

There are increased due diligence requirements for establishing a private banking relationship with a PEP. An authorised institution should apply enhanced customer due diligence (EDD) procedures, including:

- obtaining approval from its senior management;
- taking reasonable measures to establish the customer’s or the beneficial owner’s source of wealth and the source of the funds; and
- applying enhanced monitoring to the relationship in accordance with the assessed risks.

**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.**

The following identification documents should be obtained as a standard requirement:

<b>Natural persons</b>	<ul style="list-style-type: none"> <li>(i) for Hong Kong permanent residents: an individual’s name, date of birth and identity card number should be verified by reference to their Hong Kong identity card;</li> <li>(ii) for non-permanent residents: an individual’s name, date of birth, nationality and travel document number and type should be verified by reference to a valid travel document (eg, an unexpired international passport); and</li> <li>(iii) proof of residential address.</li> </ul>
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<b>Corporations</b>	<ul style="list-style-type: none"> <li>(i) a copy of the certificate of incorporation and business registration (where applicable);</li> <li>(ii) a copy of the company’s memorandum and articles of association which evidence the powers that regulate and bind the company;</li> <li>(iii) details of the ownership and structure control of the company (eg, an ownership chart);</li> <li>(iv) the names of all directors, verifying the identify of directors on a risk-based approach;</li> <li>(v) confirmation that the company is still registered and has not been dissolved, wound up, suspended or struck off;</li> <li>(vi) independent identification and verification of the names of the directors and shareholders recorded in the company registry in the place of incorporation; and</li> <li>(vii) verification of the company’s registered office address in the place of incorporation.</li> </ul>
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The HKMA expects that prior to establishing a private banking relationship, authorised institutions should carry out a more detailed customer due diligence than expected for normal retail banking. For each private banking customer an authorised institution should obtain the following information:

- purpose and reasons for opening the account;
- business or employment background;
- estimated net worth;
- source of wealth (where possible and appropriate, corroboration of major economic activities that gave rise to the wealth);
- family background, such as information on spouse, and where appropriate (eg, in the case of inherited wealth), parents;
- source of funds (ie, description of the origin and the means of transfer for monies that are acceptable for the account opening);
- anticipated account activity including nature and level of business and transactions; and
- references (eg, introduced by whom and when and the length of relationship) or other sources to corroborate reputation information where available.

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

In the AMLO, ‘money laundering’ is defined as:

*an act intended to have the effect of making any property:*

- (a) *that is the proceeds obtained from the commission of an indictable offence under the laws of Hong Kong, or of any conduct which if it had occurred in Hong Kong would constitute an indictable offence under the laws of Hong Kong; or*
- (b) *that in whole or in part, directly or indirectly, represents such proceeds, not to appear to be or so represent such proceeds.’*

‘Tax evasion’ under the Inland Revenue Ordinance is an indictable tax offence fulfilling the above ‘money laundering’ definition, which constitutes a predicate offence for money laundering in Hong Kong:

- (1) *Any person who wilfully with intent to evade or to assist any other person to evade tax—*
  - *omits from a return made under this Ordinance any sum which should be included; or*
  - *makes any false statement or entry in any return made under this Ordinance; or*
  - *makes any false statement in connection with a claim for any deduction or allowance under this Ordinance; or*
  - *signs any statement or return furnished under this Ordinance without reasonable grounds for believing the same to be true; or*
  - *gives any false answer whether verbally or in writing to any question or request for information asked or made in accordance with the provisions of this Ordinance; or*
  - *prepares or maintains or authorizes the preparation or maintenance of any false books of account or other*

- records or falsifies or authorizes the falsification of any books of account or records; or*
- *makes use of any fraud, art, or contrivance, whatsoever or authorizes the use of any such fraud, art, or contrivance, commits an offence.*

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

An authorised institution as financial intermediary is required to identify, assess and understand its money laundering risks. The risk assessment should take into account relevant risk factors, including the risk in relation to tax evasion during the account opening stage.

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

If a financial institution (as defined in the AMLO to include a licensed bank and a SFC licensed corporation) knowingly contravenes any specified provision in relation to client due diligence and record-keeping under schedule 2 of the AMLO, the financial institution commits a criminal offence. If a person who is an employee of a financial institution or is employed to work for a financial institution, or is concerned in the management of a financial institution knowingly causes or knowingly permits the financial institution to contravene any specified provision in relation to client due diligence and record-keeping under the AMLO, that person commits a criminal offence and is liable on conviction to a fine and imprisonment: (i) on conviction on indictment to a fine of HK\$1 million and to imprisonment for two years; or (ii) on summary conviction to a fine of HK\$100,000 and to imprisonment for six months.

**Client segmentation and protection**

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

Broadly, the legal and regulatory framework on offers of investment products and services in securities or futures differentiates between Retail Investors and Professional Investors as defined under the SFO. There are three main categories of Professional Investors: Institutional Professional Investors, such as financial institutions and specific bodies as prescribed in the legislation, and Individual Professional Investors or Corporate Professional Investors that meet the relevant minimum net worth or net assets requirements (being individuals with a portfolio of at least HK\$8 million, or a corporation or partnership with a portfolio of at least HK\$8 million or net assets of HK\$40 million).

**20 What are the consequences of client segmentation?**

Offers of investments that are not made to the public and not authorised for retail distribution may be made on a private placement basis, and in particular, private placement offers and marketing activities in that connection can be directed at an unlimited number of Professional Investors.

Licensed corporations or registered institutions are required to comply with applicable requirements under the SFC Code of Conduct (referred to in question 1) in the conduct of regulated activities, including a certain expected standard of conduct with a view to investor protection, such as fulfilling a suitability obligation in the recommendation or solicitation of financial products, certain disclosure requirements and requirements on client agreements. However, offers or provision of services to Institutional Professional Investors and to Corporate Professional Investors that meet relevant assessment criteria are exempted from such investor protection measures under the SFC Code of Conduct.

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

The Hong Kong Consumer Council is constituted and empowered, pursuant to the Consumer Council Ordinance, to protect and promote the interests of consumers of goods and services (and also purchasers, mortgagors and lessees of immovable property). This is applicable to private banking and wealth management services, and consumers

may lodge complaints to the Consumer Council on unfair treatment or practices in services received or dissatisfaction over services. The Consumer Council regularly provides feedback and views to promote the protection of consumers in banking or investment services.

**Exchange controls and withdrawals**

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

Hong Kong does not impose exchange controls or restrictions on the movement of funds. Under article 112 of The Basic Law, it is stipulated that no foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region, and the Government of Hong Kong shall safeguard the free flow of capital within, into and out of Hong Kong.

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

There are no restrictions on cash withdrawals imposed by law or regulation, and it is not usual for banks to impose restrictions on account withdrawals, unless a restriction on withdrawal is imposed on any account in question due to legal or regulatory action over the account (such as sanctions or orders to freeze the account or under regulatory investigation or suspicion of money laundering or criminal activities).

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

Unless a restriction on withdrawal is imposed on any account in question due to legal or regulatory action over the account (such as sanctions or orders to freeze the account or under regulatory investigation or suspicion of money laundering or criminal activities), there are no general restrictions on other withdrawals from an account.

**Cross-border services**

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

Where an institution engages in the conduct of regulated activities in securities and futures business in Hong Kong or actively markets to the public, whether by itself or another person on its behalf and whether in Hong Kong or from a place outside Hong Kong, any services it provides that would constitute a regulated activity if provided in Hong Kong, such an institution will need to be licensed by or registered with the SFC to conduct the relevant regulated activity, unless any relevant exemption applies. Failure to be licensed or registered where required would constitute an offence under the SFO. On the other hand, under the BO, it is also an offence to advertise, invite or issue any document to members of the public in Hong Kong to make a deposit, even if such an act is conducted from outside Hong Kong, unless in compliance with relevant requirements or authorised by HKMA.

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

See question 25.

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

Forms of cross-border services that are subject to regulation and potential licensing requirements would be activities that would constitute the conduct of regulated activities in securities and futures business in Hong Kong or the active marketing, whether by itself or another person on its behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any services it provides, which would constitute a regulated activity if provided in Hong Kong.

**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?**

If employees of foreign private banking institutions travel to meet clients and prospective clients in Hong Kong that involves the conduct of regulated activities, there may be licensing requirements such that the foreign institution should apply for a temporary licence. In order to

obtain a temporary licence, the institution should be carrying on business principally outside Hong Kong in an activity which, if carried on in Hong Kong, would constitute a regulated activity, and the temporary licence if granted shall be for a duration of not more than three months at any one time, and not more than six months in total within any period of 24 months. A temporary licence may be applied for carrying on the activities of dealing in securities (Type 1), dealing in futures contracts (Type 2), advising on securities (Type 4), advising on futures contracts (Type 5), advising on corporate finance (Type 6) and providing credit rating services (Type 10).

Where the foreign private banking institution has a local affiliate or subsidiary in Hong Kong having the relevant licence, such local affiliate or subsidiary may act as the sponsor to support the foreign institution's application for the employees to obtain a temporary licence and be accredited to the local affiliate or subsidiary.

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

If the activity of sending documents to clients and prospective clients in Hong Kong from outside Hong Kong amounts to the active marketing to the public, whether by itself or another person on its behalf and whether in Hong Kong or from a place outside Hong Kong, of any services it provides that would constitute a regulated activity if provided in Hong Kong, as noted above in question 25, licensing requirements may apply.

**Tax disclosure and reporting**

**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?**

There are no specific requirements on individual taxpayers in Hong Kong to disclose or establish the tax compliant status of private banking accounts, but note the reporting obligations of financial institutions to the US tax authority or to the Hong Kong Inland Revenue Department with respect to the Common Reporting Standard, as discussed in question 31.

**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?**

As Hong Kong has signed Model II IGA for the US Foreign Account and Tax Compliance Act 2010 (FATCA), which is supplemented by an agreement with the US for the exchange of information relating to taxes, this forms the basis for Hong Kong to provide for the exchange of information in relation to information reported by financial institutions in Hong Kong to the US under FATCA. Hong Kong has also implemented the Common Reporting Standard (CRS) and the automatic exchange of financial account information in tax matters (AEOI) on a reciprocal basis with appropriate partners, with the first exchanges expected by the end of 2018. The legal framework has been put in place for CRS reporting by financial institutions in Hong Kong (which would include private banks or financial intermediaries) in respect of a list of 75 reportable jurisdictions, although Hong Kong would only exchange information with a reportable jurisdiction where there is an arrangement in place with such jurisdiction that forms the basis for exchange (currently, Hong Kong has signed comprehensive avoidance of double taxation agreements with 39 jurisdictions and tax information exchange agreements with seven countries.)

**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?**

Following legislation amendment to the Inland Revenue Ordinance, financial institutions and intermediaries are under legal obligation to report to the Hong Kong Inland Revenue Department on financial accounts for reportable persons under CRS, and no client consent is required to permit reporting.

**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.**

The most common legal structure for holding private assets in Hong Kong is the use of a special-purpose company or investment holding company incorporated in Hong Kong or in an offshore tax neutral jurisdiction. This structure is commonly adopted by high net worth individuals to hold private assets directly, and is also commonly the structure which settlors settle private assets into a trust arrangement under which the trustee shall hold assets through holding the shares of the special-purpose company or investment holding company. Accordingly, a combination of a trust arrangement and private companies is commonly adopted for holding private assets. Where assets are held through a Hong Kong company, transfers of ownership through the transfer of shares in the Hong Kong company would attract Hong Kong stamp duty, whereas there would be no stamp duty if change of ownership is taken through a transfer of shares in a company incorporated in an offshore jurisdiction that does not impose stamp duty. Under Hong Kong's tax framework, there is a potential charge of Hong Kong tax on profits derived from the conduct of a business in Hong Kong, but Hong Kong does not impose tax on foreign-sourced income or tax on the basis of receipt, and does not impose dividend withholding tax. Therefore Hong Kong can offer a tax-efficient structure and may benefit with a reduced rate of withholding tax on dividends or other receipts from a jurisdiction under the applicable double tax treaty. In comparison, using an offshore company in a tax-free jurisdiction may offer a tax advantage and reduce the administrative burden that a Hong Kong company is subject to (of annual returns and tax filings), but it involves the loss of treaty benefits that may otherwise potentially apply for a Hong Kong-resident asset owner.

Where private assets are to be held through a collective investment arrangement, it is common to structure such a collective investment scheme using an offshore fund structure for similar stamp duty and tax considerations. Under the efforts to further develop Hong Kong as an asset management and wealth management services hub, tax incentives have been introduced in the form of the offshore fund profits tax exemption, which would exempt Hong Kong profits tax where an offshore fund structure is tax-resident outside Hong Kong and meets relevant prescribed conditions. It is also expected that, during the second half of 2018, the Hong Kong open-ended fund company (OFC) structure will be available to be adopted, as the relevant legislation as well as rules and applicable SFC code will be finalised. The OFC will also enjoy exemption from profits tax, subject to meeting relevant prescribed conditions.

**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?**

See question 15 for the KYC requirements for corporations.

**35 What is the definition of controlling person in your jurisdiction?**

Hong Kong has introduced requirements for Hong Kong companies to maintain a significant controllers register which shall contain the required particulars of its significant controller(s). A person is a significant controller if one or more of the following conditions is or are satisfied:

- the person holds, directly or indirectly, more than 25 per cent of the issued shares in the company; or if the company does not have a share capital, a right or rights to share in more than 25 per cent of the capital or profits of the company;
- the person holds, directly or indirectly, more than 25 per cent of the voting rights in the company;
- the person holds, directly or indirectly, the right to appoint or remove a majority of the board of directors of the company;
- the person has the right to exercise or actually exercises significant influence or control over the company; and
- the person has the right to exercise or actually exercises significant influence or control over the activities of a trust or firm that is not a legal person, but whose trustee(s) or members satisfy any of

### Update and trends

There are regulatory updates being introduced to the SFC Code of Conduct aimed to address conflicts of interest in the sale of investment products and enhanced disclosure at the point of sale by:

- restricting an intermediary from representing itself as 'independent' or using any terms with a similar inference when distributing an investment product if the intermediary receives commission or other monetary benefits in relation to distributing such an investment product, or it receives any non-monetary benefits from any party or has close links or other legal or economic relationships with product issuers which are likely to impair its independence; and
- requiring an intermediary to disclose the maximum percentage of any monetary benefits received or receivable that are not quantifiable prior to or at the point of sale.

These requirements under the Code of Conduct will take effect in mid-August 2018. There are also specific enhanced requirements with respect to the conduct of discretionary accounts management services by licensed persons or registered institutions which will apply from November 2018, including minimum content requirements of client agreements, and requiring performance review of the portfolio at least twice a year or valuation reports to be provided at least on a monthly basis, unless otherwise agreed in writing.

In recent years, there have been particular efforts on the part of the Hong Kong banking and securities regulators (HKMA and SFC) and the market participants to focus on the further growth and development of the private banking and wealth management industry. Among the notable efforts, an industry association in the form of the Private Wealth Management Association (PWMA) has been formed with several key objectives, including to enhance Hong Kong's position as the private wealth management hub in the region, and to promote standards of

professional conduct and competence of private wealth management professionals in Hong Kong. An enhanced competency and certification framework for private wealth management professionals has been introduced with the support of the PWMA, the Hong Kong Institute of Bankers, the Hong Kong Securities and Investment Institute and the Treasury Markets Association, and led by HKMA. Although the said competency and certification framework is a voluntary scheme, it demonstrates the industry and regulatory efforts and the focus on the proficiency and professional standards of the private wealth management industry that is desired to deepen the private banking and wealth management industry in Hong Kong.

On the technology front, the SFC has launched a regulatory sandbox which will enable qualified firms to utilise innovation technologies under a confined regulatory environment to operate regulated activities, so as to engage in close dialogue and supervision by the SFC to address any risks or concerns on the operating model before the technology may be used on an actual and expanded scale. Besides this, the SFC has provided guidance and clarification on the applicable regulatory requirements in the context of online product distribution and advisory platforms (including robo-advisers), under the current regulatory and licensing framework and the expected standard of conduct, including complying with the suitability obligation. The SFC issued the Guidelines on Online Distribution and Advisory Platforms to be effective from April 2019, which also covers online platforms that operate automated trading services. Separately, the HKMA has issued a guideline for the authorisation of 'virtual banks' to be established in Hong Kong (with the requirement to maintain a physical presence in Hong Kong as its principal place of business), and where by definition the virtual bank may deliver banking services primarily, if not entirely, through the internet or other electronic delivery channels.

the four conditions mentioned above (in their capacity as such) in respect of the company.

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

There are no particular regulatory obstacles. Refer to question 33 in relation to the broad tax issues to consider.

### Contract provisions

#### 37 Describe the various types of private banking and wealth management contracts and their main features.

Broadly speaking, private banking and wealth management are commonly governed by client account terms and conditions that set out the contractual provisions for the access and use of account holders to the products and services of the private bank or financial intermediary. Where the services involve discretionary account management or specific investment management or an investment advisory or portfolio management arrangement, there shall be a specific written client agreement that contains appropriate authorisation for discretionary management, under the client account terms and conditions, or under a separate investment management agreement or investment advisory or portfolio management agreement. There is no mandatory requirement for such contracts to be governed by Hong Kong law. However, it is recommended to adopt Hong Kong law, as the private bank or financial intermediary is authorised or licensed in Hong Kong to conduct its business and provide the relevant products and services, and is subject to compliance with applicable Hong Kong law and regulatory requirements such as under the Code of Banking Practices or SFC Code of Conduct. The requirement to enter into a written client agreement and the minimum content requirements of a client agreement are set forth in the SFC Code of Conduct, as well as the SFC Fund Manager Code of Conduct with respect to discretionary account management (except where exempted).

#### 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?

Generally, there is no statutorily prescribed liability standard, and the liability of a private bank in its contractual obligations or duties to an

account holder or client would fall to be determined by a court of law. The contract or client agreement would typically contain provisions on the standard of care as well as limits of liability.

#### 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?

As noted in question 37, the requirement to enter into a written client agreement and minimum content requirements of a client agreement are set forth in the SFC Code of Conduct, as well as the SFC Fund Manager Code of Conduct with respect to discretionary account management (except where exempted).

In the context of the offer of financial products by a private bank or wealth management financial intermediaries, the SFC Code of Conduct specifically requires that there should be a mandatory provision on the obligation to ensure suitability in the solicitation or recommendation of financial products, which provision must appear in the exact prescribed form and cannot be abrogated by any other contractual provisions.

#### 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 general limitation period under Hong Kong law is six years for contractual or tort claims, except where otherwise prescribed or extended or where other specific circumstances apply for a longer or different limitation period, under the Hong Kong Limitation Ordinance.

### Confidentiality

#### 41 Describe the private banking confidentiality obligations.

Confidentiality is generally protected under legal and contractual duties of confidentiality, code of banking practice and standard of conduct, and personal data privacy. However, legal and regulatory requirements may mandate disclosure or reporting of information to certain regulatory authorities or agencies, such as under anti-money laundering requirements, reporting of suspicious transactions and under CRS.



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

See question 41.

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

See question 41.

**44 What is the liability for breach of confidentiality?**

No statutorily prescribed liability.

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

The competent local authorities for dispute resolution in the private banking industry could be the Consumer Council, the Small Claims Tribunal (for claims not exceeding HK\$50,000), or more likely higher amounts of claims at the District Court (where the amount of the claim is over HK\$50,000 but not more than HK\$1 million) or the Court of First Instance of the High Court.

An investor may potentially also bring a claim to the Investor Compensation Fund for losses suffered due to the default of a licensed intermediary or authorised financial institution in relation to exchange-trade products in Hong Kong. Hong Kong has also established the Financial Dispute Resolution Centre as an avenue (alternative to making a claim by civil litigation) for disputes with financial institutions.

**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?**

Complaints against a private bank may be lodged with the HKMA. The HKMA will review complaints received, and thereafter, where considered valid, refer the complaint to the bank for handling and reply. The HKMA may further investigate the complaint and potentially take such action against the bank in the exercise of its supervisory or disciplinary powers, where considered appropriate.

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# Israel

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## Private banking and wealth management

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

The following are the main sources of law and regulation relevant for private banking in Israel:

- the Securities Law 1968; (supervision on portfolio managers);
- the Banking Ordinance 1941; (the Banking Supervision Department and its directives, Banking confidentiality);
- the Banking Law (Service to Customers) 1981;
- the Banking Law (Licensing) 1981;
- the Trust Law 1979;
- the Agency Law, 1965;
- the Tort Ordinance [New Version] 1968; (professional liability, professional negligence);
- the Protection of Privacy Law 1981;
- the Bar Association Law 1961;
- the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Law 1995 (the Investment Advising Law);
- the Prohibition on Money Laundering Law 2000;
- the Bank of Israel Law 2010;
- the Payment Systems Law 2008;
- the Contracts Law (General Part) 1973;
- the Standard Form Contracts Law 1982;
- the Prohibition of Money Laundering (The Business Service Providers Requirements Regarding Identification, Record-Keeping for the Prevention of Money Laundering and the Financing of Terrorism) Order, 5775-20142;
- the Law to Minimise the Use of Cash (published in March 2018 and coming into force in January 2019); and
- the Company Law 1999.

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

The main bodies are:

- the Israeli Securities Authority (ISA);
- the Banking Supervision Department (BSD);
- the Israel Money Laundering and Terror Financing Prohibition Authority;
- the Accountants Council;
- the Israel Bar Association (IBA);
- the Bank of Israel; and
- the Registrar of Companies.

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

Each of the large banks has an extensive private banking department. There are also highly experienced asset management and advisory companies. Multi-family offices are usually managed for the benefit of specific high net worth families, in most cases by accountants. There are also investment opportunities via insurance companies, which provide provident funds. The private wealth services can also be provided by licensed portfolio managers.

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

There is no one specific definition. The term 'private banking' is commonly interpreted as referring to the scope of financial services provided to high net worth individuals. In some banks, there is a threshold amount (a minimum amount of between US\$500,000 and US\$1 million) that must be held in an account to qualify for private banking services.

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

Under the Banking (Licensing) Law, 5741-1981, the Governor of the Bank of Israel may, at his or her discretion and after consulting with the Licensing Committee, issue a banking licence to a company. In issuing licences under this law, the following matters shall be taken into consideration:

- the applicant's plan of action and probability of its fulfilment;
- the suitability of the holders of means of control, the directors and the managers for their positions;
- the contribution of issuing the licence to competitors in the capital market and, in particular, to competitors in the banking industry and the standard of its service;
- the government's economic policy;
- the public interest; and
- with respect to a foreign bank: reciprocity in banking corporation licensing between Israel and the country in which the applicant has its main business.

Furthermore, a licence shall not be issued unless the applicant's issued and paid-up capital is no less than the sum set out in the First Addendum of the Law, according to which, for an Israeli bank the minimum paid-up capital is 10 million shekels, and for a foreign bank foreign currency equivalent to 10 million shekels.

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

The requirements of a licence and minimum capital must be fulfilled.

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

A financial corporation must obtain a licence in order to operate as a bank in Israel. Most foreign banks do not obtain such licence and are therefore not permitted to conduct banking activities in Israel. For this reason, foreign banks usually maintain a representative office in Israel. Israeli banks usually maintain an internal private banking department.

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

The application procedure consists of five stages and takes a minimum of six months.

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

Under the Banking (Licensing) Law, 5741-1981, the Governor may, after consulting with the Licensing Committee, withdraw a licence under one of the following conditions and after providing sufficient opportunity to the licence holder to object:

- the entity requested to cancel the licence;
- the entity did not start the business or stopped the business;
- the entity does not fulfil the requirements of the licence;
- the entity does not fulfil the capital requirements;
- the entity breached the law in a way that its credibility is affected;
- an order to liquidate the entity or to appoint a liquidator was given subject to certain exceptions;
- the entity decided to be voluntarily liquidated; or
- there is a public interest to withdraw the licence.

With respect to any entity engaging in investment advice, marketing investments or portfolio management, the Investment Advising Law establishes an independent disciplinary tribunal, whose job is to impose disciplinary sanctions on licensees who have violated the fiduciary duties of trust and care towards their clients. The tribunal is an independent committee appointed by the Minister of Justice, which is authorised to impose sanctions on licensees, including warnings, censures, fines or the suspension or revocation of licences.

In addition, an action can be brought before the courts on different grounds, such as the criminal offence of money laundering, or the civil offences of violating fiduciary duties or fraud. Such a process can also result in the withdrawal of a licence.

#### 10 Is wealth management subject to supervision or licensing?

Further to the answer to question 5, the Investment Advising Law provides as follows:

- ‘investment advising’ – providing advice to others regarding the advisability of an investment, holding, purchase or sale of securities or financial assets; for this purpose, the word ‘advising’ shall refer to either direct or indirect advising, including through publications, circulars, opinions, mail, facsimile transmission or by any other means, excluding publication by the state or by a corporation carrying out a statutory function, in the framework of its function; and
- ‘investment portfolio management’ – executing transactions at the portfolio manager’s discretion, for the accounts of others.

Although the Investment Advising Law distinguishes between investment advising (non-discretionary) and investment portfolio management (discretionary), both activities require that a licence be obtained.

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

Under the Investment Advising Law, the legal requirement to be licensed applies both to individuals and entities engaged in providing investment advice, in marketing investments or in portfolio management. Individual investment advisers can either be self-employed or employees of a licensed advisory firm or a (commercial) banking corporation. Portfolio managers are entitled to work solely as employees of licensed portfolio management firms. However, there is no requirement for a director, CEO, shareholder, controlling person etc of a portfolio management firm to be licensed.

##### Licensing of individuals

An individual wishing to engage in a licensed investment profession must meet the following criteria:

- be at least 18 years of age;
- be a citizen or resident of Israel;
- has not been convicted of a crime (among the crimes stipulated in the Investment Advising Law);
- has successfully completed the professional exams administered by the ISA (Israeli Securities Authority) in the following subjects:
  - securities law and professional ethics;
  - accounting;
  - statistics and finance;
  - economics;
  - securities and financial instrument analysis; and
  - portfolio management (for portfolio manager applicants only);
- has completed an internship (six months for investment advisers and marketing agents, nine months for portfolio managers); and
- must secure professional indemnity insurance for the minimum amount stipulated in the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Application for a Licence, Examinations, Internship

and Fees), 1997; the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Equity and Insurance), 1997; and the update of equity and insurance amounts required of licensees in 2016.

Notwithstanding the conditions mentioned above, in special circumstances the ISA is authorised to grant an exemption from examinations and internships under section 8A of the Securities Law.

The ISA reserves the right to withhold a licence from an individual who meets all the above criteria if circumstances exist that render the applicant unfit to be licensed (fit and proper tests).

##### Licensing of entities

Only entities legally established in Israel are entitled to obtain a licence. An applicant entity must comply with the following requirements:

- it must undertake that it will only employ licensed individuals for the purpose of rendering investment advice, investment marketing or portfolio management services;
- it must undertake that no individual that, to the best of the company’s knowledge, has been convicted of one of the crimes stipulated in the law, or whose licence has been either suspended or revoked, will serve as an executive or director;
- it must fulfil minimum capital requirements as stipulated in the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Application for a Licence, Examinations, Internship and Fees) 1997; and the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Equity and Insurance) 2000;
- it has secured insurance, a bank guarantee or deposit of the sum stipulated in the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Application for a Licence, Examinations, Internship and Fees) 1997; and the Regulation of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Equity and Insurance) 2000; and
- an additional requirement is placed on portfolio management firms. These firms are prohibited from engaging in underwriting services and can only engage in investment advice, investment marketing, portfolio management and ancillary activities.

##### Exceptions from obtaining a licence

The following occupations do not require a licence pursuant to the Investment Advising Law:

- investment advising or investment portfolio management for no more than five clients during the course of a calendar year, by an individual who does not engage in investment advising or investment portfolio management in the framework of a licensed corporation or a banking corporation;
- investment advising or investment marketing which the person provides by virtue of his or her membership in an investment committee or a board of directors of a corporation, and which is provided only to that corporation in the course of carrying out his or her function as a member of the committee or board of directors, whichever is relevant;
- management of a corporation’s investment portfolios, by a party doing so as part of carrying out his or her function in that corporation or in a corporation that is affiliated with that corporation;
- investment advising or investment portfolio management for a family member;
- investment advising by a corporation whose main occupation is the appraisal of corporations, provided that it does not engage in other investment advising or in portfolio management;
- investment advising or investment portfolio management by an accountant, attorney or tax adviser, when such activities accompany a service provided to a client within the field of their respective professions;
- investment portfolio management by a party that has been appointed by a court order or by the order of a competent tribunal to act with respect to the assets of another party, in the course of carrying out such duties; and
- investment advising, investment marketing or investment portfolio management, for a qualified client (see question 19).

### Licensing of trustees

Trustees are not required to obtain a licence. However, trustees of certain trusts must file tax reports with the Israeli tax authorities.

Trustees of public trusts (a trust whose objectives are the furtherance of a public purpose) are requested to report to the Registrar of Hekdeshot (Registrar of Public Trusts) within 30 days of their appointment as trustee. The registrar must be informed of certain matters outlined in the law including changes concerning the objects, assets, settlor, trustee etc.

A 'Public Trustee', which refers to the Administrator General, may be appointed by the court in certain situations.

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

Payment of an annual fee in accordance with the Regulations of Investment Advising, Investment Marketing and Investment Portfolio Management Regulations (Application for a Licence, Examinations, Internship and Fees) 1997.

### Anti-money laundering and financial crime prevention

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

The Directive titled 'Supervisor of Banks: Proper Conduct of Banking Business (6/15) [13] page 411-1, Prevention of Money Laundering and Terrorism Financing, and Customer Identification' imposes identification of the client obligations (KYC) on banks in Israel. The Directive requires that each bank adopts a KYC procedure in accordance with the Directive, that an officer in charge of obligations under the Prevention of Money Laundering Law be appointed, that the bank identifies each new client, and monitors high-risk clients and certain transactions.

Furthermore, on 16 March 2015, the Supervisor of Banks issued a circular entitled 'Managing risks deriving from customers' cross-border activity'. According to the circular, foreign resident clients of Israeli banks are required to declare their residency for tax purposes, and confirm that their financial assets have been declared to the relevant tax authority. Moreover, they are required to waive confidentiality vis-à-vis the relevant tax authority abroad. Failure to comply with all these requirements may result in the bank's refusal to open the account or blocking of activities in an existing account.

Under a circular of the Supervisor of Banks issued on 26 January 2016, titled 'Managing risks involved in operating a voluntary disclosure programme in Israel', the mere fact that the financial assets in the account have been properly declared to the relevant tax authority does not derogate from the bank's obligation to establish that the financial assets do not derive from a predicate offence under the applicable anti-money laundering legislation.

In order to comply with all the above, all banks require evidence with respect to the following:

- the origin of the funds and providing information of how the funds were accrued (earnings, savings, inheritance etc);
- confirmation that the financial assets have been properly declared to the relevant tax authorities;
- the nature of the transactions; and
- identification of all entities and persons involved (specifically, the identification of all beneficial owners).

Tax offences are predicate offences under the Prohibition on Money Laundering Law, 2000 as detailed in question 16.

#### 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?

The Prohibition of Money Laundering (the Business Service Providers Requirements Regarding Identification, Record-Keeping for the Prevention of Money Laundering and the Financing of Terrorism) Order, 5775-2014 imposes KYC obligations on attorneys and accountants when providing certain services, described as business services. The Order defines a 'foreign politically exposed person' as:

*a foreign resident holding a senior public position abroad, including a relative of a resident as aforesaid or a corporation under his*

*control or a business partner of one of them; in this context, 'senior public position' – including a head of state, president of a state, mayor, judge, member of parliament, government minister or a senior army or police officer, or anyone actually holding such office as aforesaid even if his official title is different.*

The Order further states that a client considered a 'foreign politically exposed person' is an indication of a high risk for money laundering or terrorist financing, and therefore requires broader KYC inspection.

The Israel Money Laundering and Terror Financing Prohibition Authority published a circular entitled 'The Prevention of Money Laundering which Originates in Corruption and in Bribery of Foreign Politically Exposed Persons, and the procedure to Identify Irregular Activity Relating to them'. The circular provides guidelines for conducting increased due diligence processes for such clients.

#### 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.

The due diligence process includes identity, utility bills, source of funds for which the business service is being performed and confirmation that the funds were declared in the country of residence of the client, which may include professional confirmations (including evidence of tax compliance), documentary evidence of the specific financial transaction (eg, real estate contracts, gifts deeds, etc).

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

The Prohibition on Money Laundering Law, 2000 was recently amended to include certain tax offences as predicate offences. The First Addendum of the Law lists the predicate offences. The Addendum also includes that under subsection (17b) an offence in accordance with section 220 of the Income Tax Ordinance is a tax offence if it fulfils one of the following:

- the income resulting from the tax offence is in an amount higher than 2.5 million shekels in a period of four years, or in an amount higher than 1 million shekels in a period of a year;
- the tax offence or an offence in accordance with sections 3 or 4 which originated in the tax offence was committed with sophistication, and the income from the tax offence is in an amount higher than 625,000 shekels;
- the tax offence or an offence in accordance with sections 3 or 4 which originated from the tax offence was in relation to a criminal organisation or a terror organisation as defined in (17a) herein; and
- an offence in accordance with sections 3 or 4 which originated from the tax offence and was committed by someone other than the taxpayer; and
- subsections (17a) and (17c) are similar to subsection (17b) above.

Subsection (17a) relates to offences under the value added tax and subsection (17c) relates to offences under the Taxation of Real Property law. In both cases, the offence is considered as a predicate offence provided it was committed with respect to a certain minimum amount, or if it was committed with sophistication, or with relation to a criminal or terror organisation, or with the assistance of a third party. This amendment came into effect in October 2016.

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

Attorneys and accountants are subject to KYC obligations under the Prohibition of Money Laundering (the Business Service Providers Requirements Regarding Identification, Record-Keeping for the Prevention of Money Laundering and the Financing of Terrorism) Order 2014.

Under the said Order, any attorney or accountant who is requested by a client to provide a business service as listed in the Order (ie, real estate transactions, mergers and acquisitions, entity incorporation, management and administration and management of assets (including financial assets)) is required to obtain a declaration from the client, where the nature of the business service, the identity of the persons and

entities involved and the source of the funds are detailed. Should the attorney or accountant suspect that the business service may be considered money laundering in accordance with red flags published as guidance, he or she must conduct further investigation into the matter, and if the suspicion persists, he or she must refrain from executing the client's wishes.

In order to facilitate the evaluation process of the attorney or accountant, it lists indications (red flags mentioned above) of a high risk disposition, which require further examination, and may result in refusal of the attorney or accountant to provide the requested service.

The business service provider is obligated to maintain records in accordance with the Order. There is no disclosure requirement, but the records of business service providers may be subject to inspection by the IBA or the Accountants Council, as the case may be. Failure to comply with the requirements of the Order may result in an ethical violation.

Financial intermediaries (any third party dealing with the financial assets, other than attorneys or accountants) are required to obtain evidence that the client is tax compliant and that the origin of the funds is not derived from money laundering activities.

The Supervisor of the Designated Non Financial Business and Profession Supervisor (DNFBP) may review these records of attorneys and accountants at the Department of Justice.

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

This is a serious criminal offence. Under the Prohibition of Money Laundering Law, a money laundering offence may be punishable by up to 10 years' imprisonment, or by a penalty of up to 4.52 million shekels. In addition, monies may be subject to seizure by the state in an amount determined to have been subject to the anti-money laundering legislation.

### **Client segmentation and protection**

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

According to the Investment Advising Law, an entity engaging in investment advice, in marketing investments or in portfolio management is exempt from obtaining a licence if the client is a qualified client (QC).

A QC is among those defined below:

- a joint investment trust fund or a fund manager;
- a management company or provident fund as defined in the Provident Funds Control Law;
- an insurer;
- a banking corporation or an auxiliary corporation as defined in the Banking Law (Licensing), other than a joint services company;
- a licensee;
- a stock exchange member;
- an underwriter qualified under the Securities Law;
- a corporation, other than a corporation that was incorporated for the purpose of receiving services, with equity exceeding 50 million shekels; in this paragraph, the term 'equity' – includes the definition given to that term by foreign accounting rules, international accounting standards, and accepted accounting principles in the United States;
- an individual for whom one of the following conditions is met and who has given his or her consent in advance to being considered a QC for the purpose of this law:
  - the total value of the cash, deposits, financial assets and securities owned by the individual exceeds 12 million shekels;
  - the individual has expertise and skills in the capital market field or has been employed for at least one year in a professional position which requires capital market expertise; or
  - the individual has executed at least 30 transactions, on average, in each quarter during the four quarters preceding his or her consent; for this purpose, the term 'transaction' will not include a transaction executed by a portfolio manager for an individual who has entered into a portfolio management agreement with the manager;
- a corporation that is wholly owned by investors who are among those listed above; or

- a corporation that was incorporated outside Israel, whose activity has characteristics similar to those of a corporation listed above.

#### **20 What are the consequences of client segmentation?**

A provider of financial services is exempt from obtaining a licence if providing services to a QC as mentioned in question 19.

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

There is no legislative protection; however, past experience has indicated that the Israeli government and the Bank of Israel will attempt to avoid a bank's collapse that might result in an overall financial crisis. In certain cases of bankruptcy of a bank in the past, the Bank of Israel assumed the obligations of the bank and paid the clients the value of their bank deposits.

### **Exchange controls and withdrawals**

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

There are no longer any exchange control regulations. These were abolished with respect to individuals in 1998, and with respect to financial institutions in 2003.

A new law to reduce the use of cash was published in March 2018 and will come into force in January 2019. Its purpose is to minimise the use of undeclared funds and funds arising from offences or subject to tax evasion, severe crime, money laundering and terror financing. Cash payments are limited as follows:

- 11,000 shekels if the payer or the payee is a business;
- 50,000 shekels if neither the payer or the payee are businesses;
- 55,000 shekels if one of the parties is a tourist;
- 11,000 shekels for salaries, donations or loans, except loans given by a regulated financial intermediary; and
- 50,000 shekels for gifts.

Lawyers and accountants are subject to the above limitations if these are received in connection with the business services provided as explained in question 17.

There are certain exceptions to the above limitations which do not apply to:

- authorities which are exempt by the Minister of Finance;
- payments between family members which are not salary payments; and
- interest-free loans during a two-year period from the date the new law was published.

The following limitations apply to cheques:

- the endorsement of a cheque or the receipt of an endorsed cheque without the details of the endorser (ie, a blank cheque or partly blank cheque) if the payee is a business. The above applies if the amount of the cheque is more than 50,000 shekels and the payer and payee are not businesses; and
- a bank is not allowed to pay out a cheque if the details of the payee are not written on the cheque, or an endorsed cheque if the amount is more than 10,000 shekels and endorsed more than once (or twice if the second endorser is a regulated financial intermediary) or without the details of the payer and payee unless the ID number of the payer appears.

Sanctions for breach of the law are imposed according to the amount of the payment.

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

There are no restrictions on cash withdrawals; however, there are reporting requirements under anti-money laundering legislation. Accordingly, the Prohibition on Money Laundering (Obligations of Identification, Reporting and Keeping Records of Bank Corporations to Prevent Money Laundering and Terrorism Financing) Order, 2001 lists the circumstances under which a banking corporation is obligated to report to the Israel Money Laundering and Terror Financing

Prohibition Authority. Such obligation arises with respect to a deposit, withdrawal or exchange of cash, whether in shekels or in other currency, in an amount equivalent to 50,000 shekels at least.

In addition, the Prohibition on Money Laundering (Modes and Times for Transmitting Reports to the Data Base by Banking Corporations and the Entities Specified in the Third Schedule to the Law) Regulations, 2002 define the procedure of submitting such reports.

Certain exemptions apply under the above-mentioned legislation where the transaction is conducted by an exempt entity, such as a public institution, a bank corporation, the Postal Bank or a member of the stock exchange.

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

As mentioned in question 23, there are no restrictions, although anti-money laundering legislation applies, and further to the reporting obligations mentioned in question 23, reporting obligations also apply in the following cases:

- the issuance of a bank draft, whether in shekels or in other currency, in an amount equivalent to 200,000 shekels or higher;
- the purchase or sale of traveller's cheques or bearer bills of a financial institution abroad in an amount equivalent to 200,000 shekels or higher; if the financial institution is located in a territory listed in the Order, the bank corporation is obliged to report such transaction if it is in an amount equivalent to 5,000 shekels or higher. Territories that are included in the Order, as mentioned in question 24, are, inter alia, territories that the FATF has published guidelines with respect thereto concerning their conformity to the FATF's recommendation in the matter of prohibition of money laundering and terror financing; and
- the wiring of funds from Israel to another territory or vice versa in an amount equivalent to 1 million shekels or higher. If the foreign financial institution is located in one of the territories listed in the Order, the bank corporation is obliged to report the transaction if it is in an amount equivalent to 5,000 shekels or higher.

In addition to the said reports, a bank corporation is obliged to file a report on any irregular activity of the service recipient – for example, a transfer of 1 million shekels to a bank account of a student, whose net monthly income is 2,000 shekels.

### **Cross-border services**

#### **25 What is the general framework dealing with cross-border private banking services into your jurisdiction?**

As mentioned in questions 23 and 24, there may be reporting obligations on the bank corporation with respect to a cross-border transaction.

Furthermore, as mentioned in question 13, a bank corporation is obliged to identify the persons involved and the nature of the transaction, and to establish that the funds do not derive from a predicate offence, including a tax offence. As also mentioned in question 13, foreign residents who wish to open an account with an Israeli bank must waive their right to confidentiality and declare that their financial assets have been declared to the relevant tax authority in the country of their residence.

Israeli residents are subject to tax and reporting obligations on their worldwide income.

On 24 April 2018, the Supervisor of Banks published Provisions No. A306 and 306 'Proper Banking Management' to regulate the supervision of foreign branches of Israeli banks. These provisions, which include instructions relating to the activity of the banking group and supervision of foreign branches, also enhance the current provisions for supervision and proper banking management and even make clearer the importance of the existence of corporate governance and quality supervision and compliance at the branches.

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

There are no specific requirements for cross-border private banking services. However, if such services include investment advice, marketing investments or portfolio management, a licence must be obtained, as detailed in question 5.

Anti-money laundering legislation also applies, and the requirements detailed in questions 13 and 23 to 25 are to be met.

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

There are no specific regulations for cross-border private services. General anti-money laundering legislation, as mentioned in questions 13, 23 and 24, applies.

#### **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?**

Any investment advice, marketing of investments or portfolio management requires a licence as mentioned in question 5. Employees of foreign private banking institutions may travel to meet clients in Israel for purposes other than those requiring a licence. Such employees should ensure that the banking relationship does not contradict anti-money laundering and tax legislation. In addition, they should be aware that their activity may reach a point where the foreign bank is deemed to be 'doing business' in Israel, which may have adverse tax and regulatory consequences.

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

See question 28.

### **Tax disclosure and reporting**

#### **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?**

As noted in question 25, Israeli residents are subject to tax and reporting obligations on worldwide income.

The controller of the bank of Israel may require information from the head controllers of the banks in a subsidiary or branches of the banks.

#### **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?**

The reporting requirements imposed on bank corporations are detailed in questions 13, 23 and 24.

The applicable reporting obligations vary with respect to financial intermediaries, in accordance with the specific financial intermediary. One example is of attorneys and accountants. When such are concerned, a specific procedure applies whereby there is no obligation to report to the Israel Money Laundering and Terror Financing Prohibition Authority, yet other reporting and information retention obligations are imposed. The procedure is explained in question 17.

Similarly, the legislator has outlined specific reporting procedures with respect to other service providers, such as members of a stock exchange, portfolio managers, insurance agents, dealers in precious stones and the Postal Bank. A portfolio manager, for example, is obliged to report any transfer of securities or other financial assets from abroad to its client's managed account if it is in an amount equivalent to 200,000 shekels or higher.

#### **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?**

Anti-money laundering legislation does not require that the consent of the client be obtained in order to file relevant reports. However, it should be noted that the consent of foreign residents is required by banks in Israel in order to exchange information with the relevant tax authority abroad, as detailed in question 13. Exchange of information is not usually carried out by the private bank or financial intermediary, but rather these entities file reports to the Israeli Tax Authority, which in turn exchanges this information with other tax authorities under applicable treaties, agreements and legislation.

One such treaty is the Convention on Mutual Administrative Assistance in Tax Matters. Israel joined this convention, which allows exchange of information for tax purposes, in 24 November 2015, but it has not yet ratified it.

In addition, Israel entered into an agreement with the United States for the implementation of the Foreign Account Tax Compliance Act (FATCA). The agreement is in force, and regulations were implemented.

In order to implement such treaties, the Income Tax Ordinance was amended in 2015 and 2016 to contain specific provisions allowing such exchange of information.

In October 2014, Israel declared that it would act to implement the Common Reporting Standard (CRS) and allow for exchange of information in accordance therewith by the end of 2018.

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## 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.

The Trust Law, 1979 provides for the creation of an Israeli private trust (known under the law as *Hekdesh*). Such a trust is not considered a legal entity, therefore an underlying company is usually established in order to hold the trust's assets. An Israeli trust is created upon the signing of the trust deed by the settlor before a notary. The trust deed is not required to be deposited or registered other than at the private office of the notary; hence it is confidential. Such a trust can be used to limit the requirement for inheritance procedures, which are administratively complex. It may also be used for asset protection purposes or to care for a family member with special needs or for intergenerational wealth transfers. The creation of an Israeli trust with the assistance of an attorney or accountant is subject to the anti-money laundering obligations imposed on attorneys and accountants, which are detailed in question 17.

Although the Trust Law does not provide for the establishment of a foundation, a foundation established under foreign legislation (of Liechtenstein, Panama etc) is nonetheless viewed as a trust for tax purposes under the Israeli Income Tax Ordinance.

### 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?

As mentioned in questions 13 and 15, a bank corporation is required to obtain evidence concerning the following, regardless of whether the client is an individual or an entity (including an entity that is a part of a more complex structure):

- identification of all entities and persons involved, (specifically, all beneficial owners or controlling persons);
- the origin of the funds. It must be established that they do not derive from a predicate offence and how the funds were accrued (earnings, savings, inheritance etc);
- confirmation of tax status. It must be established that the person and/or structure is tax compliant where it is resident for tax purposes and that taxes were paid in all the relevant jurisdictions; and
- some banks request a lawyer's or accountant's reference confirming the origin of funds and tax compliance.

On 3.4.18 the Financial Crimes Enforcement Network (FINCEN) published clarifications (frequently asked questions) for the implementation of KYC procedures for individual ultimate beneficial owners, as required by financial institutions under the regulations published in 2016, which came into force on 11 May 2018 (Regulations).

Under these Regulations, financial institutions have the duty to apply enhanced due diligence of their clients in connection with individual ultimate beneficial owners of legal entities and structures. The ultimate beneficial owner is defined as 'an individual holding, directly or indirectly, at least 25 per cent or more of the capital of the legal entity and/or an individual who has fundamental management responsibility in the legal entity'.

KYC duties were extended and include, among others, three main duties:

- collection, identification and verification of ultimate beneficial owners when the account is opened and on a regular basis. The

financial institution has the duty to identify an individual who is the controlling person;

- the formation of a client profile, using procedures based on a risk profile, regulating the character and objectives of the activities in the account; and
- ongoing supervision procedures, based on the risk profile, to identify and report suspicious activity.

There is a duty to identify the ultimate beneficial owner in complex structures according to international standards.

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### 35 What is the definition of controlling person in your jurisdiction?

The Securities Law, 1968 defines 'control' as 'the ability to direct the activity of a body corporate, exclusive of that ability derived only from holding the position of Director or some other post in the body corporate, and the presumption is that a person has control in a body corporate if he or she has half or more of a certain means of control in the body corporate'.

By 2017 the terms 'beneficiary', 'controlling person' and 'means of control' were defined in the Prohibition of Money Laundering Law 5760-2000 (prior to that, 'control' was referred to in the Israeli Securities Law, 1968). A beneficiary is defined as a natural person for whom assets are held or who can influence the company's assets, including a controlling person. A controlling person is a natural person who can influence an entity's operations (directly or indirectly), a shareholder who holds more than 25 per cent of the shares, the CEO of a company etc. Means of control refers to the ability to appoint authorised signatories of the company, to vote in general meetings, appoint directors or the CEO, a right to revenues of the company or a right to the assets of the company after debts have been paid.

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

Withholding tax regulations, anti-money laundering legislation and KYC requirements may present obstacles when establishing and maintaining banking relationships.

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## Contract provisions

### 37 Describe the various types of private banking and wealth management contracts and their main features.

There is no specific standard contract that relates to private banking and wealth management, but rather each bank or portfolio manager has its own designated contract. The contract is subject to the provisions of the Contracts Law (General Part) 1973 and other legislation concerning contracts. As such, it can be varied by the parties, but this is unusual. The governing law in any banking contract in Israel is Israeli law, as dictated by all banks.

According to the Investment Advice, Investment Marketing and Investment Portfolio Management Law the agreement has to be in writing and include certain mandatory provisions as outlined in the law (see question 39).

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### 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?

In order to hold the bank liable, the court should be convinced that the bank has violated an obligation imposed on it under applicable legislation, such as the Tort Ordinance, case law, directives of the Supervisor of Banks and internal procedures of the bank. Not all lawful causes to file a claim against a bank are provided for in the legislation. Accordingly, a violation of a bank's duty of care, fiduciary duty or confidentiality duty has been recognised as a lawful cause by the court. In general, the Israeli court takes into consideration the balance of powers between the bank and the client, and recognises the importance of banks to the Israeli economy, and therefore tends to impose a higher standard of obligations on the banks.

The liability of the bank is determined in accordance with the applicable legislation and case law. Israeli case law provides that any clause in the banking contract that releases the bank from liability may be considered as a depriving condition in a standard contract under the Standard Form Contracts Law 1982, and can therefore be disregarded.

### Update and trends

The implementation of various new compliance regulations (AML, FATCA, CRS, LEI) has placed a heavy burden on banks, their officers and compliance departments. Concerned at being targeted by foreign authorities, banks and their officers have turned into the 'long arm' of tax authorities. The opening of a bank account has become a long and exhausting procedure requiring many forms and extensive documentation. It is no longer sufficient to show the origin of the funds, but proof must be provided that taxes in the relevant jurisdictions were paid.

Over the last few years and due to the financial crisis in 2008, banking supervision has been increased to provide for better stability, to implement the insights learned from the crisis, to adjust the business model to upcoming fintech trends and to ensure efficiency and competition. Risk management has been increased to deal with new challenges of cyber crimes, information leaks etc.

It is estimated that by 2025 technology will replace most of the staff in private banking. Already today certain private banking sectors have been replaced by technology (eg, the execution of payments and cheque transfers, portfolio advice and management), allowing those services to be provided to a wider population. This should result in greater efficiency and lower banking fees, improve the turnover and revenues of the bank and change the image of private banking.

### 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?

There are no special requirements concerning private banking contracts as opposed to other banking contracts. However, with respect to foreign clients, banks are obliged to comply with the relevant directive as mentioned in question 13. In addition, banks are obliged to obtain certain information under FATCA and CRS regulations and the instructions of the Supervisor on the Banks.

In the Investment Advice, Investment Marketing and Investment Portfolio Management Law, 1995 there is a requirement to have an agreement in writing and to provide the client with a copy before the service can be provided. The agreement must include all the subjects required for the service to be provided and specifically the following:

- the client's details and ID number;
- the service must be adjusted to the needs of the client after evaluating his or her financial situation (including his or her securities, financial assets etc) and his or her investment objects subject to the condition that the client agreed to provide the required information;
- fees and payment of expenses;
- a clause that the client is free to cancel the agreement whenever he or she wishes;
- a clause concerning whether the services may be provided by telephone;
- a clause to ensure that the client has been made aware of the fact that his or her information will be kept confidential, but such confidentiality is subject to the obligation to pass information in accordance with the law ; and
- if the licence holder is a public company, a clause that the client has been made aware of the fact that the agreement is subject to the duties of the licence holder according to the Regulations of the Israeli Stock Market and the Securities Law 1968.

In addition, there are certain requirements to be included only if the agreement is with a portfolio manager:

- the scope of discretion and authority granted under the power of attorney, the investment policy and whether the portfolio shall be managed by way of a blind trust;
- whether credit to the client may be granted and under what conditions;
- how the portfolio should be formed (ie, types of securities and financial assets and the value thereof or whether this may be determined according to the portfolio manager's sole discretion); and
- whether securities, bonds and futures may be purchased at a higher rate than the exchange rate and sold at a lower rate than the exchange rate.

### 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?

Under the Statute of Limitation Law 1958, the period within which a claim in respect of which an action has not been brought will be prescribed (hereinafter 'the period of prescription') is seven years in the case of a claim relating to a banking contract.

The law also provides that the period of prescription begins on the day on which the cause of action occurred, and case law shows that difficulty in determining that day may result in adverse consequences. For example, the court accepted a bank's claim against a client whose account was in debt for more than seven years as it considered the day the bank first demanded the repayment of the debt as the day on which the cause of action occurred.

### Confidentiality

#### 41 Describe the private banking confidentiality obligations.

Section 15a of the Banking Ordinance 1941 further provides:

- a person shall not divulge any information delivered to him or her or present any document submitted to him or her under this Ordinance or under the Banking (Licensing) Law; however, it shall be lawful to divulge information if the governor deems it necessary to do so for the purpose of a criminal indictment, or if the information or document was received from a banking corporation and it consents to its disclosure;
- for the purposes of the disclosure of documents and information received under this Ordinance or under the Banking (Licensing) Law to a court, the Bank of Israel or the supervisor and his or her employees shall have the status of the state and its employees; and
- a person who violates this section or section 6(5) shall be liable to one year's imprisonment or to a fine of 10,000 shekels.

However, the court (Civil Appeal 174/88 *Hilda Guzman v Company de Participation* 42(1) PD 963 [1988](Isr.), Permission for Civil Appeal 1917/92 *Jacob Scholar v Nitza Jerby* 47(5) PD 764 [1993](Isr.)) has interpreted this section such that it does not refer to the relationship between the bank and the client, but rather to the information a bank provides to the Bank of Israel or to the Banking Supervision Department.

Nonetheless, in the past the Supreme Court (Permission for Civil Appeal 1917/92 *Jacob Scholar v Nitza Jerby* 47(5) PD 764 [1993](Isr.)) held that a bank was under a confidentiality obligation with respect to the affairs of its client.

In the time since these judgments, the confidentiality obligation to which banks are subject has been drastically reduced. Under anti-money laundering legislation, banks are now required to report information concerning their clients to other authorities, such as the Israel Money Laundering and Terror Financing Prohibition Authority. Furthermore, banks are required to conduct a thorough due diligence procedure (see questions 15, 23, 24 and 34), and may even refuse a client, unless he or she releases the bank from its confidentiality obligation (see question 13). The recent amendment to the Prohibition on Money Laundering Law, which provides that certain tax offences are considered as predicate offences (see question 16), has further diminished this obligation.

In addition, CRS and FATCA regulation dramatically affect the confidentiality of the banks.

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

As mentioned in question 41, the obligation would generally apply to all the documents and information exchanged between the bank and the client.

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

The confidentiality obligation imposed on banks is relative, and therefore may be reduced when it is proper to do so. Such is the case when maintaining the confidentiality obligation may cause damage to the bank, or when it contradicts applicable reporting duties under anti-money laundering legislation.

In addition, there is one specific exception referring to foreign residents, as mentioned in question 13.



**44 What is the liability for breach of confidentiality?**

A claim under the Contract Law on the ground of breach of contract or the Torts Ordinance on the ground of breach of duty of care and negligence.

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

If a client wishes to complain against a licensed person providing investment advice, marketing investments or portfolio management, he or she may file a claim with the tribunal of the Banking Supervision Department, as mentioned in question 9. Furthermore, the ISA was recently authorised to impose civil fines on licensees violating certain provisions of the Law. The ISA is also authorised to suspend or revoke licences in administrative proceedings of licensees who have failed to maintain threshold licensing requirements. This category includes persons served with criminal indictments. The Civil Fine Committee established under the Prohibition on Money Laundering Law and chaired by the ISA Chairman is empowered to impose civil fines for violations of this law.

In addition to the tribunals of the ISA, there are the tribunals of the Banking Supervision Department mentioned in question 46.

A lawsuit may also be filed with the competent court in any matter. Certain matters are considered criminal; for example, violations of restrictions on holding and proprietary securities trading as well as engaging in investment advice without a licence constitute criminal violations of the Securities Law, and therefore must be brought before the court in accordance with the proper criminal procedure.

**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?**

A complaint about a bank or credit card company may be submitted to the Public Enquiries Unit of the Banking Supervision Department. The Public Enquiries Unit was established under section 16 of the Banking (Service to the Customer) Law 1981, which empowers the Supervisor of Banks to investigate enquiries from the public related to their dealings with banking corporations - banks and credit card companies. The Unit is an objective and neutral authorised entity comprised of lawyers, economists and accountants, who are very familiar with the banking sector and provide services for the general public.

The Unit thoroughly investigates all enquiries and complaints submitted to it based on legal criteria. If the complaint is found to be justified, the bank or credit card company must correct the deficiency, and it has the authority to enforce that.

While banks and credit card companies are required to fulfil the Unit's decisions, the one who petitioned (that is, the client) is not bound by those decisions.

There is no requirement to pay a fee or to be represented by an attorney in order to file a complaint. A complaint may be filed by mail, fax or online, on the Bank of Israel's website. A complaint should include the following information:

- full name, address and telephone number;
- name of bank or credit card company that is the subject of the complaint;
- a description of the events - as detailed as possible (include names, dates, and documentation); and
- any additional information that can clarify the issue.

If the results of the investigation are not satisfactory, the client may submit the claim to court.



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# Italy

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Chiomenti

## Private banking and wealth management

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

The primary laws and regulations governing the Italian private banking industry are:

- Legislative Decree No. 385/1993 (the Italian Consolidated Law on Banking (TUB)), which contains the main provisions regulating the carrying out of banking business in Italy;
- Legislative Decree No. 58/1998 (the Italian Consolidated Law on Finance (TUF)), which contains the key principles regulating the provision of investment services in Italy; and
- Consob Regulation No. 16190 of 29 October 2007, which sets out the TUF implementation rules for 'intermediaries' (ie, banks and any other intermediary, Italian investment firms (SIMs) included, which have been authorised to provide investment services in Italy).

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

There are two main regulatory and supervisory bodies (ie, the Bank of Italy and the Commissione Nazionale per le Società e la Borsa (Consob)), whose objectives are common: the stability, efficiency and competitiveness of the financial system, the protection of savers and investors, and the observance of provisions on banking and financial matters.

The Bank of Italy is responsible for the sound and prudent management of banks and intermediaries, for their prudential supervision and risk management, as well as for the transparency and correctness of conduct in the provision of banking services. Consob is responsible for the transparency and correctness of conduct in the provision of investment services.

Pursuant to the implementation of the European Union (EU) Single Supervisory Mechanism (SSM), the Bank of Italy shares some of its tasks, and cooperates, with the European Central Bank (ECB) and other national competent authorities (NCAs) of euro area countries.

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

In Italy, the provision of private banking and wealth management services is not subject to a specific licence. However, considering that very often the way in which such services are carried out amounts to a reserved activity (subject to a factual and case-by-case analysis), it is necessary to obtain a licence that allows the pursuit of such a reserved activity.

Broadly speaking, private banking and wealth management services are usually performed by way of portfolio management or investment advice services. According to TUF provisions, when such services concern financial instruments and are performed for the public on a professional basis, they then qualify as investment services, and therefore can only be carried out by banks, SIMs or Italian asset managers (SGRs). More precisely:

- for banks, the application for the authorisation to provide (one or more) investment services must be submitted to the Bank of Italy, either along with the application originally submitted for carrying out banking activities (in such a case, the timings for granting the two authorisations are aligned; see question 8), or at a later time (in such a case, the authorisation is given within 90 days);

- for SIMs, the authorisation to provide (one or more) investment services is granted by Consob; and
- for SGRs, the authorisation to provide portfolio management or investment advice must be submitted to the Bank of Italy, either in the context of the initial application for the provision of asset management services, or at a later time.

In any case, the licence to provide investment services does not vary for the different types of investors for whom the services are carried out.

Banks, SIMs and SGRs may also carry out the promotion or placement of their investment services in a place other than their registered office or premises, by way of financial advisers engaging in 'door-to-door selling' and being listed on the single register of financial advisers. Moreover, investment advice services may also be carried out by natural (independent financial advisers) and legal (financial consulting companies) persons, both having to be listed on the single register of financial advisers.

Regarding foreign entities, see questions 25 and 26.

In light of the above, the main players in the Italian private banking market are:

- Italian banks, either having an internal private banking division or specialising exclusively in private banking;
- foreign banks (mainly through the establishment of a subsidiary or a branch); and
- SGRs, SIMs and financial advisers.

Finally, it is also worth mentioning the existence of several family offices, whose authorisation differs according to the activities performed. In particular, family offices can be divided into three categories: single-family offices, offering their services to a single family, which also owns the entity; multi-family offices, offering their services to several families, which may or not be shareholders of the entity; and multi-client family offices, run by subjects unrelated to the families.

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

Italian laws and regulations do not provide for specific definitions of 'private banking' or 'wealth management'.

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

As already outlined under question 3, the Italian legal framework does not set out specific licensing requirements for the provision of private banking and wealth management services. The relevant licensing requirements are those imposed on banks, SIMs and SGRs when they apply for their respective authorisation.

In general terms, banks, SIMs and SGRs shall comply with requirements and conditions that cover the following aspects: (i) their legal form; (ii) the location of their registered office; (iii) the amount of paid-up capital; (iv) the submission to the authorities of their articles of incorporation and bylaws, and of a programme of operations setting out the structure of the company's organisation and the type of business that they envisage carrying out; (v) reputation and financial soundness requirements for significant shareholders; (vi) reputation, experience, skills, knowledge and independence requirements for corporate officers; and (vii) effective exercise of supervisory functions by the competent authorities. A licence will be granted if it is proven that the sound

and prudent management of the bank, SIM or SGR, also with respect to the provision of investment services, will be ensured.

Finally, financial advisers are also subject to reputation, experience, independence and financial soundness requirements and need to be listed in the single register of financial advisers, provided they successfully complete an exam.

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

In general, during the course of business, licence holders must fulfil the conditions under which their authorisation was granted, and must comply with the prudential requirements set out in the applicable national and EU provisions.

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

See question 3.

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

In Italy there is only a single licence for taking up and the pursuit of banking activities, regardless of whether the bank, in light of the banking activities actually provided, would qualify as being 'private' or not.

According to the SSM mechanism, the application for a banking licence must be submitted to the Bank of Italy, which will then propose to the ECB a draft decision on the application. The ECB must make its final decision within 180 days of the Bank of Italy's receipt of the application and relevant documentation.

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

Under the Italian legal framework, in order not to have its licence revoked, a bank must not cease to engage in business for more than six months, must not fail to adhere to a deposit guarantee scheme (nor be excluded from it) and must not be subject to compulsory administrative liquidation. The licence would also be revoked if the authorisation has been obtained through false statements or if the conditions on the basis of which it was granted are no longer satisfied.

Pursuant to the SSM Mechanism, both the Bank of Italy and the ECB hold the right to propose the withdrawal of a banking licence, and should consult between themselves on this. The bank is entitled to represent its views on the matter and is given the right to be heard by the ECB, which is ultimately responsible for making the final decision.

#### **10 Is wealth management subject to supervision or licensing?**

See question 3.

#### **11 What are the main licensing requirements for wealth management?**

See question 5.

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

See question 6.

### **Anti-money laundering and financial crime prevention**

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

Legislative Decree No. 231 of 21 November 2007 (AML Decree) – which has been recently amended by Legislative Decree No. 90 of 25 May 2017 in order to implement Directive (EU) 2015/849 (IV AML Directive) – sets out the main AML obligations for banks and other intermediaries, which consist of the following:

- customer due diligence (CDD) obligations, such as: (i) identifying the customer and the 'executor' (this being the person authorised to operate in the name and on behalf of the client); (ii) identifying, where applicable, the beneficial owner; (iii) verifying the identity of the customer and, where applicable, of the executor and of the beneficial owner, on the basis of documents, data or information obtained from a reliable and independent source; (iv) obtaining information on the purpose and intended nature of the business

relationship; and (v) conducting ongoing monitoring of the business relationship;

- record-retention obligations: a copy of the documents relating to the CDD obligations and the original or the copy of the records of the transactions are required to be retained for a period of 10 years after the date of the occasional transaction or the end of the business relationship. In this regard, banks and other intermediaries are required to maintain records in a standardised customer database, although the applicable provisions in this respect are currently subject to revision; and
- reporting obligations: banks and other intermediaries must file a report with the competent authority (the Financial Intelligence Unit, UIF) of a 'suspicious transaction' whenever they know, suspect or have reason to suspect that money laundering or terrorist financing is being, or has been, carried out or attempted.

#### **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?**

Under the Italian legal framework, a politically exposed person means a natural person who is or has been entrusted with prominent public functions, as well as their immediate family members and the persons known to be their close associates; further clarifications are contained in article 1, paragraph 2 of the AML Decree. With respect to transactions or business relationships with PEP, banks and other intermediaries must: (i) obtain senior management approval before establishing business relationships or executing occasional transactions; (ii) take adequate measures to establish the source of assets and funds that are involved in the business relationship or transaction; and (iii) conduct enhanced ongoing monitoring of the business relationship.

#### **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.**

When the customer is a natural person, identification is carried out through the acquisition of identification data (such as name, date and place of birth, residence, identification document details and, where assigned, fiscal code), upon provision of an identity card or another valid document for identification, such as passport, driving licence or any other identification document (with a photograph of the holder and a stamp) that has been issued by an Italian or other country public administration body.

When the customer is a legal person, the identification is carried out with respect to: (i) the customer, through the acquisition of its identification data (such as name, registered office and, where assigned, fiscal code); and (ii) the executor, through the acquisition of its identification data and its power of attorney. Attention must be paid to the purposes that the customer pursues and to the legal form adopted, especially where it shows particular elements of complexity or opacity that may prevent or hinder the identification of the beneficial owner or the actual business purpose. Further elements should be taken into account, such as any connection between the customer and entities residing in a non-EU country, any situation of financial or economic weakness that may expose the customer to the risk of criminal infiltration, any activity in economic sectors concerned by the provision of public funds.

The identification of the beneficial owner takes place on the basis of identification data supplied by the customer, or in another way, for example by making use of public registers, lists, records or documents publicly accessible. Legislative Decree No. 90 of 25 May 2017 has introduced the obligation, for entities and trusts, to report to the Companies' Register accurate and up-to-date information on their beneficial ownership.

In any case, the intensity and scope of CDD has to be calibrated to the actual and factual risk of money laundering and terrorism financing associated with the individual case (pursuant to the risk-based approach).

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

Preliminarily, it should be noted that the Italian legal framework contains two different definitions of money laundering. Pursuant to the

definition of money laundering for criminal purposes (under article 648-bis of the Italian Criminal Code), a predicate offence is considered to be every offence that has been committed with a subjective element other than negligence (ie, any *delitto non colposo*). Pursuant to the definition of money laundering for purposes of prevention and contrast money laundering (under article 2 of the AML Decree), predicate offences are linked to the concept of criminal activity, which is nevertheless defined as the commission or the involvement in the commission of a *delitto non colposo*.

In line with international guidelines, the prevailing Italian case law has confirmed that tax offences also qualify as predicate offences for AML purposes. In this respect, it should be considered that tax offences may be triggered only in relation to income taxes and VAT, when the taxpayer has carried out specific violations (eg, the issuance of false invoices) or the relevant violation exceeds specific thresholds provided by the law (eg, the taxpayer has not paid income taxes for more than €150,000 and the omitted positive income is higher than the 10 per cent of the overall taxable income or, in any case, higher than €3 million).

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

Tax compliance verification does not fall within the scope of CDD obligations.

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

The AML Decree has set up a twofold sanctioning system: violation of AML provisions may lead to the commission of offences having either a criminal or administrative nature.

Broadly speaking, criminal sanctions are provided for serious breaches of CDD and record-retention obligations (eg, committed through fraud or falsification of documents) and for informing the customer concerned or other third persons that a suspicious transaction has been reported to UIF. For those criminal offences committed by managers or employees in the interest or for the benefit of the bank or intermediary, the bank or intermediary itself can be held responsible when certain other conditions occur.

As to administrative sanctions, in some cases the bank or intermediary is the direct addressee of the sanction, while in other cases the person being fined is the individual committing the violation, but the bank or intermediary is held jointly and severally liable.

Finally, the client providing false information in the context of the CDD may also be sanctioned.

### Client segmentation and protection

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

In accordance with Directive 2004/39/EC (MiFID) – now replaced by Directive (UE) 2014/65 (MiFID II) – the Italian legal framework identifies three types of customer for investment services purposes:

- professional customers, which are further classified into public and private categories. Moreover, private professional customers are also classified into two categories: (i) private professional customers by law, such as banks, SIMs and large companies; and (ii) private professional customers on request, ie, customers that explicitly request to be treated as professional and that the intermediary can reasonably consider to be capable of making informed investment decisions on their own and to understand the risks that they are assuming;
- eligible counterparties, ie, the customers identified pursuant to article 6, paragraph 2-4, letter d) of TUF and Article 58 of Consob Regulation on intermediaries, and to whom are provided the following investment services: reception and transmission of orders in relation to one or more financial instruments; execution of orders on behalf of clients; and dealing on their own account. In summary, almost every private professional customer by law qualifies as an eligible counterparty; and
- retail customers: any customer not included in the previous categories.

#### 20 What are the consequences of client segmentation?

Broadly speaking, the extent of the rules of conduct to be adopted by banks and other intermediaries in the provision of investment services differs according to the three types of customers: maximum care towards retail customers, lesser requirements towards professional customers, and almost no requirements towards eligible counterparties.

More specifically, the classification as a professional customer leads to the disapplication of some protective provisions, as well as to a partial exemption from the rules on the evaluation of suitability and appropriateness in articles 39-42 of the Consob Regulation on intermediaries; in particular, the knowledge and experience of professional customers is presumed. Finally, with regard to eligible counterparties, the bank and other intermediaries are not required, unless a different agreement with the client states otherwise, to comply with the obligations in articles 27-56 of the Consob Regulation on intermediaries.

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

The Italian legal framework provides rules on transparency and correctness of conduct for both the provision of investment services and banking services:

- as to investment services, the main obligations are set out in Consob Regulation on intermediaries. Specific protective provisions govern the door-to-door selling of investment services, although they do not apply when the customer is classified as professional; and
- as to banking services, Title VI of TUB sets out the key principles, while more detailed provisions are contained in the Bank of Italy Regulation of 29 July 2009. Apart from some exceptions, these apply to all types of customers. TUB also contains specific rules on credit to consumers, which is the granting of financing to a consumer (ie, 'a natural person acting for purposes outside his or her business, trade, craft or profession'). In addition to the above, a specific section of Legislative Decree No. 206/2005 (Consumer Code) provides certain requirements for distance marketing of banking service to consumers.

In general, high net worth individuals (HNWIs) may fall within the definition of consumer; however, the rules on credit to consumers would not apply to loans towards consumers for amounts higher than €75,000.

### Exchange controls and withdrawals

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

In general, there are no exchange controls or restrictions on the movement of funds in Italy, whose liberalised system is fully compliant with European directives on free movement of capital. Only certain restrictions apply:

- in general, according to article 49, paragraph 1 of the AML Decree, transfers of cash or bearer instruments, in euros or in foreign currency, effected for whatever reason between different parties, must be carried out by means of banks or other financial institutions when the total amount of the value to be transferred is more than €3,000;
- there is also no limit on the amount of cash that can be materially taken abroad. However, anyone entering or leaving the country and carrying cash of an amount equal to or greater than €10,000 must declare that sum to the Customs Agency; and
- finally, for tax reporting requirements, see the response to question 31.

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

Italian law does not prescribe any limitation on the amount of cash withdrawals that may be carried out at a bank counter or ATM. In general, however, banks impose restrictions on cash withdrawals at ATMs, and these amounts may often be negotiated and agreed with the customer.

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

Italian law does not prescribe any such restrictions.

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**Cross-border services**
**25 What is the general framework dealing with cross-border private banking services into your jurisdiction?**

Entities regulated abroad may perform private banking services in Italy subject to the compliance with certain licensing requirements (see question 26), which mostly change depending on whether the entity is based in an EU member state or in a third country.

In particular, while non-EU entities need to be authorised by the Italian authorities for carrying out private banking services in Italy, EU entities benefit from the principle of mutual recognition of authorisations; thus they would only need to complete a notification procedure between the authorities of their home member state and the Italian authorities (the passport procedure). Moreover, according to the home country control principle, an EU entity operating in Italy will be primarily supervised by its competent authorities, while the Italian authorities will mainly assume a complementary role (especially if the EU entity operates under the freedom to provide services regime).

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

As mentioned above, EU banks may carry out private banking services in Italy simply by way of the passport procedure; such procedure changes according to whether the EU bank intends to establish a branch or to operate under the 'freedom to provide services' regime, to whether the EU bank is based or not in a member state participating in the SSM, and to whether the EU bank qualifies or not as a 'significant' credit institution under the SSM rules. More specifically:

- a bank based in an EU member state participating in the SSM may establish a branch in Italy by simply submitting a notification to the NCA of its home member state, which would then pass that information to the ECB if the EU bank qualifies as significant; where no decision to the contrary is taken by – respectively – the NCA or the ECB within two months of receipt of the notification, the branch may be established in Italy and commence its banking activities. The NCA or ECB must communicate this information to the Bank of Italy; and
- as to banks based in an EU member state not participating in the SSM, if they wish to establish a branch in Italy they have to notify their NCA, which, unless it has reason to doubt the adequacy of the administrative structure or the financial situation of the bank, within three months, must communicate that information to the Bank of Italy (which must immediately notify the ECB) and must inform the bank accordingly. Within two months, the branch in Italy may be established and commence its banking activities, while the Bank of Italy (or the ECB, if the branch qualifies as significant pursuant to SSM rules) may, if necessary, indicate the conditions under which, in the interests of the general good, the branch may carry out its activity in Italy;
- under the freedom to provide services, any EU bank wishing to carry out its banking activities in Italy for the first time must notify its NCA of the banking activities that it intends to carry out. That NCA must, within one month, send that notification to the Bank of Italy and to the ECB. The EU bank may commence its activities upon the Bank of Italy's receipt of the notification.

In all of the aforementioned cases, the Bank of Italy must inform Consob if the EU bank also intends to perform investment services in Italy.

On the contrary, non-EU banks wishing to carry out banking activities in Italy need to be authorised by the Bank of Italy (not by the ECB, as the cross-border activities of credit institutions from third countries are not in the scope of the SSM), provided it has the prior consent of the authority supervising the non-EU bank, and subject to the condition of reciprocity. The establishment of the first branch is authorised within 120 days; in the context of such application, the non-EU bank may apply to the Bank of Italy for the provision of investment services, and in this case the timings for the authorisation are aligned; if the non-EU bank applies to the Bank of Italy to provide investment services once

the establishment of the branch has already been approved, the procedure takes 90 days. Also, the pursuit of banking activities under the freedom to provide services is authorised by the Bank of Italy within 120 days (to which a further 30 days must be added for the issuance of Consob's opinion).

Likewise, EU investment firms may carry out investment services in Italy, either with the establishment of a branch or under the freedom to provide services regime, simply by way of the passport procedure; in this case, Consob is the Italian authority that must be informed. In contrast, non-EU investment firms wishing to establish a branch in Italy or to operate under the freedom to provide services regime need to be authorised by Consob, which must grant its approval within 120 days of receipt of the application (and to which a further 30 days must be added for the issuance of the Bank of Italy's opinion).

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

Both banking services and investment services (in particular, portfolio management and investment advice), may be provided cross-border, provided there is compliance with the procedure and requirements set out in question 26.

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**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?**

According to the Italian authorities, an investment service is deemed to be provided in Italy if the initial contact with the investor is derived from the carrying out on Italian territory, by any means, of activities such as promotion of that service, canvassing, customer research, description and conclusion of contracts. Therefore, in order not to be accused of performing a reserved activity, the private banking institution would first need to carry out the passport procedure or to obtain the relevant authorisation, in accordance with the licensing requirements described in question 26. The Italian authorities have quite a restrictive approach in this respect.

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

See question 28.

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**Tax disclosure and reporting**


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**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?**

The requirements on individual taxpayers, under Italian tax law, to disclose or establish a tax-compliant status are different for domestic and foreign private banking accounts.

As a general rule, non-resident individual taxpayers are not subject to any tax obligations in Italy with reference to foreign private banking accounts.

**Requirements for domestic private banking accounts**

Private banking accounts held in Italy by both resident and non-resident individual taxpayers are not subject to any specific tax disclosure requirements.

Income arising from domestic private banking accounts must be reported in the relevant income tax return, unless a final withholding tax or a substitutive tax (generally at 26 per cent) has been applied. Under Italian tax law, certain financial income realised by non-resident individual taxpayers, (eg, interest on bank and postal accounts and capital gains realised on shares traded in a regulated market), are not subject to tax in Italy.

Domestic private banking accounts are subject to an annual stamp duty ranging from €32.40 to 0.20 per cent of the value of the assets held and which is withheld by the Italian depositary intermediary.

**Requirements for foreign private banking accounts**

For foreign private banking accounts, the main reporting requirements on individual resident taxpayers to disclose or establish a tax compliant status are the following:

- to report in the relevant income tax return the nature and the value of the foreign private banking accounts according to the Italian foreign assets reporting duties (cash deposits and bank accounts are not subject to reporting duties if their overall maximum value during the relevant calendar year has been lower than €15,000);
- to determine and pay the wealth tax on financial assets held abroad (IVAFE) whose amount ranges from €32.40 to 0.20 per cent of the value of the assets held abroad; and
- to report in the relevant income tax return all income arising from the foreign private banking accounts, unless a final withholding tax or a substitutive tax (generally at 26 per cent) has been applied by an Italian financial intermediary.

**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?**

Under Italian tax law, Italian financial intermediaries are subject, among other things, to the following reporting requirements:

- on a monthly basis, they must communicate to the Italian tax authorities the opening and the termination of any financial relationship with a client;
- on an annual basis, they must communicate to the Italian tax authorities, among other things, the following information related to each financial relationship: identification data (eg, the unique code); the initial, the final and the average balance of the relevant year; and information regarding overall deposits and withdrawals;
- they must collect and transmit to the Italian tax authorities any data regarding transfers of funds and other financial assets exceeding €15,000 involving foreign countries carried out on behalf or in favour of both resident and non-resident individual taxpayers; and
- they must act as a withholding agent, if applicable in relation to income paid to their clients, and file a withholding agent tax return for withholding and substitutive taxes applied.

**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?**

Irrespective of clients' consent, Italian financial intermediaries are required by law (i) to report monitoring data to the Italian tax authorities; (ii) to apply, if due, withholding and substitutive taxes on income paid to their clients; and (iii) to report these taxes in their withholding tax agent return.

## 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.**

The most common legal structures that an individual can use for holding private assets in Italy are trusts, insurance policies and fiduciary agreements as well as simple partnerships. Italian foundations are not legal structures capable of holding private assets, since Italian foundations may be used for social purposes only.

### Trusts

Trusts are recognised in Italy by virtue of the Hague Convention of 1 July 1985 on the Law Applicable to Trust and on their recognition, ratified in Italy pursuant to Italian Law No. 364 of 16 October 1989.

Trusts may be used for succession planning, for the generational shift in family enterprises or for family estate purposes, for pursuing of public aims, and for planning the maintenance and care of disabled persons.

In any case, the trust deed provisions must not violate any domestic mandatory provisions, as specified in Article 15 of the Hague Convention of 1 July 1985. Therefore, trust deed provisions should comply with the domestic provisions on succession rights and, in particular, the reserved shares of spouses, children and relatives, or the domestic provisions on creditors rights.

The main costs related to such a legal structure are: (i) the fees paid for the establishment of the trust (ie, notary public and legal assistance, usually in the range of €10,000 and €30,000); (ii) the fee paid to the trustee (usually in the range of €10,000 and €20,000 per annum plus a

set-up fee); and (iii) the taxes to be paid upon the transfer of the assets to be held on trust.

Under Italian tax law, non-commercial resident trusts are taxable persons for corporate income tax purposes (IRES, which applies at 24 per cent rate). In more detail, the relevant taxable income is determined according to the same rules provided for individual taxpayers, save for certain exceptions, and then subjected to the IRES tax rate.

However, trusts with identified beneficiaries (ie, beneficiaries who have a current unconditional right to claim the income generated by the trust fund), are subject to a look-through tax regime. Accordingly, the income realised by the trust is allocated to the identified beneficiaries as income from capital and is subject to progressive individual income tax rates (equal to 43 per cent for taxable income higher than €75,000).

In this respect, the following should also be considered:

- revocable trusts may be disregarded for income tax purposes where they are actually managed by the settlor or the beneficiaries; in such a scenario, income realised by the trust may be directly allocated to the settlor or the beneficiaries and taxed accordingly; and
- Italian inheritance and gift tax applies to the contribution of assets to the trust fund; the applicable rate and possible exemptions are determined depending on the relationship between the settlor and the beneficiaries.

### Insurance policies

Insurance policies may be used by individuals to invest their assets and obtain yields to provide the insured party's family a considerable amount.

The owner of the insurance policy has no influence on its administration, and its subject matter tends to be limited only to certain kinds of assets, such as sums of money or financial products.

The main costs related to such a legal structure are: (i) fees to be paid to the insurance company for the administration of the assets (which is usually a percentage over the invested amounts); and (ii) penalties for early termination of the insurance policy (if any).

Trust and insurance policies may also be used on a combined basis to ensure that the insured assets are used to achieve a specific purpose intended by the insured party upon the termination of the insurance policy.

As a general rule, income arising from an insurance policy is subject, as income from capital, to a 26 per cent substitutive tax. The relevant income is determined by the difference between the amount received (eg, the redemption amount) and the insurance premiums paid.

According to the particular tax exemption regime, the amount received, *mortis causa*, by the beneficiaries of an insurance policy, if related to the mortality risk only, is not subject to tax.

### Fiduciary agreements

Fiduciary agreements may be used for the attainment of different purposes, such as ensure the confidentiality of the beneficial ownership of transferred assets, to grant the coordination of the management of shareholdings held in several companies, or to allow the generational shift of the family assets, ensuring the continuity of management.

The owner must continue to manage its assets by giving instructions to the fiduciary company, which acts as an agent only. The fiduciary agreement is binding only with respect to the relations between its parties and it is not enforceable against third parties.

The main costs related to such a legal structure are the fees to be paid to the fiduciary company (usually in the range of €6,000 to €10,000).

Fiduciary agreements are not relevant for income tax purposes. Therefore, income arising from assets held through a fiduciary agreement is directly attributed to the relevant owner. However, individual Italian taxpayers are not subject to tax reporting duties in relation to foreign assets held through a fiduciary agreement.

### Simple partnerships

Simple partnerships are the basic type of partnership provided for under the Italian Civil Code. In particular, Italian law does not require special formalities for the incorporation of simple partnerships, since they may be used for non-commercial purposes only and for holding private assets. Therefore, simple partnerships are not required to keep books and accounts.

In addition to the above, the regime provided for under Italian law in relation to simple partnerships is quite flexible and may be derogated from with the consent of all the partners.

Simple partnerships may be used for wealth planning purposes and are a useful legal structure for managing family assets (ie, shares in the family holding, securities and real estate).

The main costs related to such a legal structure are the fees to be paid for the registration of the simple partnership in a special section of the Company Register (usually not more than €5,000).

Simple partnerships are subject to a look-through tax regime. Accordingly, the income realised by a simple partnership is allocated to its quota holders and taxed based on its specific nature (eg, income from capital, capital gains, professional income or real estate income).

### 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?

Broadly speaking, private banking relationships require a thorough assessment of the client's profile for AML purposes, given that they imply the personalised management of large amounts of assets (see question 15). The CDD obligations must also be conducted if the customer is a trust or a fiduciary company, including the identification of the subject on whose behalf such structures operate. With particular respect to trusts, following the implementation of the IV AML Directive, the beneficial owners should now be regarded as: (i) the settlor; (ii) the trustee or trustees; (iii) the protector, if any; (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; or (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means.

Moreover, pursuant to the MiFID legal framework, banks and other intermediaries, before carrying out the services of portfolio management or investment advice, must obtain from their clients or potential clients the necessary information regarding their knowledge and experience of the financial markets, their financial situation and their investment objectives. However, should the client qualify as a professional customer for MiFID purposes, banks and other intermediaries may presume that they have the knowledge and experience necessary to understand any risk related to the transaction to which the investment service refers.

### 35 What is the definition of controlling person in your jurisdiction?

The Italian legal framework provides for several definitions of control. The most general one is that in article 2359 of the Italian Civil Code, pursuant to which a company is deemed to be 'controlled' when another entity either has the majority of the voting rights exercisable at its shareholders' meeting, has sufficient voting rights to exercise a dominant influence at its shareholders' meeting or is able to exercise a dominant influence on the company by virtue of contractual constraints between the two. Different definitions of control apply in specific fields (eg, for acquisitions of shareholdings in banks or in SIMs, where reference is made to the notion of control provided by article 23 TUB, or for takeover bids, where reference is made to the notion of control provided by article 93 TUF).

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

If a trust is set up with the purpose of sheltering funds and other assets from the payment of income taxes and VAT amounting at least to €50,000, the taxpayer may commit the crime of fraudulent misappropriation of taxes.

It should be noted that this tax crime:

- may be triggered even if:
  - the relevant tax violations have not been assessed at the time of the contribution to the trust fund;
  - the taxpayer is able to pay the relevant taxes; and
  - the embezzled value is lower than €50,000 should this conduct affect the collection of taxes assessed for an amount higher than €50,000; and

- may be punished by imprisonment for a period from six months up to six years.

## Contract provisions

### 37 Describe the various types of private banking and wealth management contracts and their main features.

As described in question 3, the main private banking contracts are those governing the provision of portfolio management, the provision of investment advice or a combination of the two.

Pursuant to article 1, paragraph 5-quinquies, TUF, portfolio management is the management, on a discretionary and individual basis, of portfolio investments including one or more financial instruments, according to a mandate conferred by the customer; pursuant to article 1, paragraph 5-septies, TUF, investment advice is the provision of customised recommendations to a customer, upon its request or on the initiative of the intermediary, in relation to one or more transactions concerning one financial instrument.

TUF and the Consob Regulation on intermediaries impose specific obligations for the provision of the above-mentioned investment services. In particular, the following rules apply to portfolio management:

- the customer may issue binding instructions with regard to transactions to be performed;
- the customer may withdraw from the contract at any time; and
- the power to exercise voting rights in relation to financial instruments under management may be conferred upon the intermediary by means of a proxy granted in writing for each shareholder's meeting.

Moreover, following the implementation in Italy of MiFID II, before providing investment advice, the intermediary must inform the client:

- whether or not the advice is provided on an independent basis;
- whether the advice is based on a broad or on a more restricted analysis of different types of financial instruments; and
- whether the intermediary will provide the client with a periodic assessment of the suitability of the financial instruments recommended to that client.

Finally, pursuant to the general principles of private international law, the governing law of these contracts can be varied by the parties.

### 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?

Pursuant to article 23 TUF, in actions for damages brought by the customer against the intermediary, the burden of proof of having acted with the necessary due diligence is placed on the intermediary, which must demonstrate that it has complied with the technical rules governing the provision of investment services. In particular, the intermediary must refrain from conducting investment transactions that are inadequate – by type, subject, frequency or size – to the actual needs of the customer.

As to the contractual provisions that intervene of such liability framework, if the investor qualifies as a consumer, they might be regarded as unfair terms, and thus they may potentially be null and void.

### 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?

TUF and the Consob Regulation on intermediaries provide for specific requirements with which the contracts for the provision of investment services must comply. As a general rule, apart from investment advice contracts, they all need to be executed in writing and a copy must be given to the investor. Additional conditions apply to contracts for the provision of portfolio management. To date, most of the requirements relating to the disclosure, form and content of the contracts do not apply with respect to professional customers. However, following the implementation of MiFID II, both the contracts for the provision of portfolio management and investment advice, even when entered into with professional customers, must be in written form (unless the investment advice is provided without a periodic assessment of the suitability).

**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?**

Generally speaking, the intermediary's liability for damages arising from the breach of the rules of conduct placed upon him or her is of a contractual nature, and is therefore subject to the ordinary (in the Italian legal framework) limitation period of 10 years. Since the limitation period is provided by law under general provisions, the parties cannot renounce it or alter its terms in advance; the limitation period may be waived only after it has elapsed.

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

The Italian legal system does not contain provisions that positively uphold a general obligation of bank confidentiality. Such confidentiality is, according to prevailing legal interpretations, more likely to be attributable to a custom. In any case, several exceptions apply to confidentiality, for example, under tax legislation, AML legislation or the TUB itself (which obliges banks to report to the Bank of Italy – which is held to professional secrecy – any data or document it requests). To date, banking confidentiality is enhanced by the legislation on the right to privacy, specifically governed by Legislative Decree No. 196 of 30 June 2003 (the Privacy Code).

The Privacy Code does not contain specific provisions on private banking. However, private banking activity could lead to the collection of information qualifying as personal data, sensitive data or judicial data. In particular, under the Privacy Code, personal data means 'any information relating to natural persons that are or can be identified, even indirectly, by reference to any other information including a personal identification number'; sensitive data means, among other things, 'personal data allowing the disclosure of ..., membership of parties, trade unions, associations or organisations of a religious, philosophical, political or trade-unionist character', and judicial data means 'personal data disclosing the measures referred to in section 3(1), letters a) to o) and r) to u), of the Presidential Decree No. 313 of 14 November 2002 concerning the criminal record office, the register of offence-related administrative sanctions and the relevant current charges, or the status of being either defendant or the subject of investigations pursuant to sections 60 and 61 of the Criminal Procedure Code'. The principles set out in Privacy Code and in certain General Provisions adopted by the Italian Data Protection Authority apply to the private banking sector. In particular, reference should be made to the 'Guidelines for the Processing of Customers' Data in the Banking Sector' (dated 25 October 2007), and to the general authorisations Nos. 5 and 7 with regard to, respectively, the processing of sensitive and judicial data.

Pursuant to such general principles, the collected information can only be processed for lawful purposes – for example, to fulfil contractual obligations or to meet legal requirements – and in compliance with all the provisions set out in the applicable legislation concerning personal data protection. In particular, the Privacy Code states that the data of

'data subjects' can be processed: (i) only by persons in charge of the processing (or the 'data processors', where appointed), within the limits of their appointment; (ii) in compliance with data minimisation and data quality principles as regards data accuracy and updating; (iii) by informing the data subjects appropriately beforehand; and (iv) by requesting the data subjects' consent unless certain exemptions provided by the Privacy Code occur.

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

The principles mentioned above also apply to the processing of information obtained for the identification of customers establishing a contractual relationship or performing banking transactions. For the documentation required for AML purposes, see the response to question 15.

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

Pursuant to the Privacy Code, the personal data of the data subject may be collected and processed only with his or her prior consent unless certain exemptions provided by the Privacy Code occur. In particular, there is no need to obtain the client's consent in order to perform private banking transactions, while it is necessary to inform clients (at least once and for all) when the data is processed pursuant to legal requirements or to fulfil contractual obligations or to comply with specific requests made by clients. Broadly speaking, the subject in charge of performing private banking transactions must keep confidential all the data; communicating a client's personal data to third parties is allowed only with the client's consent or if any of the conditions for processing the data (as per article 24 of the Privacy Code) are fulfilled.

**44 What is the liability for breach of confidentiality?**

Breach of the confidentiality obligations can be identified as an unlawful processing of personal data under the Privacy Code. In particular, unlawful processing of personal data is sanctioned according to articles 167 and 162, paragraph 2-bis of the Privacy Code, which provide for, respectively, a criminal sanction and administrative sanctions consisting of payment of a fine ranging from €10,000 to €120,000. In any case, the non-compliance with the relevant applicable law could result in the application of administrative fines, usually in the range of €6,000 to €180,000.

**Disputes**

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

Under the Italian legal framework, competence to rule on disputes relating to banking and financial services is granted to the ordinary courts. However, before referring the matter to court it is mandatory to have first attempted a mediation procedure or, alternatively, to have referred the matter to:

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- the Arbitro Bancario Finanziario (ABF), which is the body responsible for disputes relating to banking services, regulated by the Bank of Italy; or
- the Arbitro per le Controversie Finanziarie (ACF), which is the body responsible for disputes relating to the provision of investment and asset management services, regulated by Consob.

For both these alternative dispute resolution bodies:

- only the customer has the right to access the services of each body, after having lodged a complaint without success with the bank or intermediary;
- only certain types of customers are admitted. In particular, only investors qualifying as retail may refer the matter to ACF, while access to ABF is prevented to subjects carrying out activities on a professional basis in the banking, financial and insurance sector, unless they act for purposes that are outside their profession; and
- the decisions of these bodies are not binding but their enforcement is guaranteed through reputational sanctions.

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**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?**

Without prejudice to the supervision performed by the Bank of Italy and Consob, there is no general obligation to disclosure to such authorities of the outcome of private banking disputes.

The Bank of Italy and Consob may receive petitions by which customers and investors may report facts or misconduct occurring in the relationship with banks and other intermediaries. The authorities cannot provide immediate and direct protection to the rights of the individuals, but may carry out inspections aimed at verifying what has been reported, in the general interest of the protection of savings.

# Jersey

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## Private banking and wealth management

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

At present, banking (deposit-taking) and investment business are regulated under separate legislation. Accordingly, most private banks will need to be registered under both pieces of legislation as well as a general piece of legislation that applies to all businesses.

Accordingly, the main sources of law and regulation governing private banking in Jersey are the Financial Services (Jersey) Law 1998 (FSL), as amended, the Banking Business (Jersey) Law 1991 (the Banking Law), as amended, and the Control of Housing and Work (Jersey) Law 2012 (the Control Law). There is some customary law.

The Control Law simply regulates anyone that wishes to conduct business from Jersey. All businesses must have a general business licence under the Control Law and comply with its requirements. Failure to do so constitutes a criminal offence.

The FSL stipulates that legal persons may only conduct 'financial services business' in Jersey by way of business if it is regulated to do so or is exempt from the need to be supervised. It is a criminal offence to breach the FSL.

The FSL defines financial service business as covering investment business, trust company business, general insurance mediation business, money service business, fund services business or alternative investment fund (AIF) services (covered by Directive 2011/61/EU). Most private banks are regulated for at least investment business. Investment business includes dealing in investments, discretionary investment management as agent for a principal and giving investment advice. Investments covers shares, debentures, instruments entitling holders to shares or securities, units in a collective investment fund, options, futures, contracts for differences, long-term insurance contracts and rights to or interests in any of the above investments.

In addition, if the private banks are providing deposit-taking services, they must also be registered under the Banking Law. However, such registration is subject to very strict criteria.

Banks may either be set up in their own right or managed by an existing organisation on behalf of a bank that does not wish to set up there in itself.

A business is not classed as a deposit-taking business if in the normal course of business the person carrying on that business does not hold itself out as accepting deposits on a day-to-day basis and any deposits that are accepted are only accepted on particular occasions.

As regulated and supervised entities, private banks are required to comply with the relevant codes of practice for the purpose of establishing sound principles for the conduct of financial services business or banking (as the case may be) dealing with integrity, highest regard for interests of their clients, organising their affairs effectively for the proper performance of their business activities and being able to demonstrate adequate risk management services (basic standards, organisation and competence of principal persons, key persons and other employees, qualifications and experience of employees, continuing professional development, compliance and record-keeping), transparency, financial resources and adequate insurance, being open and cooperative with the Jersey Financial Services Commission (JFSC) and they must not make statements that are misleading, false or deceptive. These requirements are set out in the various codes of practice published by the JFSC.

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

The JFSC, established by the Financial Services Commission (Jersey) Law 1998, as amended, is responsible for the regulation and supervision of private banks in Jersey.

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

There is a wide scope of services offered by private banks in Jersey as a result of high demand. Such services include private banks and independent asset management. There has been significant growth of family offices over the last few years (some are regulated under the FSL while others benefit from one of the exemptions).

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

'Private banking' is not defined under Jersey law but is widely accepted to include any form of wealth management, investment business and other financial services business to high net worth individuals and ultra-high net worth individuals. There are usually entry-level requirements of between £1 million and £2 million of assets under management. Exceptions are sometimes made.

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

The JFSC has published a licensing policy for each of the various regulated activities. The authorisation process requires an applicant to make a detailed application providing information and supporting documentation (including a business plan) dealing with the business, corporate governance, span of control, ownership, financial resources and systems and control. The applicant will also need to demonstrate suitability and satisfy a fit and proper test. Certain employees being principal persons and key persons will be required to hold certain professional qualifications and have the appropriate level of experience.

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

Private banks (subject to their regulated status) must meet the legal and regulatory requirements of Jersey. This includes abiding by the relevant codes of practice published by the JFSC from time to time, which registered persons (being the private banks) are required to follow. The private banks will be actively supervised (with regular supervisory visits) and must have appropriate financial and non-financial resources and satisfy the core principles under the relevant codes of practice depending on their registrations under the FSL and/or the Banking Law.

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

A foreign private bank typically sets up a Jersey entity (usually a limited liability par value company). The entity will be regulated by the JFSC and separately capitalised. It is possible to have a Jersey branch. It is not a separate legal entity and will need to be regulated by both the regulator in its home jurisdiction and the JFSC.

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

An application for a private bank to obtain an investment business registration under the FSL takes from three to four months. An application for a registration under the Banking Law can take up to a year depending upon the nature and status of the application. There are very strict criteria for a registration under the Banking Law.

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

The JFSC has very wide powers under the FSL to take enforcement action against registered persons. Article 9 of the FSL gives the JFSC powers to revoke registrations. To date, the JFSC has not revoked any registrations as the registered persons have agreed to cease trading and surrender their registrations.

There is a right of appeal to the Royal Court of Jersey within one month of the decision on the grounds that the JFSC's decision was unreasonable having regard to the circumstances of the case.

### 10 Is wealth management subject to supervision or licensing?

Like private banking, wealth management firms are usually registered persons under the FSL for investment business and are regulated by the JFSC in the same way.

Family offices can structure themselves in such a way to avoid registration on the proviso that the family in question owns a majority stake in the entity.

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

The licensing requirements are identical to a private bank not registered under the Banking Law (see question 5).

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

These are the same as a private bank (see question 6).

## Anti-money laundering and financial crime prevention

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

Private banks must comply with the Proceeds of Crime (Jersey) Law 1999 (the Proceeds of Crime Law), as amended, the Money Laundering (Jersey) Order 2008 (MLO), as amended, and the Drug Trafficking Offences (Jersey) Law 1988 (the Drug Trafficking Law), as amended, in relation to drug trafficking and the Terrorism (Jersey) Law 2002 (the Terrorism Law), as amended. Accordingly, private banks must have in place effective systems and controls to comply with the anti-money laundering and financial crime requirements.

Although the Jersey legislation is partly modelled on the UK legislation, the Proceeds of Crime Law had four main effects:

- it enabled the Royal Court of Jersey to confiscate the proceeds of criminal conduct;
- it allowed for the enforcement in Jersey of foreign confiscation orders;
- it created certain offences relating to money laundering; and
- it imposed obligations on those persons who provide financial services to screen and identify clients, produce records for each client, train staff to recognise potential money laundering activity and produce an internal system to report such suspicious activities to local police authorities.

The Drug Trafficking Law makes provision for:

- the making and enforcement of confiscation orders against persons convicted of drug trafficking offences;
- the offence of assisting drug traffickers to retain the proceeds or benefit of trafficking;
- the offence of making any disclosure likely to prejudice an investigation; and
- the making of production and enforcement orders in relation to production of and access to materials required in connection with a police investigation.

The Terrorism Law provides for:

- the making and enforcement of exclusion orders;
- the offence of financial assistance for terrorism; and
- the offence of assisting another in the retention or control of terrorist funds.

The MLO sets out a higher level of customer due diligence measures (CDD) than most jurisdictions including the UK, which private banks have to comply with before entering into a business relationship or carrying out a transaction. Private banks are obliged to take a 'risk-based approach' to CDD. As a result, private banks are expected to verify, inter alia, identity, place of residence, source of wealth and source of funds. In addition, private banks are expected to classify clients as low risk, standard risk or high risk.

### 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?

Article 15(6) of the MLO defines a PEP as an individual (including immediate family member and close associate) who is or has been entrusted with a prominent public position outside of Jersey or an international organisation outside of Jersey. Examples include heads of state, heads of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations and important political party officials.

### 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.

A private bank opening an account for an individual must verify the client's full legal name, residential address, date of birth, tax residence (including tax code), source of wealth and source of funds. This information must be verified by obtaining legally certified documents.

For verification of identity, this must be a valid passport or EU national identity card showing the client's full name, photograph, residential address or date of birth. For proof of address this must be a utility bill (in the last three months and not a mobile phone) or a bank statement. It is possible to accept certain other documentation such as military identity card, driving permit, government pension documentation, a letter from the tax office and TV licence.

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

Money laundering offences assume that a criminal offence has occurred in order to produce criminal property (that is say property representing a person's criminal conduct) now being laundered. This is effectively called a predicate offence. Where a tax offence is a criminal offence in Jersey or outside of Jersey, it is a predicate offence for the purposes of Jersey anti-money laundering legislation.

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

The MLO requires private banks to conduct due diligence when they enter into a business relationship or carry out a transaction. This is mainly to verify the identity of the client. Private banks are required to establish whether or not their clients are reportable under the Common Reporting Standard (CRS) and the Foreign Account Tax Compliance Act (FATCA). This includes verifying where a client is resident for the purposes of any tax imposed by law.

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

The Proceeds of Crime Law created four main offences:

- assisting another to retain the benefit of criminal conduct;
- acquiring, possessing or using the proceeds of criminal conduct;
- concealment or transferring the proceeds of criminal conduct; and
- tipping off.

Article 23 of the MLO makes it an offence for failing to report knowledge, suspicion or where there are reasonable grounds for knowing or suspecting, that another person is engaged in money laundering.

To be guilty of an offence there must be knowledge or suspicion of criminal conduct by the client. This will be a question of fact in each case.

A private bank's employees will not be liable if they promptly disclose their knowledge or suspicion of money laundering to the money laundering reporting officer. The money laundering reporting officer does not necessarily need to pass on the suspicious activity report after reviewing it unless it is deemed reportable. It can be an offence for the money laundering reporting officer to fail without a reasonable excuse to pass on such disclosures to the States of Jersey Police (usually the Joint Financial Crimes Unit).

The MLO creates a general obligation on private banks to establish adequate and appropriate procedures to prevent money laundering. Liability can be occurred by the registered persons, principal persons and key persons.

Failure to comply with any of these legal obligations is a criminal offence and risks a prison term and a fine.

### Client segmentation and protection

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

To the extent that the private bank is an investment business under the FSL, it must notify the client of its type of registration and any restrictions. It must also categorise the client and notify the client of the type of categorisation. Retail clients receive the highest degree of protection under Jersey's regime.

#### 20 What are the consequences of client segmentation?

Professional clients and sophisticated clients receive a lesser degree of protection. Private banks have different legal obligations depending upon the type of business that they conduct such as investment business and banking.

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

Apart from the regulatory and legal requirements imposed on private banking by the relevant codes of practice, private banks need to consider the implications of the Supply of Goods and Services (Jersey) Law 2009 for retail clients.

### Exchange controls and withdrawals

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

There are none.

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

There are none, save for those imposed by the internal rules of the relevant private bank (typically ranging from £200 to £1,000 per day).

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

There are none. Private banks will honour all withdrawals subject to sufficient cleared funds.

### Cross-border services

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

There are none at present.

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

There are none at present.

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

There are none at present.

#### 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?

No.

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

No, it has to be distributed through a registered person under the FSL.

### Tax disclosure and reporting

#### 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?

The only major tax in Jersey is income tax. Liability for income tax is based on residence. All residents are required to report interest earned on their worldwide accounts in their tax returns.

#### 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?

If private banks in Jersey have reportable accounts, they need to report to the Comptroller of Taxes the name and address, jurisdiction of residence and date and place of birth of account holders if they are resident in any of the CRS jurisdictions as well as the account number and balance. If the account holder is an entity, private banks should report the details in respect of any person controlling that entity as well as beneficial ownership.

Further, there is a legal obligation pursuant to the MLO on private banks for staff to compile a suspicious activity report to give to their designated money laundering reporting officer (which may lead to a suspicious activity report to the Joint Financial Crimes Unit) where money laundering is suspected. It is also an offence to inform a client that a suspicious activity report has been made.

#### 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?

No client consent is required. Typically, private banks' terms of business contain provisions to disclose information if legally obliged to do so.

### 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.

The most common structure in Jersey is an Anglo-Saxon discretionary trust. The Trusts (Jersey) Law 1984, as amended, codified the existing customary law.

The trustee is usually a registered trust company business under the FSL. Trusts offer clients the benefits of confidentiality, dynasty planning, creditor protection (in certain circumstances) and the preservation of wealth. There is no register of trusts and the terms contained in the trust instrument are confidential as the trust instrument is a private document. Subject to the terms of the trust, the beneficiary class can be restricted or extended.

A trust can be set up for approximately £3,000 with annual administration costs varying from £5,000 to £100,000 depending on the activity of the trust and value of the trust fund.

There are several types of trust including fixed interest trusts, discretionary trusts and purpose trusts.

Jersey has a healthy range of structure products including companies, foundations and partnerships.

The choice of companies (both private and public) can be established as limited liability, par value and no par value, limited by guarantee, protected cell companies and incorporated cell companies. The main piece of legislation for companies is the Companies (Jersey) Law 1991, as amended, which has many features of the UK companies legislation but much more flexibility.

The concept of a foundation was established by the Foundations (Jersey) Law 2009 and has proved popular, especially with clients in civil law jurisdictions. It allows the settlor to play a more active role.

Limited partnerships are also used for family private wealth structures. Jersey also has separate limited partnerships and incorporated limited partnerships.

Limited liability partnerships tend to be more suited to professional firms.

**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?**

Insofar as trusts are concerned, private banks must obtain the following information: full name of the trust, its nature, purpose and objects, jurisdiction of establishment, names and registered address of trustees, names and addresses of potential beneficiaries and name and address of any protector, settlor, controller and enforcer.

The private bank should have a legally certified copy of the trust instrument, the certificate of incorporation of the corporate trustee, the memorandum and articles of the corporate trustee, the registers of directors and secretaries of the corporate trustee, and the register of members of the corporate trustee.

**35 What is the definition of controlling person in your jurisdiction?**

A controlling person is anyone holding more than 25 per cent of the beneficial interest in an entity or voting rights. It also includes a director of a company, a trustee of a trust, an enforcer to a purpose trust, a protector of a trust, the council members and guardian of a foundation.

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

Apart from complying with local legislation, there are no Jersey regulatory or tax obstacles to the use of structures to hold private assets. Jersey is a tax-neutral jurisdiction so any regulatory or tax obstacles would be imposed by foreign applicable jurisdictions.

**Contract provisions**

**37 Describe the various types of private banking and wealth management contracts and their main features.**

The main types of private banking contracts in Jersey are discretionary investment management, non-discretionary advisory and execution only.

A discretionary investment management contract is where the client gives the private bank absolute discretion to buy and sell holdings in the client's portfolio without obtaining the prior consent of the client. The contract will stipulate the parameters.

A non-discretionary investment management advisory contract is where the private bank makes recommendations to the client but the bank can only carry out these transactions with the specific permission of the client.

**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?**

The liability standard provided for by law is typically gross negligence, although negligence is more apparent where the client has some bargaining power. Gross negligence, wilful misconduct and fraud cannot be excluded.

**Update and trends**

The Dormant Bank Accounts (Jersey) Law 2017 has enabled private banks to close dormant bank accounts by depositing the account balance into a central fund, the Jersey Reclaim Fund. Any money that is not reclaimed from the fund will be used for charitable and social purposes. This has permitted private banks to remove the liabilities associated with dormant accounts from their balance sheets. An account will be dormant if no transactions have been carried out by the customer on it for 15 years. Private banks will have to notify customers with dormant accounts three months before transferring the funds.

The Bankers Depositors Compensation (Jersey) Law 2017 and the Bank Recovery and Resolution (Jersey) Law 2017 have enhanced protection for customers depositing funds with certain private banks with compensation up to a maximum amount of £50,000 per Jersey banking group capped at £100 million over a five-year period. The bank must be bankrupt as defined by article 8 of the Interpretation (Jersey) Law 1954.

The private banking community is embracing fintech. The Jersey Financial Services Commission is well engaged in its development. In particular, substantial groundwork has already been laid for virtual currency. The Proceeds of Crime (Jersey) Regulations 2016 have brought virtual currency exchangers within the ambit of Jersey's anti-money laundering legislation. There is an exemption for exchangers with a turnover of less than £150,000.

**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?**

These are contained in the FSL and the Banking Law (where applicable), together with the codes of practice and guidance notes issued by the JFSC from time to time.

**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?**

Jersey law contains a multitude of prescription periods for different causes of action. As a general rule of thumb, the limitation period in contract is 10 years and three years in tort (see Law Reform (Miscellaneous Provisions) (Jersey) Law 1960).

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

Jersey does not have any statutory framework for bank or professional secrecy. Banking and other professional confidentiality arises as a matter of an express or implied contractual obligation.

Decisions of the Royal Court of Jersey confirm the existence of a duty on the part of a banker or other person not to disclose to a third party information that is in its nature 'confidential' to the customer or the client.

Private banking contracts will contain the usual clauses dealing with confidentiality. In addition, the relationship between a private bank and its client will generally be sufficient to imply an obligation of confidentiality under the customary law doctrine of breach of confidence based on the English common law position.

A person is also guilty of an offence if he or she discloses any information relating to the business or affairs of anyone protected by the FSL without the consent of the person to whom it refers.

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

Confidentiality will apply to all information that has the 'necessary quality' of confidence. Most information and documents will fall within this scope.

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

The duty of confidentiality will not apply to documents in the public domain or where disclosure is under compulsion of law. Examples include disclosure to the JFSC where it is for the purpose of enabling or assisting the JFSC to discharge its functions under the FSL, disclosure to the Royal Court of Jersey and disclosure to the Attorney General or a police officer in certain circumstances.

**44 What is the liability for breach of confidentiality?**

The client may apply to the Royal Court of Jersey for an injunction preventing further disclosure of its confidential information. Damages may also be recoverable.

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

A standard private banking contract is usually governed by the laws of Jersey and the parties submit to the jurisdiction of the Royal Court of Jersey.

**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 banks have to keep a register of complaints for the JFSC. A client can complain to the JFSC if there has been a breach of the codes of practice such as lack of transparency and integrity. Complaints are usually investigated by an officer of the JFSC.



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# Liechtenstein

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## Private banking and wealth management

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

The main sources of law and regulation relevant for private banking are statutory legislation passed by parliament and ordinances issued by the government, as well as directly applicable European legislation. Furthermore, the Financial Market Authority Liechtenstein (FMA), as competent authority, may issue instructions relevant for financial intermediaries in Liechtenstein. As the Principality of Liechtenstein is an active member of the European Economic Area (EEA), the main sources of law regarding wealth management are heavily influenced by European law.

Private banking services are first and foremost subject to civil law and the contractual relationship between the intermediary and the client, and therefore to the General Civil Code (ABGB) and the Law on Property (SR). Structures and vehicles used for wealth and estate planning purposes are subject to the Liechtenstein Persons and Companies Act of 20 January 1926 (PGR).

Secondly, the contractual relationship is influenced and organised by public law and regulation. In the field of private banking this is particular banking and asset management regulation, as well as regulation of trustees and fiduciaries.

Liechtenstein Banks are regulated under the Liechtenstein Banking Act (BankG) and Banking Ordinance (BankV), which is transposing and complementing the European regulatory framework covering banks and investment firms (in particular the CRD/CRR framework as well as the European MIFID/MIFIR framework). European law provides for a number of directly applicable Regulations in this regard, most importantly the Capital Requirements Regulation (Regulation (EU) 575/2013 – CRR).

Other wealth management services, such as individual portfolio management and investment advice with regard to financial instruments, are regulated under the Liechtenstein Asset Management Act (VVG) and Asset Management Ordinance (VVO) as well as the BankG, all of which are transposing in particular the European MIFID II framework. European law provides for a number of directly applicable Regulations in this regard.

Trustees and Trust Companies in Liechtenstein are regulated under the Professional Trustees Act (TrHG), and are also subject to oversight by the Liechtenstein Institute of Professional Trustees and Fiduciaries, which is a public law corporation that safeguards the honour, reputation and rights of trustees and supervises their duties.

Collective investment schemes (CIS) and insurance contracts may also be used for private wealth management purposes. CIS are regulated under the Liechtenstein AIFM-Act (AIFMG) and UCITS-Act (UCITSG). Both laws transpose European Regulation and are accompanied by a number of directly applicable European regulations. For CIS outside of the AIFM and UCITS framework, in particular for collective investment of families and investment clubs, the Liechtenstein Law of Investment Undertakings (IUG) is applicable. Insurers in Liechtenstein are inter alia subject to the Insurance Supervision Act (VersAG) and Insurance Contract Act.

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

The main government body relevant for financial regulation in Liechtenstein is the Ministry for General Government Affairs and Finance, and in particular the Office for International Financial Affairs (Stabsstelle für internationale Finanzplatzagenden (SIFA)). The main regulatory body in Liechtenstein is the FMA.

The most important industry associations in the field of private banking and wealth management are the Liechtenstein Bankers Association (LBV), the Liechtenstein Institute of Professional Trustees and Fiduciaries (THK), the Liechtenstein Association of Independent Asset Managers (VuVL), the Liechtenstein Investment Fund Association (LAFV), the Liechtenstein Chamber of Lawyers (RAK), the Liechtenstein Insurance Association (LVV) and the Association of Liechtenstein Charitable Foundations (VLGS).

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

The most important providers of private banking and wealth management services in Liechtenstein are fiduciaries, banks (which traditionally focus on private banking services) and asset managers. However, fund management companies and insurers also offer private wealth management solutions. Liechtenstein law provides for a variety of structuring options for private wealth management purposes, inter alia the foundation and the trust (see question 33 et seq).

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

Liechtenstein law does not provide for a definition of 'private banking'. The regulation of banks and other wealth management services in Liechtenstein is harmonised under European law and thus depends on the specific services provided.

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

Banks are subject to prudential regulation. Licensing requires a sound internal organisation and a proper business operation. The intermediary must provide a business plan that outlines the details of the organisation, which is mapped out by the legislator. Organisational requirements are applied with regard to the size of the institution and the nature of its business and the services provided. The minimum initial capital of a bank under Liechtenstein law amounts to at least 10 million Swiss francs. One of the most important licensing requirements is that intermediaries must have their head office situated in Liechtenstein and must be organised in a permitted legal form. Furthermore, there is a requirement to have an investor compensation scheme in place. The key personnel of the intermediary (board of directors and management body as well as the head of the internal audit department) must be fit and proper and thus must be sufficiently qualified with respect to their education and experience in the sector and must be of good repute. There is also an eligibility requirement with regard to shareholders with qualifying holdings. Further licensing requirements are provided by law.

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

The preconditions of granting a licence must be fulfilled on an ongoing basis. Changes with regard to certain aspects of the organisation are subject to prior approval by or notification to the FMA. The licensee is subject to ongoing supervision as well as reporting and record-keeping requirements.

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

Under Liechtenstein law banks may be organised as a limited company (AG) or as a European company (SE). In justified cases the government may allow other legal forms. Foreign banks may establish a subsidiary or branch in Liechtenstein under the applicable legal provisions.

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

There is no specific licence for a private bank; however, with regard to a licence as a bank or investment firm the FMA must decide within six months after the receipt of the application if the dossiers are complete, and in any event within 12 months after the receipt of the application. With regard to a licence as an asset manager under the VVG, the Liechtenstein FMA must decide within six months after the receipt of the application if the dossiers are complete.

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

The licence expires when the respective business activities have not been taken up within one year of the licence being granted or no business activities have been conducted for a period of at least six months. The licence furthermore expires when bankruptcy proceedings are legally initiated or the legal entity is removed from the commercial register.

The FMA may withdraw a licence if the requirements for authorisation are no longer met or the licensee fails to meet specific legal requirements, for example with regard to own funds or liquidity. Furthermore the FMA may withdraw a licence if legal obligations have been seriously violated. The FMA may revoke a licence if material circumstances were not disclosed or the licence was obtained on the grounds of incorrect information. Lastly, the licence may be renounced.

## 10 Is wealth management subject to supervision or licensing?

Providers of specific wealth management services, such as individual portfolio management on a discretionary client-by-client basis or investment advice with regard to financial instruments, are subject to supervision and licensing. In the case of asset managers, these business activities are regulated under the VVG and VVO. Investment firms are subject to the BankG. A licence as a bank under the BankG also allows the provision of such wealth management services.

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

Investment firms and asset managers are subject to prudential regulation. In its basic features, the licensing requirements are quite similar to those of banks; however, as mentioned above, the requirements show consideration for the size of the institution and the services provided. The minimum initial capital of investment firms under the Liechtenstein BankG amounts to at least 730,000 Swiss francs, while asset managers must have a minimum initial capital of at least 100,000 Swiss francs.

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

The preconditions of granting a licence must be fulfilled on an ongoing basis. Changes with regard to certain aspects of the organisation are subject to prior approval by or notification to the FMA. The licensee is subject to ongoing supervision as well as reporting and record-keeping requirements.

## Anti-money laundering and financial crime prevention

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

Liechtenstein has attached great importance to anti-money laundering. As an EEA member, Liechtenstein has implemented the Fourth EU Money Laundering Directive (2015/849/EU) and the Regulation on information accompanying transfers of funds (2015/847/EU).

Banks and investment firms licensed under the BankG as well as asset managers licensed under the VVG are subject to due diligence requirements according to the Due Diligence Act and the accordant ordinance, implementing the European Directives on money laundering. Such requirements include the identification and verification of the identity of the client, the identification and verification of the identity of the beneficial owner of the assets and the establishment of a business profile, as well as a risk-adequate monitoring of the business relationship. The verification of the identity of clients regularly takes place within the scope of personal meetings. In this regard the financial intermediary shall inspect the passport, identity card, driving licence or certified copies thereof, and collect further specific information on the client. Under specific conditions, financial intermediaries may undergo an online verification process instead of verifying the client in a personal meeting (eg, video chat). For the verification process of the identity of the beneficial owner, Liechtenstein law provides blank forms to be completed containing information on the beneficial owner. The business profile shall contain inter alia information on the economic background and origin of the assets deposited.

Increased due diligence requirements may apply in specific cases specified by law.

### 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?

A PEP is defined as a natural person who is, or was up until one year ago, entrusted with a prominent public function, as well as his or her immediate family members, or a person known to be a close associate of such a person. Such prominent public functions include, but are not limited to, heads of state, heads of government, ministers and deputy or assistant ministers and senior officials of political parties; members of parliaments; members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances; members of courts of auditors or of the boards of central banks; ambassadors, *chargés d'affaires* and high-ranking officers in the armed forces; and members of the administrative, management or supervisory bodies of state-owned enterprises.

Increased due diligence measures apply to business relationships and transactions with PEP. The financial intermediaries mentioned above shall establish additional measures by implementing adequate risk-based procedures to determine whether the contracting party or the beneficial owner is a PEP or not, obtaining the approval of at least one member of the management before establishing a business relationship with a PEP as contracting party or beneficial owner or – where a contracting party or a beneficial owner is recognised as a PEP in the context of an existing business relationship – before continuing the business relationship. Each year, at least one member of the management shall approve the continuation of the business relationships with a PEP.

### 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.

Financial intermediaries are required to collect certain customer and beneficial owner information before establishing a private banking relationship. The minimum information required for private individuals includes the full name, date of birth, residence and citizenship. The information required for legal entities includes the name or firm, type of legal entity, registered office, date of establishment, and date and place of entry in the public register, as well as the names of the bodies or trustees formally acting on behalf of the legal entity in dealings with the banks and wealth managers. This information must be proved by a valid official identification document with a photograph (in particular a



passport, identity card or driving licence). Legal entities need to provide an extract from the commercial register or a similar document. In order to establish a business profile, banks and wealth managers must obtain information on the economic background and origin of the assets deposited, the profession and business activity of the effective depositor of the assets and the intended use of the assets, as well as authorised agents and bodies in contact with banks and wealth managers. In practice, financial intermediaries require more detailed information for account opening on a case-to-case basis.

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

Yes, tax offences are predicate offences for money laundering. All crimes that are committed with intention that are punishable by a term of imprisonment of at least three years. Other specific crimes are covered from the scope of the predicate offences. In practice, the main predicate offences that may apply in the context of private banking are fraud and breach of trust.

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

An internal directive by the Liechtenstein Banking Association relating to due diligence measures with regard to the tax compliance of their clients requires banks to verify the tax compliance of their clients. Other financial intermediaries also undertake different measures to verify the tax compliance of their clients (eg, requesting tax compliance confirmations issued by the clients or their tax advisers).

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

Financial intermediaries (private bank or wealth management institution and its employees) that fail to comply with due diligence measures under the Due Diligence Act either face criminal prosecution (a prison sentence of up to six months or a fine of not more than 360 times the daily fine rate set by the court) or administrative procedures (a fine of up to 200,000 Swiss francs; in cases of repeatedly or systematically committed administrative offences up to 5 million Swiss francs), depending on the type of failure.

Clients and financial intermediaries committing financial crimes under the Criminal Act can face criminal prosecution (prison sentence or fine). Civil liability may also arise from the failure to comply with money laundering or financial crime rules.

**Client segmentation and protection**

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

Liechtenstein law distinguishes between types of clients in banking and investment law in line with European law. According to Annex 1 BankG and Annex II MifID II, respectively, a distinction is made between eligible counterparties, professional clients and non-professional clients. High net worth individuals (HNWIs) as well as vehicles that are in place to structure the wealth of HNWIs may be professional clients or non-professional clients.

The legally provided classification may be altered if the client wishes to waive the benefit of more protective regulation and there is reasonable assurance that the client is capable of understanding the risks involved. This may, however, only be assumed if the client passes at least two of the three following tests:

- the client has over the previous four quarters carried out an average of 10 transactions of significant size on the relevant market;
- the client has a financial instrument portfolio, including cash deposits and financial instruments, exceeding €500,000; and
- the client has substantial professional experience, namely, works or has worked for at least one year in a professional position in the financial sector, which requires knowledge of the envisaged transactions or services.

Furthermore, Liechtenstein law in the field of collective investment, specifically in the AIFMG and IUG, distinguishes between types of

clients, in particular between professional investors, private investors and qualified investors.

**20 What are the consequences of client segmentation?**

The primary consequence of the client segmentation is the applicable level of investor protection. In particular the duties with regard to information and counselling are lighter when dealing with professional clients. Those duties, however, also depend on the specific services provided. In the law on collective investment specific products are only available for qualified investors. In particular CIS subject to the IUG, which may be used for wealth management purposes and offer a somewhat lighter regulatory environment, are only available for qualified investors.

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

General consumer protection legislation, such as the Liechtenstein KSchG, may be applicable to financial services. With regard to the distance marketing of financial services to consumers, the law regarding distance marketing of consumer financial services (FernFinG) specifically applies.

**Exchange controls and withdrawals**

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

Not applicable.

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

Under specific circumstances, the FMA may impose such restrictions. Banks may impose such restrictions or demand an advance notice if larger amounts are withdrawn. In particular, banks may refuse incoming and outgoing cash payments of a higher amount (eg, 10,000 Swiss francs) in specific cases.

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

See question 23.

**Cross-border services**

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

Banks and wealth management institutions from the EEA have access to the market in Liechtenstein based on the freedom to provide cross-border financial services upon receipt of a notification by the local regulator (passporting).

Banks and wealth management institutions from third countries (outside the EEA) providing private banking services into Liechtenstein on a cross-border basis must establish a Liechtenstein branch in order to actively approach clients in Liechtenstein. Without establishing a local branch, banks and wealth management institutions outside the EEA may only provide private banking services to clients in Liechtenstein on a reverse solicitation basis. However, the applicability of reverse solicitation is limited.

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

Yes. Banks and wealth management institutions outside the EEA providing banking services (eg, accepting deposits, lending, opening bank accounts) to clients in Liechtenstein on a cross-border basis require a banking licence. The only exception is reverse solicitation.

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

The provision of all cross-border wealth management, advisory and banking services provided for by law to Liechtenstein clients is regulated.

The regulation of cross-border services is stipulated in question 25.

### Update and trends

In the private banking sector in Liechtenstein, the transposition of Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, as well as the implementation of Directive 2014/65 on markets in financial instruments, are the most relevant recent developments. With regard to Directive 2015/2366 on payment services in the internal market, the transposition process has already been initiated and it is anticipated that the respective national provisions will enter into force in mid-2019.

Based on the belief that fintechs will be of growing importance in the future, Liechtenstein has positioned itself as a fintech-friendly jurisdiction, both pioneering and shaping the legal and technical development in this area of finance. The most important drivers of this development are the successful entrepreneurs and projects already located in Liechtenstein, the communities and experience they have created, and the small size of the country, which allows the Principality to react quickly to innovations, take the relevant regulatory measures and provide easy access to regulatory authorities. Furthermore, a Liechtenstein bank has already positioned itself in connection with the safe-keeping of cryptocurrencies internationally.

### 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?

If the licensing or notification requirements mentioned in question 25 are complied with, employees of foreign private banking institutions may travel to meet clients and prospective clients in Liechtenstein.

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

If the licensing or notification requirements mentioned in question 25 are complied with, employees of foreign private banking institutions may send documents to clients and prospective clients in Liechtenstein.

### Tax disclosure and reporting

### 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?

If the private banking account is subject to taxation in Liechtenstein, individual taxpayers are obliged to disclose domestic and foreign private banking accounts to the Tax Authority.

### 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?

Financial intermediaries are not subject to tax reporting requirements to the Tax Authority in respect of their domestic and international clients. However, financial intermediaries may be obliged to report on the grounds of anti-money laundering suspicion.

### 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?

Not applicable.

### 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.

Liechtenstein has strong international connections from both business and legal perspectives. The legal system offers a broad range of structuring possibilities that are attractive to clients from different jurisdictions. Besides corporate vehicles for wealth management purposes, commonly known in central European jurisdictions, Liechtenstein law

offers several vehicles, which are tailored with regard to wealth management purposes. Liechtenstein thus has a very expedient and viable foundation law as well as its own trust law, which dates back to 1926.

Most commonly used structures for private wealth management purposes in Liechtenstein are the Liechtenstein foundation (Stiftung), the Liechtenstein trust and other corporate vehicles such as the Liechtenstein establishment (Anstalt). In addition, investment funds (private label funds) and insurance products are commonly used for wealth management purposes. The benefits and risks of each structuring option depend strongly on the objectives pursued. The foundation and the trust, however, both offer specific advantages with regard to asset protection purposes, if structured accordingly.

### 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?

With regard to anti-money laundering and financial crime prevention, see question 15.

Furthermore, Liechtenstein law stipulates KYC rules stemming from European financial regulation for consumer protection purposes. When providing investment advice or portfolio management services, service providers must inter alia inquire into the specific objectives, risk appetite and experience of the client.

### 35 What is the definition of controlling person in your jurisdiction?

Within the meaning of the Liechtenstein due diligence law, control, both for corporations and foundations and trusts as well as foundation-like establishments is defined as the power to dispose of the assets of the legal entity, to amend the provisions governing its essential nature or to amend the beneficiaries. Control is also given if a person is able to influence the exercise of those aforementioned control powers.

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

Any structuring under Liechtenstein law must observe the requirements and formalities that the legislator imposes with regard to their establishment and maintenance in order to avoid personal liabilities or nullity. Any contract that violates a legal prohibition or that is contrary to accepted principles of morality is void. Other limits and obstacles, as well as structuring possibilities, depend on the specific situation as well as on the objective of the structure; for example, if a structure makes use of the Status of a Private Asset Structure (PVS) it may not carry out commercial activities. In general, it is advisable to consult a tax adviser to analyse the specific situation.

### Contract provisions

### 37 Describe the various types of private banking and wealth management contracts and their main features.

According to the principle of freedom of contract, Liechtenstein law does not provide for a concluding list of private banking and wealth management contracts. In practice, there are various types of private banking and wealth management contracts, such as asset management agreements and investment advisory agreements. Banks and wealth management institutions use general terms and conditions applicable to the private banking contracts with clients.

Private banking contracts often contain a choice of law clause. Liechtenstein law only provides for limited restrictions on the validity of the choice of law clause, but, especially for consumer protection reasons, such restrictions exist.

### 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?

Liability for a breach of private banking contract under Liechtenstein law is provided by civil law. Clients may claim from banks or wealth management institutions compensation for damages caused by wilful or negligent breach of private banking contracts. The extent of the claim for damages depends on the fault (wilful or negligent). In the case of claiming damages by breach of contract, banks and wealth

management institutions are required to prove that there is neither wilful nor negligent causation of damages. The liability of banks or wealth management institutions against consumers may only be excluded in the event of slight negligence behaviour. But also in other cases, the exclusion of liability for wilful or gross negligence behaviour might not be valid.

**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?**

Wealth management institutions are obliged to conclude a written agreement with clients on the rights and obligations and other conditions, especially on the type of investments, extent of authorisation for portfolio management and remuneration of wealth management institution (article 18 of the Asset Management Act).

Disclosure obligations may arise with respect to specific wealth management services, such as the provision of investment advice, for client protection reasons.

**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 limitation period for claims for damages under a private banking or wealth management contract is three years from the date of knowledge of the damage and the party causing the damage. The limitation period will be extended to 30 years in the case of specific criminal behaviour.

The waiver of the limitation period is not possible in advance – only under specific conditions upon the occurrence of damages.

### Confidentiality

**41 Describe the private banking confidentiality obligations.**

Liechtenstein Banks and other financial intermediaries are subject to the Liechtenstein data protection legislation. Furthermore, there is specifically stipulated banking secrecy that prevents the passing on of information that was obtained due to a banking relationship and a specific protection of trustee secrecy. Duties of confidentiality may also stem from the contract between service provider and client.

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

All information that banks and their employees are entrusted with or otherwise obtain due to the business relationship with a client are subject to the specifically stipulated banking secrecy provisions.

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

The fulfilment of a legal obligation to provide information to third parties (eg, to give testimony or information to criminal courts and supervisory bodies as well as provisions regarding cooperation with other supervisory bodies), is not deemed to be a violation of banking secrecy. There is, however, no time limit with regard to banking secrecy.

**44 What is the liability for breach of confidentiality?**

The violation of secrecy obligations pursuant to the BankG is punishable by a term of imprisonment of up to three years. If damages are caused by the breach of confidentiality, civil liability may also be incurred.

### Disputes

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

Clients and financial intermediaries may contact the conciliation board in order to resolve disputes without the involvement of the court. The conciliation board promotes discussions between the involved parties, and submits a negotiated solution to the parties. The parties are not bound by the solutions proposed by the conciliation board. Thus, they are free to accept the proposed solution or initiate court proceedings.

Court proceedings between clients and financial intermediaries take place at the civil court. The ordinary civil procedure rules apply for these proceedings.

**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?**

A client may lodge a complaint with the local regulator in the event of a breach of supervisory legislation by the financial intermediary. The failure to comply with supervisory law may be punishable under criminal, administrative and civil law. However, disputes between clients and financial intermediaries under civil law are not subject to automatic disclosure to the local regulator.

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# Monaco

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## Private banking and wealth management

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

The main sources of law and regulation regarding private banking in Monaco are agreements with the European Union, French banking legislation and Monégasque legislation.

#### Agreements with the European Union

On the basis of the revised monetary agreement between the European Union and Monaco of 29 November 2011 (replacing the monetary agreement of 24 December 2001) the Principality of Monaco is entitled to use the euro as its official currency.

The Savings Directive, which since 2005 allowed tax administrations better access to information on private savers, was repealed on 10 November 2015. The repeal was adopted as a consequence of the adoption in December 2014 of Directive 2014/107/EU amending provisions on the mandatory automatic exchange of information between tax administrations. Directive 2014/107/EU implements the July 2014 OECD Global Standard on automatic exchange of financial account information within the European Union, with a scope covering not only interest income, but also dividends and other types of capital income, and the annual balance of the accounts producing such items of income. Directive 2014/107/EU entered into force on 1 January 2016.

#### French banking legislation

The Treaty between Monaco and France of 14 April 1945 on exchange control established the principle of the application in Monaco of some French banking regulations, and subsequent agreements in the form of exchanges of letters have defined the practical details.

The last agreement in the form of an exchange of letters on 20 October 2010 between the government of France and the government of Monaco on banking regulation provides that the legislation in force in France and the general regulations taken for its implementation concerning credit institutions are applicable in Monaco.

However, only a part of the French banking legislation and regulation concerning prudential requirements and organisation of credit institutions is applicable in Monaco.

Specific Monégasque legislation regulates financial services and the anti-money laundering system.

#### Monégasque legislation

Financial activities including discretionary asset management, reception and transmission of orders and advice and assistance in these matters are regulated by Monégasque Law 1,338 of 7 September 2007 on financial activities and by Sovereign Order 1,284 of 10 September 2007 implementing this act. Reception and transmission of orders and advice in investment activities are also regulated by Law 1.439, creating the multi-family office activity.

In addition, Monégasque Law No. 1,339 of 7 September 2007 concerns collective investment funds and investment funds and Sovereign Order 1,285 of 10 September 2007 implements this law and provides regulation with regard to investment funds.

Monégasque Law No. 1,314 of 29 June 2006 concerns the activity of safekeeping or administration of financial instruments and

Ministerial Order No. 2012-199 of 5 April 2012 relates to the professional obligations of credit institutions custody account-keepers.

The Principality of Monaco has developed its own anti-money laundering legislation, including Act 1,362 of 3 August 2009 on the fight against money laundering, terrorist financing and corruption and Sovereign Order 2,318 of 3 August 2009 setting the conditions for application of Act 1,362. Since the beginning of 2018, the Common Reporting Standard is also applicable in Monaco.

Finally, provisions of the Monégasque Civil and Commercial Codes are applicable to the relations of credit institutions and asset management companies with their clients.

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

Credit institutions in Monaco are licensed by the French Prudential Control and Resolution Authority (ACPR) for the banking services they render and by the Monégasque Supervisory Committee for Financial Activities (CCAF) regarding their financial activities including discretionary asset management, management of Monégasque funds, reception and transmission of orders, advice and assistance in these matters and management of foreign investment funds.

The main government, regulatory and self-regulatory bodies for private banking and wealth management are:

- the ACPR – French banking activities regulator responsible for granting and withdrawing licences for banking activities in Monaco and controlling Monégasque credit institutions;
- the CCAF – Monégasque financial activities regulator responsible for granting and withdrawing licences for financial activities in Monaco and controlling financial institutions;
- the Financial Circuits Information and Control Department (SICCFIN) – Monégasque anti-money laundering regulator; and
- the Supervisory Commission on Personal Data (CCIN) – Monégasque data privacy regulator.

The following authorities also exist in Monaco:

- the Office of Economic Expansion – Monégasque Company House;
- the Monégasque association for financial activities (AMAF), acting as the professional body for authorised institutions conducting banking or financial activities in the Principality of Monaco; and
- the Monégasque Association of Compliance Officers (AMCO), bringing together the compliance officers of Monégasque credit institutions and asset management companies.

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

Private wealth services are provided in Monaco by banks and asset management companies. Private wealth services are also provided by family offices, but to the sole extent that such services are offered for the sole benefit of the legal entities that control them, directly or indirectly, or of the legal entities that they control. Law 1.439 dated 2 December 2016 also extends the provisions of private wealth services to multi-family offices.

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

There is no legal definition of private banking.

We can consider that private banking may be defined as banking and financial services offered to high net worth individuals and including banking services, discretionary asset management, advice and assistance in discretionary asset management and reception and transmission of orders.

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

Monégasque regulations distinguish between financial activities on the one hand and banking services on the other. Banking services include the reception of reimbursable public funds, banking payment services and granting any form of credit.

In the answer to this question we will consider licensing requirements for banking services. Licensing requirements for financial activities will be discussed in question 11.

The ACPR is in charge of granting licences for banking activities to Monégasque credit institutions. To obtain a licence for banking activities the following requirements must be met:

- minimum amount of own funds equal to €5 million;
- programme of operations, technical and financial resources, organisation;
- identity and status of capital contributors, and where applicable of their guarantors, and the size of their holding;
- the activity must be effectively run by at least two people, whose knowledge, experience and fitness must be demonstrated, both individually and collectively, as must their availability; these persons should also meet the propriety requirements for their position;
- members of the governing body must meet knowledge, experience, fitness and propriety requirements, assessed both individually and collectively, and also satisfy the availability and propriety requirements for their position;
- managers of key functions must meet propriety, knowledge, experience and fitness requirements; and
- assets must exceed liabilities by an amount that is at least equal to the minimum capital requirement.

In addition, a Monégasque business authorisation is required and the entities carrying out banking operations in Monaco must comply with the requirements of the Monégasque law.

Finally, it should be noted that the Principality of Monaco is not a member of the European Economic Area; as a consequence, the provisions relating to the mutual recognition of authorisations are not applicable.

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

In this question we will consider banking licences. Ongoing conditions of licence for financial activities will be discussed in question 12.

If there are changes to the particulars taken into consideration when licensing a credit institution, the ACPR must be informed of this. In some cases, it will be necessary to obtain prior authorisation by mailing the ACPR General Secretariat a detailed application.

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

The only common form of organisation of a private bank is a Monégasque limited company (SAM) (except for branches). Private banks are, in Monaco, mainly subsidiaries of foreign banks.

Monégasque limited companies may only be incorporated with government authorisation by ministerial decree; their articles of association must be established by authentic deeds and approved by government.

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

After receiving a licence application, the Authorisation, Licensing and Regulation Division of the ACPR will review the request. Credit institution licences are issued by the ACPR.

The licensing decision must be taken within six months of receipt of a complete application.

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

In this question we will consider banking licences. Conditions for closure or withdrawal of licences for financial activities will be discussed in question 12.

A credit institution's licence may be withdrawn by the ACPR in the following cases:

- at the request of the credit institution; or
- automatically:
  - if the institution no longer meets the requirements or commitments on which its licence was conditional;
  - if the institution has not made use of its licence within a 12-month period; or
  - if the institution has not pursued its activity for at least six months.

Withdrawal will take effect:

- immediately if the ACPR believes that all the conditions set by the current regulations are satisfied;
- at the date when the conditions precedent set by the ACPR with respect to the dossier are lifted; or
- after a period to be determined by the ACPR and during which the institution must confine itself to run-off management of its regulated activities.

Prior to the licence withdrawal, at the request of the credit institution an application to withdraw the licence shall be submitted, in two copies, to the Authorisation, Licensing and Regulation Division of the ACPR.

#### 10 Is wealth management subject to supervision or licensing?

The following financial activities are subject to licensing by the CCAF:

- discretionary asset management, for third parties, of portfolios of securities and futures;
- the management of mutual funds and other Monégasque investment funds (covered by Monégasque Law 1,339 of 7 September 2007);
- reception and transmission of orders for third parties;
- giving advice and assistance in discretionary asset management, and reception and transmission of orders; and
- the management of foreign investment funds.

In addition, an administrative authorisation delivered by the Monégasque government according to the provisions of Law 1,144 of 26 July 1991 shall be obtained.

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

To obtain a licence for financial activities listed in question 10 a company shall be set up in the form of an SAM or such a licence may be issued to credit institutions having their headquarters in a foreign country and a branch in the Principality of Monaco.

The capital requirements for setting up a Monégasque limited company are as follows:

- €450,000 for discretionary portfolio management and management of foreign funds;
- €300,000 for reception and transmission of orders, for third parties, giving advice and assistance in discretionary asset management, management of Monaco funds and reception and transmission of orders; and
- €150,000 for the management of funds incorporated under Monégasque law up to €250 million in managed assets, then €40,000 supplementary for every €200 million of managed assets.

The licence application must be sent to the CCAF. The application file shall include documents relating to:

- the identity, status and quality of each contributor of capital;
- the premises where the activity will be carried out;
- the different activities in which the company intends to engage;
- the identity of at least two of the persons who effectively determine the company's policy and management;
- the total number of employees and a detailed organisation chart;
- any delegations to other organisations;

- the identity of intermediaries responsible for executing orders;
- the monitoring and management control procedures; and
- models of the mandates proposed to customers.

Companies intending to manage foreign funds must also provide information about the fund, the depositary and their clients.

The CCAF may ask the applicant for all additional information necessary for it to take its decision and will deliver its decision within six months of submission of a complete application.

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

Any modification to essential elements on which a licence for financial activities was granted must receive prior authorisation from the CCAF, particularly the scope of activities, shareholders and the executive directors.

The licensed company shall comply with the prudential rules: in particular, having an appropriate administrative and accounting organisation, and being structured and organised so as to restrict to a minimum any risk of conflicts of interest.

The company shall also comply with the rules of good conduct: in particular, it must act with loyalty and act fairly in the best interests of its clients and the integrity of the market, perform its business with due skill, care and diligence, ensure that the individuals placed under its authority have the appropriate qualifications and expertise and a sufficient level of knowledge, have the necessary resources and procedures, try to avoid conflicts of interests and, when they cannot be avoided, ensure that its clients are fairly treated, and refrain from any initiative whose object or effect might be to favour its own interests over those of its clients.

The company must join the AMAF to which an annual membership fee is payable.

Finally, the CCAF may order temporary suspension of the licence for a period not exceeding six months or final withdrawal of the licence if the authorised company:

- has not engaged in any notable activity for a period of 12 months without good reason or has expressly renounced its licence;
- no longer has sufficient resources or staff to pursue the activities to which the licence relates;
- has obtained its licence by means of false statements or by any other unlawful means;
- no longer fulfils the conditions on the basis of which the licence was issued;
- has materially and repeatedly failed to comply with the provisions of Law 1,338 of 7 September 2007 on financial activities or its implementing regulations; or
- is liable by pursuing its business to jeopardise its clients' interests.

## Anti-money laundering and financial crime prevention

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

The Principality of Monaco has developed its own anti-money laundering legislation by Act 1,362 of 3 August 2009 on the fight against money laundering, terrorist financing and corruption and Sovereign Order 2,318 of 3 August 2009. In July 2018, the Monegasque AML regulation was amended by Law 1.462, which adopts equivalent measures to EU Directive No. 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (known as the 4th AML Directive). An updated Sovereign Order will soon be published to summarise and complete some provisions of Law 1.462.

Among other entities, companies providing banking services and companies performing financial activities regulated by Monegasque Law 1,338 of 7 September 2007 are subject to the following anti-money laundering obligations.

#### The obligation to identify clients and due diligence

Companies carrying out banking and financial activities such as wealth management activities must, before forming business relations, identify clients as well as their agents and check the identity of each of these persons based on their ID documents. A copy of these

documents shall be kept. If the client is a legal person, a legal entity or a trust, the measures also (in addition to the collection of corporate documents) include the identification of the individual or individuals who, ultimately, own or control the client entity (the beneficial owner). Since the entry into force of Law 1.462 amending the former AML legislation, Monegasque registered companies have to transmit information concerning their beneficial owner to the Minister of State. This information will be compiled in a beneficiary ownership register accessible to the Monegasque AML regulator, the Monegasque Courts and the Monegasque tax administration. The register can also be consulted by credit institutions, asset management companies and any person with a legitimate interest in a few cases that are to be determined in the upcoming Sovereign Ordinance.

As part of the obligation of identification, credit institutions and asset managers shall also identify the client's economic background. On this basis, banking and asset management companies are to exercise constant due diligence on the transactions undertaken throughout the course of the relationship with the client. Any unusual or complex operations are to be subject to a deeper and documented analysis. The due diligence obligation also requires the keeping of updated identification documents of the client. The due diligence obligations are greater for politically exposed persons (PEPs) (see question 14).

The obligation of identification also covers the transfers of funds for companies that execute wire transfers (ie, credit institutions). In this regard, the fund transferor and the beneficiary of the transfer shall be identified by the bank.

#### Obligations concerning internal organisation

Banks and asset management companies shall implement organisational procedures and control measures to effectively comply with the Monegasque AML legislation. Companies are required to keep a copy of all substantiating documents used for their identification for at least five years after ending relations with regular or occasional clients.

Companies shall take appropriate measures to train their employees and designate one or several persons to be responsible for the application of Act 1,362 of 3 August 2009, amended, on the fight against money laundering, terrorist financing and corruption. Procedures must also be in place to enable employees to warn internally of any breach of the AML obligations.

Also, the new AML Law 1.462 dated 28 June 2018 contains new provisions enabling (subject to several conditions) Monegasque banks and asset management companies to exchange information with their group for organising the fight against terrorism, money laundering and corruption only.

#### Declaration of suspicion

Companies carrying out banking and financial activities are required to declare to the SICCFIN all sums held in their accounts and all operations that might be related to money laundering, terrorist financing or corruption. This declaration, made on the basis of reasonable grounds to suspect, must be submitted in writing, where possible, before the operation is carried out, and must give details of the facts that constitute evidence upon which the said companies have based the declaration.

A declaration made in good faith may not be subject to prosecution on the basis of violation of professional secrecy. No civil liability action may be initiated and no professional sanction pronounced against the company, its directors or authorised employees who make such a declaration in good faith.

### 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?

Sovereign Order 2,318 of 3 August 2009 (which is expected to be amended shortly) provides a definition of a PEP as follows:

Persons who hold, or during the last three years have held, prominent public functions in a foreign country shall be considered as politically exposed, whether they are clients, beneficial owners or proxies, such as, in particular:

- heads of state;
- members of governments;
- members of Parliament;

- members of Supreme Courts, Constitutional Courts or other high-level judicial bodies whose decisions are not subject to further appeal except in exceptional circumstances;
- the leaders and senior officials of political parties;
- the members of courts of auditors and the boards of central banks;
- ambassadors, advisers and high-ranking officers in the armed forces;
- members of the administrative, management or supervisory bodies of state-owned enterprises; and
- senior politicians and high-ranking civil servants of international or supranational organisations.

The spouses and direct ascendants or descendants of these persons must be treated as if they themselves were PEPs.

Persons known to be close associates of any of the persons referred to above must also be considered as PEPs and in particular:

- any natural person who is known to have joint beneficial ownership of a legal person or legal entity or any other close business relations with them; and
- any natural person who has sole beneficial ownership of a legal person or legal entity known to have been set up de facto for the benefit of one of the persons mentioned above.

The due diligence obligations pertaining to PEP are greater. If PEPs wish to enter into business relations with professionals or contact them to perform occasional operations, the acceptance of these clients shall be subject to a particular examination and must be decided at an appropriate level of hierarchy. The said acceptance requires the taking of all appropriate measures in order to establish the origin of their assets as well as that of funds that are or will be employed in the business relations or in the occasional operation contemplated.

Professionals who maintain business relations with PEPs are required to monitor them closely on an ongoing basis. Due diligence measures shall also apply when it later transpires that an existing client is or has become a PEP.

These measures of due diligence shall apply whether PEPs are clients, beneficial owners or proxies.

#### **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.**

When identifying clients who are natural persons, the verification of their identity must be carried out in their presence using a valid official document bearing their photograph.

If the client's address is not mentioned on the substantiating documents presented, or in the event of doubt as to the exactitude of the address mentioned, the professional is required to check this information using another document that is likely to prove their real address (eg, water, gas, electricity bills) and of which a copy shall be retained.

For legal entities and trusts, identification and verification concerns the corporate name, the registered office, the list of directors and the knowledge of the provisions governing the power to incur the liability of the legal person or trust. Identification also concerns the purpose and nature of the contemplated business relations and the effective beneficiary of the legal entities. In the latter case, the identification measures shall aim at understanding the ownership structure and control of the legal entity.

For more details regarding the identification documentation required to establish a private banking relationship with a structure, see question 34.

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

Tax offences would be included in the categories of offences covered by money laundering provisions in Monaco only if punishable by more than three years' imprisonment in Monaco.

In Monaco, the money laundering offence is covered by article 218 of Monaco's Criminal Code, which provides that any person who knowingly, in any manner whatsoever, for him or herself or for another person, acquires movable or real assets by directly or indirectly using assets or funds of unlawful origin or knowingly possesses or uses such

assets, and any person who knowingly assists any transaction to transfer, invest, conceal or convert assets or funds of unlawful origin shall be liable to five to 10 years' imprisonment.

Assets and funds of unlawful origin are deemed to be the proceeds of offences punishable in Monégasque law by more than three years' imprisonment as well as the proceeds of some other offences punishable by inferior penalties. Monaco's definition of money laundering covers all categories of predicate offences designated by the FATF in its glossary of 40 Recommendations.

The offences referred to in article 218 of the Criminal Code shall be constituted even though the offence from which the laundered funds derive has been committed in another country if it is punishable in Monaco and in the state where it has been perpetrated.

Finally, in Monaco, the law provides penalties for any person who, in disregard of his or her professional obligations, provides assistance with any transfer, investment, concealment or conversion of assets or funds of unlawful origin.

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

To date, none from a legal AML perspective. In practice, banks and asset management companies mention in general terms and conditions their clients undertaking to provide justifications of their tax status. Furthermore, in accordance with the Common Reporting Standard, enforceable in Monaco since early 2018, private banks are required to identify the tax residence of their clients. For that purpose, each natural person must certify his or her tax residence in order to open an account in Monaco.

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

Violation of money laundering or financial crime rules can be punished either by administrative sanctions or criminal penalties.

Regarding administrative sanctions, a warning may be delivered to the obliged entities by a decision of the Monégasque Minister of State.

In a case of serious infringement of the obligations provided by Law 1.362, the Minister of State is empowered to take the following administrative sanctions, which can be published in the Monégasque Official Journal:

- a reprimand;
- a pecuniary penalty that cannot exceed €1 million and €5 million or 10 per cent of the annual turnover for certain obliged entities (banks, asset management companies and insurance companies);
- a prohibition against carrying out certain operations;
- temporary suspension of their authorisation to exercise their profession; or
- the withdrawal of their authorisation.

Administrative sanctions can also be taken against directors or employees of the obliged entities in case of direct and personal liabilities.

In some cases provided by the amended Law 1.462, the violation of the rules aimed at fighting against money laundering, terrorist financing and corruption can constitute crimes punishable by imprisonment or fines.

#### **Client segmentation and protection**

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

Sovereign Order 1,285 of 10 September 2007 implementing Act No. 1,339 of 7 September 2007 concerning collective investment funds and investment funds provides in article 47 a definition of 'sophisticated investor', which is a person or entity sufficiently experienced to assess the merits, risk and liquidity characteristics of financial investments. The minimum initial investment in a fund reserved for sophisticated investors is €10,000.

Moreover, article 48 of Sovereign Order 1,285 of 10 September 2007 provides a definition of professional investors deemed to be sophisticated investors.

This legal distinction among clients only relates to collective investment funds.

Furthermore, in the light of Sovereign Order 1,284 and the definition set out in Sovereign Order 1,285, Monégasque case law considers that whatever the financial activity, a credit institution or a financial institution is under a general obligation to inform and provide guidance to its clients.

The content of this general information would depend on the type of client, sophisticated or not.

#### **20 What are the consequences of client segmentation?**

Client segmentation provided in Sovereign Order 1,285 of 10 September 2007 implementing Act No. 1,339 of 7 September 2007 concerning collective investment funds and investment funds relates to the possibility to invest in different types of fund. Some funds may be restricted to sophisticated or professional investors.

The obligation provided in Sovereign Order 1,284 of 10 September 2007 to enquire about clients' financial situation, investment experience and objectives sets out the exact scope of the informational and warning duties due to the client for the contemplated transactions.

Besides, as stated in question 19, the general obligation set out by Monégasque case law requires banks to enquire about clients' investment experience and inform them about the risks relating to the contemplated transactions. The content of the delivered information is, in this respect, subject to the type of client, the obligation being alleviated when the client is a sophisticated investor.

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

There is no specific consumer legislation in Monaco.

However, regarding clients' protection in private banking, professionals have a duty of information and in some cases duty to warn the client about risks related to the contemplated transaction.

For wealth management activities, Law 1,338 dated 7 September 2007 and Sovereign Order 1,284 dated 10 September 2007 offer protective provisions for clients. In this regard, prior to entering into wealth management contracts with the client, the private bank or asset manager shall enquire about the client's objectives, experience in investment and financial situation.

In addition, since the adoption of Law 1,448 dated 7 July 2017, non-professional Monégasque residents benefit from a jurisdictional privilege in some cases. Under this privilege and notwithstanding any exclusive jurisdiction clause, non-professional Monégasque residents are granted a right to seize the Monégasque Courts. In accordance with the aforementioned law, foreign consumer protection provisions can be applied if the Monégasque bank directs its activities in a foreign country to contract with such a consumer.

#### **Exchange controls and withdrawals**

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

There are no exchange controls in Monaco.

Concerning restrictions on cross-border transport of cash and bearer instruments, all individuals entering or leaving the territory of Monaco in possession of cash or bearer instruments whose total amount is more than €10,000 must, on request from the Police Commission, make a declaration using the form established for this purpose. This amount may be modified by the Sovereign Order to be adopted shortly.

Finally, regarding cash payments, the retail sale price of an article whose total value reaches or exceeds an amount of €30,000 may not be paid in cash.

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

There is no restriction on cash withdrawals imposed by law.

In the case of a transaction that appears complicated or unusual, particularly a cash transaction, all banking institutions have a regulatory duty to obtain relevant information and supporting documents concerning the transaction from their clients and to ascertain the source and destination of the funds.

Banks usually impose contractual restrictions on account withdrawals in general conditions or in account agreements with clients.

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

No, except for contractual restrictions, if any.

#### **Cross-border services**

##### **25 What is the general framework dealing with cross-border private banking services into your jurisdiction?**

Concerning banking operations, the French banking restrictions (banking monopoly) apply in Monaco according to treaties between France and Monaco. Banking operations include the receipt of repayable funds from the public, credit operations and banking payment services. Banking operations cannot be conducted in Monaco by a non-authorised entity due to the principle of banking monopoly.

Financial activities (defined in question 10) in Monaco are subject to obtaining a licence from the CCAF.

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

To provide banking services in Monaco a banking licence from the ACPR is required and to provide financial activities in Monaco a licence from the CCAF is required. An additional authorisation from the Minister of State shall also be obtained.

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

See questions 25 and 26.

##### **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 banking institutions may travel to Monaco to meet clients and prospective clients at their request only, and subject to not performing in Monaco any activity considered as banking or financial activity (eg, investment advice). This is to be construed very strictly.

In addition, Monégasque Law No. 1,144 of 26 July 1991 provides that any commercial activity conducted in Monaco requires a business authorisation from the Minister of State.

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

Sending documents relating to banking or regulated financial activities in Monaco and their acceptance by clients or prospective clients in Monaco may be considered as the conclusion of underlying operations in Monaco and therefore may fall under the banking monopoly or financial activities licence requirements. It will be analysed on a case-by-case basis.

#### **Tax disclosure and reporting**

##### **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?**

To date, there are none.

##### **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?**

Reporting requirements leading to a state-to-state exchange of information are imposed according to the following procedures:

- exchange on request, where a requesting state, on the basis of a bilateral agreement, makes a formal request to Monaco. Such a procedure must meet substantive and procedural requirements. Clients are informed by Monaco and may litigate Monaco's decision to exchange information, as the case may be;
- voluntary exchange is a unilateral decision made by Monaco under some specific circumstances. On 13 October 2014 Monaco signed the Convention on Mutual Administrative Assistance in Tax Matters; and



- automatic exchange: the new automatic exchange of information standard issued by the OECD is effective in Monaco as from early 2018.

Within the framework of the Common Reporting Standard, Monégasque financial institutions are required to collect information on their clients annually.

The collecting operations started on 1 January 2017. The above-mentioned institutions have until 30 June of each year to disclose the collected information regarding the previous calendar year.

The Monégasque tax department, in turn, has until 30 September of each year to disclose to the relevant foreign tax authorities the information collected.

The first annual disclosure will occur for both financial institutions and the Monégasque tax department in 2018 for the information collected in 2017 (ie, before 30 June 2018 for the financial institutions and before 30 September 2018 for the Monégasque tax department).

### 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?

Client consent is not required. The client may challenge Monaco's decision to exchange information before a specific chamber of the Monégasque Court of First Instance only if the exchange of information is made on request.

## 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.

Private assets are commonly held either directly by the clients or through Monégasque civil companies, trusts or foreign foundations.

### 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?

When identifying clients that are legal persons, verification must be carried out using the following documents:

- the original, or an authenticated or certified copy, of a deed or extract from an official register giving the name, legal form and registered office of the legal person;
- the articles of association of the legal person;
- any substantiating documents allowing the list of directors to be established; and
- in case of legal representation of the legal person, any document certifying the power of attorney of the company representative.

Professionals must also understand the economic background of the legal person as well as its structure of ownership and control.

When identifying clients that are legal entities or trusts, professionals should familiarise themselves with the existence, nature, purpose and means of management and representation of the legal entity or trust concerned. This identification also includes familiarity with and verification of the list of persons authorised to administer or represent these clients. Professionals must also understand the structure of ownership and control of the legal entity or trust.

Professionals are to check this information using substantiating documents in written form. For that purpose, a copy of the relevant documents shall be kept.

If the client is a legal entity or trust, the obligations to identify the client will be extended to the identification of the beneficial owner of the legal structure. The effective beneficiary is defined as the natural person who ultimately controls the client or for whom the transaction or the activity is carried out.

### 35 What is the definition of controlling person in your jurisdiction?

There is no legal definition of controlling person per se.

Anti-money laundering legislation provides a definition of the beneficiary owner as being the individual or individuals who, ultimately,

## Update and trends

The Monégasque Parliament voted for new Monégasque AML legislation in June 2018. This new AML legislation amends the existing legislation and aligns Monégasque AML regulation with the provisions of the 4th AML EU directive of 20 May 2015. This amended regulation is expected to be completed soon by a Sovereign Order that will summarise and clarify several provisions of this text.

With regard to fintech, a draft bill to frame blockchain technology in Monaco is under discussion in the Monégasque Parliament. This draft bill proposes a secure and unencumbered framework for private bankers and asset managers (among others) to implement blockchain technology in their banking and wealth management activities.

own or control the entity. The forthcoming Sovereign Order will provide for more details on the notion of controlling person.

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

There are no regulatory or tax obstacles to the use of structures to hold private assets.

## Contract provisions

### 37 Describe the various types of private banking and wealth management contracts and their main features.

Private banking contracts include management mandates, advisory agreements, securities account agreements, account agreements and mandates for transmission of orders.

By a management mandate a client gives to the asset management company the authority to administer, on his or her behalf and for his or her account, his or her assets in currency and financial instruments. The asset management company will take all investment decisions without having to consult the client and without obtaining his or her prior approval to any decision to invest.

An advisory mandate allows the client to receive personalised investment recommendations and advice based on his or her profile of risk and desired investments against payment by the client of an advisory fee.

Clients shall deposit the funds or securities to be managed with a credit institution, which will have custody of the securities, keep the cash and securities account and keep accounts of transactions on the various markets.

Mandates for transmission of orders provide terms and conditions for transmitting orders.

The parties may choose the governing law subject to respecting mandatory provisions of Monégasque law. In practice, Monégasque law is usually chosen as the governing law in private banking contracts concluded in Monaco. It should also be noted that where a banking or wealth management activity is directed in a foreign activity, the chosen governing law cannot be in contradiction with the consumer protection rules of the foreign country in which the client is domiciled. A few exceptions are nevertheless provided by article 70 of the Monégasque International Code.

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

Financial institutions have an information and advice obligation towards their clients. However, it is an obligation of means.

According to case law, courts consider on a case-by-case basis the failure of a private bank regarding its obligations of vigilance, information and advice.

Regarding the vigilance obligation, financial institutions shall detect the apparent abnormalities affecting account activity.

Concerning the advice obligation, this obligation may be lightened in the case of a well-informed client or if the client expressly accepted the risks related to the contemplated transaction.

Private banking contracts usually provide a period of between one and six months for contesting operations. Expiry of this period does not prevent the client from contesting the operations, but shifts the burden of proof onto the client rather than the financial institution.

Contractual limitation of responsibility, if any, will not be applicable in the case of gross negligence of the financial institution. Moreover, in the event of litigation the court will decide on a case-by-case basis upon the application of the contractual limitation of responsibility.

In the case of management mandate or mandate for transmission of orders, the financial institution shall be responsible if it has acted outside of its mandate.

Finally, concerning account agreements, the depository credit institution shall not be responsible for negotiations carried out on its clients' behalf by the asset management company.

**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?**

A management mandate shall set out the service provider's obligations with regard to the client. The agreements shall be drawn up in duplicate and signed by the client and the company. One copy shall be provided to the client.

Before the client signs the agreement, the company must make enquiries about the client's objectives, investment experience and financial situation. The proposed services must be adapted to the client's financial situation. The authorised company shall provide the client with all relevant information.

The mandate shall include at least the following information:

- the management objectives;
- the classes of financial instrument that the portfolio may contain;
- procedures for informing clients about the management of their portfolios;
- the method for compensating the company; and
- the term of the mandate and the conditions for renewing or terminating it.

Where the mandate allows leveraged transactions, the client's express consent must be given in a special agreement that indicates the conditions under which such transactions are to be carried out and how the client is to be informed of them. The mandate must state the risks inherent in certain transactions.

Concerning accounts agreements, the parties must sign a written agreement in order to open an account. The depository credit institution shall not accept deposits or withdrawals of funds or securities on the asset management company's initiative unless the client has issued a special power of attorney in writing, renewable for each transaction.

Concerning the reception and transmission of orders, any authorised company mandated to transmit orders with a view to their execution on financial markets by an intermediary authorised to take part in trading must be able to furnish proof that each order has been given by the client. Authorised companies must inform their clients of the conditions for transmitting orders.

**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 general limitation period for civil claims in Monaco is five years as from 21 December 2013. A special limitation period is also provided for the claims of professionals against their clients for the services they render.

Private banking contracts usually provide between one and six months for contesting operations. Expiry of this period does not prevent the client from suing in court, but shifts the burden of proof concerning litigious operations onto the client rather than the financial institution.

**Confidentiality**

**41 Describe the private banking confidentiality obligations.**

Managers and employees of financial institutions operating in Monaco are bound by the rules of professional secrecy. A breach of these rules may be prosecuted under the provisions of article 308 of the Criminal Code.

This commitment is designed to protect clients' interests and create the confidence required for the banking and financial sector to operate effectively.

In their relationships with depositors and borrowers, banks obtain extensive information on clients' financial status, business affairs and private lives. All of this information is protected by professional secrecy, as is the very existence of a bank account and all of the transactions made to it, particularly those involving asset management.

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

The scope of confidentiality covers all information regarding operations carried out on the accounts, the existence of accounts in the name of a person and the nature of these accounts, and the identity of agents or guarantors, as well as information relating to business secrets or privacy.

Precise and non-public information, collected in the privacy of professional relationships with clients, is covered by professional secrecy.

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

As in all countries with an organised financial system, professional secrecy does not apply to information requested by the financial industry's supervisory and money laundering authorities, which themselves are bound by secrecy rules, or by local legal authorities involved in a criminal investigation.

Pursuant to the 1963 tax treaty between France and Monaco, the other exception to professional secrecy concerns persons with France as their fiscal domicile.

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**44 What is the liability for breach of confidentiality?**

Article 308 of the Criminal Code provides that any person who, by his or her position or profession, is the depositary of the secret entrusted to him or her, and who discloses that secret, other than in cases where the law obliges or permits him or her to do so, shall be punished by six months to one year's imprisonment and by a fine from €8,000 to €18,000, or one of these penalties.

In addition, the client may sue the company with a civil claim for damages relating to violation of professional secrecy.

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**Disputes**

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

Monégasque ordinary courts are competent for disputes in the private banking industry.

Monégasque ordinary courts include the First Instance Court, the Court of Appeal and the Court of Revision.

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**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 not subject to disclosure to the local regulator. However, clients may lodge a complaint with the CCAF regarding financial activities and with the ACPR concerning banking operations.

# Singapore

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## Private banking and wealth management

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

The conduct of banking business (defined to include receiving money on current or deposit accounts, paying and collecting cheques, and making of advances) in Singapore is regulated and subject to the licensing requirement under the Banking Act, Chapter 19 of Singapore (the Banking Act).

Merchant banks operate within the Guidelines for Operation of Merchant Banks issued by the Monetary Authority of Singapore (MAS) and are approved financial institutions under the Monetary Authority of Singapore Act, Chapter 186 of Singapore (the MAS Act).

The conduct of fund management in Singapore is separately regulated under the Securities and Futures Act, Chapter 289 of Singapore (SFA). A corporation that carries on business in fund management would need to either hold a capital markets services licence (CMSL) in fund management or be registered with the MAS as a registered fund management company (RFMC), unless otherwise exempt. RFMCs are limited to servicing a maximum of 30 qualified investors (of which no more than 15 may be funds or limited partnership fund structures) and managing up to S\$250 million in assets under management. Qualified investors refer broadly to accredited investors (ie, high net worth persons), institutional investors or a fund or limited partnership whose underlying investors or limited partners are all accredited and institutional investors. Licensed banks and merchant banks are exempt from the requirement to hold a CMSL in fund management provided they file the relevant notifications with the MAS.

The MAS also issues notices, guidelines, circulars and other written directions that apply to banks, merchant banks, CMSL holders and RFMCs, which are available on the MAS website.

In addition to the above, the Private Banking Code of Conduct (Code of Conduct) issued by the Association of Banks in Singapore (ABS) sets out the standards of good practice on competency and market conduct expected of financial institutions that provide financial services to high net worth individuals (HNWIs).

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

The MAS is Singapore's central bank and financial regulatory authority, and it administers the SFA, the Financial Advisers Act, Chapter 110 of Singapore (FAA), the Banking Act and the MAS Act. Separately, the ABS is a non-profit organisation that represents the interests of the commercial and investment banking community.

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

Private wealth services in Singapore are provided by a variety of financial institutions including banks, merchant banks and fund management companies (FMCs).

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

There is no legal definition of private banking business.

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

A bank incorporated in Singapore is required to maintain paid-up capital and capital funds of at least S\$1,500 million; however, a Singapore-incorporated wholesale bank is only required to maintain paid-up capital of S\$100 million. A bank incorporated outside Singapore is required to maintain head office capital funds of at least S\$200 million. Licensed banks are also required to comply with risk-based capital requirements as well as other regulatory capital requirements imposed by the MAS. Key personnel, including the chief executive officer, deputy chief executive officer and the head of treasury of a bank, are also required to fulfil the fit and proper criteria in the MAS' Guidelines on Fit and Proper Criteria.

A merchant bank incorporated in Singapore is required to maintain paid-up capital and capital funds of at least S\$15 million at all times, while a merchant bank whose head office is situated outside Singapore is required to maintain net head office funds of not less than S\$15 million at all times. Merchant banks are also required to comply with risk-based capital requirements as well as other regulatory capital requirements imposed by the MAS. Key personnel, including the chief executive officer, deputy chief executive officer and the head of treasury of a merchant bank, are also required to fulfil the fit and proper criteria in the MAS' Guidelines on Fit and Proper Criteria.

The base capital requirement that applies in respect of fund management depends on the target clientele of the FMC. FMCs that carry out fund management in respect of any collective investment scheme (CIS) offered to any investor other than an accredited or institutional investor are required to maintain a base capital of S\$1 million. FMCs that carry out fund management (non-CIS) on behalf of any customer other than an accredited or institutional investor are required to maintain a base capital of S\$500,000. FMCs that carry out fund management solely as a venture capital fund manager are not subject to base capital requirements. FMCs that carry out fund management in all other cases (including RFMCs) are required to maintain a base capital of S\$250,000. CMSL holders for fund management (excluding venture capital fund managers) are also required to comply with risk-based capital requirements imposed by the MAS. The shareholders, directors, representatives and employees, as well as the FMC itself, are also required to fulfil the fit and proper criteria in the MAS' Guidelines on Fit and Proper Criteria. There are also, among other things, minimum competency requirements (eg, minimum number of appointed representatives) and compliance arrangements that apply to FMCs as set out in the MAS' Guidelines on Licensing, Registration and Conduct of Business for Fund Management Companies.

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

Licensed banks are required to comply with the ongoing compliance requirements under the Banking Act and the subsidiary legislation promulgated thereunder, as well as the notices and guidelines issued by the MAS. These include complying with restrictions on prohibited businesses, banking secrecy obligations, restrictions on the grant of loans and limitations on exposures, as well as regulatory filing obligations. Banks are also required to comply with the anti-money laundering obligations prescribed under MAS Notice 626 on Prevention of Money Laundering and Countering the Financing of Terrorism – Banks.

As mentioned above, merchant banks operate within the Guidelines for Operation of Merchant Banks. Accordingly, merchant banks may only conduct the activities specified in the Guidelines, and are not permitted to accept deposits or borrow from the public in any form in Singapore dollars except from banks, finance companies, shareholders and companies controlled by shareholders. A merchant bank may, however, with the MAS' approval, establish and operate an Asian currency unit which can conduct non-Singapore dollar denominated banking business. Merchant banks are also required to comply with the ongoing compliance requirements under the notices and guidelines issued by the MAS. Similar to banks, this includes complying with obligations relating to banking secrecy, restrictions on the grant of loans and limitations on exposures, as well as regulatory filing obligations. Merchant banks are also required to comply with the anti-money laundering obligations prescribed under MAS Notice 1014 on Prevention of Money Laundering and Countering the Financing of Terrorism – Merchant Banks.

FMCs are required to comply with the ongoing compliance requirements under the SFA and the subsidiary legislation promulgated thereunder, as well as the notices and guidelines issued by the MAS. These include ensuring that assets under management are subject to independent custody and independent valuation and customer reporting, mitigating conflicts of interest and ensuring adequate disclosures to customers, as well as regulatory filing obligations (but venture capital fund managers are not subject to certain regulatory requirements that are imposed on other FMCs). An RFMC is also required to monitor the size of the assets being managed to ensure that it adheres to the limit of S\$250 million in assets under management. FMCs are also required to comply with the anti-money laundering obligations prescribed under the MAS Notice to Capital Markets Intermediaries on Prevention of Money Laundering and Countering the Financing of Terrorism. Separately, banks and merchant banks that have invoked the licensing exemption to carry on fund management as exempt persons are also subject to certain ongoing compliance requirements under the SFA by virtue of regulation 54 of the Securities and Futures (Licensing and Conduct of Business) Regulations. These include appointing its staff as representatives for fund management under the representative notification framework and ensuring that they comply with the Notice on Minimum Entry and Examination Requirements for Representatives of Holders of Capital Markets Services licence and Exempt Financial Institutions under the SFA.

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

Private banks in Singapore are commonly banks or merchant banks, and include local banks as well as subsidiaries and branches of foreign banks.

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

As a rough estimate, it will take about 12 to 18 months to obtain a bank licence or approval to establish and operate a merchant bank.

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

The MAS has wide powers to revoke the licence of a bank or CMSL holder (as the case may be) on various grounds specified under section 20 of the Banking Act and section 95 of the SFA respectively, including where the licence holder contravenes a provision of the relevant act. The MAS may similarly withdraw the status of an RFMC on various grounds specified under section 99(6) of the SFA, including where the RFMC contravenes any provision of the SFA. The MAS may also withdraw approval of a merchant bank under the MAS Act if, among other things, it is in the public interest to do so.

### 10 Is wealth management subject to supervision or licensing?

Yes – see question 1. Fund management is a licensable activity under the SFA and is defined to mean the undertaking on behalf of a customer (whether on a discretionary authority granted by the customer or otherwise) of (i) the management of a portfolio of securities or futures contracts; or (ii) foreign exchange trading or leveraged foreign exchange trading for the purpose of managing the customer's funds. Upcoming legislative amendments will refine the definitions of regulated activities under the SFA, including fund management – see 'Update and trends'.

There is a separate licensing requirement for the provision of financial advisory services under the FAA, which is defined to include, inter alia, advising others, either directly or through publications or writings, concerning any investment product. CMSL holders, banks and merchant banks are exempt from the FAA licensing requirement provided they file the relevant notifications with the MAS.

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

See question 5.

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

See question 6.

## Anti-money laundering and financial crime prevention

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

The main legislative acts to combat money laundering and financial crime are:

- the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, Chapter 65A of Singapore (CDSA), which criminalises the laundering of proceeds derived from more than 400 drug dealing and other serious offences; and
- the Terrorism (Suppression of Financing) Act, Chapter 325 of Singapore (TSOFA), which criminalises terrorism financing.

The CDSA makes it mandatory for a person, in the course of his or her business or employment, to lodge a suspicious transaction report (STR) if he or she knows or has reason to suspect that any property may be connected to criminal activity. The TSOFA also imposes a duty to provide information pertaining to terrorism financing to the police.

In addition, the MAS has issued separate notices and guidelines on money laundering and terrorism financing to financial institutions. In particular, the MAS has issued notices and guidelines to, among others:

- banks (MAS Notice 626 and Guidelines to MAS Notice 626);
- merchant banks (MAS Notice 1014 and Guidelines to MAS Notice 1014);
- capital markets intermediaries (MAS Notice SFA04-No2 and Guidelines to MAS Notice SFA04-No2); and
- financial advisers (MAS Notice FAA-No6 and Guidelines to MAS Notice FAA-No6).

The notices and guidelines issued by the MAS require the financial institutions to implement procedures for, among others, customer due diligence, record keeping and reporting of suspicious transactions.

### 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?

A PEP is defined in the MAS Notices as a natural person who is, or has been, entrusted with prominent public functions, whether in Singapore, a foreign country, or an international organisation, including persons who hold the roles held by a head of state, a head of government, government ministers, senior civil or public servants, senior judicial or military officials, senior executives of state-owned corporations, senior political party officials, members of the legislature and senior management of international organisations.

A financial institution is required to perform enhanced customer due diligence measures where a customer or any beneficial owner of the customer is determined by the financial institution to be a PEP or a family member or close associate of a PEP. Enhanced customer due diligence measures include:

- obtaining approval from the financial institution's senior management to establish or continue business relations with the customer;
- establishing, by appropriate and reasonable means, the source of wealth and source of funds of the customer and any beneficial owner of the customer; and
- conducting, during the course of business relations with the customer, enhanced monitoring of business relations with the customer.

**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.**

The standard due diligence measures to establish a private banking relationship would include the following:

- obtaining and verifying information pertaining to the customer and, where the customer is not a natural person, certain other persons associated with that customer;
- where the customer is not a natural person, identifying and verifying the identity of the natural persons appointed to act on the customer's behalf;
- determining whether any beneficial owners exist and applying the identification and verification procedures to those beneficial owners;
- where business relations are to be established, obtaining information as to the nature and purpose of the intended business relations; and
- identifying and corroborating the source of wealth of the customer and beneficial owner.

To open a private banking account, the minimum identification documentation that would typically be required are documents evidencing:

- the customer's full name, including any aliases;
- unique identification number (such as an identity card number, birth certificate number or passport number, or where the customer is not a natural person, the incorporation number or business registration number);
- the customer's residential address, registered or business address, and if different, principal place of business (as may be appropriate);
- the customer's date of birth, establishment, incorporation or registration (as may be appropriate); and
- nationality, place of incorporation or place of registration (as may be appropriate).

MAS has provided guidance on financial institutions' use of MyInfo for non-face-to-face customer identification and verification. MyInfo is a digital service that enables individuals to authorise service providers to access their personal data that has been submitted to and verified by the Singapore Government. Where MyInfo is used, MAS will not require financial institutions to obtain additional identification documents to verify a customer's identity.

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

Tax offences have been designated as money laundering predicate offences.

The main predicate offences are:

- domestic and foreign drug dealing offences;
- serious offences such as bribery, corruption, criminal breach of trust, cheating, misappropriation of property and the foreign counterparts of such offences (ie, an offence under foreign law which if the conduct had occurred in Singapore would have constituted an offence);
- domestic tax offences; and
- foreign tax offences (regardless of whether the foreign tax concerned is of a type that is imposed in Singapore).

The predicate offences include conspiracy to commit or an attempt to commit the relevant offences.

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

Financial institutions in Singapore are generally required to undertake ongoing monitoring of their business relations with customers, and to have adequate systems and processes to detect and report suspicious transactions. Financial institutions must also have internal policies, procedures and controls in order to meet their obligations to report suspicious transactions and to help prevent money laundering and terrorism financing.

Under the MAS' Guidelines to its Notices on Prevention of Money Laundering and Countering the Financing of Terrorism, financial institutions are expected to reject a prospective customer where there are reasonable grounds to suspect that the customer's assets are the proceeds of serious crimes, including wilful and fraudulent tax evasion. Where there are grounds for suspicion in an existing customer relationship, the institution should conduct enhanced monitoring and (if the customer is to be retained) approval must be obtained from senior management with the substantiating reasons properly documented, and the account subjected to close monitoring and risk mitigation measures. This requirement applies to serious foreign tax offences, even if the foreign offence relates to a type of tax for which no equivalent obligation exists in Singapore. Appendix B to the Guidelines sets out examples of tax crime-related suspicious transactions and red flags, such as negative tax-related reports from the media.

In addition, Addendum 1 to the ABS' Code of Conduct sets out industry sound practices relating to the designation of serious tax offences as predicate offences to money laundering in Singapore. Among other things, a financial institution should have procedures to assess the bona fides of clients and assets booked, and to carefully evaluate the tax-related risks. Prior to on-boarding a client, the relevant staff should assess the client's tax-risk profile and determine whether there are any reasonable grounds for suspecting that the client's funds are proceeds from serious tax crimes. An institution's relationship manager should also provide written confirmation that, from the information provided by the client during the due diligence process at on-boarding and during the maintenance of the account, there is no indication that the funds are proceeds from serious tax crimes. At the time of account opening, clients should acknowledge in writing that they are responsible for their own tax affairs. In addition, clients should provide any information relating to their tax affairs as may be required by the institution, including signing a declaration to confirm that they have, to the best of their knowledge, not committed or been convicted of any serious tax crimes.

See also question 31 on reporting requirements applicable to private banks or financial intermediaries in relation to the US Foreign Account Tax Compliance Act and the Standard for Automatic Exchange of Financial Account Information in Tax Matters or Common Reporting Standard.

Separately, on 14 May 2018, the Anti-Money Laundering and Countering the Financing of Terrorism Industry Partnership (ACIP) published a best practice paper, 'Legal Persons – Misuse Typologies and Best Practices', which highlights recent typologies involving the misuse of companies and other legal persons. The ACIP is a private-public partnership that is co-chaired by the Commercial Affairs Department (CAD) of the Singapore Police Force and MAS. The practice paper highlights red flags that led to detection of such typologies, and sets out industry best practices that could detect or prevent such abuses. The paper is relevant to the private banking industry and includes red flags and best practices relating to suspected tax fraud and tax-motivated activities. The CAD and MAS have encouraged all relevant firms to adopt the red flag indicators and recommended measures set out in the paper to strengthen resilience against money laundering and terrorism financing risks.

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

Failure to comply with the CDSA and TSOFA may constitute a criminal offence, which is punishable by fines and imprisonment.

Non-compliance with notices and guidelines issued by the MAS may amount to an offence that is punishable with a maximum fine of S\$1 million, and, in the case of a continuing offence, with a further fine of S\$100,000 for every day during which the offence continues after conviction.

In addition, as mentioned above, the MAS has wide powers to revoke the licence of a bank or CMSL holder, withdraw the status of an RFMC or withdraw approval of a merchant bank.

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**Client segmentation and protection**


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

The main investor classes under Singapore's regulatory framework include accredited investors, institutional investors, expert investors and retail investors. Currently, accredited investors include an individual whose net personal assets exceed S\$2 million or whose income in the preceding 12 months is not less than S\$300,000, or a corporation with net assets exceeding S\$10 million.

Institutional investors include licensed banks, merchant banks, licensed insurers, licensed finance companies, the Singapore government or statutory bodies established under Singapore statutes.

Expert investors are persons whose business involves the acquisition and disposal, or the holding, of capital markets products, whether as principal or agent.

Upcoming legislative amendments will refine the definitions of accredited investors and institutional investors – see 'Update and trends'.

**20 What are the consequences of client segmentation?**

FMCs that only carry on business in fund management with qualified investors as well as RFMCs are generally subject to less onerous requirements, such as lower base capital requirements and reduced minimum competency requirements. For instance, RFMCs are only required to have at least two appointed representatives residing in Singapore, while FMCs who serve retail investors are required to have at least three appointed representatives residing in Singapore.

Licensed banks, merchant banks and FMCs will also be able to take advantage of several exemptions from ongoing compliance requirements when servicing accredited investors, institutional investors or expert investors.

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

The provision of financial products and financial services is subject to the Consumer Protection (Fair Trading) Act, Chapter 52A of Singapore (CPFTA) and the Consumer Protection (Fair Trading) (Regulated Financial Products and Services) Regulations 2009. Under the CPFTA, a consumer may sue a provider of financial products and financial services for any 'unfair practice' (as defined in the CPFTA).

As claims by consumers are subject to a monetary limit of S\$30,000, the impact of the consumer protection legislation on the private banking industry has not been significant. However, the impact of such consumer protection legislation has been more pronounced for the retail wealth management industry.

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**Exchange controls and withdrawals**


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

Licensed institutions in Singapore are subject to limits on providing Singapore dollar credit facilities to non-resident financial institutions. However, there are no such limits on lending to individuals.

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

No.

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

None.

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**Cross-border services**


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

Section 339 of the SFA governs the extraterritorial application of the SFA. Section 339(1) provides that an act done partly in and partly outside Singapore, which, if done wholly in Singapore, would constitute

an offence under the SFA, shall be treated as if the act were carried out wholly in Singapore. Separately, section 339(2) provides that if a person does an act outside Singapore which has a substantial and reasonably foreseeable effect in Singapore, and if that act would, if carried out in Singapore, constitute an offence under certain specified parts of the SFA, that person shall be guilty of that offence as if the act were carried out by that person in Singapore. Accordingly, fund management services provided from partly or wholly outside Singapore may still attract licensing requirements in Singapore.

Separately, section 4A(1) of the Banking Act provides that no person shall, in the course of carrying on (whether in Singapore or elsewhere) a deposit-taking business, accept in Singapore any deposit from any person in Singapore, unless such person is a licensed bank or merchant bank. Section 4A(2) of the Banking Act further provides that no person shall, whether in Singapore or elsewhere, offer or invite or issue any advertisement containing any offer or invitation to the public or any section of the public in Singapore (i) to make any deposit, whether in Singapore or elsewhere; or (ii) to enter or offer to enter into any agreement to make any deposit, whether in Singapore or elsewhere, unless such deposit is to be made with a licensed bank or merchant bank.

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

See question 25.

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

See question 25.

**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?**

If the employees of foreign private banking institutions are regarded as carrying on any regulated activities in Singapore or are in breach of any of the other restrictions outlined in question 25, this may constitute an offence under Singapore law.

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

A foreign private banking institution may attract licensing requirements under the SFA if it is regarded as conducting a regulated activity in Singapore, unless it is otherwise exempt. See question 25 for guidelines on the extraterritorial application of the SFA as well as restrictions on the solicitation of deposits from persons in Singapore under the Banking Act. Offers of securities in Singapore may also separately attract prospectus registration requirements under the SFA.

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**Tax disclosure and reporting**


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**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?**

Apart from the ordinary tax reporting requirements where individual taxpayers are to report income taxable in Singapore to the Inland Revenue Authority of Singapore (IRAS), there are no specific requirements for individual taxpayers to disclose information on their private banking accounts (whether domestic or foreign) to the IRAS.

**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?**

Licensed banks, merchant banks and FMCs are generally subject to certain obligations to furnish the MAS with periodic returns under the respective governing acts. This may include furnishing statements on assets and liabilities in relation to both domestic and international clients.

Pursuant to the Model 1 Intergovernmental Agreement, which Singapore has signed with the United States to facilitate compliance with the US Foreign Account Tax Compliance Act (FATCA), specified

financial institutions are required to report the account information of specified persons to the IRAS.

Singapore has also committed to implementing the Standard for Automatic Exchange of Financial Account Information in Tax Matters or Common Reporting Standard (CRS) developed by the Organisation for Economic Co-operation and Development. Regulations to allow Singapore to implement the CRS came into operation on 1 January 2017. Pursuant to these regulations, specified financial institutions are required to report specified information to the IRAS.

The IRAS also has broad information-gathering powers, which empowers the IRAS to obtain information and documents from financial institutions on their clients and accounts for the purposes of, inter alia, enabling the IRAS to fulfil its obligations in relation to FATCA and the CRS.

In addition, as domestic tax offences and foreign tax offences have been designated as money laundering predicate offences under the CDSA, a bank must lodge an STR if it knows or has reasonable grounds to suspect that any property of its customers may be connected to domestic tax offences or foreign tax offences.

**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?**

Client consent is not required for the private bank or financial intermediary to carry out its reporting obligations to the IRAS under FATCA or the CRS. Further, the said reporting requirements are generally not affected by any general duty of confidentiality imposed by Singapore laws that may be applicable to the private bank or financial intermediary.

For the purposes of banking secrecy (see questions 41 and 42), client consent is not required for the disclosure of customer information to MAS in compliance with (i) in the case of licensed banks, the Banking Act or any notice or directive issued by MAS to banks; or (ii) in the case of merchant banks, any notice or directive issued by MAS to merchant banks under section 28 of the MAS Act. In relation to other types of financial intermediaries, there is no regulatory requirement to obtain client consent for reporting to the MAS.

**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.**

Private assets are commonly held through a Singapore investment holding company or a private family trust.

Singapore companies provide for limited liability and may generally be more cost-effective to maintain, but are subject to the regulatory and reporting requirements under the Companies Act, Chapter 50 of Singapore; for example, they are required (subject to certain exceptions) to file audited accounts and annual returns with the Registrar of Companies. Information on, inter alia, the directors and shareholders of a Singapore company as well as its audited accounts can be purchased by members of the public for a nominal fee.

Private family trusts, on the other hand, need not comply with the Companies Act (and therefore have greater flexibility in their potential structure) and may provide more confidentiality since the trust deed, related trust documents and the trust accounts are generally not publicly available. However, in practice a trust may be more expensive to maintain as compared to a Singapore company given that a Singapore licensed trust company must be appointed to administer the trust.

**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?**

Under each of the notices issued by the MAS to licensed banks, merchant banks, CMSL holders and RFMCs on the Prevention of Money Laundering and Countering the Financing of Terrorism, such persons are required to perform customer due diligence measures on their customers, natural persons appointed to act on the customer's behalf, connected parties of the customer and beneficial owners of the customer. 'Connected party' means any director or any natural person having

executive authority in a legal person (other than a partnership), any partner or manager in relation to a partnership, and any natural person having executive authority in a legal arrangement. 'Legal arrangement' means a trust or other similar arrangement while 'legal person' means an entity other than a natural person that can establish a permanent customer relationship with a financial institution or otherwise own property.

Where the customer is a legal person or legal arrangement, the customer due diligence measures would include identifying the legal form, constitution and powers that regulate and bind the legal person or legal arrangement.

Separately, the ACIP practice paper on the misuse of companies and other legal persons, 'Legal Persons – Misuse Typologies and Best Practices' (see question 17), includes best practices relating to the conduct of client due diligence.

**35 What is the definition of controlling person in your jurisdiction?**

See question 34.

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

Different asset holding structures would give rise to different tax issues depending on the structure and assets involved. There is a wide range of investment income that may be exempt from Singapore income tax if the investments are held directly by an individual, but which may be subject to tax if instead the investments are held by a Singapore investment holding company or a private family trust. That said, there are certain tax incentives available for private family trusts administered by licensed trust companies in Singapore which can mitigate the potential Singapore tax exposure, provided the prescribed conditions are met. Stamp duty may also be payable if interests in, inter alia, Singapore immovable property, certain equity interests in prescribed property holding entities (which include partnerships and trusts) that have an interest (directly or indirectly) in Singapore residential properties or Singapore stocks or shares are transferred to the Singapore investment holding company or private family trust.

**Contract provisions**

**37 Describe the various types of private banking and wealth management contracts and their main features.**

The main types of private banking and wealth management contract are:

- discretionary contract, where the investment manager may make any investments he or she thinks suitable for the customer without reference to the customer. Under such contracts, the investment manager has broad discretion to make investments in accordance with the manager's professional judgement, without the need to seek the customer's prior approval. Such contracts sometimes require the manager to manage the portfolio in accordance with agreed investment objectives and restrictions;
- advisory contract, where the customer is in charge of making his or her own investment decisions in respect of his or her portfolio, with the benefit of the bank's advice. Under such contracts, the bank cannot make investments or enter into any transactions without the approval of the customer. The bank has a contractual duty to advise and a duty to take care when giving advice; and
- execution-only contract, where the customer is in charge of making his or her own investment decisions in respect of his or her portfolio, but the bank has no obligation to provide advice. Under such contracts, the bank cannot make investments or enter into any transactions without the approval of the customer. The bank has no duty to provide advice.

The parties are generally free to agree on the applicable governing law for the various types of private banking and wealth management contracts, and the courts would generally respect the parties' choice of governing law.



### Update and trends

The Securities and Futures (Amendment) Act 2017 (Amendment Act) was passed by Parliament on 9 January 2017 but is not yet in force. The Amendment Act will introduce wide-ranging changes to the SFA, including refining the definitions of regulated activities (see question 10) and the classification of non-retail investors (see question 19). The definition of institutional investors will be widened to include persons professionally active in the capital markets, such as financial institutions regulated by foreign regulators, foreign central governments and sovereign wealth funds. Statutory bodies, other than prescribed statutory boards, will no longer be deemed as institutional investors. Accredited investors will include (i) an individual whose net personal assets exceed S\$2 million (but the net equity of an individual's primary residence can only contribute up to S\$1 million of this threshold); and (ii) an individual who has more than S\$1 million of financial assets (net of any related liabilities).

The MAS has also proposed an 'opt-in' regime whereby eligible investors will be given the option of electing accredited investor or retail status. Under the new regime, investors who meet the prescribed wealth thresholds and are eligible to be considered accredited investors would be required to opt in to be treated as an accredited investor and have a lower level of regulatory protection. If they do not opt in to be treated as accredited investors, they will have retail status and will benefit from the full range of regulatory safeguards applicable to retail investors. Financial institutions can continue to treat existing clients who meet the eligibility criteria for accredited investors as 'accredited investors' under the new regime unless they opt out of such a status. The MAS stated that these changes will be introduced through future legislative amendments.

In a step towards further developing Singapore as a centre for fund management activities and investment fund domiciliation, the MAS issued a consultation paper in March 2017 on proposals to establish a new corporate structure called the Singapore Variable Capital Company (S-VACC). The S-VACC structure is tailored for CISs and

will complement the existing structures used by investment funds in Singapore. The framework seeks to provide investment managers with greater operational flexibility, and allow CISs to consolidate the fund domicile with the respective fund management activities in Singapore.

On 4 June 2018, MAS issued a consultation paper on two sets of proposed new guidelines. First, the proposed Guidelines on Provision of Financial Advisory Service will provide for a two-stage test in determining whether a person is deemed to be carrying on a business of providing financial advisory service. These Guidelines include MAS' position on specific activities, such as robo-advisory services relating to portfolio allocation. Second, the proposed Guidelines on the Design of Advisory and Sales Forms will introduce key principles setting out what financial advisers should incorporate in the design of the forms used to conduct fact-finding and needs analysis, and to make suitable product recommendations.

In the realm of fintech, Mr Ravi Menon, Managing Director of MAS, delivered a speech at the Singapore FinTech Festival on 14 November 2017, where he highlighted that fintech developments are forcing regulators to review the way regulation is done. Increasingly, MAS will have to take a more risk-specific approach and an activity-based approach with respect to fintech.

As mentioned in question 15, MAS permits financial institutions to use the MyInfo platform for non-face-to-face customer identification and verification. Mr Menon's speech indicated that the MAS is also working closely with local and foreign banks to explore a Banking KYC Shared-Services Utility that will streamline end-to-end KYC.

In June 2017, the MAS consulted on proposals to facilitate the provision of digital advisory services (also known as robo-advisory services) in Singapore. Such services contemplate the provision of advice on investment products using automated, algorithm-based tools by digital advisers (or 'robo-advisers') with limited or no human adviser interaction.

### 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?

Generally, the liability standard provided for by law is that of negligence, which needs to be proven by the plaintiff on a balance of probabilities.

In execution-only contracts, it is common to include disclaimers and non-reliance clauses to exclude any duty of care in relation to the introduction of products or recommendations made by relationship managers. Such disclaimers and non-reliance clauses are subject to the test of reasonableness under the Unfair Contract Terms Act (Chapter 396 of Singapore). If the parties to the agreement are sophisticated businesspeople of equal bargaining strength, the courts would be less likely to hold that the disclaimers and non-reliance clauses are unreasonable.

### 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?

There are no mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation. However, there are various rules and regulations in relation to conduct of business that may be applicable to private banking.

The FAA imposes specific obligations on licensed financial advisers and exempt financial advisers in the conduct of their business, such as:

- disclosing to every client and prospective client all material information relating to any designated investment product that the financial adviser recommends to such person; and
- not making a recommendation with respect to any investment product if the financial adviser does not have a reasonable basis for making the recommendation.

Regulation 18B of the Financial Advisers Regulations also requires a financial adviser to carry out a due diligence exercise to ascertain whether a new product is suitable for the client before selling or marketing such new product.

Note, however, that some of the obligations in the FAA and the Financial Advisers Regulations (including those specifically identified

above) do not apply to institutional investors, accredited investors and expert investors or banks who have a 'unit exemption' (ie, exemptions for specialised units serving HNWI) from the MAS.

There are also separate obligations imposed on CMSL holders and exempt persons in relation to the conduct of business under the SFA, such as:

- furnishing customers with a written risk disclosure document prior to opening a futures trading account or leveraged foreign exchange trading account; and
- giving the investor clear and prominent notice in writing of his or her right to cancel an agreement to purchase units in a unit trust or an unlisted debenture.

The MAS also issues other notices, guidelines, circulars and other written directions that may be applicable to private banking, such as the Notice on the Sale of Investment Products, Notice on Recommendations on Investment Products and Fair Dealing Guidelines.

As mentioned in question 1, the ABS' Code of Conduct is supposed to 'provide guidance on standards of good practice' for private banks that provide services to HNWI. These include disclosure standards, such as a requirement for private banks to provide clients with a fee schedule covering fees, charges and other quantifiable benefits for all investment products and services at the time of account opening. The Code of Conduct does not have the force of law but the MAS expects private banks to comply with the Code of Conduct and will take into consideration the extent of the private bank's compliance with the Code of Conduct when considering whether a private bank is a fit and proper person for licensing purposes. Further, the Code of Conduct may provide prima facie evidence on the standard of care expected by the industry.

### 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 Limitation Act, Chapter 163 of Singapore, provides generally that for actions for negligence or breach of contract, the limitation period is six years from the date on which the cause of action accrued (ie, six years from the events that give rise to the claim).

The limitation period can be varied contractually, although limitation periods which are shorter than the statutorily prescribed limit will be subject to a reasonableness test under the Unfair Contract Terms Act, Chapter 396 of Singapore.

The limitation period can be suspended or waived by mutual agreement between the parties. Further, the normal limitation period may potentially be extended where the damage claimed consists of latent injuries and damage, the plaintiff was a minor or mentally incapacitated when the cause of action accrued or the action is based on fraud or a mistake.

## Confidentiality

### 41 Describe the private banking confidentiality obligations.

Banking secrecy in Singapore is regulated pursuant to section 47 of the Banking Act. Section 47 states that customer information shall not in any way be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in the Banking Act.

Section 47 of the Banking Act also applies, with some modifications, to merchant banks approved as financial institutions by the MAS.

In addition, the statutory banking secrecy regime does not preclude a bank from contracting with its customers to assume a higher standard of confidentiality.

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

The banking secrecy obligation under section 47 of the Banking Act applies to customer information. 'Customer information' is defined in the Banking Act as:

- any information relating to, or any particulars of, an account of a customer with the bank, whether the account is in respect of a loan, investment or any other type of transaction; or
- 'deposit information', which in turn is defined as information relating to:
  - any deposit of a customer of the bank;
  - funds of a customer under management by the bank; or
  - any safe deposit box maintained by, or any safe custody arrangements made by, a customer with the bank.

Customer information does not include any information that is not referable to any named customer or group of named customers.

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

Exceptions to the general prohibition against disclosure in section 47 are set out in the Third Schedule to the Banking Act. Examples of such exceptions include:

- written permission has been obtained;
- bankruptcy or insolvency of the customer;
- compliance with a court order under the Evidence Act (Chapter 97 of Singapore);
- internal audit or risk management;

- suspension or cancellation of a credit or charge card;
- assessment of a credit bureau; and
- creditworthiness for a commercial transaction.

### 44 What is the liability for breach of confidentiality?

An individual who breaches the provisions of section 47 commits an offence punishable by a fine not exceeding S\$125,000, or imprisonment for a term not exceeding three years, or both. In the case of a corporation, the offence is punishable with a fine not exceeding S\$250,000.

In addition, a breach of contractual confidentiality obligations is a breach of contract, which attracts liability for damages. The contractual confidentiality obligations may also be enforced by an injunction prohibiting any disclosures by the bank in breach of the contractual confidentiality obligations.

## Disputes

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

The main dispute resolution options for the private banking industry in Singapore are: (i) the courts; (ii) arbitration; and (iii) the Financial Industry Disputes Resolution Centre Ltd (FIDReC).

The civil court structure in Singapore consists of four layers: the Magistrate's Court, District Court, High Court and Court of Appeal. All Singapore courts are created by legislation and their jurisdiction is therefore determined by statute.

The Magistrate's Court for instance generally hears disputes in which the amount claimed or the value of the subject matter in dispute does not exceed S\$60,000. On the other hand, the District Court generally hears cases where the amount claimed or the value of the subject matter in dispute does not exceed S\$250,000.

The High Court has original jurisdiction to hear disputes where the amount claimed or the value of the subject matter in dispute is greater than S\$250,000. In January 2015, the Singapore International Commercial Court (SICC) was launched as a division of the High Court. The SICC is designed to deal with transnational commercial disputes where the claim in the action is of an international and commercial nature.

Besides court proceedings, disputes may also be resolved by arbitration by mutual consent of the parties. The Singapore courts encourage the use of arbitration as a means to resolve disputes and this is evidenced by the fact that they recognise arbitration agreements and have stayed legal proceedings because of such agreements.

FIDReC is an independent organisation that specialises in the resolution of disputes between financial institutions and consumers in a cost-effective and relatively informal process. FIDReC adjudicates disputes between banks and consumers, capital market disputes and all other disputes (including third-party claims and market conduct claims) up to a limit of S\$100,000. The procedure for adjudication at FIDReC is considerably less formal than court proceedings and arbitration; parties often represent themselves without lawyers. The dispute resolution process at FIDReC comprises mediation (at the first stage)

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followed by adjudication (at the second stage, if the dispute is not settled by mediation).

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**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, by themselves, need not be disclosed to the MAS. However, under MAS Notice No. 641, a bank is required to report to the MAS 'any suspicious activities and incidents of fraud where such activities or incidents are material to the safety, soundness or reputation of the bank'. In addition, financial advisers, CMSL holders and exempt financial institutions are required to report any misconduct committed by their representatives.

If a private banking dispute relates to incidents of fraud or misconduct of the bank's representatives or is otherwise material to the safety, soundness or reputation of the bank, the dispute would probably have to be reported to the MAS.

A customer can lodge a complaint with the MAS. There is an online feedback form for such complaints on the MAS website. The MAS is unable to resolve commercial disputes between the bank and customer but will investigate any violations of MAS rules and regulations, and breaches of other relevant codes of practice and guidelines. In conducting its investigations, the MAS will usually contact the bank and give the bank an opportunity to respond to the complaint.

# Switzerland

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## Private banking and wealth management

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

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

- the 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.

The relevant statutes relating to financial services and institutions are in the process of being revised; see 'Update and trends'.

### 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, 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 subject to the Swiss anti-money laundering 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 anti-money laundering requirements). The SROs are responsible for monitoring their members as regards their compliance with their obligations under the Swiss anti-money laundering regulations. The SROs are in turn subject to FINMA authorisation and supervision.

In addition, given the high degree of self-regulation in Switzerland in the private banking and wealth management sector, the primary SROs active in those markets need to be mentioned and include: (i) the Swiss Bankers Association (SBA); (ii) the Swiss Funds and Asset Management Association (SFAMA); and (iii) 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.

### 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 (see 'Update and trends').

### 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 for the time being (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.

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

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

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

#### **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.

#### **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 (ABPS) counts 10 members, which are all Swiss banks that are privately owned and not listed entities. However, out of the 10, 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 usually 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.

#### **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.

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

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

The withdrawal of the licence is ordered on the basis of a decision of the regulator, which triggers the winding-up of the bank. In this context, the governing bodies of the bank are no longer entitled to represent

the bank, and a liquidator, supervised by FINMA, is appointed for the purpose of the liquidation procedure. For the rest, the bank is liquidated in accordance with the specific provisions of the BA and the Swiss Debt Collection and Bankruptcy Act.

#### **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 (see 'Update and trends'), to supervision or licensing requirements, to the exclusion of compliance with Swiss anti-money laundering regulations.

#### **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 anti-money laundering compliance purposes, which is not per se a licence (ie, no continuing prudential supervision, capital or equity requirements or rules of conduct). This will change with the entry into force of the new Financial Institutions Act (FinIA), which is expected by 1 January 2020.

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

See question 11.

### **Anti-money laundering and financial crime prevention**

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

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

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

#### **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 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.

**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 know-your-customer duties, which are in line with international standards.

In particular, they are required to verify, prior to entering into any business relationship, the identity of their contractual counterparties with a copy of a passport, identity card, driving licence or other similar documents. They further must record the first and last names, date of birth, nationality and address of their clients in their files. Further specific requirements apply to relationships established by correspondence or the internet. In this respect, it is 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) which entered into force on 18 March 2016 (and which is currently under revision to reflect the feedback of financial intermediaries and the technological evolution since then). 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.

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: (i) it appears unusual, unless its legality is clear; or (ii) 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 know-your-customer duties to the said manager and rely on his or her indications for anti-money laundering 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 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 (i) financial transactions or (ii) an activity of a corporate body of an offshore company). The draft provides for the removal of the 20 day period during which the regulatory body is to review the reporting made by the financial intermediary and revert, as the case may be. According to the Federal Council, this would allow the regulatory body to prioritise the filings and treat them in a more efficient manner. The consultation procedure is opened up until 21 September 2018 and will likely trigger intense discussions in the Swiss parliament.

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

Since 1 January 2016, qualified tax offences in relation to direct taxes constitute predicate offences for money laundering within the meaning of the revised 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: (i) these are also treated as an offence in that foreign country; and (ii) the evaded tax amount reaches the equivalent above threshold in Swiss francs.

For the rest, one should mention that qualified tax offences in relation to indirect taxes have constituted a predicate offence for money laundering since 2009. From 1 January 2016, the definition of this offence has been extended and is no longer limited to customs contraband.

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

Since 2012, 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 OECD since 2018 will likely alleviate 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 have become 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.

**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 1.08 million Swiss francs). In addition, in the event that they do not comply with their reporting duty to the regulatory body, they may be subject to a fine of up to 500,000 Swiss francs under the AMLA. Finally, financial intermediaries may be subject to further fines and disciplinary measures imposed by their SROs or, for banks, the Supervisory Commission of the SBA, in case of violation of their anti-money laundering self-regulatory rules.

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

**Client segmentation and protection**

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

For the time being (see 'Update and trends'), 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 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 new Financial Services Act (FinSA) (see 'Update and trends').

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## 20 What are the consequences of client segmentation?

See question 19.

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## 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 which 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.

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## Exchange controls and withdrawals

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

There are no foreign exchange controls applicable in Switzerland.

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

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### 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, 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.

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### 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.

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## Cross-border services

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### 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.

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

As mentioned above, in the event that a foreign bank (ie, an entity that: (i) benefits from a licence to conduct banking activities in its home jurisdiction; (ii) uses the terms 'bank' or 'banker' in its corporate name, purpose or documentation; or (iii) 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.

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### 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.

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### 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.

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### 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.

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## Tax disclosure and reporting

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### 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 depend 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.

**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 FATCA and its implementing Act and Ordinance. Under this regime, banks are to report account details directly to the US tax authorities, provided the consent of the US taxpayer concerned is given (FATCA Model 2). In the absence of such consent, financial institutions are allowed to disclose data only through administrative assistance channels. On 8 October 2014, the Federal Council adopted a specific mandate to discuss with the US a changeover to Model 1 (ie, automatic exchange of information through the Swiss tax authorities). At present, it is still unknown when the new agreement introducing a Model 1 IGA arrangement will be implemented with the United States.

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, who in turn transmit the information to the tax authorities of the country of residence of the taxpayers, which have an agreement in place with Switzerland in this respect. To date, Switzerland has implemented the automatic exchange of information with 38 partner states and territories, including the EU.

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

**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 question 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

**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: (i) offshore private investment companies with or without an overlying foreign trust or foundation; (ii) trustees (in case of a trust); or (iii) 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.

**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: (i) collect the same information on the settlor (effective and not fiduciary); (ii) record the characteristics of the trust (eg, revocable, discretionary etc); and (iii) 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.

**35 What is the definition of controlling person in your jurisdiction?**

Since 1 January 2016, 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.

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, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.

**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 anti-money laundering perspective, the use of an offshore structure is a high-risk indicia, unless there is a clear business rationale for the recourse to such a structure.

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

## Contract provisions

**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 the 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: (i) the financial intermediary has received the request as regards the conclusion of the contract in that state; (ii) 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 (iii) 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.

### **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 incur civil liability based on both tort or breach of contract. The claimant is to prove the existence of: (i) an unlawful act, respectively, a breach of contract; (ii) damage; (iii) a causal link between the unlawful act, respectively, the breach of contract and the damage; and (iv) 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 SCO. Under this article, an agreement according to which liability for unlawful intent or gross negligence would be excluded is null and void. In addition, a waiver of liability for simple negligence may be considered to be null and void at the discretion of the judge if, inter alia, the liability arises out of the conduct of a business that is carried on under an official licence (eg, banking licence according to Swiss case law). By contrast, a bank may exclude its liability in 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.

### **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 and 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 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 of the above case law, 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).

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. In a nutshell, both Guidelines: (i) provide that asset management agreements are to be in writing (including any equivalent electronic form); (ii) 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 (iii) 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.

### **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 is worth noting that the Swiss Supreme Court has recently 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**

### **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 of foreign countries. The situation has, however, changed as regards tax matters with the implementation of the automatic exchange of information (see question 31).

### Update and trends

In November 2015, the Swiss Federal Council published two new drafts of the FinSA and the Financial Institutions Act (FinIA). While the purpose of the FinIA is to provide for a 'new legal framework' governing all financial institutions, the objective of the 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 the FinSA and the FinIA. The new legislation is now considered as final, subject to a potential referendum. Its expected date of entry into force is currently 1 January 2020. The drafts of the implementing ordinances of both acts will be subject to a consultation procedure by the end of 2018.

According to the FinIA, asset managers, as well as trustees, who are currently not subject to any ongoing prudential supervision, will be newly supervised. They will be directly subject to FINMA's general supervision (including authorisation process and enforcement proceedings). That being said, day-to-day supervision will be entrusted to supervisory organisations approved and monitored by FINMA. The FinIA will namely provide for specific governance requirements applicable to asset managers and trustees whose gross revenues exceed certain thresholds.

The FinSA will implement a new regime aiming at strengthening client protection, increasing transparency in financial services and aligning Swiss financial services regulation to MiFID 2. In this context, 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. Furthermore, the FinSA will introduce client segmentation – much like MiFID 2 – with three main segments (retail clients, professional clients and institutional clients). It is worth noting that the concept of qualified investors under the CISA will not be abolished and will remain relevant in the context of assessing whether a specific collective investment scheme can be offered. The provisions on the various duties of the financial services providers, as well as the offered financial products, will be adapted to the protection needs of the respective client segment. The FinSA will further provide for an opting system in favour of the clients (subject to certain conditions). Finally, on the specific topic of retrocessions, which was heavily debated during the consultation procedure, these will continue to be allowed subject to complying with the current transparency regime. The principles laid down in Swiss case law and FINMA Circular 01/2009 will be crystallised in the FinSA.

Since 2015, FINMA's focus has been on adapting the applicable legal and regulatory framework to the needs of the financial technology (fintech) sector. According to the Swiss regulator, regulation in this context should be based on the following principles:

- the neutral nature of the regulation as regards technological change;
- the use of a principles-based approach (as opposed to a rules-based approach); and
- precluding the emergence of technology-based regulatory gaps which undermine client protection and the system as a whole.

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.

Besides the above, clients' data is also protected by the provisions of the Data Protection Act (DPA), which is generally in line with European legislation on data protection. Currently, the DPA is under revision in order – at least in theory – to harmonise it with the new data protection standards adopted by the EU (ie, the EU General Data Protection Regulation 2016/679 (GDPR) and EU Directive 2016/680). The draft bill has recently been split into two separate projects and priority has been given to the implementation of the EU Directive 2016/680 over the GDPR. At the time of writing, the Swiss legislator has not yet published a time frame 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.

In this context, on 1 February 2017 the Federal Council proposed to implement in 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 an innovation area called 'sandbox', 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 and prohibition on investing deposits; 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 a case, 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 regime were adopted by the Federal Council on 5 July 2017, and entered into force on 1 August 2017. In this context, FINMA revised its Circular 03/2008 on 'Public deposits with non-banks' in order to further outline the sandbox regime and provide for concrete examples of its application. The revised Circular, which entered into force on 1 January 2018, clarified, among other things, that the settlement account exemption does not apply to cryptocurrency dealers as long as their activity is comparable to that of a foreign exchange trader.

With respect to the third item, the 'fintech licence light' will be implemented at a later stage. The legal basis for this was voted on by Parliament as part of the FinSA and FinIA package, and subject to the consultation of the implementing ordinance this is expected to enter into force as early as 1 January 2019. In addition to a prohibition on lending, as well as investment activities, holders of such a licence will be 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 will apply to them by analogy and to the extent that this is necessary.

In the past couple of years, FINMA has further been focusing on new forms of capital raising by start-ups in the form of initial coin offerings (ICOs), token-generating events and token sales. Due to the increase in the number of companies using such business models, on 16 February 2018 FINMA published its guidelines for enquiries regarding the regulatory framework for initial coin offerings. The guidelines are intended to provide more transparency regarding FINMA's practice on this topic, and also to allow it to streamline enquiries as regards possible or existing ICO launches. It is worth noting that FINMA has already initiated a certain number of investigations against several ICOs with a view to determining the existence of potential breaches of supervisory law. In specific instances, FINMA has decided to close down a number of cryptocurrency providers.

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

### 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 which relates to an identified or identifiable person (ie, the data subject), it being understood that Swiss law adopts a 'relative' approach to the identification, in the sense that the ability to identify a data subject from the data is assessed relative to the person processing the data, by reference to legal means to access other data that may be correlated to the dataset under review, and not merely

based on the theoretical ability of any person to reverse engineer a dataset.

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

As mentioned above, 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.

#### 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 1.08 million Swiss francs or a jail sentence of up to three years for the individuals involved. In cases where a pecuniary advantage was obtained for the individual involved or a third party through the breach, the potential jail sentence is up to five years or a fine. In

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) 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 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 1.08 million Swiss francs.

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

#### 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. That being said, in the event, inter alia, the value in dispute exceeds 100,000 Swiss francs, the parties can jointly waive the conciliation proceedings and submit their dispute directly to the competent civil court.

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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.

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**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 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).

# United Kingdom

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## Private banking and wealth management

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

The Financial Services and Markets Act 2000 (FSMA), as amended, is the main source of law relevant to private banking in the UK. The so-called ‘general prohibition’ in FSMA provides that a legal person may only carry out a regulated activity in the UK if it is either authorised to do so or is exempt from the need to be authorised. A breach of the general prohibition is a criminal offence.

Authorised persons are only able to carry out those activities for which they have permission. UK regulated activities are set out in the FSMA 2000 (Regulated Activities) Order 2001. Private banks typically carry out a number of regulated activities, including accepting deposits and providing investment management and investment advisory services in relation to specified investments (defined as including shares, debentures, futures and options, contracts for difference and units in collective investment schemes). Private banks wishing to carry out these activities in the UK must therefore obtain authorisation from the relevant regulator (see below) and ensure that they have the relevant permissions. It is a criminal offence for an authorised person to carry out a regulated activity for which they do not have permission.

Private banks, as authorised firms, are subject to various conduct of business and governance rules. These rules are primarily set out in the Financial Conduct Authority’s *Handbook of Rules and Guidance* (FCA Handbook) and the Prudential Regulation Authority’s Rulebook (PRA Rulebook). Private banks must also comply with certain European Union (EU) legislation that has direct effect in the UK, including, for example, the Markets in Financial Instruments Regulation and the Market Abuse Regulation.

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

On 1 April 2013, the UK adopted a ‘twin peaks’ model of supervision. The Financial Services Authority was replaced by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA). The PRA at the Bank of England is responsible for the prudential regulation and supervision of systemically important firms, including private banks and major investment firms. Certain wealth managers (eg, those that do not accept deposits and are not considered to be systemically important) are not regulated and supervised by the PRA (although they will be regulated and supervised by the FCA). The FCA is responsible for regulating the conduct of business of all authorised firms, regardless of whether they are also regulated by the PRA. Firms regulated by both the PRA and FCA are known as dual-regulated firms. The FCA is also responsible for the prudential regulation of authorised firms not otherwise regulated by the PRA. On 1 April 2014, the FCA took over responsibility for regulating firms that provide consumer credit from the Office of Fair Trading.

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

In the UK, private banks and asset managers are typically the principal providers of private wealth services. Some wealthy individuals, usually ultra-HNWIs, set up family offices. Some family offices provide services to a number of families. There has been a recent trend in the UK

towards a dual provider model of independent financial advisors providing advice with platforms providing brokerage and custody services.

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

Neither ‘private banking’ nor ‘wealth management’ are defined terms in English law and regulation. Rather, they are broadly understood to be umbrella terms that capture firms offering wealth management services such as banking and deposit-taking, the provision of investment management and investment advisory and other similar related financial services to HNWIs. Some private banks and wealth managers also offer services that are not regulated, such as concierge services.

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

Private banks are dual regulated firms requiring authorisation from both the PRA and FCA. Applicants are required to provide a regulatory business plan detailing their proposed business, including financial forecasts. Information on governance structures, ownership (up to ultimate beneficial owners), IT and business contingency, and systems and controls also need to be provided. Applicants must be able to demonstrate that they can satisfy the applicable regulatory capital requirements.

The Senior Managers Regime, which came into force in 2016 for private banks and certain other large financial institutions, aims to improve corporate culture by holding individuals accountable for their conduct and competence. Under the regime, private banks need to demonstrate that those individuals undertaking senior management functions are fit and proper, with PRA and FCA approval being necessary for certain roles. Firms will be responsible for certifying that certain other individuals are also fit and proper.

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

Private banks must conduct their business in accordance with the requirements of the UK regulatory regime. In addition, they are required to meet, on an ongoing basis, the threshold conditions detailed in Schedule 6 of FSMA. The threshold conditions are designed to ensure that firms are effectively supervised, have appropriate financial and non-financial resources and meet the suitability requirements (including in relation to their business model).

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

Private banks are often structured as public limited companies, although they can be structured as private companies limited by shares. Foreign private banks can opt to provide services in the UK via a branch or a subsidiary. Although it is possible for a private bank to operate as a branch in the UK, there is generally a regulatory preference to provide services as a subsidiary authorised and regulated by the PRA and FCA, with separate capitalisation from its parent entity. As branches are not separate legal entities, they will, effectively, be regulated by both their home member state competent authority and the PRA and the FCA.

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

Private banks should expect the process to take approximately one year from first instructing counsel to prepare the application before

they obtain authorisation, although this time frame will depend on the complexity and sensitivity of the proposed application. The process for obtaining a deposit-taking licence can be particularly time consuming and will likely involve considerable scrutiny by the PRA and FCA.

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

Firms that breach the UK regulatory regime can become the subject of an enforcement action by the PRA or FCA. FSMA grants regulators the power to vary a firm's permissions or even revoke their authorisation. Revocation of authorisation is generally limited to the most serious of breaches; for example, where a firm fails to meet its capital adequacy requirements on an ongoing basis. The regulators have a variety of other disciplinary measures at their disposal, including private warnings, fines and public censure.

### **10 Is wealth management subject to supervision or licensing?**

Some wealth managers are subject to supervision and licensing. Typically, wealth management firms carry out a number of regulated activities, such as discretionary investment management, providing investment advice and arranging safe custody of client assets, requiring them to be authorised with the relevant permissions. Firms can opt to be subject to a lighter touch regulatory regime by limiting their regulated activities to the provision of investment advice and arranging transactions on behalf of their clients. Firms opting for the lighter touch regime can work under another authorised firm's regulatory umbrella and are subject to lighter regulatory capital requirements.

Some family offices structure themselves in such a way that authorisation is not required at all. This can be achieved by making use of the group exemption. The group exemption is available, for example, where one entity in the group is managing investments that are beneficially owned by another member of the group.

### **11 What are the main licensing requirements for wealth management?**

Wealth managers are usually solo regulated firms, and are only regulated by the FCA. While the authorisation is broadly similar to that for private banks (see question 5), the time scales are generally shorter. In some limited circumstances, wealth managers may be able to 'borrow' a licence from a regulatory host to allow it to commence limited activities pending full FCA authorisation. The Senior Managers Regime will be extended to all regulated firms, including wealth managers, in 2019.

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

The main ongoing conditions of a wealth management licence are broadly similar to those for a private bank (see question 6).

## **Anti-money laundering and financial crime prevention**

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

Private banks are required to establish and maintain effective systems and controls for the prevention of money laundering and financial crime. The Criminal Finances Act 2017 introduced a new corporate offence of failure to prevent the criminal facilitation of tax evasion, which potentially carries unlimited financial penalties. Private banks and wealth managers must put in place reasonable procedures to prevent their associated persons from committing tax evasion facilitation offences in order to have a defence where criminal facilitation by an associated person occurs.

In the UK, the relevant primary legislation can be found in the Terrorism Act 2000 and the Proceeds of Crime Act 2002 (POCA). These are supported by the anti-money laundering and financial crime requirements as set out in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs). The fifth Money Laundering Directive was adopted on 30 May 2018, with EU member states (including, subject to Brexit, the UK) being obliged to implement it by 10 January 2020.

Under the MLRs, private banks and wealth managers are required to undertake customer due diligence (CDD, formerly known as know your customer or KYC) before establishing a business relationship with

a customer, including undertaking occasional transactions for customers, and at other times where the firm becomes aware of changed circumstances in relation to an existing customer or wherever money laundering or terrorist financing (including where documentation provided is inadequate or dubious) is suspected. The UK regime requires firms to take a risk-based approach to customer due diligence. Industry guidance designed to assist private banks and other firms to interpret and implement the relevant anti-money laundering and terrorist financing requirements has been published by the Joint Money Laundering Steering Group. This includes specific guidance in relation to CDD.

### **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?**

A PEP is defined in Regulation 35 of the MLRs as 'an individual who is entrusted with prominent public functions', but does not include a 'middle-ranking or more junior official'. Private banks are also required to determine whether an individual, even if not a PEP themselves, is a family member or known close associate of a PEP. Private banks are required to undertake enhanced CDD on PEPs, their family members and known close associates. This includes seeking additional information in relation to the source of their wealth and funds. Senior management should be involved when establishing a business relationship with a PEP, their family member or a known close associate, and this should be documented.

### **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.**

Private banks and wealth managers should, at a minimum, obtain the following information when opening a new account for an individual: full name, residential address and date of birth. This information must be verified via reliable and independent sources. Identities should be verified based on either:

- a government-issued document which incorporates the customer's full name and photograph and either his or her residential address or date of birth; or
- a government- (or court or local authority) issued document without a photograph which incorporates the customer's full name supported by a second document, either government-issued or issued by a public sector body or authority, a utility company or an FCA-regulated firm, which incorporates the customer's full name and either his or her residential address or date of birth.

Firms may use external third parties for electronic verification purposes, although private banks should satisfy themselves that the information supplied by such third parties is reliable and accurate and is independent of the subject of the CDD.

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

A tax offence can be a predicate offence for money laundering purposes. Money laundering offences assume that the proceeds of crime are being laundered. A person can still be found guilty of a money laundering offence even where they have not been convicted of the predicate offence.

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

The International Tax Compliance Regulations 2015 (as amended in 2016 and 2017) (the Tax Regulations 2015) require private banks to establish which accounts are held for individuals who are tax-resident in certain other jurisdictions with which the UK has entered into an agreement to automatically exchange tax information, collect that information and then report it to Her Majesty's Revenue and Customs (HMRC). Private banks can outsource this due diligence to a third-party provider, although ultimate responsibility for the due diligence rests with the private bank and relevant accountable senior manager.

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

Broadly, there are three categories of money laundering offences under POCA. These are where persons:

- knowingly (i) conceal, convert or transfer criminal property, (ii) are involved in an arrangement which facilitates the acquisition or use of criminal property or (iii) acquire, use or possess criminal property (acquisition, use and possession);
- fail to report knowledge or suspicion of money laundering (including where there were reasonable grounds for knowing or suspecting); and
- tipping someone off that an investigation is contemplated or under way or prejudicing an investigation.

To the extent that an employee at a private bank promptly raises concerns with the firm's money laundering reporting officer (MLRO) they will not have committed the failing to report offence. The MLRO can be guilty of an offence if he or she fails to communicate concerns to the National Crime Agency without a reasonable excuse.

Private banks are required under the MLR and the FCA Handbook to establish adequate and appropriate systems and controls as well as policies and procedures to prevent money laundering. Both the firms, their officers and any individual controllers of the firm can incur liability in relation to the commission of money laundering offences by the firm. Failing to comply with these requirements is a criminal offence and as such can result in imprisonment, a fine or both.

### Client segmentation and protection

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

Private banks are required to categorise new clients as a retail client, a professional client or an eligible counterparty for regulatory purposes. Retail clients are afforded the greatest protections. The private bank must notify the client of their classification and inform them that they have the right to request a different categorisation, although this may involve the loss of some protections. Some private banks do not have permission from the FCA to deal with retail clients.

HNWIs sometimes opt-up to professional client status. In order to opt-up from retail status, the private bank must undertake an assessment to ensure that the client has sufficient expertise, experience and knowledge to make their own investment decisions and understands the attendant risks. Where the private bank is undertaking certain services for the client (including providing investment advice), it must ensure that the client satisfies at least two of the following three criteria: the client has undertaken a certain number of transactions during the previous four quarters; the client's investment portfolio exceeds €500,000; and the client has worked in the financial industry as a professional for at least one year.

#### 20 What are the consequences of client segmentation?

The regulatory regime affords the greatest level of protection to retail clients. As a result of the burden imposed on firms when dealing with retail clients, some firms choose not to offer services to them. Professional clients may not have the right to file complaints with the Financial Ombudsman Service or seek compensation from the Financial Services Compensation Scheme. In certain circumstances, firms are required to assess the appropriateness and suitability of products and services for clients. Such assessments, where required, are generally less burdensome when dealing with clients categorised as professional rather than retail.

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

Firms are required to consider the relevant consumer protection legislation, particularly the Consumer Rights Act 2015 (CRA), in addition to the requirements of the FCA Handbook. Private banks must ensure, under the CRA, that their communications with clients, including their terms of business, are fair and transparent.

### Exchange controls and withdrawals

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

An exchange control is a governmental restriction on the movement of currencies between countries. Exchange controls were abolished in the UK in 1979 and as such there are currently no general exchange controls in place in the UK. Exchange controls may, however, be imposed with respect to the target state of sanctions imposed by the UK, either unilaterally or as part of its international obligations. There are sometimes notification requirements or limits on the amount of cash that may be carried to certain countries.

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

There are no restrictions imposed by English law on cash withdrawals, whether in sterling or, for foreign currency denominated accounts, foreign currencies. In practice, some banks may impose limits on the amount of cash that can be withdrawn. While private banks may apply bespoke cash withdrawal limits, high-street banks impose blanket limits on cash withdrawals for all customers. Limits on cash withdrawals from ATMs are usually imposed. Private banks would usually expect clients to contact the bank in advance where they wish to make large cash withdrawals so that the bank can ensure that it has the funds available. Banks may query the purpose of the withdrawal as part of their financial crime systems and controls.

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

There are no restrictions imposed by English law on cheque withdrawals or the withdrawal of bullion or securities from an account. Private banks may not honour requests for cash withdrawals, however, if there are insufficient funds available in the account or such withdrawal would exceed any pre-agreed overdraft limit. Requests for bullion withdrawals would depend on the client having sufficient bullion stored in safe deposit.

### Cross-border services

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

Firms authorised in a member state of the European Economic Area (EEA) are able to provide their services in other EEA member states via a 'passport' under the Capital Requirements Directive (CRD). Firms can exercise their passport rights by notifying their home state regulator of their intentions. The home state regulator then notifies the PRA, which will liaise with the FCA in relation to the notification.

Wealth managers also have passport rights available to them under MiFID. The procedure for exercising the MiFID passport is broadly the same as the one under CRD. Private banks authorised outside of the EEA are generally required to set up a branch or subsidiary in the UK and would need to seek PRA and FCA authorisation to undertake the relevant regulated activities. Wealth managers may be able to conduct certain business in the UK in limited circumstances under the overseas persons exemption; otherwise they would be required to set up an FCA-authorised branch or subsidiary in the UK in order to undertake regulated activities here.

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

This is set out in response to question 25 above. Note that firms cannot commence their activities in the UK until the PRA has processed their notification.

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

A number of EU directives regulate the provision of cross-border services within the EEA. Banking services can be provided cross-border under the CRD and wealth management services under MiFID. Asset managers can market interests in their funds across the EEA via the marketing passport available under the Alternative Investment Fund Managers Directive (AIFMD).

**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 EEA firms who have exercised their passporting rights under the appropriate legislation may meet clients and prospective clients in the UK. Employees of EEA firms that have not so exercised their passporting rights or employees of non-EEA firms that do not have an authorised establishment in the UK should be mindful of the general prohibition in section 19 of FSMA and the restrictions on financial promotions contained in section 21 of FSMA. Section 19 prohibits the undertaking of regulated activities without authorisation and the relevant permissions. A breach of sections 19 or 21 is a criminal offence.

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

Foreign private banking institutions are subject to the restriction on invitations or inducements to engage in investment activities contained in section 21 of FSMA. Broadly, a foreign private bank that would like to communicate such an invitation or inducement to a UK-based prospective client must be FCA-authorized, must have the communication approved by an FCA-authorized firm or ensure that the communication falls within one of the exemptions or exclusions set out in the FSMA 2000 (Financial Promotions) Order 2005. There are, for example, exclusions available for clients who are investment professionals, or HNWI's or companies.

**Tax disclosure and reporting**

**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?**

In the UK, it is an individual's UK residence and domicile that determines their UK tax liability. UK residents who are higher rate tax payers (and those who are otherwise required to file a tax return with HMRC) are required to disclose any interest earned on UK accounts. Private banks are required to report information on accounts held with them to HMRC (see also question 17). While not strictly a requirement regarding the tax-compliant status of the accounts themselves, non-domiciled individuals claiming the remittance basis of taxation will need to maintain separate non-UK bank accounts for income, capital gains and clean capital so that they can demonstrate which funds represent UK tax-free resources if brought to the UK.

**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?**

Under the Tax Regulations 2015, private banks must establish and maintain arrangements designed to identify 'reportable accounts'. For holders of reportable accounts from OECD Common Reporting Standard (CRS) jurisdictions, private banks must disclose to HMRC reportable information, including the name, address, jurisdiction(s) of residence, date and place of birth of the account holders, account number and balance. The reporting obligations placed on private banks where account holders are specified US persons (under FATCA) or another EU member state (under the Directive on Administrative Cooperation (DAC)) target broadly similar information, but are slightly different than for CRS jurisdictions.

Under POCA, employees at private banks are required to report any suspicious activity to their MLRO or the National Crime Agency if money laundering is suspected. It is an offence to tip off a client that a suspicious activity report is contemplated or has been made.

Under the disclosure of tax avoidance scheme rules, promoters are obliged to inform the UK tax authorities about certain tax avoidance arrangements that enable or might be expected to enable someone to obtain a UK tax advantage.

The UK tax authorities can issue third party notices requiring banks to provide information and documents in their power or possession that are reasonably required for the purpose of checking the tax position of clients whose identity is known to the tax authorities' issuing officer.

**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?**

Private banks are required to notify a client of reporting obligations under the Tax Regulations 2015 or under the other reporting obligations noted in response to questions 30 and 31. It is standard practice for account-opening terms and conditions to expressly grant the private bank the right to make disclosures required by law and regulation and in any event, at the bank's sole discretion. Where a client fails to provide all the required information, the bank should usually file the incomplete reportable information with HMRC. In the usual way, HMRC will in turn share the information automatically with other tax authorities.

**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.**

As a result of a number of changes to the tax regime in the UK, individuals are increasingly structuring their investments as private funds, family limited partnerships and family investment companies (FIC), which attract certain tax benefits. For example, profit on an investment held in a FIC is subject to the corporation rather than individual tax rate. Wealth can be passed on to future generations via a FIC without attracting inheritance tax, as value is passed on creation (although where FIC shares are gifted, inheritance tax may be relevant where the individual making the gift passes away less than seven years after the gift has been made). A FIC can have various share classes with different rights, which can assist with estate planning. Recent tax changes have limited the amount that wealthy individuals can hold in a pension fund (although pension funds remain the structure of choice for sub-threshold individuals).

Trusts are still a very common structure for entrepreneurs or family business owners due to the generous Business Property Relief (BPR) from UK inheritance tax available on the transfer of such assets into trust. By using BPR, or Agricultural Property Relief (APR) for farmland, an individual can transfer significant value into a lifetime discretionary trust. Where such reliefs are not available, and as a result of a number of changes to the tax treatment of trusts in 2006, there are limits as to the amount an individual can transfer into a lifetime trust. Nevertheless, a married couple can still get £650,000 out of their joint estates every seven years, trusts are still valid asset protection and tax planning tools.

For HNWI's, trusts are very common in wills as a means of providing flexibility, tax-planning opportunities (particularly with BPR or APR assets) and to consider asset preservation and succession planning issues. Non-domiciled UK residents do still establish (non-UK) trusts before they become UK-domiciled or deemed domiciled.

The civil law concept of a foundation does not map directly across to the UK. This creates an unwelcome uncertainty, as, depending on their exact structure, they are treated as trusts or corporations for tax purposes.

**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?**

The MLR specify that a beneficial owner of a trust means each of the following: the settlor; the trustees; the beneficiaries; or any individual with control over the trust. The identity of the trust must be verified on the basis of documents or information obtained from a reliable source which is independent of the customer. This may require sight of relevant extracts from the trust deed, or reference to an appropriate register in the country of establishment. The private bank must take reasonable measures to understand the ownership and control structure of the customer.

In respect of trusts, private banks should obtain the following information:

- the name of the settlor;
- the full name of the trust;
- the nature, purpose and objects of the trust (e.g., discretionary, testamentary, bare);



- the country of establishment;
- the names of all trustees;
- the names of any beneficiaries (or, when relevant a description of the class of beneficiaries); and
- the name of any protector or controller.

It should be noted that private banks cannot satisfy their obligations to verify the identity of beneficial owners by relying only on information contained in a register. Finally, where there is a large number of trustees the private bank may take a risk-based approach to determining on how many, and which, in respect of whom they should carry out full CDD measures.

### 35 What is the definition of controlling person in your jurisdiction?

Beneficial owners are defined in the MLRs as including individuals owning or controlling more than 25 per cent of a body corporate or partnership. In relation to a trust, a person is deemed to have control where they may vary or terminate the trust, deal with trust property, add or remove a beneficiary of the trust, appoint or remove trustees or persons with control over the trust or direct or veto the exercise of any of these powers. Companies House maintains a public register of people with significant control (PSC) information.

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

There are a number of potential regulatory and tax obstacles to the use of certain structures to hold private assets. Family offices often seek to rely on the group exemption to avoid the need to be authorised under FSMA. The group exemption is, however, narrowly defined, so family offices should be careful not to offer services which would otherwise constitute a regulated activity to individuals or entities outside their group. Similarly, the AIFMD exempts from the definition of an alternative investment fund vehicles that do not raise external capital. This exemption would not be available where a family office seeks to manage funds raised from a number of different wealthy individuals or family offices.

Trustees of private family trusts will also have to consider their regulatory and compliance position in respect of FATCA, CRS and the new Trusts Registration Service in the UK.

The Finance Act 2006 introduced further tax obstacles to the use of trusts as a vehicle for holding private assets (although they are still highly effective in certain circumstances; see question 35). Transfers of wealth into trusts above the nil band rate now attract inheritance tax at the lifetime transfer rate of 20 per cent. Every 10 years trusts are subject to a charge. Trusts are also subject to income and capital gains tax. From April 2013, Companies and other 'non-natural persons' that hold high-value residential property in the UK are subject to an annual charge (Annual Tax on Enveloped Dwellings (ATED)) as well as capital gains tax (known as ATED-related CGT) when the property is sold.

Since April 2017, inheritance tax has been imposed on the owners of such companies in respect of the residential property held by the company. Historically, non-UK residents holding direct and indirect interests in UK immovable property were outside the scope of UK tax on capital gains. The position has changed in recent years, such that from April 2015 a non-resident capital gains tax applies to non-UK resident individuals, trustees, closely held funds and companies on the disposal of UK residential property.

Currently, the UK government is consulting on proposals to bring all gains on non-resident disposals of UK real estate within the scope of UK tax for gains accrued on or after April 2017, with an anti-forestalling measure to support this reform. More generally, there may be direct and indirect tax costs to setting up, dismantling or restructuring structures designed to hold private assets, and non-domiciled individuals in particular may wish to hold their assets in a way that clearly separates UK assets from non-UK assets.

## Contract provisions

### 37 Describe the various types of private banking and wealth management contracts and their main features.

Depending on the nature of the services being offered by the private bank or wealth manager, clients are usually asked to enter into

## Update and trends

At 23:00 GMT on 29 March 2019, the UK is scheduled to leave the EU. At the time of writing (August 2018), the terms of the UK's withdrawal from the EU had yet to be finalised. Absent an agreement to maintain the status quo for anything other than a temporary transitional period, Brexit will likely impact the way in which both UK and EU-based private banks and wealth managers market and deliver their services cross-border between the UK and the remaining 27 EU member states. However, many of the laws and regulations governing UK-based private banks and wealth managers' interaction with their UK-based clients will likely remain substantially unchanged in the immediate aftermath of Brexit.

discretionary investment management agreements or non-discretionary investment advisory agreements. Under the former, the client typically grants the private bank or wealth manager discretion over the client's portfolio, allowing the firm to buy and sell specific investments without consulting the client, but in accordance with investment objectives and parameters set out in the agreement. Under the latter, the private bank or wealth manager can make recommendations regarding the client's portfolio, but can only buy and sell investments on the instructions of the client.

The governing law of these agreements is typically English law, although this is ultimately determined by the parties. Contracts generally provide that they may be varied at the written agreement of all parties to the agreement.

### 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?

The liability standard at law is negligence, although gross negligence is becoming recognised by English courts. It is the client's responsibility to bring a negligence claim against the private bank or wealth manager. The exact terms of the contractual liability provisions are a matter of negotiation between the private bank or wealth manager and their client. The outcome of this negotiation is generally dictated by the relative bargaining powers of the parties involved – ultra-HNWIs and large family offices tend to have greater bargaining power than regular HNWI. Typically in the UK, private banks and wealth managers seek to limit their liability to losses resulting from their negligence, fraud, wilful misconduct or a material breach of contract.

### 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?

Private banks and wealth managers are required under the regulatory regime to include certain provisions in their contracts. These are generally set out in the FCA Handbook and include provisions relating to client categorisation, disclosures, complaints procedures and safeguarding client assets.

### 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 Limitation Act 1980 (LA) provides for different limitation periods in respect of different causes of action. Of particular relevance to private banking and wealth management agreements will be the limitation period for simple contracts and certain actions in tort (six years) and breaches of obligations contained in deeds (12 years). These periods run from the date on which the cause of action accrued. Although the LA does not specifically prevent parties from altering or contracting out of these limitation periods, any attempt to alter the limitation period to a client's detriment could be subject to the reasonableness test set out in the Unfair Contracts Terms Act 1977.

**Confidentiality****41 Describe the private banking confidentiality obligations.**

Private banks are usually bound by express confidentiality obligations contained in their terms of business and the contractual arrangements that they enter into with their clients. There is also the equitable doctrine of breach of confidence available to the clients of private banks under English law. Under this doctrine, where a private bank receives information in such a manner as to give rise to a duty of confidence on the part of the private bank, the latter may only use the information for the purpose for which it was given and the client may bring an action against the private bank where the private bank has disclosed this information other than for the purpose for which the information was provided and the client has suffered a loss as a result of the unauthorised disclosure.

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

Information which by its nature is confidential will generally fall within either the relevant contractual obligations or the equitable doctrine of breach of confidence. In the context of a private banking relationship, this would typically include personal and financial information.

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

The duty of confidentiality only applies to information that is confidential. As such, the duty of confidentiality generally does not apply to information that is already within the public domain or which the private bank obtained legitimately from a third party. In addition, requirements to disclose information under applicable law and regulation will override any contractual duty of confidentiality and the equitable doctrine of breach of confidence.

**44 What is the liability for breach of confidentiality?**

There are a number of remedies available to clients where private banks have breached their duty of confidentiality. These include a court injunction to prevent the private bank from making any further disclosures of the confidential information in question and damages. Damages can be sought either for breach of contract or for a breach of the equitable doctrine of breach of confidence. The quantum of damages depends on the circumstances of the breach. Although in some instances the client may be able to base its damages claim on the profits that the private bank has made as a result of its breach of confidentiality, more typically clients seek compensatory damages.

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

The contractual arrangements and non-contractual obligations between private banks and wealth managers and their clients are typically governed by and construed in accordance with English law. Such arrangements typically provide for the English courts to have exclusive jurisdiction to settle any disputes or claims that arise out of or in connection with the agreement – including any non-contractual disputes. In some instances, the contractual arrangements may provide that disputes are governed by English law but are settled by way of arbitration. London is often, but not always, chosen as the seat of any such arbitration. Finally, clients classified as retail may bring complaints to the Financial Ombudsman Service.

**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?**

Under Principle 11 of the FCA Handbook, authorised firms have a duty to deal with the regulator in an open and cooperative manner. As such, authorised firms have an affirmative duty to disclose to the regulator anything that the regulator would reasonably expect notice of. While private banks and wealth managers would not therefore be expected to disclose business as usual disputes, the regulator would expect disclosure of significant disputes or of a series or pattern of disputes which taken as a whole are significant (for example, a large volume of claims made by retail clients in connection with a particular product or service).

Under Principle 6 of the FCA Handbook, authorised firms are required to pay due regard to the interests of their customers and treat them fairly. As such, they should seek to resolve any complaints that arise. Where a client, including an HNWI, is classified as an eligible complainant under the FCA Handbook and is not satisfied with the authorised firm's proposed resolution of their complaint, they may have the right to complain to the Financial Ombudsman Service.



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# United States

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This chapter focuses primarily on US federal regulation of entities providing private banking services. Unlike other jurisdictions where private banking services are routinely offered by specialised private banking institutions, in the United States, reflecting the historical segmentation of the US financial marketplace, such services are offered by the full panoply of US financial intermediaries – banks, broker-dealers, investment advisers, trust companies and insurance companies – each of which may also offer a varying range of commercial, investment and retail banking, and securities and commodities services, and is subject to a multitude of different, but often overlapping, functional regulatory frameworks. This chapter generally discusses private banking within the context of a full-service national bank (ie, a bank with a federal charter from the Office of the Comptroller of the Currency (OCC)) and the federal laws and regulations that apply. Each state can also charter banks and other institutions, and legal and regulatory frameworks for such institutions vary from state to state. Because many financial institutions operate in New York, this chapter also refers to certain aspects of New York law. Where appropriate, responses also mention the regulatory frameworks applicable to securities and insurance services.

## Private banking and wealth management

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

The principal statutes relevant to establishing and maintaining private banking operations on the part of national banks are:

- the Federal Reserve Act, establishing the Federal Reserve System and regulation of state-member banks (member banks);
- the Federal Deposit Insurance Act, providing for federal deposit insurance, the Federal Deposit Insurance Corporation (FDIC) as a regulator of FDIC-insured banks, the permissible activities for insured state non-member banks, and receivership of failed banks;
- the National Bank Act, providing for full-service and limited-purpose national banks and the OCC as their primary supervisor;
- the Bank Holding Company Act of 1956, as amended, subjecting companies that control a bank (ie, bank holding companies (BHCs)) and certain of their subsidiaries to regulation by the Board of Governors of the Federal Reserve System (the Federal Reserve);
- the Bank Secrecy Act of 1970, as amended (BSA), establishing programme, record-keeping, and reporting requirements for US financial institutions to assist the US government in the detection and prevention of money laundering;
- the Securities Exchange Act of 1934 (the 1934 Act), requiring, inter alia, the registration of brokers and dealers of securities in interstate commerce and prohibiting manipulative and deceptive practices in connection with the purchase or sale of any security;
- the Investment Advisers Act of 1940 (the Advisers Act), requiring, inter alia, certain investment advisers to register with the Securities and Exchange Commission (SEC);
- the Employee Retirement Income Security Act of 1974 (ERISA), establishing minimum standards for pensions and retirement plans (eg, information requirements, fiduciary responsibilities) and giving participants the right to sue for breaches of fiduciary duty, among others; and
- state laws concerning, for example, chartering state banks and trust companies, trusts, wills, fiduciary activities, contracts, securities

and registration of certain investment advisers. State law also regulates insurance (including annuities and life insurance investment products) and insurers.

Relevant regulations are generally found in the US Code of Federal Regulations at the following titles:

- Title 12, covering banking activities and consumer protections;
- Title 17, covering securities, securities trading, broker-dealers and investment advisers;
- Title 29, covering ERISA regulations (related provisions also codified, for instance, in Title 12 for national banks); and
- Title 31, covering economic sanctions, as well as anti-money laundering (AML) regulations.

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

The main federal regulatory bodies relevant for private banking and wealth management are:

- the Federal Reserve, as the primary supervisor of BHCs and member banks. The Federal Reserve also coordinates the supervision of foreign banking organisations' (FBOs') US operations with other federal and state banking agencies;
- the FDIC, as a regulator of FDIC-insured banks, and the primary federal supervisor of state-chartered non-member banks;
- the OCC, within the Treasury Department, as the primary supervisor of full-service and limited-purpose national banks;
- the Financial Crimes Enforcement Network (FinCEN), within the Treasury Department, which collects and analyses financial transaction data to combat financial crimes, including money laundering and terrorist financing;
- the Office of Foreign Assets Control (OFAC), within the Treasury Department, which administers and enforces economic sanctions, including by imposing controls on transactions and freezing assets within the jurisdiction of the United States;
- the SEC, as regulator of much of the securities industry (ie, registered broker-dealers, investment companies, investment advisers, exchanges and clearing agencies), including many money managers, investment consultants and financial planners who are investment advisers;
- the Financial Industry Regulatory Authority (FINRA), a self-regulatory organisation, as regulator of member broker-dealers;
- the Consumer Financial Protection Bureau (CFPB), responsible for consumer protection as regulator over entities engaging in offering or providing consumer financial products or services;
- the Federal Trade Commission, preventing business practices by institutions other than banks, insurance companies, broker-dealers and investment advisers that are deceptive or unfair to consumers; and
- the Internal Revenue Service (IRS), as the US tax collection agency, which administers and enforces the Internal Revenue Code.

Additionally, federal and state prosecutors can bring criminal and civil proceedings to enforce violations of the relevant financial laws and regulations.

As noted above, states can also regulate the financial sector. For example, the New York State Department of Financial Services

(NYDFS) supervises the chartering, licensing and examining of safety and soundness of NY-chartered banks and trust companies, among other institutions; protects against financial fraud under state law; supervises insurance companies doing business in New York; and monitors certain real estate finance services, among other duties.

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

Private wealth services are commonly provided by the various types of financial intermediaries described above, who design products and services to offer to high net worth individuals (HNWIs). Because some services (eg, cash deposit accounts) can only be offered by certain types of intermediaries, integrated financial services firms that combine different types of financial subsidiaries under one holding company are able to offer a 'suite' of private banking services to HNWIs. They often do so by designating investment professionals, typically sitting in a securities affiliate, as relationship managers to coordinate the various private banking services and products offered by the various group affiliates and business units.

A standalone investment adviser or trust company can offer a more limited range of 'non-banking services' that fall within the ambit of private banking services. Such services include offering advice for investment in securities on a discretionary or non-discretionary basis, but do not include accepting cash deposits. Family offices are not as common in the United States; however, they may be becoming more common.

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

Private banking does not have a general statutory or regulatory definition under US federal law. See question 13 for a discussion of 'private banking accounts' within the context of AML efforts.

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

The main licensing requirements are that an entity obtain a full-service or limited-purpose bank charter from the OCC or a state regulator, or a broker-dealer or investment adviser registration with the SEC or state regulators, or both (or under certain circumstances, neither). Licensing requirements vary based on the entity that will offer the private banking services.

#### Banks

No special licence is required for an existing bank to offer private banking services. However, for national banks, specific OCC approval is required to provide fiduciary services within the bank or a subsidiary of the bank. The creation of a full-service national bank requires an application to the OCC for a charter and typically requires an application to the FDIC for deposit insurance approval. During the application stage, the OCC evaluates the business plan, character and competence of the bank's management and directors, and the financial resources available, including the ability to maintain regulatory capital levels. After extensive review, conditional approval may be given and the bank will be subject to ongoing supervision to ensure that, consistent with its business plan, it is operated safely and soundly and that risks to the bank and the financial system are minimised. An alternative to the full-service national bank charter is the establishment of a limited-purpose national bank, which does not require an application to the FDIC for deposit insurance, but generally limits the new institution to providing only fiduciary services. Both full-service and limited-purpose national banks must become members of the Federal Reserve System, which requires that a national bank purchase and hold the stock of one of the Federal Reserve Banks.

Although registration as an investment adviser under the Advisers Act may be required to provide investment advisory services, US banks and BHCs are generally excluded from the registration requirement. Additionally, registration or notice filing may be required in states where an investment adviser has a place of business or more than a de minimis number of clients.

Each state has its own laws and regulations for chartering banks within the state as well as granting fiduciary powers to banks and other institutions, which typically include trust companies, the state-law analogue to a limited-purpose national bank.

#### Non-banks

Investment advisory or custodial services may be provided outside of a banking organisation. If the entity meets the definition of investment adviser under the Advisers Act registration is required, unless prohibited or an exemption applies. Investment advisers register with the SEC or a state regulator, or neither, depending on the amount of regulatory assets under management, location of offices and clients, and number of clients (some SEC-registered investment advisers must make 'notice filings' with state regulators).

#### Branches of non-US banks

Historically, banks that are located outside of the United States that have sought to branch directly into states have done so by obtaining licences from state regulators, principally in New York. There is evidence, however, that this is changing because banks that seek to establish operations in more than one state can find the national breadth and efficiency of dealing with one regulator (the OCC) more efficient and cost-effective. Although branches of non-US banks cannot generally accept cash deposits of less than US\$250,000, this is rarely a significant operational impediment in the private banking context. To establish a federal branch, a licence is needed from the OCC, which will evaluate the non-US bank's condition, its compliance history with US laws, the character, competence and experience of the anticipated management group, community needs and the adequacy of the operating plan. A separate permit must be obtained before a federal branch may exercise fiduciary powers.

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

#### Banks

A national bank is subject to ongoing supervision by the OCC and, like other banks, is examined every 12 to 18 months, depending on its size. Generally, a bank must maintain positive examination findings and is rated based on its (i) capital adequacy; (ii) asset quality; (iii) management ability; (iv) earnings performance; (v) liquidity; and (vi) sensitivity to market risk. Regular reporting and record-keeping requirements apply as well. The OCC can appoint receivers and conservators and revoke charters in order to protect the safety and soundness of the banking system. Other compliance issues include consumer protection, information security, privacy, AML requirements, related party transactions and community reinvestment requirements (eg, offering equal access to banking services regardless of race and meeting the credit needs of local individuals, including residents of low- and moderate-income neighbourhoods). Similar conditions apply to state banks and trust companies.

#### Non-banks

Investment advisers and broker-dealers register with the SEC or one or more states, or both, or neither. Investment advisers and broker-dealers are subject to examination by the SEC. In addition, broker-dealers are generally subject to examination by FINRA and must maintain sufficient amounts of net capital.

#### Branches of non-US banks

The Federal Reserve, FDIC (for insured branches) and OCC (for federal branches) coordinate supervision of branches of FBOs. Similar to national banks, federal branches are assessed on their (i) risk management; (ii) operational controls; (iii) compliance; and (iv) asset quality. Additionally, the FBO is assessed by the Federal Reserve to determine its capacity to provide financial, liquidity and management support to the federal branch and is subject to comprehensive consolidated supervision in its home country (ie, that home country regulators receive sufficient information on the foreign bank's worldwide operations so as to assess its overall financial condition and compliance with applicable laws and regulations).

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

Because various types of financial intermediaries may provide private banking services, there is no prevalent form of organisation. Increasingly, private banking products offered by different types of intermediaries are being managed by a lead relationship manager who

coordinates and bundles services among affiliated or unaffiliated business units.

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

There is no specific licence for a private bank, as such. Chartering a bank or trust company entails a rigorous process of detailed disclosures to the regulators. For a national bank, the chartering process (including time to prepare a complete application) often takes 9–12 months, or longer if the application constitutes an institution's first entry into the US market. A similar time frame is required to establish a federal branch.

A prospective investment adviser registers by filing Form ADV with either the SEC or the state securities authorities. Most prospective broker-dealers file Form BD with FINRA, but some prospective municipal securities dealers instead file Form MSD with the SEC and a US banking regulator. Although the SEC and/or FINRA will complete their initial review of the application within 30 to 45 days after the registration application is filed, the application process, including preparation of the application, can take several months.

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

#### Banks

A national bank can relinquish its full-service or limited-purpose charter through voluntary liquidation, conversion to another type of charter (such as a state bank), or merger or consolidation with a depository institution that does not hold a national bank charter. If a bank receives a poor examination rating (eg, for operating in an unsafe or unsound condition) or is near insolvency and does remedy the situation in sufficient time, the bank may be put into FDIC receivership (whereby the FDIC liquidates the bank and its affairs are wound up) or conservatorship (whereby the FDIC preserves the bank as a going concern). Often, the bank is quickly sold to another institution, with or without government assistance.

#### Non-banks

An investment adviser or broker-dealer may deregister by filing notice with the SEC, but books and records retention requirements will generally continue for five years from the date of deregistration. The SEC can revoke an investment adviser or broker-dealer's registration through an enforcement action in connection with a violation of a regulatory provision or obligation. Additionally, an individual can be suspended from being associated with an investment adviser or broker-dealer.

#### Branches of non-US banks

Like a national bank, a federal branch can close through voluntary liquidation or through merger or acquisition. In voluntary liquidation, notice to the OCC and public notice in a newspaper are required. Additionally, the OCC can revoke a federal branch's licence if the non-US bank has violated applicable US law or is engaging in unsafe and unsound practices (the Federal Reserve can also recommend termination).

### 10 Is wealth management subject to supervision or licensing?

Wealth management, as such, is not subject to special supervision or licensing, but is covered by the licensing and supervision frameworks applicable to the financial intermediaries (eg, banks, trust companies, investment advisers) described above. An entity that is neither a traditional bank nor an investment adviser may provide certain services that fall within the range of wealth management services, such as a limited-purpose national bank or state trust company that offers fiduciary services.

Professionals offering wealth management services owe fiduciary duties to their clients and must disclose all conflicts of interest and provide full and fair disclosure of all material facts about themselves and their investments. For licensing or supervisory purposes of investment advisers, there is no distinction between discretionary or non-discretionary wealth management services. However, a national bank that provides discretionary fiduciary accounts is subject to additional OCC regulations and must conduct annual reviews of its discretionary fiduciary accounts.

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

Banks with fiduciary powers, investment advisers, or a non-bank with fiduciary powers at the state level, among other intermediaries, subject to their general licensing requirements, may conduct wealth management activities. Individual wealth managers who work for firms may be required to pass licensure examinations that are administered by FINRA (eg, Series 7 exam). As an alternative to the FINRA-administered exams, certain individual wealth managers may be able to rely on various professional credentials, including being a Certified Financial Planner (CFP) or a Chartered Financial Analyst (CFA). Each involves an examination by a board or institute.

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

State law specifies the ongoing conditions for non-bank fiduciaries, and in some cases, trustees and professional wealth managers. These vary by state, to the extent that they are separately regulated from banks. Some states may have additional applicable regulations for state banks with fiduciary powers.

Individual wealth managers may have professional certification requirements based on minimum continuing education requirements and an ongoing record of ethical behaviour.

### Anti-money laundering and financial crime prevention

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

The Bank Secrecy Act (BSA), a federal law, requires financial institutions (banks, broker-dealers, US branches of foreign banks and some insurance companies, but as of today, not standalone investment advisers or trust companies) to maintain effective AML compliance programmes reasonably designed to prevent them from being used to facilitate money laundering and terrorist financing. Institutions covered by the BSA are expected to take a top-down approach with respect to implementing AML policies that reinforce a culture of compliance throughout the organisation. The board of directors must approve AML policies and an annual risk assessment should be performed. An effective AML compliance programme also includes the designation of a BSA and AML compliance officer, training, independent testing of BSA and AML compliance and customer due diligence (CDD). Investment advisers may become subject to federal AML requirements in the near future; however, in practice, those affiliated with banking organisations comply with the policies and procedures that apply to those organisations.

The customer identification programme (CIP) and CDD requirements apply to banks, broker-dealers, and others, and entail acquiring additional information from each customer and certain beneficial owners of legal entity customers, and an understanding of how an account will be used. This information is used to assist in risk-rating and suspicious activity detection.

Private banking accounts are subject to special enhanced due diligence standards and prohibitions under federal law. Such accounts are defined for AML purposes in the USA PATRIOT Act to mean an account, or a combination of several accounts (i) established or maintained for the benefit of a non-US person; (ii) with a minimum aggregate deposit of funds or assets of at least US\$1 million; and (iii) assigned to a bank employee serving as liaison between the bank and the non-US person (eg, a relationship manager).

Financial institutions are also required to maintain appropriate records and file certain currency transaction reports (CTRs) for a transaction involving currency greater than US\$10,000 and suspicious activity reports (SARs). Additionally, any US person (including a financial institution, corporation or other entity formed under the laws of the United States) that maintains a foreign financial account (eg, a bank account, securities account or other account such as an insurance or annuity policy with a cash value in a country other than the United States) with an aggregate value of US\$10,000 at any point during a calendar year must report that account to FinCEN by filing a 'Report of Foreign Bank and Financial Account' and to the IRS as part of filing their annual income tax return. US persons that maintain more substantial interests in foreign financial assets (ie, over \$50,000) may be required to file a 'Statement of Specified Foreign Financial Assets' with the IRS.

Implementing and maintaining a well-functioning and properly proportioned AML compliance system has proven to be a challenge for a number of US financial institutions and has resulted in significant enforcement actions. Such difficulties often involve processing payments that originate from or are paid to beneficiaries residing outside the US, as well as providing specialised services to HNWIs, including politically exposed persons (PEPs).

In June 2016, the NYDFS adopted new regulations requiring certain financial institutions (notably state banks, state trust companies and state-licensed branches of non-US banks, among others, but not broker-dealers and investment advisers) to implement transaction monitoring and watch list filtering programmes to ensure compliance with federal AML and sanctions laws. Additionally, the board of directors or senior officers is required to file an annual 'compliance finding' with the NYDFS.

Finally, in August 2016, FinCEN proposed a new rule to subject private banks and certain trust companies, inter alia, that do not have a federal regulator to the AML programme and beneficial ownership requirements.

**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?**

Generally, the term applies to international political figures and those who are closely connected to them. It does not apply to US counterparts. Under US law, the term includes current and former senior foreign political figures, their immediate family members and close associates. Actual roles, rather than titles, determine who is a PEP.

Banks are not prohibited from providing services to PEPs but, under the USA PATRIOT Act, enhanced scrutiny is required for any PEP's private banking account. Specifically, the institution must (i) determine the identity of the nominal and beneficial owners of the private banking account; (ii) determine whether any owner is a senior foreign public official that is subject to enhanced scrutiny; (iii) determine the sources of the funds deposited and the purpose or expected use of the account; and (iv) review the account activity to verify that the activities conducted are consistent with the bank's understanding of the source and expected use of the account. Institutions that are not certain as to their ability to meet the enhanced due diligence requirements should consider whether to offer banking services to PEPs at all.

**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.**

The CIP rule requires a bank (including a non-US bank's US branch), as well as broker-dealers and others, to collect certain customer information before opening an account. The minimum information required generally includes the individual's name, date of birth, address, and an identification number (eg, Social Security number, employer identification number, passport number and country of issuance), as well as similar information for certain beneficial owners of legal entity customers. Institutions are expected to obtain copies of the government-issued identification document used to establish a customer's or beneficial owner's identity. Additionally, such institutions must have procedures to determine whether customers appear on any suspected terrorist or terrorist organisation lists issued by the US government and are prohibited from engaging in transactions with certain countries or non-US citizens (generally called 'specially designated nationals') under OFAC rules. Typically this is done by submitting names through an automated screening process that identifies potential matches against government issued lists. Although insurance companies are not subject to CIP, they generally must obtain all relevant and appropriate information related to the customer to administer an effective AML programme.

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

No. However, the US Supreme Court has held that, in certain contexts, fiscal offences (even those involving non-US tax laws) can constitute violations of the US wire and mail fraud statutes, which are predicate offences. Some other predicate offences that may apply in the context of private banking are:

- fraud: in the sale of securities; against financial institutions; fraudulent bank entries; fraudulent Federal Deposit Insurance transactions and related activity in connection with identification documents;
- bribery and corruption; and
- crimes such as computer fraud and abuse; smuggling goods; counterfeiting; and forgery, false use or misuse of a passport.

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

A client of a US bank is not subject to tax compliance verification by the bank. However, financial institutions may have specific reporting obligations. See questions 30–32.

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

Clients can face criminal and civil penalties for money laundering, terrorist financing, and violations of the BSA (eg, up to 20 years in prison, a fine of up to US\$500,000 and forfeiture of property involved in a transaction or traceable to the proceeds of the criminal activity).

Financial institutions can face cease-and-desist orders and enforcement actions for failure to establish and maintain a reasonably designed BSA compliance programme. In addition to asset forfeiture and civil monetary penalties, banks risk losing their charters and facing possible criminal penalties.

Employees risk being barred from banking activities. Wilful violations of the BSA, its regulations or structuring transactions to evade BSA reporting requirements can result in criminal penalties.

**Client segmentation and protection**

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

Federal and state banking laws generally apply to all clients. Additionally, investment advisers owe fiduciary duties to all clients, regardless of assets, but must take the type of client (eg, institutional or retail investor) into account when determining whether a particular investment is suitable. In some cases, consumer protections do not apply for certain secured loans at certain values.

Certain securities laws, however, do make exceptions for sophisticated investors (ie, generally with a net worth of at least US\$1 million, excluding the value of a primary residence, or an income of at least US\$200,000 for each of the last two years), for instance, allowing them to buy pre-IPO securities, if certain conditions are satisfied.

As mentioned above, enhanced due diligence requirements apply under the USA PATRIOT Act. See questions 13 and 14.

**20 What are the consequences of client segmentation?**

See question 19. Limited exceptions may apply.

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

Both federal and state consumer protection laws apply to private banking and wealth management activities involving HNWIs. Generally, federal consumer protection laws apply to every individual regardless of his or her income or net worth. Notable provisions include:

- the Truth in Lending Act, which requires disclosures regarding the cost and terms of using consumer credit. Its protections may not apply in certain circumstances (eg, non-real estate secured loans above a certain amount);
- the Real Estate Settlement Procedures Act, which requires certain disclosures for home purchase and other real-estate related loans, as well as other safeguards, including a prohibition against kickbacks for referrals of settlement services;
- the Fair Credit Reporting Act, which regulates the collection, distribution and use of consumer information, and protects consumers from the inclusion of inaccurate information in their credit reports;
- the Fair Debt Collection Practices Act, which provides legal protections from certain practices of third-party debt collectors and a process to dispute and obtain validation of debt information;

- the Electronic Fund Transfer Act, which requires certain fund transfer protections (eg, error resolution for unauthorised transfers and consumer authorisation for pre-authorised electronic fund transfers) and disclosures; and
- SEC rule 10b-10 under the 1934 Act, which requires securities trade confirmations.

In addition, states have their own consumer protection laws. For instance, state law may require specific details in account statements or disclosures. State licensing requirements for consumer lending may not apply to unsecured consumer loans or consumer loans secured by personal property if the principal amount exceeds a certain threshold.

#### Exchange controls and withdrawals

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

Not applicable.

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

Besides the reporting requirement for CTRs (see question 13), generally no. There are certain limitations to the number of withdrawals from savings accounts to prevent them from operating as cash transaction accounts (eg, cheques), but these limitations do not prevent large one-time withdrawals (usually via a bank cheque or electronic transfer).

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

No.

#### Cross-border services

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

In principle, non-US financial institutions have access to the US market on equal terms as US institutions; certain additional inquiries may apply related to a non-US institution's home country and other non-US operations.

A financial institution operating outside the United States must comply with US law to the extent that it is applicable. This means that, if it satisfies certain registration 'triggers' (that differ among various types of intermediaries and US regulators, and that may involve, for example, dealing with persons or entities in the United States, US persons outside the United States, persons or entities subject to US sanctions, or conducting transactions through or in the United States), it will have to register.

Non-US institutions have also been successfully prosecuted by US authorities for violations of US sanctions, AML and tax law violations in connection with the provision of cross-border services to private banking clients.

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

Generally, accepting deposits or opening or servicing bank accounts for customers in the United States may trigger licensing requirements. Approval is also required for the establishment of representative offices by state licensed banks. Such offices only provide limited services compared to those offered by US branches and agencies of non-US banks. However, meeting with existing customers in the United States and furthering existing relationships, without accepting deposits, executing agreements or selling additional products or services may be permissible, depending on state law, if it is otherwise in compliance with US federal law (for example, it does not assist US taxpayers in evading their US tax obligations).

To conduct business in the United States, non-US broker-dealers and non-US investment advisers (ie, investment advisers whose principal office and place of business is outside the United States) must generally register under the 1934 Act or Advisers Act, respectively, and have been penalised by the SEC for not doing so. There are no residency requirements or minimum educational requirements, and foreign investment advisers are not required to establish a US subsidiary.

Certain foreign investment advisers can be exempt from registration if they have (i) no place of business in the United States; (ii) fewer than 15 clients and investors in the United States in private investment funds advised by the adviser; (iii) less than US\$25 million in regulatory assets under management attributable to clients and investors in the United States; and (iv) not been holding themselves out to the public generally in the United States as investment advisers. Other narrower exemptions may be available (ie, for private fund advisers and venture capital funds).

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

See questions 25 and 26.

##### 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?

If the employees work for entities that are licensed or registered with the appropriate US regulator (and they otherwise comply with US law), they may travel to meet clients and prospective clients in the United States. For others, entering the United States and engaging in private banking activities that require licensing or registration (as described above) is prohibited. Furthermore, travelling to the United States or soliciting US customers from outside the United States, in order to aid in the evasion of US tax or other laws, will subject such individuals and their employers to criminal prosecution.

Additionally, certain border checks may apply. For instance, a 'Report of International Transportation of Currency or Monetary Instruments' must be submitted for negotiable monetary instruments (eg, currency, endorsed personal cheques, traveller's cheques, securities in bearer form) valued at US\$10,000 or more that are transported into the United States. Travelling employees also must disclose the purpose of their visits to US border authorities.

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

Yes, documents may be sent to clients within the United States from non-US financial institutions, but in some situations, the transmission of such documents may trigger US licensing and registration requirements. As a general matter, once US 'jurisdictional means' (email, mail or telephone) are used, the United States may enforce federal laws against the people who employ such means, whether or not they are in the United States.

#### Tax disclosure and reporting

##### 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?

There is no explicit disclosure requirement for US and non-US taxpayers to disclose a US account to the US tax authorities. However, US taxpayers must report income derived from such accounts on their US tax returns. In addition, US financial institutions generally must report to the IRS information about income paid to such individuals' bank accounts. The requirements differ with respect to private banking accounts held by US persons outside the United States: the existence of such accounts must be reported to US tax authorities and the US Treasury Department.

##### 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?

There are comprehensive reporting requirements imposed on US financial institutions with respect to their US and non-US clients. Income paid with respect to US stocks or securities is generally subject to information reporting by the payor if the amount exceeds US\$10. In addition, other information reporting requirements may apply, such as the Foreign Account Tax Compliance Act (FATCA). US financial intermediaries (including US affiliates of non-US banks) that make payments to non-US financial intermediaries are also required to comply

with FATCA information reporting requirements which apply to all payments from US sources.

**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?**

No client consent is required to enable reporting by a financial institution to the IRS. However, a US taxpayer's failure to provide certain required taxpayer identifying information may result in the imposition of withholding tax.

**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.**

Limited liability companies (LLCs), corporations, trusts and partnerships are the most frequently used structures in the United States. The manner in which each structure is taxed may provide certain benefits or costs. The risk associated with each type of structure is largely based on the corporate formalities required or the extent to which liability is limited.

LLCs are formed under state law and are a popular structure because they provide the limited liability of corporations and provide the ability to be treated as pass-through entities for taxation purposes (ie, individuals are taxed, not the entity). LLCs may be formed with either one or more members. Although an LLC requires compliance with certain legal and procedural formalities, they are generally not as onerous as those for a corporation.

Corporations are chartered under state law and must follow certain legal and procedural formalities in order to maintain a separate legal identity from its owners. As a general matter, income derived by a corporation is subject to US federal income tax at the corporate level and is also subject to US federal income tax at an individual taxpayer level when distributed to its shareholders.

Partnerships are formed under state law. For US federal income tax purposes, income generally flows through the partnership and is reported on each partner's individual income tax return. In a general partnership, partners are liable for the business debts of the partnership (unlike a corporation, limited liability is not available). Other forms of partnership (eg, limited partnerships, limited liability partnerships) offer varying degrees of liability protection. Individuals typically do not hold wealth in partnership form unless the partnership is a collective investment vehicle, such as an investment fund. Under US tax rules, a partnership may elect to be taxed as if it were a corporation.

Trusts are created under state law, whereby trustees hold property for the benefit of beneficiaries. As a general matter, complex trusts are considered taxable entities while simple trusts and grantor trusts are treated like pass-through entities, such that income derived by the trust is taxed as if it were derived directly by the beneficiaries of a simple trust or the grantor of a grantor trust. Trusts that engage in a trade or business may elect to be taxed as a corporation or partnership.

**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?**

As of May 2018, general KYC requirements apply to all structures that are legal entities under US law (eg, LLCs, corporations, and partnerships) and require banks, broker-dealers and others to conduct due diligence on certain beneficial owners of legal entity customers. Although financial institutions are not required to look through a trust to its beneficiaries, additional steps to verify the identity of a customer that is not an individual, such as obtaining information about persons with control over the account, may be required.

**35 What is the definition of controlling person in your jurisdiction?**

Generally, in the case of a trust, a controlling person means any natural person who exercises control over the trust, which could be the settlors, the trustees, the protectors, the beneficiaries or any other natural person. Note that the concept of a 'controlling person' generally is not

relevant for US taxation purposes, which looks to the beneficial owner of the trust or the trust itself for determining tax liability.

In the case of legal entities (ie, other than trusts), natural persons in similar positions are controlling persons. In the case of a corporate structure, an investor can be a controlling person if he or she owns or controls more than a certain percentage of a corporation's voting or outstanding shares. The specific percentage of share ownership or control that will trigger controlling person status varies depending on the relevant legal requirement, and may be as low as five per cent in the case of ownership of an insured bank or as high as 50 per cent for certain economic sanctions.

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

State law requirements must be satisfied to reap the benefits (eg, potentially simplified taxation, limited liability) that structures afford. For instance, corporate formalities must be followed or the corporate form will be disregarded, with generally negative consequences for the individuals behind the structure.

Typically, the choice of structure is governed by whether the investor desires look-through treatment (eg, the ability to offset income with certain investment losses) or seeks to defer tax until a distribution is made or the corporate stock is sold.

The choice of how to deal with the tax obligations imposed under US law is complex and investors should always contact their tax adviser for assistance in determining the best approach based on their particular facts and circumstances.

Non-US owners of certain entities that invest in the United States may be obligated to report certain information to the US tax authorities. In addition, US entities are generally obligated to report, on an annual basis to the US tax authorities, certain payments made to their equity or debt holders.

**Contract provisions**

**37 Describe the various types of private banking and wealth management contracts and their main features.**

Private banking and wealth management services may entail various contracts depending on the products, services and intermediaries involved. Typically, the contractual relationship between a customer and a bank or manager is somewhat one-sided, in favour of the institution. However, under federal law, banks are required to disclose or provide notice of the key terms and features for a customer's accounts or products. Such disclosures may include deposit agreement terms, loan terms and related disclosures for electronic banking and ATM usage, among others.

For investment advisers, certain contractual terms are prohibited, for example, assignment without the client's consent. Additionally, the contract language cannot waive compliance with the rights or rules under the Advisers Act. Similarly, a customer cannot contractually waive his or her rights or duties owed under the 1934 Act. Also, broker-dealers that are members of FINRA must arbitrate disputes with customers before FINRA panels (FINRA has its own code of rules for arbitration).

**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?**

**Contract liability**

A financial institution that breaches its agreement with a client may be liable for actual damages occurring as a result of the breach, provided that the damages were (i) foreseeable (that is, reasonably contemplated by the parties) at the time of contracting; (ii) proven with reasonable certainty; and (iii) proven by a preponderance (more than 50 per cent) of the evidence. Punitive damages generally are not available for breach of contract. In New York, punitive damages may be available for breach of contract if the breach was aimed at the public generally and involved particularly egregious misconduct. A contract may select the body of law to be applied, as well as the court (venue) in which the dispute will be resolved, and typically will be permitted to select arbitration as an alternative to judicial adjudication, but cannot vary the liability standard. A contract may, however, agree on the amount of applicable damages (known as liquidated damages) if



### Update and trends

Financial technology and innovation (fintech) continues to shape how institutions provide private banking and wealth management services. Additionally, institutions that rely on fintech-focused business models are increasingly active in wealth management. Some of the new entrants offer digital products that support existing wealth managers, while others seek to compete with existing firms and draw-off high-value, digitally savvy clients. Federal and state regulators continue to take steps to promote responsible innovation and modernise existing regulations to respond to the changes driven by fintech.

The OCC is considering the establishment of a new form of limited-purpose national bank charter that would allow fintechs to obtain a bank charter to pursue their business model. A fintech company chartered as a limited-purpose national bank would be subject to many of the same laws and regulations as other national banks and would be able to operate in all 50 states without having to pursue registration or licensure on a state-by-state basis. Certain states and the Conference of State Bank Supervisors (CSBS), a state banking regulator trade association, continue to strongly oppose the OCC's actions, and some new entrants are investigating alternatives to the limited-purpose charter, such as the industrial loan company charter granted by certain state banking regulators.

Distributed ledger technology (DLT) (also called blockchain) and robo-advising (also called automated advising) are also having an effect on private banking. DLT changes how transactions are processed in ways that may increase the speed of transactions and the resilience and integrity of the transaction processing system. However, DLT presents AML compliance concerns because such transactions may involve anonymous counterparties, network operators and record-keepers, none of whom would be visible to the suspicious activity monitoring

conducted by national financial intelligence units such as FinCEN. Additional compliance concerns with DLT include control over assets, customer privacy and security.

Robo-advising involves the use of algorithms and online programmes to provide digitally tailored investment advice based on information that is input into the programme by a client. The SEC has taken an interest in robo-advisers and recommends that institutions conduct regular monitoring and maintenance of the algorithmic programmes and provide adequate information to the client about the nature of the investment advice and how it is generated.

Many regulators have introduced innovation initiatives, including: (i) the CFPB's Project Catalyst to promote consumer-friendly innovation; (ii) the Federal Reserve's 2016 study on DLT in payments, clearing and settlement; (iii) OFAC's 2018 guidance on sanctions compliance with respect to virtual currencies; and (iv) state initiatives, such as the CSBS Vision 2020 released in May 2017, the Arizona Attorney General's fintech regulatory sandbox and the NYDFS's 'BitLicense' for virtual currency businesses.

Institutions providing private banking and wealth management services will need to evaluate how new technologies may affect existing legal requirements and obligations and offer opportunities to grow and innovate. Institutions that ignore fintech do so at their peril, as it is expected that by 2020, half of the workforce will consist of members of the 'millennial' generation who have embedded fintech into their lifestyle. In light of the favourable regulatory climate that has developed in the United States, institutions may consider more aggressively engaging with federal and state regulators to develop and offer new and enhanced technology-driven products and services.

(i) the amount of damages would be uncertain if damages had to be proven; and (ii) the amount selected is reasonable. A contract can also provide for a waiver of consequential damages (ie, damages that do not arise directly from the breach) and incidental damages arising from a breach, or may include a cap on contractual damages. Damages arising from a breach may be offset if the customer recovers from other sources (eg, insurance).

#### Tort liability

Under (typically state) common law, all types of financial institutions typically can be held liable to their clients for their negligence. Negligence is the failure to use reasonable care, which results in damage to a client.

In some instances, an institution may be permitted, by contract, to limit its liability to customers to those cases involving gross negligence or wilful misconduct. Gross negligence is serious carelessness and involves a voluntary, conscious disregard of the need to use reasonable care that is likely to cause foreseeable grave harm to persons or property. Wilful misconduct requires proof of knowledge or intent by the institution to engage in wrongdoing (eg, fraud, conversion (civil theft), or other intentional torts).

Wilful misconduct can result in the imposition of punitive damages. In many states, gross negligence can also result in the imposition of punitive damages. In some instances, an institution may be permitted, by contract, to preclude punitive damages, but as a matter of public policy, many courts will not enforce such limitations on punitive damages in cases of wilful misconduct or gross negligence.

Broker-dealers, custodians, investment advisers, and others with relationships of trust with their clients (which may occur in the private banking context) typically owe their clients a fiduciary duty, and may be liable to their clients for breach of fiduciary duty. A fiduciary duty is the highest standard of care. It typically includes obligations of good faith, fair dealing and loyalty. Damages for a breach of fiduciary duty may include any amounts necessary to make the client whole and, typically in cases involving evidence of egregious misconduct, may include punitive damages. A financial institution that breaches its fiduciary duty may also be required to account (providing accounting details) to help the client trace his or her money and assess his or her damages.

#### Statutory liability

Statutes (typically federal) may also impose liability on institutions in specific contexts. For example, broker-dealers must fulfil an obligation

of suitability to their customers: they must reasonably believe that their recommendations are in the best interests of the customer. Additionally, broker-dealers and investment advisers have a duty of best execution; that is, they must seek the best execution reasonably available for their customers' orders.

#### 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?

See question 37. Broker-dealers, investment advisers and insurance companies must generally give privacy notices (as banks do) and there may also be product-specific notices required by law.

#### 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?

Contracts are generally governed by state law and statutes of limitations vary by state. For instance, in New York, the statute of limitations for contracts is six years. At times, statutes of limitation are also specified in federal law. For instance, for SEC enforcement actions, the statute of limitations is five years from the date of the violation (in the case of a private right of action, it may be two years after the discovery of the facts constituting the violation).

#### Confidentiality

##### 41 Describe the private banking confidentiality obligations.

US federal law does not provide the type of strict confidentiality (data protection and financial privacy) found in many other countries. Two federal statutes provide a lower level of protection.

The Right to Financial Privacy Act of 1978 (RFP) applies to US government requests for financial records for most customers (ie, individuals, but not necessarily all companies or partnerships) of banks, among other institutions. The RFP provides mechanisms to disclose such records to government authorities, provided that the financial institution complies with certain notice procedures to customers (if applicable), among other requirements. Certain exceptions may apply that allow for the disclosure of financial records in connection with law enforcement activities and private parties may be able to subpoena

financial records in the context of private litigation, depending on the nature of the dispute and subject to a court's determination.

In addition, the Gramm-Leach-Bliley Act (GLBA) prohibits financial institutions (including banks and investment advisers) from disclosing non-public personal information about a consumer to non-affiliated third parties, unless the institution satisfies various notice and opt-out requirements or an exception applies. Even if a financial institution does not disclose non-public personal information, notice must be given at the time the customer relationship is established and annually thereafter if there has been a change to the policies and practices since the last notice. Furthermore, federal regulations require notice to customers and provide opt-out opportunities in situations involving marketing among affiliates.

State constitutions or statutes may provide more confidentiality beyond what federal law provides (eg, Florida has a state constitutional right to privacy that includes financial privacy), but, as a general matter, they do not restrict the ability to obtain financial information in civil or criminal proceedings. State common law, contractual obligations and industry practice also generally prevent a financial institution from disclosing confidential customer information to unaffiliated third parties absent customer consent, a court or administrative order, or a clear legal authorisation to do so (eg, disclosure of confidential information that is necessary to pursue a legal claim against a customer in a court).

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

The RFPA covers financial records: an original or copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

Under GLBA, non-public personal information includes any information that is not publicly available, for instance, information that a consumer provides to a financial institution to obtain a financial product or service; results from a transaction between a consumer and the institution involving a financial product or service; or a financial institution otherwise obtains about a customer by providing a financial product or service.

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

Exceptions to the RFPA include, among others, when a financial institution submits financial records for bank supervisory or regulatory purposes, or in accordance with federal statutes (eg, the BSA), by court order, judicial or administrative subpoena, or when requested by a government authority subject to a lawsuit involving the customer.

The GLBA includes certain exceptions to a customer's right to opt out, including when (i) the customer receives initial notice that a non-affiliated third party will perform services for the financial institution and that third party is prohibited by contract from using or disclosing the information outside of the specified purposes of the contract; (ii) disclosure is necessary to effect a transaction authorised or requested by the customer; (iii) a financial institution seeks to protect a customer

against actual or potential fraud, or gives the information to its attorneys, accountants or regulators; or (iv) disclosure is to comply with federal or state laws or other legal requirements or to comply with authorised civil, criminal, or regulatory investigations or subpoenas or to respond to judicial process or government regulatory authorities. The BSA provides a safe harbour for financial institutions and their employees in connection with a good faith SAR filing.

#### **44 What is the liability for breach of confidentiality?**

A customer may collect civil penalties from any government agency or department that obtains, or financial institutions or their employees who disclose, information in violation of the RFPA. Penalties can include actual damages, court costs and reasonable attorneys' fees, as well as punitive damages for wilful or intentional violations. However, a financial institution that relies in good faith on a federal agency or department's certification may not be held liable to a customer for the disclosure of financial records.

Under the GLBA, civil and criminal penalties (including fines and imprisonment for five to 10 years) may be imposed on the institution as well as its officers and directors through actions by prosecutors and regulatory authorities. Additionally, sanctions may be imposed including, for banks, the termination of FDIC deposit insurance, as well as removal of the financial institution's management, and potentially barring those individuals from working in the banking industry. There is generally no private right of action available under the GLBA. See question 38 for a discussion of the liability standards that would apply to other breaches of a duty of confidentiality involving a financial institution or its employees (eg, breaches involving contract liability).

#### **Disputes**

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

Federal and state courts are available for dispute resolution. In addition, arbitration is available and sometimes can be mandatory under contractual agreements between the customer and a bank or other institution.

#### **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?**

Banking regulators typically do not get involved in disputes between a bank and its clients; however, federal examiners will evaluate a bank's exposure to litigation and its impact on the bank's risk profile in the course of their supervisory activities. To do so effectively, the examiner will need to know about significant pending or potential litigation against the bank. In addition, the Class Action Fairness Act requires banks and US branches of non-US banks (among others) to notify their federal regulator of proposed class action settlements.

A broker-dealer, on a Form BD, and investment adviser, on a Form ADV, must disclose facts about certain legal or disciplinary events that are considered to be material to a client's evaluation of the business or

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its management, including litigation or customer complaints, and such complaints must be kept in records that the SEC or FINRA inspect during examinations.

Furthermore, customers can lodge complaints with federal or state regulators, and a state's attorney general typically accepts financial crime complaints. For instance, the SEC accepts complaints related to the federal securities laws directly through hotlines. In the case of a registered broker-dealer or investment adviser, the SEC may directly inquire as its regulator. For other US persons, the SEC can use the federal courts. For non-US persons, the SEC will work with foreign regulators to investigate the violation.

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## *Getting the Deal Through*

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  
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  
Loans & Secured Financing  
Mediation  
Merger Control  
Mining  
Oil Regulation  
Outsourcing  
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-Private Partnerships  
Public Procurement  
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  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
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