Private Banking & Wealth Management

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

2017

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Published by
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First published 2016
First edition
ISSN 2398-5860

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

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Preface

Private Banking & Wealth Management 2017

First edition

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

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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

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

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

London
September 2016

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Introduction

Shelby R du Pasquier
Lenz & Staehelin

Private banking and wealth management have been and remain one of the main pillars of the banking industry. Historically, a number of jurisdictions, such as the Channel Islands, Luxembourg, Switzerland and the United Kingdom, had developed a particular expertise in that field. This being said, all financial centres today have a wealth management industry that typically targets their own residents. Private banking and wealth management further have evolved in parallel with international economic growth and 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 places like Hong Kong and Singapore. Similarly, the United States, benefiting from its own formidable domestic market and proximity to South American investors, has been and remains one of the most important jurisdictions in the world in the field of private wealth management. Out of US$9.2 trillion of assets under management in 2014, Switzerland had a 22 per cent market share in the wealth management business, compared with an 18 per cent share for the United Kingdom and 16 per cent for the United States. This percentage is materially unchanged since 2008, apart from the United States, whose share went up from 12 per cent to 16 per cent. At the same time, Hong Kong and Singapore increased their combined market share from 7 per cent in 2008 to 12 per cent in 2014.

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', 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 substantially 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 now only regulated from an anti-money laundering perspective, are now contemplating the introduction of a supervision of asset managers.

Similarly, 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 – if not instrumental in the structuring and administration of their undeclared financial assets – private bankers have been forced, in particular as a result of the implementation of the FATF recommendations as regards the fight against money laundering, to become de facto the 'long arm' of their compliance officers and even regulators and tax authorities, and now report as a matter of course 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 of 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 in 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 those represented a few hundred 10 years ago, more than 2,600 information requests were sent to that country in 2015, coming mainly from European countries, India and the United States.

In addition, after the introduction in 2014 of FATCA, which focused on US taxpayers, 2017 and 2018 will see the implementation in more than 100 countries of a multilateral automatic exchange of information for tax purposes. As a result, the coming years are expected to see an overwhelming flow of personal and financial information related to 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 has or will soon disappear. On the other hand, KYC and compliance have increasingly become a critical aspect of wealth management, both at the inception of the relationship as well as on an ongoing basis. Compliance and tax transparency have become the key words of the international financial industry. Similarly, ensuring proper client information and suitability assessments has become a key part of private bankers' jobs following the 2008 financial crisis and the resulting regulatory initiatives (eg, 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 onshore 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 is disappearing. This has in turn had an impact on the industry itself and has fostered an international concentration trend since 2008. 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. By 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 since the 2008 financial crisis 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 of the clients have found themselves lost – if not betrayed by their bankers – in the international regulatory and tax overhaul. The often long-standing relationship between bankers and their clients has further been 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

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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 services and pricing, all of which are being put under pressure from the emergence of sophisticated 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 facing unprecedented challenges and 'paradigm' shifts, all of which cross borders and span multiple jurisdictions.

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Argentina

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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 for private banking are the Civil and Commercial Code; the Banks and Financial Institutions Act No. 21,526, as amended; the Argentine Central Bank (BCRA) Act No. 24,144, as amended; and regulations issued by the BCRA. There is no specific statute addressing private banking in Argentina and there are no regulations addressing the activity as independent from banking activity or advisory services, as the case may be.

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

The BCRA is the governmental agency with regulatory authority over banks and financial institutions in Argentina. It is a self-governed entity that supervises the banking, financial and foreign exchange activities. Private banking activities as currently practised in Argentina do not completely fall within the scope of authority of the BCRA.

The BCRA's powers include:

- the authority to establish the required minimum corporate capital, liquidity and solvency of banks and financial institutions;
- approving mergers, capital increases and purchase and sale of financial institutions;
- granting and revoking banking licences;
- authorising the establishment of branches and representative offices of foreign banks; and
- granting financial aid to financial institutions undergoing exceptional liquidity problems.

In addition, to the extent an institution has issued publicly offered securities, it will fall within the supervision of the Argentine National Securities Commission.

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

Private banking and wealth services are normally provided in Argentina by banks or financial institutions through specialised offices. In addition, some individual advisers with financial knowledge and ad hoc family offices provide private banking services, although, eventually, any and all transactions have to be carried out through a bank or financial institution that is licensed in Argentina.

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

There is no definition of private banking in the Argentine legal system.

5 What are the main licensing requirements?

As a consequence of the activity not being subject to specific regulation, there is no licence required to render private banking services. However, the establishment of banks or financial institutions (through which the transactions have to be made) requires licensing from the BCRA.

Institutions can be set up as commercial banks, investment banks, mortgage banks, financial companies, building and loan associations or credit unions. Commercial banks are classified according to the transactions they perform into first- and second-tier institutions.

To obtain a licence to operate as a bank or a financial institution in Argentina, the most relevant requirements are:

- filing with the BCRA an authorisation request, which includes a brief description of the financial institution, its proposed activities and budgets and certain information related to shareholders and managers;
- shareholders, directors and managers are required to comply with certain eligibility standards;
- filing of a certificate that evidences the shareholders' lack of criminal records; and
- filing certain financial information. It is not necessary to set up any guarantee; however, in addition to the mentioned requirements, the BCRA has imposed a minimum corporate capital for financial institutions.

When considering the authorisation request, the BCRA will evaluate the convenience and characteristics of the project, the general and particular conditions of the market and the financial experience and background of the requesting party.

The minimum capital requirement is determined on the basis of the jurisdiction where the financial institution's main activity is located, with decreasing levels of basic requirement for those areas with less relative offer of banking services and depending on the type of financial institution involved. The minimum capital requirement set for banks is between 15 million and 26 million pesos; for credit unions, between 1 million and 6 million pesos, and for the remaining institutions, between 8 million and 12 million pesos.

6 What are the main ongoing conditions of a licence?

The main ongoing conditions of a licence are the maintenance of the basic conditions that were taken into account by the BCRA when granting the licence.

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

There are no 'private' banks in Argentina (assuming private banks are those whose only purpose is to provide private banking services). Banks and financial institutions have to be set up as corporations, except for branches of foreign financial institutions; commercial banks, which may also be incorporated as cooperative associations; and credit cooperatives, which must be incorporated as cooperative associations.

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

Given that the authorisation by the BCRA is discretionary, it is difficult to estimate the time required for obtaining a licence for a bank or financial institution.

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

The BCRA may decide to revoke the licence of financial institutions or banks, after a process in which the institution itself is involved, in the following cases:
- at the request of the legal or statutory authorities of the entity;
- in the event of dissolution under the Civil and Commercial Code rules;
- in the event of solvency or liquidity problems that cannot be settled by a regularisation and reorganisation plan;
- as a result of violations of the Financial Institutions Act; and
- upon fundamental changes to the conditions that were taken into account by the BCRA when granting the licence.

10 Is wealth management subject to supervision or licensing?

Argentine law does not regulate wealth management activities.

11 What are the main licensing requirements for wealth management?

Not applicable.

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

Not applicable.

Anti-money laundering and financial crime prevention

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

There are no specific provisions for private banking, but rules applicable to banks and financial institutions in general. Banks are required to adopt an anti-money laundering and terrorist financing policy, which shall include at least:
- the development of a manual describing procedures and mechanisms to prevent money laundering and terrorist financing;
- appointment of a compliance officer;
- conducting periodic audits;
- staff training;
- kepping a record of risk analysis and of unusual or suspicious transactions detected and reported;
- development of technological tools that are in accordance with the operational development of the bank, which are effective in preventing and detecting such activities; and
- systems that enable institutions to electronically consolidate transactions made by single clients and detect suspicions patterns or 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?

The following persons are considered, under Argentine law, as PEPs:
- Foreign public officers: individuals who are or have been entrusted with prominent functions up to two years before the date when the transaction was conducted, occupying certain relevant positions further described in the regulations, as well as their spouses or legally recognised partners, relatives in the ascending or descending line of first degree of consanguinity and close friends.
- Public officers of either national, provincial or municipal level in Argentina who are or have been entrusted with a prominent function up to two years before the date when the transaction was conducted. Regulations include a detailed list of the relevant positions that are deemed PEPs.
- Authorities and attorneys-in-fact of national or provincial political parties who are or have been entrusted with prominent functions up to two years before the date when the transaction was conducted.
- Authorities and legal representatives with decision-making capacity of trade union and business organisations (chambers, associations and other forms of corporate groups), with certain exceptions.
- Authorities and legal representatives with decision-making capacity of healthcare institutions encompassed by Law 23,660 that are or have been entrusted with such functions up to two years before the date when the transaction was conducted.
- Individuals who are or have been entrusted with prominent functions up to two years before the date when the transaction was conducted, with higher functions in an international organisation and who are members of the senior management thereof, excluding middle- or lower-ranking officers.
- Spouses or legally recognised partners, relatives in ascending or descending line or of first degree of consanguinity of any of the foregoing.

Upon starting any business or contractual relationship, banks are required to obtain from any prospective client a signed affidavit as to its status as a PEP. In connection with those clients that qualify as PEPs, banks are required to heighten their scrutiny standards in the follow-up of the relationship, strengthen measures directed to determine the origin of funds involved in the transactions and continuously monitor the 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.

Both the Financial Information Unit and the BCRA issue anti-money laundering regulations.

In compliance with the standards issued by those entities, to open bank accounts customers need to present an identification document with a photo (usually the national identification card) and provide information as to their date and place of birth, tax identification number, address, profession, employer name and marital status, and declare the legal origin of funds to be deposited. Proof of income and origin of funds may be requested, but it is not mandatory. Remote account opening and transactions are allowed by the anti-money laundering regulations, provided that the bank applies special ex-post monitoring procedures to identify any unusual transactional patterns. However, in practice, this option is rarely used by banks for account opening, since bankers widely assume the BCRA requires face-to-face account opening. There are no regulations requiring banks to specifically conduct customer due diligence, but know-your-client policies are enforced as part of the anti-money laundering protocol. If a transaction or a group of related transactions exceeds 120,000 pesos, the client has to provide supporting documentation on the origin of the funds.

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

According to Argentine law, any offence, including tax offences, may constitute a predicate offence for money laundering purposes. There are no specific predicate offences under Argentine criminal law.

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

Argentine regulations do not provide for financial intermediaries requesting any tax compliance documents from their clients. However, it is customary for banks to request from clients their tax returns in order to corroborate the origin of funds and the consistency of their economic situation. There are no mandatory tax compliance requirements that financial intermediaries are required to obtain from their clients.

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

In the event of failing to comply with money laundering rules, banks and financial institutions shall be punished with a fine of one to 10 times the value of the transaction, provided that the act does not constitute a major crime. The fine may also be applied to a bank's employees responsible for anti-money laundering measures.

Money laundering crimes shall be punished with imprisonment from six months to 10 years, depending on the value of the transaction, as well as fines from two to 10 times such value and suspension of activities up to a maximum of 10 years.

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Client segmentation and protection

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

The Argentine legal and regulatory framework does not distinguish between types of clients for private banking purposes. The only existing classification by the BCRA refers to the debt situation of clients.

20 What are the consequences of client segmentation?

Not applicable.

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

The Consumer Protection Act applies to private banking activities.

In addition, in January 2013 the BCRA issued a regulation for the protection of financial service users, which grants broad rights to general banking consumers and sets forth detailed procedures for the management of consumer claims.

Exchange controls and withdrawals

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

According to current BCRA regulations, Argentine residents are entitled to access the local foreign exchange market without requiring prior approval in connection with:

- real estate investments abroad;
- loans granted to non-Argentine residents;
- Argentine residents' contributions of direct investments abroad;
- portfolio investments of Argentine individuals abroad;
- certain other investments abroad of Argentine residents;
- portfolio investments of Argentine legal entities abroad;
- purchase of foreign currency to be held in Argentina; and
- purchase of traveller's cheques.

In other cases, prior approval of the BCRA needs to be secured in order to access the foreign exchange market.

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

There are no local laws or regulations currently in force that restrict cash withdrawals nor the currency in which it can be made. There are, however, some requirements (related to security issues) when a client is planning to make a relevant withdrawal in which the client is required to furnish the bank with prior notice.

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

There are no other restrictions for other withdrawals.

Cross-border services

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

As indicated above, there are no regulations specifically addressing the activities of investment advisers in Argentina. Thus, there are no restrictions on the rendering of financial advice by a non-resident individual or entity to an Argentine citizen. Parties are entitled, under Argentine civil law principles, to choose the applicable law that will regulate their relationship.

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 in Argentina, although, as indicated above, no actual banking services in Argentina may be rendered.

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

Save for certain tax aspects of cross-border services (in general, it is deemed that any technical or financial advisory services rendered from outside of Argentina to a local resident is fully of Argentine source and subject to withholding tax), there are no regulations on the matter. Neither for services in general, nor for private banking activities in particular.

Foreign banking institutions are allowed, subject to previous authorisation granted by the BCRA, to establish a representative office. BCRA regulations forbid any such representative office from carrying out actions aimed at (directly or indirectly) collecting financial resources in any manner for itself, third parties or for its principal. In practice, representative offices generally advise on services and promote the represented institution's activities regarding credits, project financing, investment opportunities, securities, trade finance, financing analysis and management, warranties, technical assistance and other activities.

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?

There is no regulation regarding employees of foreign private banking institutions, nor are there registration or licensing requirements for them to travel and meet clients in Argentina.

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

There are no restrictions as to foreign private banking institutions sending documents to local clients and prospective clients. However, customarily, mainly due to either privacy or security reasons, clients choose not to receive any such documents in Argentina.

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?

Banks and financial institutions are not required to verify the tax-compliant status of their clients. In order to open accounts, clients need to present their tax identification number (whether Argentine residents of foreign residents) that solely evidences that the relevant client has complied with its registration obligations with the tax authority (but not that the client is in compliance with its substantial tax obligations).

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?

Banks and financial institutions are required to inform the Federal Tax Authority, on a monthly basis, of any and all relevant openings and closures of bank accounts as well as different relevant transactions registered in clients' bank accounts (deposits, withdrawals, balance of accounts, debit and credit card charges, etc). Under current regulations, a transaction is deemed relevant if it exceeds 10,000 pesos. In the case of foreign residents' accounts, certain information needs to be disclosed on a yearly basis instead of on a monthly basis.

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. Banks and financial institutions have to disclose the required information to the Tax Authority and failure to do so exposes them to fines and other administrative sanctions.

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.

Due mainly to tax considerations, it is fair to say that private assets located in Argentina are mostly held directly by individuals in Argentina and private assets located abroad are mainly held through

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Update and trends

The recent change (December 2015) in the administration of the country has shown the beginning of a process towards a more open and deregulated banking market. Lesser requirements to access the foreign exchange market, the promotion of bankarisation, and the ability of banks to set the prices of retail banking products are among the initial steps taken.

Since the beginning of 2016, most of the foreign exchange restrictions have been lifted, so that now no mandatory deposits are required for foreign investments, and subsidiary companies are again allowed to transfer dividends to their foreign headquarters.

Banks are again entitled to freely agree their interest rates and commissions with their clients. Likewise, in order to achieve greater bankarisation in Argentina, the BCRA eliminated certain costs for opening banking accounts to consumers and for transferring funds through home banking.

In line with all of these changes, on 22 July 2016, a tax amnesty bill was passed as Law 27,260. This is a bold step forward towards the normalisation of the Argentine economy in which banks – and private banking in particular – shall have active intervention and participation. By means of a declaration (without the need for repatriating assets, if they are abroad) and payment of a special tax (depending on the nature of the assets and the timing of the declaration) levied on zero per cent, 5, 10 or 15 per cent of the declared assets, taxpayers in Argentina are relieved from any penalty related to tax offences as well as any past due taxes on such assets. Initial expectations are that, under this tax amnesty, around US$20 billion of undeclared assets pertaining to Argentine residents will be declared.

corporations, trusts or limited liability companies set up abroad in 'white list' jurisdictions.

For assets held in Argentina, access to tax exemptions and reduced tax rates is solely granted to individuals, but not to other taxpayers. Individuals benefit from exemptions from income tax when profits stem from deposits held with local banks and financial institutions, or from publicly traded public or private bonds and other securities and from reduced rates in the case of other securities. While the general applicable income tax rate for most taxpayers in Argentina is 35 per cent, individuals residing in Argentina are subject to income tax at progressive rates (from 9 per cent to 35 per cent).

For assets held abroad, current applicable law allows 'sheltering' of the income in a 'white list' jurisdiction (cooperative jurisdictions for tax purposes) entity because the Argentine resident is solely required to pay income tax in Argentina on its foreign-sourced income – when this sort of structure is used – once the income is paid to the Argentine resident. No relevant costs are associated with this structure, although some 'substance over form' issues might pose a concern.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

There are no specific KYC requirements for private assets held through a structure. However, general KYC standards require banks to have information and supporting documentation of the beneficial owner as well as reasonable information as to the origin of funds and proceeds.

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

Pursuant to the Argentine Corporations Act, as amended, a controlling person is a person who, directly or through a controlled company: (i) holds equity interests of any nature that allow such person to prevail and approve resolutions in ordinary shareholders' meetings; or (ii) has a dominant influence on the entity as a result of shares, membership interest or any other form of equity participation or by special links between companies.

In addition, the Income Tax Law sets forth a definition of related companies when both are subjected directly or indirectly to the direction or control of the same person or entity; or when the participation in capital stock, level of debts or functional influences of that person or entity give them the power to define the activities of such companies.

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, although, as explained, tax considerations tend to define the preferred structure.

Contract provisions

37 Describe the various types of private banking contract and their main features.

Private banking contracts are not specifically regulated by local legislation. Under Argentine civil law rules, parties would be entitled to choose foreign law to apply thereon.

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 general, negligence and fraud are the standard for liability purposes under the Argentine Civil and Commercial Code. In principle, the party that asserts a fact has the burden of proof; however, according to modern theories that have been affirmed in local courts, the burden of proof may also be imposed on the party that is in the best position to evidence the relevant fact. Parties are entitled to contractually waive negligence, but not fraud. Under certain circumstances, which could encompass the case of the specialised knowledge required to advise in a private banking relationship, a heightened standard of diligence and care would be required in the performance of obligations.

If a contractual relationship falls within the scope of the Consumer Protection Act, the liability standard becomes strict, and the mere non-compliance or damage is enough to generate responsibility in the party that caused it, regardless of whether there has been fraud or negligence in its actions.

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

Not applicable.

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

The general limitation period established by the Argentine Civil and Commercial Code is five years. The Code also establishes a three-year term applicable to damages claims. These periods cannot be varied contractually.

The limitation period starts running on the day that the obligation is due or the day on which the damage was caused. A formal out-of-court claim suspends the term for six months and filing of a suit interrupts such term.

Confidentiality

41 Describe the private banking confidentiality obligations.

The Financial Institutions Act provides for bank secrecy. The statute forbids banks and financial institutions from disclosing the information provided by their clients concerning deposit-taking, but not on

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the financial institutions' lending transactions and their other services. The Act imposes secrecy obligations on employees of banks and financial institutions as well, in connection with the information acquired in the course of performing their tasks.

Confidentiality is also imposed on the BCRA and its personnel and the personnel of auditing firms, with respect to information they may become aware of while supervising the activities of financial institutions or rendering their services.

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

Any information or documents of the clients are within the scope of confidentiality.

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

The Financial Institutions Act contemplates certain exceptions to secrecy such as when the information is requested by the judiciary, the BCRA, tax authorities, money laundering authorities, other financial institutions and in connection with money laundering, provided that the conditions established by the Act are met.

44 What is the liability for breach of confidentiality?

Penalties regarding violations of the secrecy obligations are not specific but, rather, are those established for the non-compliance of any obligations under the Act and include warnings, fines, disqualifications and revoking the financial institution's licence.

The Criminal Code affords protection to secrets in general. Punishable behaviour consists in disclosing a secret without fair cause by an individual who has received notice of such secret by reason of their profession, activities, title, job or art, when such disclosure may cause damage.

Disputes

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

The federal administrative or economic crime courts, depending on the matter, are the competent authorities in the dispute resolution between the BCRA and the banks, while local commercial courts are the competent authorities for dispute resolution between banks and their clients.

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 regulations requiring the banks to disclose to the BCRA disputes with clients. Clients are entitled to file complaints with the BCRA. In January 2013 the BCRA issued a new regulation for the protection of financial service users (Communication 'A' 5388, as amended), which grants broad rights to banking consumers and sets forth detailed procedures for the management of consumer claims.

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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 a financial institution 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?

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?

Private banks in The Bahamas are subject to four main types of ongoing conditions. These can be separated into capital adequacy requirements, physical presence requirements, corporate governance requirements and information sharing requirements. 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 stand-alone institution. Summarised below are the minimum requirements that are generally applied to all banking institutions.

Capital adequacy

A private bank must maintain a capital adequacy ratio of at least 8 per cent at all times, at least half of which must take the form of Tier 1 capital (ie, 4 per cent), unless it is a branch of an existing foreign bank. It is expected that in 2016 the CBB will increase the capital adequacy requirements licensed banks will be required to maintain to a minimum capital adequacy ratio of at least 10.5 per cent, which should be comprised of a minimum Tier 1 capital ratio of 4.5 per cent and a capital conservation buffer of 2.5 per cent, to bring the industry in line with Basel II and Basel III recommendations.

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 yearly statement of their accounts; notifying and obtaining approval from the CBB in respect of any outsourcing of material functions by the bank; and, generally, notifying the CBB of any changes or proposed changes to their business, operations, shareholders or corporate information.

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 stand-alone private banks that operate exclusively from within The Bahamas.

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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 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 have 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 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 time. 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 requirements for private banking 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), which 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 require that banking institutions:

- 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 and capable of assessing the level of potential risk each client relationship poses to the bank;
- identify customers and verify customers' identity using reliable, independent source documents, data or information; and 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 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.

Licensees 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 procedure, using a risk-sensitive approach prior to establishing a private banking relationship for a PEP.

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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) address; (iii) 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:

(i) 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;
(ii) 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;
(iii) 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;
(iv) any entity in which all of the equity owners are accredited investors; or
(v) 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 above.

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

There is no general consumer protection or similar legislation relevant to private banking in The Bahamas. The SIA, however, 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 (ie, 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

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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 the marketing and the 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 US clients in compliance with FATCA.

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.

The information required to be reported include the name, residence, contact information, standing instructions in relation to accounts maintained in the US and powers of attorney or authorised signatories in respect of clients that are US citizens.

The reporting obligations of private banks and financial intermediaries will increase when The Bahamas implements the CRS, which is expected to come into force in 2018, in respect of 2017 account information.

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 (when implemented), as such reporting is authorised by legislation. Nevertheless, it is customary for financial intermediaries to obtain clients' consent via waivers. Under FATCA, the reporting of client information to the relevant authority does not constitute a breach of confidentiality as the act implementing FATCA into Bahamian law absolves a financial intermediary or private bank from liability for disclosing information required to be disclosed under FATCA. 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 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 with a structure?

Where the private banking relationship is established with a 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;

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Update and trends

With the implementation of FATCA, and the CRS soon to come into force, the private banking industry in The Bahamas is becoming more transparent than it has been in the past. Private banks in The Bahamas are evolving to be able to comply with all of their disclosure obligations while continuing to offer all of the advantages that come with using offshore private banks.

- 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 contract and their main features.

The relationship between private banks in The Bahamas and their clients is generally governed by the banks' general terms and conditions. The general terms and conditions of Bahamian private banks generally 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.

39 Are any mandatory provisions imposed by law or regulation in private banking 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 contracts.

40 What is the applicable limitation period for claims under a private banking 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 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 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 both in 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.

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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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China

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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 reguation 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 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; and
- the Measures for Pilot Assets Management for Specific Clients by Fund Management Companies.

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

The banking, insurance and securities industries are supervised by the China Banking Regulatory Commission (CBRC), the China Insurance Regulatory Commission (CIRC) and the China Securities Regulatory Commission (CSRC) respectively.

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

In mainland China, financial institutions usually provide private wealth services in the form of private banking 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?

There are no relevant laws or regulations about licensing requirements.

6 What are the main ongoing conditions of a licence?

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.

Anti-money laundering and financial crime prevention

13 What are the main anti-money laundering and financial crime requirements for private banking 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 needs to report to People's Bank of China or anti-money laundering authority of the place where the branch is located, on behalf of the branch.

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.

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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 the one or more of the following methods to verify the identification of clients:
- requiring clients to provide other identification documents;
- re-checking 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?

No verification is needed.

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 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 HNWIs 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 can 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?

There are no relevant laws and regulations about consumer protection.

Exchange controls and withdrawals

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.

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 withdrawing yuan. However, a person cannot withdraw foreign currency of more than US$10,000 each day and more than US$50,000 each year. In addition, there is no limitation on the kind of foreign currency withdrawn, but not all banks have all kinds of foreign currency.

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 490,000 yuan. If the amount exceeds 50,000 yuan, it must be reported to the bank in advance, with the aim of preventing money laundering.

Cross-border services

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 hit the limit of the amount permitted by the CBRC.

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?

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

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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 relevant laws or regulations concerning requirements on individual taxpayers.

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?

Some financial institutions may report on the client's behalf, but there is no uniform reporting requirement for financial institutions.

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.

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.

- Held by company:
  - Cost: the cost of establishing and running the company.
  - Advantage: has limited liability.
  - Risk: inheritance issues can occur when the shareholders pass away.
- Held by insurance:
  - Cost: no cost.
  - Advantage: you can pledge the policy to ensure financial liquidity.
  - 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 trustor, trustee and beneficiary.
  - Risk: the trustor cannot control the trust at his or her full discretion.
- Held by funds:
  - Cost: fund management fees.
  - Advantage: higher interest.
  - Risk: information asymmetry.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a 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.

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

There is no definition of a controlling person in China.

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

If a trust holds private assets, it needs to transfer the ownership of property to the name of the trust company. It will be highly taxed if the asset is not transferred in the form of cash; when transferred in the form of cash the process will be deemed as a normal deal. 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 contract 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?

It 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 one 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 contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

There are no relevant laws or regulations concerning provisions in private banking contracts.

40 What is the applicable limitation period for claims under a private banking 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 relevant laws, in most cases, the time limitation of action regarding applications to a people's court for protection of civil rights is two years. A limitation of action begins when the entitled person knows or should know that his or her rights have been infringed upon. However, 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 Laws of Commercial Banks provides that commercial banks establish regulations concerning information management and confidentiality, and prevent the client's information from being used improperly. However, these rules are abstract and are not specific, which make them hard to implement. Some important issues have not been solved. For example, banks may disclose the clients' information in a lawsuit in order to protect public interest. In addition, China has not enacted any private information laws, and the current General Principles of Civil Law need to be perfected in terms of protecting private information. In the current situation, HNWIs 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.

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Update and trends

Investment has developed from single- to multiple-direction fields
The investment field of private banking clients has developed from deposit and fixed-income products to the secondary market: cash management, trusts, private equity and venture capital. According to research, each interviewer invests, on average, in four fields.

Most investors can bear medium- and high-risk investment instead of staying conservative
According to research on the development of Chinese private banking carried out by Societe Generale Private Banking and the Boston Consulting Group, the investors interviewed who were willing to bear a certain degree of risk increased rapidly to 68 per cent. Due to the maturing financial market, wealth management and the New Normal of the economy, private banking institutions need to enhance investors' rational knowledge of risk and return, lead investors to invest rationally and find a balance between low risk and high risk.

Financing products are starting to be customised
Clients whose assets are valued at between 6 million and 30 million yuan would focus on the interest of investment, so a product that can ensure the flow rate and relative high return can satisfy the needs of these clients. Clients whose assets are valued at over 30 million yuan usually put a high value on flow rate and combined rate of return and tend to choose customised products and services based on their needs.

The investment need has developed from individuals to the whole family
Eighty-four per cent of investors interviewed were married and had children, so inheritance of wealth is the focus of most clients. About 21 per cent of clients had started to make arrangements relating to inheritance and 37 per cent of clients had not started to make arrangements, but they are considering them.

The investment vision has been expanded to the overseas investment market instead of focusing on domestic investment
According to the analysis, China's investment aim is to isolate overseas assets from domestic assets and to enhance the security of these assets. This is the main reason (according to 38 per cent of the investors interviewed) why private banking clients invest overseas. Furthermore, China needs to increase value (37 per cent) and offset domestic risk (32 per cent). In addition, for clients with more than 30 million yuan of investable assets, convenience for developing overseas business is also an important reason.

The method for providing services is developing into a combination of online and offline
The ability and qualification of customer managers is still the essence of private banking. Fifty-four per cent of HNWIs put the profession of customer manager as the most important element when choosing the financial institution and 65 per cent would contact the customer manager first. However, under the cover of immutability, the change has appeared quietly. According to research, HNWIs are stepping into the age of digital: almost 80 per cent of HNWIs are buying digitised financing products and services.

Private banking is embracing the internet
Private banking institutions are starting to improve on the traditional business model by using the internet to provide customised suggestions, analyse and simulate clients' investment portfolios and interact with customers in real-time.

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, removing office held and 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.

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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 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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Ecuador

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Private banking and wealth management

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

In Ecuador, the main source of law regulating banking and financial business is the Monetary and Financial Code 2014 (COMF). There is a large quantity of secondary legislation issued by the Monetary and Financial Regulation Board (JRMF) (formerly, the Banking Board). The JRMF also has the power to issue securities market rules (this power was formally conferred on the National Securities Council).

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

In accordance with the COMF, the JRMF within the Executive Branch is the highest authority for issuing the policy and rules for the financial and banking sector. The Superintendency of Banks (SB) is the regulatory agency of the national banking and financial system, which is in charge of overseeing and supervising financial institutions. The Superintendency of Companies, Securities and Insurance (SCVS) is the oversight agency for the securities market. Both superintendencies belong to the Social Oversight and Transparency Branch.

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

In Ecuador, there are various entities with specific powers concerning the services they may offer. Trust managers provide fund management services (public and private funds), as well as services for managing private portfolios. Securities firms provide investment banking services and are the only ones authorised to transact at the exchange market. Private banks manage financial products (certificates of deposit, time deposits, etc).

There are no entities that may autonomously engage in all of the activities listed above, such as private wealth services.

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

There are two types of banks: (i) multiple banks, which are authorised to carry out different loan transactions in two or more segments, and (ii) specialised banks, which operate in one loan segment without surpassing the thresholds set by the JRMF.

Financial business is understood as a set of transactions and services involving supply, demand and users, in order to facilitate the circulation of money and provide financial intermediation. Its purpose includes maintaining deposits and addressing financing requirements for accomplishing the country's development objectives.

5 What are the main licensing requirements?

In order for a company to participate in the private financial sector, it must comply with the following general rules:

- it has to be a stock company;
- it must complete the process for reserving the company's name, reflecting its nature and individuality, while referring to the type of company it will be;
- it must provide economic-financial feasibility studies on the private entity to be incorporated and a market analysis demonstrating the viability of the entity's incorporation and insertion, in line with its capacity and selected specialisation, and its impact on other entities of the system; and
- it must have a minimum capital of US$11 million. Capital has to be paid only in cash.

6 What are the main ongoing conditions of a licence?

Financial entities must regularly complete the following activities:

- capital advertisement: banks may only announce their capital that has been subscribed and paid;
- they must maintain a legal reserve fund equal to at least 50 per cent of their subscribed and paid-in capital;
- they have to keep sufficient levels of high-quality liquid assets, clear of encumbrances or restrictions, which may be converted into cash in a certain period of time without significant value loss, compared to its obligations and contingencies;
- they must always maintain a ratio of not less than 9 per cent between their technical equity and risk-weighted assets and contingents; and
- the ratio between technical equity and total assets and contingents may not be below 4 per cent.

Authorised capital is the sum up to which the entities of the public and private financial sectors may accept share subscriptions or issuances, as the case may be. Subscribed and paid-in capital must be at least 50 per cent of the sum of authorised capital.

Technical equity is formed by the following, among other items:

- the sum of subscribed and paid-in capital;
- reserves;
- total earnings or surplus of the year in progress, once labour and tax obligations have been met;
- undistributable funds in the legal reserve;
- accrued earnings from previous fiscal years;
- contributions to future capitalisations; and
- unsecured convertible bonds.

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

The COMF accepts the following forms of companies for financial institutions:

- subsidiaries: they have their own legal personhood. The bank's direct or indirect stockholding must be over 50 per cent of the company's subscribed and paid-in capital;
- affiliate: they have their own legal personhood. The bank's direct or indirect stockholding must be between 20 and 50 per cent of the subscribed and paid-in of capital or the bank must exert influence in the company's management in terms of common shareholders, directors, administrators and employees;
- branch of a foreign company, which may carry out financial activities;
- representation office, which must act strictly as a customer information centre and:
  - grant mortgages and pledges, with or without titles issued, as well as unsecured loans and any other kind of loan authorised by the JRMF;
  - grant credit in checking accounts, whether or not contracted;

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    - make deposits at financial entities in and outside of the country; and
- domestic companies organised under the laws of the Republic of Ecuador.

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

The process for a private bank to obtain a licence may take up to two years.

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

The proposal must be submitted to the SB. The entity does not have any liabilities. The SB will intervene in the entity in order to duly repay all customers and creditors.

However, the SB can also request ex officio the withdrawal of a licence if the entity:

- does not meet the minimum number of transactions established by the SB, for a period of six months; or
- submits false and incomplete information or does not disclose relevant information, thus affecting the grant of the licence.

10 Is wealth management subject to supervision or licensing?

All of the activities that are part of wealth management are subject to supervision and licensing by the corresponding oversight entity, the SB or the SCVS.

The differences between discretionary management and non-discretionary advisory service are not clear under Ecuadorian legislation. Management services are necessarily related to advisory services; however, advisory activities are not limited to financial institutions.

11 What are the main licensing requirements for wealth management?

Depending on the type of service to be offered, the company will have to fulfil the following requirements:

- securities firms must:
    - be stock companies; and
    - have a certificate of equity contribution in one of the stock exchanges (Quito or Guayaquil); and
- fund managers and trusts must:
    - be stock companies;
    - have physical, technical and human resources structures for providing quality services; and
    - have computer systems, programs and independent equipment.

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

The following monthly information must be delivered within 15 days of the close of each month:

- financial statements cut at the end of each month;
- description of the 'investment' account;
- description of all securities maintained in position through underwriting contracts, in any of their forms;
- description of securities acquired under activities involving advisory, information and consultancy services regarding securities portfolio trading and structuring;
- description of the 'other assets' account;
- description of managed third-party portfolios, respecting stock exchange secrecy. The amount and type of securities, classified as fixed income and variable income, must be stated;
- description of all brokerage transactions completed; and
- description of brokerage transactions made at the over-the-counter market.

The following annual information should be submitted within 90 days from the close of the fiscal year:

- audited financial statements with explanatory notes referring to the above points; and
- an administration report.

In addition, each month fund managers, trusts and securities firms must provide investors with a summary or statement of their transactions and portfolio evolution statement, as well as the composition or valuation of their portfolio, quote variations, return and other information of interest.

Fund managers and trusts are required to deliver the following information from time to time:

- monthly information to be delivered within 15 days from the close of the month:
    - financial statements cut at the end of each month;
    - description of commissions received from each one of the funds and trust businesses they manage;
    - description of the manager's own portfolio;
    - description of investment of fund managers in investment funds;
    - market value of the quotas of the different collective funds they manage;
    - description of contracts for correspondents or representation, made with national or foreign entities. The counterpart and type of contract must be stated; and
    - additional information established for maintaining the registration of investment funds and trust businesses; and information required from trust businesses not listed in the Securities Market Register; and
- annual information to be submitted within 90 days from the close of the fiscal year:
    - audited annual financial statements;
    - sworn statement by the managers and each one of the members on the corresponding investment committee, stating they have not incurred the disqualifications established in the Securities Market Law;
    - administration report;
    - internal auditor's report;
    - update of the manuals in the case of changes; and
    - description of annual income from their business as investment fund managers, trustee, and agent handling the securitisation processes, classified by city, depending on the domicile of the participants, settlors, or originators, respectively.

Anti-money laundering and financial crime prevention

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

Premised on the COMF, entities of the national financial system have the obligation to establish internal control systems for the deterrence of crime, including money laundering and the financing of crimes, such as terrorism, in all financial transactions.

These controls include:

- registration of all operations and transactions made in the month, including accounts and commercial correspondence files. The entity's own national or international operations and transactions must be reported; and
- the 'know your customer' policy has to be applied to all potential, current, permanent and occasional customers. The following minimum measures must be taken for identifying and verifying customer identity:
    - when the business or contractual relationship starts;
    - when the customer's data change;
    - when occasional operations, transactions, or processes are made;
    - when there is doubt about the truthfulness or congruency of customer identification information; and
    - registers must be kept and updated for 10 years after the date of the last economic operation or transaction by the customer;
- politically exposed persons (PEPs);
- the 'know your employee' policy by which employee conduct must be properly selected and supervised, especially conduct of employees in jobs related to customer management, money receipt, and information control. In addition, an employee profile must be defined and updated during the employment relationship;
- the 'know your market' policy identifies risks arising from transactions, operations or processes forming part of the course of business for later establishing prevention controls; and
- the 'know your correspondent' policy requires a register of the parties obligated to report on correspondent relationships kept because of their business. They must provide sufficient information about the company they represent for its complete identification.

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There is also a brand new Anti-Money Laundering and Financial Crime Prevention Law that was enacted on 21 July 2016. In accordance with the Law, the JRMF is in charge of the anti-money laundering and financial crime prevention system. The Law also establishes the Economic and Finance Analysis Unit (UAFE) as the technical entity for oversight and compliance.

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 a person who carries out or has carried out major public duties in the country or abroad, and who, because of their profile, may expose the entity to a higher degree of the risk of money laundering, financing of terrorism, and other crimes.

Business relationships with relatives within the second degree of blood relation or the first degree of family relation and staff members of a PEP require the financial system institution to apply increased due diligence procedures.

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.

In general terms, the following information is required:
- identification document (identification card or passport);
- marital status;
- address of domicile or residence;
- utility bill showing the address of the person (water, electricity, or telephone bill); and
- commercial references accrediting level of income.

For moral persons, evidence of the following must be submitted:
- certificate of legal existence;
- declaration of the shareholders chain;
- appointment of the legal representative; and
- company by-laws.

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

Under Ecuador's Organic Criminal Code (COIP), tax offences are not predicate offences for money laundering. Money laundering and tax offences are dealt in separate subchapters of the Code. Ecuador has, to date, not included tax predicate offences in its domestic criminal law, despite being a signatory to the UN Palermo Convention.

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

For individuals, there is no minimum compliance verification with respect to their tax obligations. However, for corporate clients, the financial intermediaries must require the client's income tax return to be filed each year with the competent authorities along with their taxpayer identification registration if there has been any modification in the company's legal status or change of its legal representatives.

In addition, when making offshore transfers on behalf of their clients, financial intermediaries act as withholding agents of the capital outflow tax. Aside from sending the tax to the Internal Revenue Service (IRS), they must fulfil reporting obligations regarding the client, the amount transferred and a description of the payment.

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

In the event of the late filing of the reports of operations or transactions exceeding US$10,000, the administrative liability for natural or moral persons that deliver a late report of operations or transactions will be sanctioned with a fine from one to 10 times the unified base salary. If the person fails to submit the report, the fine will be from 10 to 20 times the unified base salary.

Criminal liability for failure to comply with anti-money laundering rules and regulations is as follows:
- one to three years' imprisonment when the amount involved in money laundering is less than 100 times the unified base salary for workers in general;
- five to seven years' imprisonment when the commission of the crime does not presuppose association for the offence;
- seven to 10 years' imprisonment in the following cases:
  - when the amount involved in money laundering is equal to or greater than 100 times the unified base salary for workers in general;
  - when the commission of the crime presupposes association for the offence, without the creation of companies or without using companies legally organised; or
  - when the crime is committed using financial system institutions or insurance companies, public institutions or dignitaries, or director positions, duties or jobs in such systems;
- 10 to 13 years' imprisonment in the following cases:
  - when the amount involved in money laundering is greater than 200 times the unified base salary for workers in general;
  - when the commission of the crime presupposes association for the offence by creating companies or using companies already legally organised; or
  - when the crime was committed using public institutions or dignitaries, a public office or public employees.

In the cases listed above, money laundering is also punishable with a fine equal to double the amount of the assets involved in the crime. Punishment also includes the confiscation of property when a legal person in dissolution or liquidation was used.

Client segmentation and protection

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

The traditional manner for classifying customers is:
- customer: individual or company with whom an institution of the financial system directly or indirectly establishes a financial, economic, or business contractual relationship, whether temporary or permanent;
- occasional customer: individual or company who, under contract, occasionally does business with a financial institution;
- permanent customer: individual or company who, under contract, has an ongoing business relationship with an institution of the financial system; and
- potential customer: individual or company inquiring about the services or products of an institution of the financial system and possibly interested in having access to a different or new product or service.

Ecuadorian regulatory legislation defines special customer categories based on the level of risk posed by the customer:
- customers dealing in high-risk industries or activities;
- customers whose equity exceeds US$400,000 or the equivalent thereof in other currencies; and
- non-resident customers.

20 What are the consequences of client segmentation?

If the customer meets any of the above criteria, the financial institution will have the obligation to apply increased due diligence procedures, understood as a set of more stringent, exhaustive and reasonably designed and differentiated policies, processes and procedures, depending on the results of risk identification, assessment and diagnosis, applied by the entity for the deterrence of money laundering, the financing of terrorism and other crimes.

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

The Consumer Defence Law, which regulates the different areas of services provided by financial institutions. The highlights are:
- regulation of accession contracts, which must be performed within certain parameters for the validity thereof;
- the possibility that the consumer will always have the right to pay everything due in advance or to make partial advance payments

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in amounts over the instalment in all sales or provision of services on credit. In such cases, interest is paid solely on the outstanding balance;
- the obligation to report on the operation of the banking system, as well as the transactions that the user makes;
- a prohibition on charging interest over interest (anatocism);
- customer privacy protection and transparency in collection action by the financial institution; and
- the price of a good must be the same, irrespective of whether payment is made in cash or by credit card.

Exchange controls and withdrawals

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

The COMF grants the JRMF the power to set the conditions and limits on the position in offshore assets that financial entities, securities firms and insurance companies, as well as non-financial loan entities, have outside the country.

The JRMF may also set the external debt conditions and limits for financial entities, securities firms and insurance companies, and non-financial loan entities, which the country contracts abroad. Furthermore, it may also order the entry into the country of currency from the transactions it determines. In addition, it may set fines up to the amount of the currency that does not enter the country, in the event such obligation is not met.

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

In order for an entity of the national financial system to deal in currencies other than the dollar, it must secure authorisation from the Central Bank of Ecuador. Entities are required to report in the manner and frequency determined by the JRMF about the sums and types of exchange of the transactions made and to provide the information the bank requires with respect to movements in their currency accounts. Nonetheless, exchange transactions may be made at the free market.

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

In Ecuador, cheques are only means of payment and cannot be used as a means of credit. Therefore, they cannot generate any kind of interest.

Gold is recognised as a currency, but cannot be deposited in bank accounts or freely used. This is because the Central Bank of Ecuador may intervene in the purchase, sale or trading of gold and may make futures transactions in currency or gold or through other derivatives.

In addition, securities may be managed from a securities clearinghouse, which keeps custody of dematerialised securities and securities in book entry form.

Cross-border services

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

Domestic financial entities may engage in cross-border activities, with the prior authorisation of the SB and in accordance with the rules issued by the JRMF.

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

With the prior authorisation of the SB, financial entities of the private financial sector may participate as shareholders in the capital of foreign financial entities of the same type, whether already organised or to be organised, subject to the conditions defined in a regulation to be issued by the JRMF.

Nonetheless, said financial entities and their shareholders that have influential equity ownership are barred from participating as shareholders in financial entities already organised or to be organised in tax havens or jurisdictions with lower taxes compared to Ecuador (defined by the IRS), or at places with oversight standards below national standards.

Investment in the capital of foreign financial entities exceeding 50 per cent of subscribed and paid-in capital will convert such entities into a subsidiary of the investor. Investment between 20 and 50 per cent will make them an affiliate.

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

With the prior authorisation of the SB, private financial sector entities may carry out the following activities in or outside Ecuadorian territory:
- make deposits at financial entities in and outside of the country;
- trade documents resulting from foreign trade transactions;
- trade securities and discount documentary remittances abroad or make advances thereon; and
- receive loans and accept credit from financial entities in or out of the country.

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?

It is not possible for employees of foreign private banking institutions to promote financial services if the foreign bank is not domiciled in Ecuador. Only entities duly authorised by the SB may promote financial services by any method or procedure.

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?

Taxpayers who are individuals owning assets worth more than US$400,000 must disclose their equity by filing an equity declaration each year. This requirement does not differentiate between domestic and foreign private banking accounts. Therefore, all accounts must be included in the equity declaration.

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 COIP, tax offences are not predicate offences for money laundering. Money laundering and tax offences are dealt with in separate subchapters of the Code. Ecuador has, to date, not included tax predicate offences in its domestic criminal law, despite being a signatory to the UN Palermo Convention.

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?

When opening an account, customers are required to sign a consent form to authorise the financial intermediary to verify the documentation filed by them and allowing the private bank or financial intermediary to report to the relevant oversight authorities all public information required by law. Such consent cannot be revoked. Financial intermediaries also have reporting obligations for complying with anti-money laundering measures and must report any unusual transactions that their customers make.

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 in Ecuador is the trust, followed by private equity funds and portfolios.

The benefit of having a trust is that the assets transferred to this legal structure are protected against encumbrances and seizures. However, the administrative expenditures and fees for their management and maintenance are considerable, resulting in this structure being used mostly for large equities.

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Private equity funds are managed by trustees that invest the funds in securities traded at the stock exchange. This is especially true for the acquisition of bonds and debt. It is not common to invest in stock or equity of companies.

Portfolios are managed by securities firms, which only invest in stocks traded at stock exchanges.

In all of these cases, the fees are regulated by the competent public entity.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

With respect to customer information, in general, financial entities are required to:

- define mechanisms for compiling, verifying and updating customer identity;
- define the monthly transaction profile of the subject under analysis, considering as a minimum the information obtained about the economic activity, the products to be used, the purpose of the business relationship, the historical transaction banking at the institution, if any, and the analysis conducted;
- establish the behaviour profile, considering all of the analysed customer's own and habitual characteristics associated with general information, way of using the institution's services and products, and so on; and
- permanently conduct processes for monitoring all transactions so as to determine whether the customer's transaction banking is in line with the defined transaction and behaviour profiles.

In the case of companies, knowing your customer also means knowing the identity of the individuals who own the shares or equity interests, or the identity of the person having the ultimate control of the company that is the customer, especially by applying increased due diligence to persons who directly or indirectly own 25 per cent or more of the subscribed and paid-in capital of the institution or company.

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

A person with equity ownership with influence, as established by the COMF, is an individual or company that directly or indirectly, has the lesser of:

- 6 per cent or more of subscribed and paid-in capital or capital stock; or
- shares or equity interests in a sum equal to or greater than 600 times the basic fraction exempt from income tax (the amount of the exempt basic fraction changes from year to year; it is US$11,170 for the 2016 fiscal year).

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

In general, the structures for holding private assets have no tax obstacles. However, structures for holding private assets in tax havens or lower-tax jurisdiction countries have a different treatment, which normally implies more tax reporting obligations and higher rates.

Contract provisions

37 Describe the various types of private banking contract and their main features.

There are various types of contracts and the most important are:

- checking account, which allows for managing money with less hassle (may generate interest for the account holder);
- savings account for managing money (always generates interest for the account holder);
- credit card, which may be issued or managed by the financial institution;
- certificate of deposit, which may be used as a guarantee mechanism for contracts or liabilities; and
- fixed-term deposit, which is a financial instrument that generates fixed interest for an established term, in favour of the account holder (may be endorsed over to third 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?

In general, shareholders in entities of the private financial sector are liable for the entity's solvency up to the value of their shares.

In the case of the mandatory liquidation of a private financial entity, the shareholders who directly or indirectly are persons with equity ownership with influence shall be liable with their own equity in the event they have acted in negligence, gross negligence or ordinary negligence.

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

The Consumer Defence Law regulates accession contracts, defined as contracts with clauses established unilaterally by the supplier and that are printed contracts or forms, without the consumer having discussed the contents thereof before signing them.

These contracts must be written up in legible font not smaller than 10 points. Furthermore, they cannot refer to documents that have not been submitted by the customer or that the customer is unaware of and to which the customer has free access.

They have to be written up in Spanish, except for technical words or terms. In addition, clauses containing rules that do the following are deemed to be prohibited clauses:

- release, attenuate or limit the liability of suppliers for any kind of defect in the goods or services provided;
- imply a waiver of the rights that the law recognises to consumers or that in any way restricts the exercise of such rights;
- invert the burden of proof to the customer's detriment;
- impose the mandatory use of an arbitrator or mediation, except if the consumer expressly gives his or her consent;
- permit the supplier to unilaterally change the price or any condition of the contract;
- exclusively authorise the supplier to unilaterally terminate the contract, suspend the performance thereof or revoke any consumer right stemming from the contract, except when such termination or modification is conditioned to non-compliance imputable to the consumer;
- include blank spaces that have not been filled or used before the contract is signed or that are illegible;
- imply the consumer's waiver of procedural rights established in the law; and
- any other clause or stipulation making the consumer defenceless or that are contrary to public policy and good practices.

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

The statute of limitations for oversight agencies to place penalties for very serious offences is eight years, for serious offences five years, and for minor offences three years, as of the date of the offence. The statute of limitations is interrupted when a penalty procedure is initiated.

Confidentiality

41 Describe the private banking confidentiality obligations.

Deposits received and any other kind of fundraising received by entities of the national financial system are subject to banking confidentiality. Therefore, no information concerning such transactions may be provided, except to the account holder or to the person expressly authorised by, or legally representing, the account holder.

Other transactions are subject to banking confidentiality and the entities of the national financial system may only give information to persons demonstrating a legitimate interest therein and so long as it is not foreseeable that knowledge of such information might be detrimental to the customer.

Reports on audits, inspections, and analyses are reserved documents, as are the documents that the Superintendent rates as such, in order to safeguard the stability of state-owned and private financial entities. Documents issued by the servants and officers of the

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Update and trends

Although still weak, there are certain signs of greater openness to foreign investment in the banking sector, but this remains subject to a series of local debates and subsequent legislative processes in order to crystallise.

Superintendency in fulfilment of their oversight duties are also reserved documents. Reports forfeit their reserved nature 180 days after the date of the resolution ordering the liquidation of the entity.

However, in Ecuador private banks are not allowed to maintain accounts, investments or any other financial service under a pseudonym or anonymously. All of the financial services must be in the name of the account holder.

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

Deposits received and other kinds of fundraising by entities of the national financial system. Reports on audits, inspections and analyses are reserved documents, as are the documents that the Superintendent rates as such.

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

- Background regarding transactions by persons who are a party or under investigation in cases aired at the courts or the Ecuadorian Prosecutor's Office;
- information about the holders of checking accounts closed because of cheques drawn without funds, required by the legitimate bearer of the cheques;
- any information required by oversight entities and the IRS, within the scope of their competencies;
- information required by the JRMF, which may be channelled through the oversight agency;
- information to be delivered by oversight entities to inform the public about the equity and financial position of financial entities;
- information required from oversight entities, within the scope of their competencies, by governments or the relevant authorities of countries with which Ecuador has reciprocal and legitimate agreements for fighting crime, in the terms and conditions of such agreements; and
- financial information constituting an exchange with banking, financial and tax oversight authorities of other countries, provided there are reciprocal and legally executed agreements in effect.

44 What is the liability for breach of confidentiality?

Individuals or companies who disclose all or part of information subject to banking confidentiality will be punished with a fine equal to 25 times the unified base salary, in addition to criminal liability consisting of one to three years' imprisonment.

Disputes

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

There are different levels of authority, depending on the type of dispute:

- claims made against the same entity, through its claims department, with regard to the provision of financial services;
- the duty of the customer ombudsman is to protect the rights and interests of financial users. Every entity of the financial system must have at least one customer ombudsman. The ombudsman processes claims at each financial entity that were not addressed directly by the entity;
- cases may be reported to the SB when the customer ombudsman does not have jurisdiction and the dispute deals with practices or conduct beyond or in violation of legal or regulatory rules; and
- judicial action at regular courts, depending on the subject matter of the claim (civil, administrative, or criminal).

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?

Claims filed with the entities mentioned in question 45 are confidential, except in court cases. The SB has the structure for addressing claims and reports filed against financial entities.

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England & Wales

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Macfarlanes

Private banking and wealth management

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

The main source of law governing private banking in the UK is the Financial Services and Markets Act 2000 (FSMA), as amended. Under the FSMA, a legal person may only carry out a 'regulated activity' in the UK by way of business if it is authorised to do so or is exempt from the need for such authorisation. Breaching the general prohibition is a criminal offence.

A description of UK-regulated activities is contained in secondary legislation. Private banks typically carry out a number of regulated activities, including accepting deposits that are lent to third parties, providing investment management services and providing investment advice. Specified investments include, among other things, shares, debentures, options, futures, contracts for differences and units in collective investment schemes. Private banks must therefore obtain authorisation under the FSMA to be able to carry out these activities in the UK.

As authorised firms, private banks are required to comply with regulatory rules relating to their conduct and governance. These requirements are primarily contained in the FCA Handbook and PRA Rulebook.

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

From 1 April 2013, the UK has operated a 'twin peaks' model of supervision. The Prudential Regulation Authority (PRA) is responsible for the prudential regulation of systemically important firms, including private banks. The Financial Conduct Authority (FCA) is responsible for the conduct regulation of all authorised firms and the prudential regulation of firms that do not have the PRA as their prudential regulator. A large number of wealth management firms do not accept deposits and these firms are authorised and regulated solely by the FCA. Since 1 April 2014, the FCA has also been responsible for regulating firms that provide consumer credit.

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

In the UK, private wealth services are commonly provided by private banks and asset managers. Some wealthy individuals use family offices, many of which provide services to a number of families.

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

The term 'private banking' is not defined in UK regulations but is broadly understood to mean any form of wealth management services, including portfolio management, banking, investment advice and similar financial services activities generally provided to high net worth individuals.

5 What are the main licensing requirements?

The authorisation process requires a firm to provide detailed information about its business, governance, ownership and systems and controls framework. The applicant will need to demonstrate that they can satisfy applicable regulatory capital requirements. The firm will also need to show that individuals carrying out controlled functions are fit and proper to carry out such activities. For some staff, this may entail passing professional examinations.

6 What are the main ongoing conditions of a licence?

Private banks need to meet the requirements of the UK regulatory system on an ongoing basis. This includes satisfying the 'threshold conditions' set out in Schedule 6 of the FSMA, which seek to ensure that authorised firms continue to be supervised effectively, have appropriate financial and non-financial resources and satisfy suitability requirements.

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

A foreign bank will often set up a UK subsidiary to provide services in the UK. A private bank subsidiary will be authorised and regulated by the FCA and PRA and be separately capitalised. Sometimes foreign banks are permitted to operate a branch in the UK, although this is less common due to the difficulties this raises from a regulatory perspective. A branch is not a separate legal entity from the bank of which it is a part and will need to be regulated by both its home state regulator and the FCA and PRA.

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

Preparing an application for authorisation as a private bank is a time-consuming process. Generally, it takes about one year to obtain authorisation, including initial preparation time, depending on the complexity of the application.

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

The FCA and PRA have the power to take enforcement action against firms that breach their rules. Section 55J of the FSMA gives the FCA and PRA powers to vary or revoke a firm's permission to carry out regulated activities in the UK. The regulators will only invoke this power in the case of serious breaches (for example, when a firm fails to satisfy threshold conditions such as maintaining appropriate resources). For less serious breaches, a number of other disciplinary measures may be available to the regulators, including public censure, a fine and/or a temporary suspension of new business.

10 Is wealth management subject to supervision or licensing?

Wealth management firms typically carry out a number of regulated activities, such as discretionary investment management and investment advisory services. Some firms decide to limit the scope of their activities to providing investment advice and arranging transactions for their customers, in which case they will be subject to a lighter touch regulatory regime than a firm that exercises discretionary management powers. This has an impact, for instance, on the amount of regulatory capital a firm is required to hold.

Some family offices avoid the need for authorisation by structuring their business and activities to fall within the group exemption. The scope of the exemption varies according to the regulated activities involved. For example, for managing investments, the group

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exemption may be used if the assets beneficially belong to a member of the manager's group.

11 What are the main licensing requirements for wealth management?

The authorisation process for a wealth manager is similar to that for a private bank (see question 5), although the timescale may be shorter for less complex applications.

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

The high-level ongoing conditions for a wealth manager are the same as 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 requirements for private banking in your jurisdiction?

Private banks must take reasonable care to establish and maintain effective systems and controls to comply with anti-money laundering and financial crime requirements. In the UK, these requirements are set out in the Money Laundering Regulations 2007 (MLRs), which support the criminal provisions in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000. The MLRs set out the high-level customer due diligence measures (CDD) with which private banks need to comply: before establishing a business relationship or carrying out an occasional transaction; at appropriate times for existing customers; or whenever they suspect money laundering or terrorist financing. Firms are required to take a 'risk-based approach' to CDD, which means that the amount of evidence a private bank needs to obtain in any particular scenario will depend on the risk attaching to particular products, services and customers. The Joint Money Laundering Steering Group has published industry guidance that helps firms to interpret and implement the legal requirements relating to money laundering and terrorist financing and includes detailed guidance on 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 14 and paragraph 4 of Schedule 2 of the MLRs. Essentially, a PEP is a person who currently holds, or has within the preceding year held, a prominent public position outside the UK and the definition includes certain closely connected parties, such as the PEP's immediate family. When establishing a banking relationship with a PEP, firms need to carry out enhanced CDD due to the risk that the individual is more vulnerable to corruption as a result of their public office. This may involve asking the PEP for additional evidence regarding their source of wealth and funds. Senior management approval should be obtained prior to establishing a business relationship 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.

When opening an account for an individual, as a minimum a firm should obtain the following information: full name, residential address and date of birth. Firms are required to verify this information based on reliable and independent sources, which might involve checking documents produced by the customer or electronically by the firm, or both.

When a firm is verifying identity from documents, this should be based on either:

- a government-issued document incorporating the customer's full name and photograph and either his or her residential address or date of birth; or
- a government-issued document without a photograph incorporating the customer's full name, supported by a second qualifying document incorporating the customer's full name and either his or her residential address or date of birth.

Many firms use a commercial agency for electronic verification purposes.

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 the criminal property now being laundered ('criminal property' being property that represents a person's benefit from criminal conduct). This initial offence is often known as a predicate offence. To the extent that a tax offence is a criminal offence in the UK, it is a predicate offence for the purposes of UK anti-money laundering legislation (how the legislation applies to tax offences under foreign laws is more uncertain). However, no conviction for the predicate offence is necessary for a person to be prosecuted for a money laundering offence.

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

The MLRs require banks to conduct due diligence when they establish a business relationship, where they carry out an occasional transaction or where they suspect money laundering or terrorist financing. However, this is to verify the identity of the client rather than to establish their tax compliance. The International Tax Compliance Regulations 2015 (the Tax Regulations) also impose verification procedures so they can establish which of their client accounts is reportable under those rules (ie, under the Common Reporting Standard (CRS), the Foreign Account and Tax Compliance Act (FATCA) or the Directive on Administrative Cooperation (DAC)). This includes verifying where a client is resident for the purposes of any tax imposed by the law of that territory. There are enhanced review procedures for high-value accounts (ie, over US$1 million). A private bank can use a service provider to undertake its due diligence operations, though the responsibility remains with the bank.

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

There are three broad groups of money laundering offences under POCA:

- knowingly assisting in concealing, or entering into arrangements for the acquisition, use and/or possession of criminal property;
- failing to report knowledge, suspicion, or where there are reasonable grounds for knowing or suspecting that another person is engaged in money laundering; and
- tipping off or prejudicing an investigation.

Employees will not commit the failing to report offence if they promptly disclose their knowledge or suspicion of money laundering to the firm's money laundering reporting officer. It is an offence for the money laundering reporting officer to fail without a reasonable excuse to pass on such disclosures to the National Crime Agency.

The MLRs also place a general obligation on firms within its scope to establish adequate and appropriate procedures to prevent money laundering. Liability can be incurred by the firm and directors of the board (or equivalent management body) who consent to or connive in the commission of money laundering offences by the firm.

Failure to comply with any of these obligations is a criminal offence and risks a prison term and/or a fine.

Client segmentation and protection

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

When a firm provides private banking services to a new customer in the UK, it must notify that client of its categorisation as a retail client, professional client or eligible counterparty. Retail clients receive the highest degree of protection under the UK's regime. Some firms do not have permission to provide services to retail clients. However, such firms may still be able to offer services to high net worth customers if they are able to opt-up to professional client status. Firms can treat clients as elective professional clients if:

- they assess the client has sufficient expertise, experience and knowledge and the client gives reasonable assurance that he or

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she is capable of making his or her own investment decisions and understanding the risks involved; and
- when carrying out services such as portfolio management or investment advice, at least two of the following criteria are satisfied:
  - the client has carried out transactions, of significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
  - the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds €500,000;
  - the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged; and
  - the firm has followed a prescribed procedure, which includes giving the client a clear written warning of the protections and investor compensation rights that the client may lose.

20 What are the consequences of client segmentation?

Many products are not designed for the retail client market and would be unsuitable investments for retail clients. Categorising clients as professional clients allows firms greater flexibility to offer a broader range of products and services. Some firms do not offer services for retail customers.

Professional clients receive a lesser degree of protection under the regulatory system and may not have the right to complain to the Financial Ombudsman Service or qualify for Financial Services Compensation Scheme protection. Firms also have different obligations under conduct of business rules depending on whether they are providing services for a retail client or professional client. For example, when a firm provides investment advice or portfolio management for a professional client and is required to assess suitability, it is entitled to assume in relation to the products, transactions and services for which the professional client has been categorised that the client has the necessary level of experience and knowledge to understand the risks involved.

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

In addition to the regulatory requirements in the FCA Handbook and PRA Rulebook, firms need to consider consumer protection legislation, most notably the Consumer Rights Act 2015 (CRA). In the private banking industry, the CRA has had an impact on firms' communications with clients. This has resulted in many firms amending their customer terms of business to ensure that their termination clauses, transfer clauses and variation clauses are fair and transparent. The CRA has raised particular concerns in relation to long-standing customer relationships and variations of terms of business to increase charges.

Exchange controls and withdrawals

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

An exchange control is a restriction placed by governments and central banks on the movement of currencies between countries. As a general principle, following the 1979 Exchange Control Parliamentary Order there are no current restrictions on the movement of funds or capital controls under English law. Nonetheless, from time to time, sanctions may be imposed on a foreign state which might result in a specific restriction or exchange control. There are notification requirements and sometimes limits in carrying cash to other countries over certain limits depending on the country in question.

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 in the UK, though certain banks may impose discretionary limits on cash withdrawals from their accounts. While high-street banks impose such restrictions on large cash withdrawals (for instance, at ATMs), premier private banks offer greater flexibility to their clients but many will apply a tailored cash withdrawal limit. The prevailing approach is that the client should contact the bank branch in advance to ensure that the requested amount is available. For foreign currency denominated accounts, there are no restrictions imposed by law and any withdrawals would be determined by the bank's own terms. Where a transaction or withdrawal is large, the bank may ask about the purpose of the cash withdrawal, as a means of minimising opportunities for financial crime.

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

There are no restrictions on maximum cheque withdrawals in the UK, though the bank may decide not to honour the cheque if there are insufficient cleared funds in the account or the payment of the cheque would cause the account to exceed an agreed overdraft limit. For banks that offer bullion services there are no restrictions on its withdrawal. However, bullion is slightly different to cash in a bank account, since the client buys the bullion coins and bars outright, but can choose to have it stored in a safe deposit where it can be liquidated or withdrawn upon request at any time. Banks that offer bullion services will require CDD to buy bullion, and additional information for large purchases such as a buyer's source of wealth and the funds used to acquire bullion.

Cross-border services

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

European Economic Area (EEA) authorised firms can exercise passport rights to carry out cross-border private banking services in the UK. The firm will need to notify the relevant EEA home state supervisor that it would like to provide services to UK clients in reliance on an EEA passport right. The EEA home state regulator will liaise with the PRA and the PRA will consult the FCA in respect of notifications under the Capital Requirements Directive (CRD). The procedure is similar for firms that would like to provide only Markets in Financial Instruments Directive (MiFID) services on a cross-border basis, such as investment management, although in this case the FCA will be the lead regulator.

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

The procedure for EEA-authorised firms to provide cross-border private banking services to UK clients is set out in question 25. EEA firms are not permitted to begin providing cross-border services until the PRA or FCA has confirmed they have processed the notification.

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

The provision of cross-border financial services within the EEA is regulated under a number of EU directives, as implemented into national law by member states. EEA-authorised firms can provide banking services under the CRD. Wealth management and investment advisory services are regulated under MiFID.

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 travelling to meet UK clients and prospective clients should be aware of two key restrictions: section 19 FSMA, which sets out the general prohibition on carrying out regulated activities in the UK without permission, and section 21 FSMA, which restricts financial promotions. The foreign employees could infringe one or both of these restrictions and incur criminal liability, depending on the particular activities in contemplation, the clients they will be meeting and the involvement of any UK-authorised firms. If the private banking institution is based in the EEA, it should be possible to carry out services in the UK by applying to exercise relevant passport rights.

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 will need to comply with the UK's financial promotions regime if it would like to communicate an invitation or inducement to engage in investment activity to a UK-based client. To comply with these requirements, the foreign private bank

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could ask an authorised firm to approve the content of the communication. Alternatively, the foreign private bank could seek to rely on an applicable exclusion to the financial promotions regime contained in the FSMA (Financial Promotion) Order 2005 or ensure that the communication is not a financial promotion.

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?

Liability to UK taxation depends on an individual's UK residence and domicile status. If the individual is a UK resident, higher rate taxpayer (and anyone else who receives a tax return from HMRC), he or she is required to report interest earned on UK accounts in his or her tax return. In addition, the Tax Regulations apply to all private banks and individuals with accounts at those banks and require the banks to report information on accounts to HMRC.

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, if private banks in the UK have 'reportable accounts', they need to report to HMRC the name, address, jurisdiction of residence and date and place of birth of account holders if they are tax-resident in any of the overseas participating CRS jurisdictions, as well as the account number and balance. If the account holder is an entity, the private banks will need to report the details above in respect of any person controlling that entity. Private banks reporting (and information-gathering) under FATCA and the DAC will need to follow slightly different rules. Under POCA, there is also an obligation on private banks for staff to compile a suspicious activity report to give to their designated money laundering reporting officer and to the National Crime Agency where money laundering is suspected. Where a client is suspected of money laundering, it would be an offence to tell a client that a suspicious activity report has been made about them.

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 permit reporting under the Tax Regulations by a private bank. However, account-opening documentation contains express powers enabling a bank to disclose information if required to do so by law and in other circumstances at the discretion of the bank. If a client does not provide the information required, the client's details can be reported to HMRC, which can pass this information on to another tax authority.

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.

Historically, the trust was a very commonly used onshore vehicle in the UK to hold private assets. However, a series of unfavourable changes to the taxation of trusts culminating in 2006 has led to significant fall in the establishment of trusts during an individual's lifetime where the individual is UK resident and domiciled. They are still very commonly found in wills. They are also still established by UK resident but non-domiciled individuals. Pension funds also hold significant assets for individuals, although adverse tax changes limit the amount that wealthy individuals can now place in pension funds. As a result, individuals are increasingly turning to alternatives such as private funds, family limited partnerships and more recently family investment companies. The use of family investment companies is increasingly attractive as corporation tax rates have reduced. Furthermore, the ability to create classes of shares with different rights can be useful for estate planning, although they are not as suitable as trusts for this. Foundations, common in civil law jurisdictions, have no equivalent in UK law and for tax purposes are treated as either trusts or companies, depending on their structure.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

For trust structures, firms should obtain the following information: full name of the trust; its nature, purpose and objects; country of establishment; names of trustees; names of beneficial owners; and name and address of any protector or controller. To verify the identity of a trust, firms may need to review relevant extracts of a trust deed or an appropriate register from its country of establishment. The firm will also need to understand the ownership and control structure of the trust. The beneficial owner of a trust is defined by reference to three categories of person:

- any individual who is entitled to a special interest in at least 25 per cent of the capital of the trust property;
- where the trust does not operate entirely for the benefit of individuals with such specified interests, the class of persons in whose main interest the trust is set up or operates; and
- any individual who has control over the trust (such as trustees or a trust protector).

Taking a risk-based approach, the firm will need to carry out CDD measures on the firm's trustees who are entering into a business relationship with the firm, in their capacity as trustees of a particular trust or foundation, and any other beneficial owners (see question 15 for standard CDD requirements).

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

The MLRs define beneficial owners as individuals either owning or controlling more than 25 per cent of a body corporate, partnership or the capital of a trust.

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

There are a number of potential regulatory obstacles to the use of structures to hold private assets. Family offices that provide regulated activities to the trustees of a trust will not be able to rely on the group exemption and will therefore require authorisation under the FSMA. The Alternative Investment Fund Managers Directive (AIFMD) provides a carveout for collective investment undertakings, such as family office vehicles which invest the wealth of investors without raising external capital. However, this carveout may not be available because of the structure adopted by a family office or where that family office acts for multiple families. This may result in the family office becoming an alternative investment fund manager for the purposes of the AIFMD and requiring authorisation under that Directive.

From a tax perspective, as under question 33, changes to the taxation of trusts in 2006 have meant that most transfers into trusts above the amount of the nil rate band are taxed to inheritance tax at the lifetime transfer rate of 20 per cent; there is a charge on trusts payable every 10 years and there are high income and capital gains tax charges. There is also an annual charge to companies that hold residential property situated in the UK ('enveloped dwellings'), as well as a charge to a particular capital gains tax when the company sells the property. From April 2017 there will also be no protection for owners of such companies from inheritance tax liability upon their death in respect of the enveloped dwelling.

Contract provisions

37 Describe the various types of private banking contract and their main features.

The main types of private banking contracts in the UK are referred to as either discretionary investment management contracts or non-discretionary investment advisory contracts.

Under a discretionary investment management contract, the client gives the private bank or the manager absolute discretion to buy and sell holdings in the client's portfolio without first gaining the client's

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Update and trends

Many of the developments affecting private banking in the UK are common to all service industries, such as a drive to increase revenue and drive down costs wherever possible. However, it is possible to identify trends that are specific to private banking:

- the need for some of the banks to establish a ring-fenced UK bank separate from other activities;
- the increasing amount of regulation affecting not only day-to-day operations but also problems of miss-selling, market manipulation and protection of the consumer;
- increasing competition for talented staff globally;
- the need to focus on the most suitable customers for the bank in question rather than simply increasing customer numbers and assets under management and generally balancing both short-term gains while still being prepared to invest in longer-term markets; and
- recognising and rewarding the long-term benefits of relatively stable 'annuity' income from private banking customers particularly where the bank is also administering structures for that customer.

The impact of Brexit is under consideration by all of the private banks in terms of access to the EU customer base, and recruiting and retaining talent to serve them, and there is no doubt that some banks will not wait for the outcome of the negotiations but will hedge their bets and divert some investment into building up their private banking operations elsewhere in the EU. However, given that the service sector in general and the City in particular is so crucial to the UK economy, it is reasonable to assume that an arrangement will be reached with the EU that means that private banks can continue to operate successfully from London into the EU and perhaps more favourably than they have been able to in the past into other countries.

consent. The contract sets out the boundaries within which the manager will manage the portfolio.

Under a non-discretionary investment advisory contract, the private bank or manager makes recommendations to the client about which holdings it considers should be bought or sold within the client's portfolio but the private bank can only carry out these transactions with the client's permission.

The parties to such contracts can determine which governing law they would like to apply and the contracts can be varied as the parties see fit.

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 negligence, though the concept of gross negligence is increasingly becoming recognised in the UK. Asserting breach of any such liability standard will ultimately require a private bank client to bring an action against the private bank to determine whether such standard has been breached.

The liability provisions in a private banking contract will generally be negotiated and agreed in line with the commercial standing of the two parties involved.

A typical negotiated liability standard in the UK provides that the private bank will not be liable for any losses arising provided that such losses have not been incurred as a result of the private bank's negligence, fraud, wilful misconduct or material breach of contract.

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

As authorised firms, private banks are required to comply with regulatory rules relating to contracts under which they provide regulated activities. These requirements are primarily contained in the FCA Handbook, but include client classification, disclosures around how they conduct their businesses and provide their services, and complaints procedures. Other than this, there are no mandatory provisions imposed.

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

As a general overview, the law on limitation periods is set out in the Limitation Act 1980 (LA). The LA sets out limitation periods in respect of different causes of action. For example, it provides for a limitation period of:

- six years for actions in respect of simple contracts and certain actions in tort; and
- 12 years for actions on a specialty, for example, for breach of an obligation contained in a deed.

In both cases, the period runs from the date on which the cause of action accrued.

The LA is silent as to whether parties may contract out, either by agreeing a longer or shorter limitation period than that prescribed under the LA, or by agreeing that there should be no limitation period applicable between them at all. However, a contractual term that imposes a shorter limitation period than provided under the LA may be subject to the reasonableness test under the Unfair Contract Terms Act 1977.

Confidentiality

41 Describe the private banking confidentiality obligations.

Private banking contracts will ordinarily contain express confidentiality obligations applicable to information passing between the private bank and the client. In addition, the relationship between a private bank and its client will generally be sufficient to imply an obligation of confidentiality under the common law doctrine of breach of confidence. Under this doctrine, where confidential information is obtained in a manner that gives rise to a duty of confidence: (i) the recipient is permitted to only use the information for the purpose for which it was provided; and (ii) the disclosing party can bring a claim if the recipient makes unauthorised use of the information and the disclosing party suffers loss as a result.

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

Obligations of confidence will apply to information that has the 'necessary quality' of confidence. Personal and financial information in the context of a private banking relationship will almost always fall within the scope of this duty.

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

The duty of confidentiality will not apply to information that is not truly confidential, and as such will not apply where the relevant information is already in the public domain. The duty will also not apply where a legal duty of disclosure overrides the duty of confidentiality – for example, where a regulator requires information to be provided to it – or where there is deemed to be a sufficient public interest in allowing the information to be disclosed (for instance, in the case of whistle-blowing).

44 What is the liability for breach of confidentiality?

The disclosing party may be able to obtain a court injunction preventing further disclosure of its confidential information. Damages may also be recoverable, though the quantum of damages will depend on the circumstances. In some cases the disclosing party may be able to claim an account of the recipient's profits obtained as a result of the unauthorised use of the confidential information, but more generally the remedy will be limited to compensatory damages (either for breach of contract or breach of the common law duty of confidence).

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Disputes

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

The parties to a private banking contract will generally provide that the agreement and any non-contractual obligations arising out of or in connection with it will be governed by and construed in accordance with the laws of England. The parties irrevocably agree that the courts of England will have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the agreement or its subject matter (including non-contractual disputes or claims).

Alternatively, the parties may provide that any disputes will be determined by way of arbitration. The parties will choose their preferred seat of arbitration (eg, London).

If the client in question is a retail client, they may bring a complaint 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?

Authorised firms have a duty to deal with their regulators in an open and cooperative way and must disclose appropriately any information relating to the firm of which the regulator would reasonably expect notice. There is no obligation for authorised firms to disclose routine disputes to its regulator, although any complaints of a serious nature should be disclosed to comply with this high-level obligation. Disclosures relating to specific areas may also be required under regulatory rules.

Authorised firms are required to treat their customers fairly and should attempt to resolve complaints in the first instance. Clients who are 'eligible complainants', which will usually include high net worth customers, may be able to complain to the Financial Ombudsman Service in relation to the regulated activities provided by the firm to the extent they are unhappy with the firm's proposed resolution to their complaint.

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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 Regulation.

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.

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?

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?

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 BaFin or the Deutsche Bundesbank, or both. 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, either 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 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 for 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 as well as to 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.

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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 requirements for private banking in your jurisdiction?

The main anti-money laundering and financial crime 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.

The German anti-money laundering and financial crime requirements are based on the Third Anti-Money Laundering Directive (EU Directive 2005/60).

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 that is or has been entrusted with prominent public functions, such as heads of state, ministers, members of parliament, as well as certain relatives. The specifics of the definition follow the PEP definition in EU Directive 2006/70.

If there is a PEP involved, senior management needs to approve the business relationship with such 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.

Customer 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?

Tax evasion is not a basis for a money laundering offence. Bases for the money laundering offence are only crimes (ie, an illegal activity with a minimum sentence of one year's imprisonment, as well as 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 by an institution with know-your-customer obligations 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 (Directive 2004/39/EC) (ie, retail clients, professional clients and eligible counterparties). The definition of each client category is in accordance with MiFID.

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.

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. In addition, there is no need to hand out a key investor information document and a meeting 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 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?

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 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

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withdrawals so that the 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. Also, existing customer relationships can be used for offering services to such customers. This concept of market access will slightly change with MiFID II from 2018 onwards.

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 MiFID passport.

For non-EEA financial institutions (eg, in Switzerland or in the United States), the German regulator offers 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 likely continue to exist on a German level.

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 up with such client in Germany. 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. 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 the 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 have to 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 have to 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 also have to report the amount of capital income.

Furthermore, if their clients pass away the banks have the obligation 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 a 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 has to be set up first. 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 for the GmbH have to 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.

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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 with a 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 the identity, an extract of the register or a comparable evidential document is required.

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; and
- in the case of foundations or trusts:
  - any natural person acting as settlor or who otherwise exercises control over 25 per cent or more of the assets or property;
  - any natural person who has been designated as the beneficiary of 25 per cent or more of the managed assets or property;
  - 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 used for pooling assets of non-family members, the structure might become an investment fund and might therefore be subject regulatory approval and oversight under the German implementation of the EU Directive on Alternative Investment Fund Managers (AIFMD).

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 contract and their main features.

There are several different types of private banking contract. 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 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. 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 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 Conditions and Terms of Private Banks. Furthermore, the banks have to fulfil the confidentiality obligation according to the Federal Data Protection Act.

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 protects 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.

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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 passes away, 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 or the Federal Data Protection Act, 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 can commit an administrative or criminal offence by breaching the obligations due to the Data Protection Act.

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 has to pay his or her own expenditures. 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.

Update and trends

The EU Directive on Alternative Investment Fund Managers (AIFMD) and MiFID II are the most relevant developments affecting private banking in Germany. Even though the AIFMD has been implemented for about three years in Germany, private banks are still struggling with the severely restricting marketing concepts of the AIFMD and its German implementation by the Investment Act. MiFID II will tighten the organisational and conduct rules of private banks. Further, the access of non-EU financial institutions to the European market will be made easier and more uniform.

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Guernsey

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Private banking and wealth management

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

The Bailiwick of Guernsey is a largely self-governing British Crown dependency. Most United Kingdom legislation does not apply to Guernsey; by convention the UK only extends the applicability of its laws to Guernsey with the consent of Guernsey's government. Guernsey bills are adopted by its elected assembly, the States of Deliberation (States of Guernsey), becoming law once approved by the Crown (after UK Justice Ministry vetting).

Guernsey's main private banking laws include:

- the Banking Supervision (Bailiwick of Guernsey) Law 1994 (the Banking Law), which provides the framework for licensing and regulation of Guernsey banks;
- the Protection of Investors (Bailiwick of Guernsey) Law 1987 (the Protection of Investors Law), which provides the framework for licensing and regulation of a range of investment businesses relating to private banking and wealth management;
- the Regulation of Fiduciaries, Administration Business and Company Directors, etc (Bailiwick of Guernsey) Law 2000 (the Fiduciaries Law), which provides the framework for licensing and regulation of trust companies and corporate administrators;
- the Guernsey Financial Services Commission (Bailiwick of Guernsey) Law 1987, which creates Guernsey's financial services regulator and provides for its general enforcement powers; and
- the Registration of Non-Regulated Financial Services Business (Bailiwick of Guernsey) Law 2008 (the Registration Law), which provides for registration of non-bank lenders, money services and certain other financial services.

Also relevant are Guernsey's anti-money laundering and anti-terrorist financing laws (discussed below).

Such laws empower the States of Guernsey to enact secondary legislation, called ordinances, and the Guernsey Financial Services Commission (GFSC) to enact secondary legislation, typically called regulations or rules.

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

The States of Guernsey passes laws for Guernsey. Through legislation, it has empowered the GFSC to license and regulate financial services including banking, wealth management and trust administration. The GFSC has more limited 'registration' powers over certain unregulated financial services, such as non-bank lending and money services.

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

Guernsey offers a wide variety of private wealth services. Private banks, asset managers and fiduciaries offering administration of trusts, foundations and companies are a significant component of the Guernsey economy. Guernsey has 29 licensed banks, 154 licensed fiduciaries or trust companies and more than 650 licensed investment businesses. About 20 per cent of Guernsey's workforce is employed in the financial sector.

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

The Banking Law regulates 'deposit-taking business'. This is defined as any business where: (i) in the course of the business money received by way of deposit is lent to others, or (ii) any other activity of the business is financed to any material extent out of the capital of or the interest on money received by way of deposit. Deposit-taking business is only permitted by banking institutions licensed by the GFSC.

The Protection of Investors Law regulates 'controlled investment business', which means carrying on a 'restricted activity in connection with a controlled investment'. A 'controlled investment' includes securities, derivatives and collective investment schemes. A 'collective investment scheme' is any arrangement with the purpose or effect of participating in or receiving profits or income (or sums paid out therefrom) from property, over which the investors do not have day-to-day control and in which the contributions and profits or income are pooled or where the property is managed by a responsible person. Exceptions to the definition of a 'collective investment scheme' include non-business arrangements, arrangements where all investors are bodies corporate in the same group, certain employee investment plans, franchise arrangements and insurance contracts. 'Restricted activities' include a broad range of activities, including circulating or making available promotional material, subscribing, dealing, managing, administering, or advising in relation to controlled investments, as well as custody services.

5 What are the main licensing requirements?

The Banking Law provides that an applicant for a deposit-taking licence must be an institution and must, at a minimum, be able to carry on business with prudence, integrity and skill and in a manner that would not bring the Bailiwick of Guernsey into disrepute. Its directors, controllers and managers must pass a fit and proper person test. At least two persons resident in Guernsey must direct the business. There must be sufficient staff employed in Guernsey to conduct the company's essential functions, including compliance and risk management functions. The applicant must have sufficient assets, which as a general rule would be at least £1 million but may be higher due to risk asset ratio requirements.

A banking licence applicant must provide its most recent financial statements and disclose any debts, guarantees and other financial commitments. The applicant must also disclose, inter alia, its business plan and forecast projections, anticipated staffing levels, insurance policies, ownership structure, directors, managers, auditors, money laundering reporting officer and company secretary. It must set out for the GFSC its anti-money laundering policies, disaster and recovery policies. The application must also disclose any wind-ups, legal proceedings or criminal investigations against the institution. It must also provide a comfort letter from its parent relating to its liabilities and other legal and moral responsibilities. The applicant must explain the economic benefit to Guernsey of its operation.

6 What are the main ongoing conditions of a licence?

Aside from a licensee maintaining its minimum licensing requirements (discussed above), the Banking Law includes several ongoing licensing requirements. These include that the banking institution must

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obtain GFSC approval for major property and investment acquisitions (over 5 per cent of its capital base) and transfers of interests by significant shareholders.

The bank must provide the GFSC with quarterly reports on its asset portfolio and updates on any material adverse changes or large exposures (above 25 per cent of its capital base). Related transactions must be approved by the board of directors of the licensed bank and be on no less favourable terms than unrelated transactions. The GFSC subjects licensed banks to periodic on-site inspections, submission of regulatory returns and audited financial statements, approval of changes in controllers, directors or managers and other significant events, and periodic additional requests for information.

The annual banking licence fee ranges from £35,500 for banks with under £500 million in assets to £53,300 for banks with over £1 billion. Most banks also obtain a licence under the Protection of Investors Law, with an annual fee in most cases of £3,162.

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

There are 29 entities with banking licences in Guernsey, including private banks and retail banks with private banking departments. Approximately 60 per cent of licensed banking entities are Guernsey-incorporated subsidiaries of overseas parents; the remainder are branches of banks headquartered outside Guernsey.

Some banks are 'administered banks', which are registered in Guernsey but their on-island business is managed on their behalf by another licensed institution in Guernsey.

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

The GFSC determines the speed of the application process. The GFSC strongly encourages applicants to contact its Banking Division to discuss proposed applications before filing. This may highlight in advance potential issues that might delay or prevent approval.

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

The Banking Law provides that a licence may be revoked if the licensed entity ceases to act with sufficient prudence, skill and integrity (including adherence to the terms of its licence) or if its directors, controllers or managers cease being not fit and proper persons. A licence may also be revoked if the bank commits a legal offence, provides the GFSC with false or misleading information, if the interests of depositors are threatened, if fees are unpaid, or if a regulator in another jurisdiction has withdrawn the institution's banking licence. Additionally, the GFSC may revoke the licence of an institution that has a liquidator or receiver appointed, has made a creditor compromise, has not taken a deposit for at least 12 months or becomes insolvent or bankrupt.

A banking institution may surrender its licence by written notice to the GFSC.

10 Is wealth management subject to supervision or licensing?

Giving advice as to the purchase, sale, subscription for or underwriting of securities, derivatives or collective investment schemes, exercising rights conferred by investments, management of an investment or underlying assets are 'restricted activities'. Conducting such activities for remuneration requires a licence from the GFSC under the Protection of Investors Law. Private banks in Guernsey commonly obtain a licence under both the Banking Law and the Protection of Investors Law, or belong to a group with both licences.

11 What are the main licensing requirements for wealth management?

The minimum criteria for licensing under the Protection of Investors Law are that the applicant and its directors, controllers, partners and managers be fit and proper persons and that the business be conducted with integrity and skill. This includes having adequate competence, experience, sound judgement, qualifications, diligence, knowledge of obligations and appropriate policies and procedures. Business must not be conducted in a manner that would bring the reputation of the Bailiwick of Guernsey into disrepute.

To obtain a licence under the Protection of Investors Law, the business will need to be managed by at least two persons who are independent of each other. The Commission may require that the licensee have both executive and non-executive directors. The business must demonstrate that it will be conducted prudently, which includes having sufficient capital, liquidity and insurance, as well as making adequate provisions and keeping appropriate records.

An investment manager with a presence in Guernsey will generally need to maintain at least £25,000 of net assets, although this could be higher depending on the type of business conducted. The investment manager applying for a licence would also need adequate insurance cover.

The application fee for a licence under the Protection of Investors Law is currently £2,170.

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

In addition to maintaining the minimum licence criteria discussed above, the licensed entity will need to obey the conditions of its licence, which may restrict the type of business that may be conducted.

Anti-money laundering and financial crime prevention

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

The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 (the Criminal Justice Law), the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 (the Terrorism Law), the Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing (the Handbook) and the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007 (the Criminal Justice Regulations) provide the key anti-money laundering requirements for financial services businesses.

'Financial services businesses' as defined under the Criminal Justice Law include lending, providing individual or collective portfolio management services or advice, investing, administering or managing funds or money on behalf of other persons and accepting deposits in the course of carrying on deposit-taking business as defined in the Banking Law, by way of business for or on behalf of a customer.

The Criminal Justice Regulations provide that a financial services business in Guernsey must (among other things):

- carry out and document a suitable and sufficient money laundering and terrorist financing (ML/TF) business risk assessment (including annual reviews);
- undertake a risk assessment of any proposed business;
- ensure that its policies, procedures and controls on forestalling, preventing and detecting ML/TF are appropriate and effective, having regard to the assessed risk;
- undertake customer due diligence (CDD) and enhanced CDD where needed;
- perform ongoing and effective monitoring of any existing business relationship (including ongoing CDD);
- report suspected money laundering for the purpose of the Disclosure (Bailiwick of Guernsey) Law 2007 (the Disclosure Law) and terrorist financing activity for the purpose of the Terrorism Law;
- screen and train relevant employees on an ongoing basis; and
- keep relevant records for a minimum specified retention period.

A financial services business must maintain accounts in a manner that facilitates the meeting of the requirements of the Criminal Justice Regulations, including ensuring that it does not have a correspondent banking relationship with a shell bank or where the respondent bank is known to permit its accounts to be used by a shell bank.

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 Handbook defines a 'politically exposed person' as a person who has, or has had at any time, a prominent public function or who has been elected or appointed to such a function in a country or territory other than the Bailiwick of Guernsey. This includes, without limitation, heads of state or heads of government, senior politicians and other important officials of political parties, senior government officials, senior members of the judiciary, senior military officers and senior

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executives of state-owned body corporates, as well as immediate family members and close associates of such persons.

The Handbook requires that politically exposed persons be subject to enhanced due diligence.

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 Criminal Justice Regulations outline the standard identity and verification requirements for the purpose of establishing a business relationship (which will include account opening services provided by banks and wealth managers). The customer must be identified and their identity verified using identification data from a reliable and independent source. Any person purporting to act on behalf of the customer must be identified and their identity and authority to act verified. The beneficial owner and underlying principal must be identified and reasonable measures must be taken to verify their identity. Such measures must include, in the case of a legal person or legal arrangement, measures to understand the ownership and control structure of the customer. A determination must be made as to whether the customer is acting on behalf of another person and, if the customer is acting as such, reasonable measures must be taken to obtain sufficient identification data to identify and verify the identity of that other person. Information must be obtained on the purpose and intended nature of each business relationship. A determination must be made as to whether the customer, beneficial owner and any underlying principal is a PEP.

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

A tax offence that constitutes a criminal offence under the laws of the Bailiwick that may be tried on indictment, or that would constitute such an offence if it were to take place in the Bailiwick, is considered 'criminal conduct' for the purposes of the Criminal Justice Law and the Drug Trafficking (Bailiwick of Guernsey) Law 2000 (the Drug Trafficking Law). A person will be guilty of an offence under the Criminal Justice Law and the Drug Trafficking Law if that person (i) conceals or transfers the proceeds of criminal conduct or drug trafficking; (ii) assists another person to retain the proceeds of criminal conduct or the benefit of drug trafficking; or (iii) acquires, possesses or uses the proceeds of criminal conduct or drug trafficking.

Under the Criminal Justice Regulations, 'money laundering' also includes an attempt, conspiracy or incitement to commit the above offences or aiding, abetting, counselling or procuring the commission of such offences. The Criminal Justice Law also extends the definition of money laundering to include certain similar offences under the Terrorism Law and the Terrorist Asset Freezing (Bailiwick of Guernsey) Law 2011.

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

The requirements outlined in question 16 apply to all financial services businesses including financial intermediaries, as long as their activities fall within the definition of 'financial service businesses' discussed above. A financial intermediary will need to obtain sufficient information relating to tax compliance as required by its ML/TF policies.

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

Convicted money launderers may be subject to forfeiture of the proceeds of crime, a fine and imprisonment for a maximum of 10 or 14 years, depending on the Law under which the offence is prosecuted.

A person who contravenes the money laundering disclosure requirements of the Criminal Justice Regulations in the course of a financial services business may be subject to five years' imprisonment or a fine, or both.

Private banks and their employees may also be subject to administrative penalties by the GFSC. A law recently passed (not yet enacted) will increase the maximum penalty on licensees from £200,000 to £4 million (with any fine beyond £300,000 capped at 10 per cent of the licensee's turnover and with penalties against individuals capped at £400,000).

Client segmentation and protection

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

Types of client for private banking are not distinguished in legislation, but the GFSC will take into account each licensed entity's client profile in its assessment of the prudent conduct of the licensee's business and may impose conditions relating to types of client in licence conditions.

20 What are the consequences of client segmentation?

Not applicable.

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

There is no consumer protection legislation in Guernsey applicable to private banking. A proposal to introduce consumer protection legislation in the financial sector is currently under review by the GFSC.

Exchange controls and withdrawals

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

There are no exchange controls or restrictions on the movement of funds. Guernsey is in a currency union with the United Kingdom; Sterling is freely exchangeable and transferrable.

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 from Guernsey.

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

There are no restrictions on other withdrawals from Guernsey.

Cross-border services

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

All Guernsey banks are either subsidiaries or branches of banks in other jurisdictions, mainly from the United Kingdom, Switzerland and France but also in 10 other countries. All of the UK clearing banks have branches in Guernsey. Prospective Guernsey banking licensees are required to disclose their relationship to banking entities in other jurisdictions and the regulatory bodies that supervise them; the parent bank must provide adequate comfort to the GFSC that its subsidiary or branch in Guernsey will satisfy its legal and moral obligations as well as its liabilities. The GFSC may revoke a licence if the institution has its licence suspended or revoked in another jurisdiction.

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

Whether cross-border private banking services require licensing depends largely on whether an element of the service is conducted in or from the Bailiwick. The Banking Law prohibits persons 'in the Bailiwick' from 'accept[ing] a deposit in the course of carrying on, whether in the Bailiwick or elsewhere, a deposit-taking business' without a GFSC licence. Likewise, the Protection of Investors Law states that 'a person shall not carry on, or hold himself out as carrying on, any controlled investment business in or from within the Bailiwick, except under and in accordance with the terms of a licence'. Most wealth management services would be considered controlled investment business.

Anyone not licensed by the GFSC who conducts financial services businesses including lending, financial leasing, money transmission, currency exchange and cheque cashing 'in or from the Bailiwick' must be registered by the GFSC under the Registration Law.

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

As set out in question 26, any form of cross-border private banking service is regulated to the extent that it involves receiving deposits in Guernsey or carrying out wealth management services in or from Guernsey.

Persons without GFSC banking licences engaging in certain cross-border non-regulated financial services, such as lending, financial leasing or money services are subject to 'registration' by the GFSC under the Registration Law if it carries on (or holds itself out as carrying on) business in the Bailiwick of Guernsey. In determining whether to register the business, the GFSC may ask for information from the applicant for the protection of the public and the reputation of the Bailiwick as a financial centre. The GFSC may also impose restrictions and limitations on the registered business.

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 licensing requirements for conducting financial services discussed above apply equally to employees of foreign private banking institutions visiting clients or prospective clients in Guernsey.

UK immigration legislation has been extended to Guernsey. Currently, British citizens and nationals of the European Economic Area and Switzerland may freely enter Guernsey. Other nationals need to obtain the necessary entry permission required under UK immigration policies.

Under the Right to Work (Limitation and Proof) (Guernsey) Law 1990 (the Right to Work Law), if an employer is not resident in Guernsey, then an employee may be in employment in Guernsey for no more than 10 days in any 30-day period and for no more than 90 days in any 12-month period. Otherwise, an employee who is working in Guernsey on a visit of more than 15 hours must obtain permission from the Guernsey Housing Department.

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

Circulating promotional information in Guernsey about securities, derivatives or 'collective investment schemes' is a restricted activity under the Protection of Investors Law, requiring a licence from the GFSC.

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?

Guernsey residents must pay tax on earned bank account interest in Guernsey or elsewhere and must declare such interest on their annual tax return.

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 Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) Regulations 2015 (the CRS Regulations) adopt reporting standards for Guernsey consistent with Common Reporting Standards. Under the CRS Regulations, a Reporting Financial Institution in Guernsey must conduct due diligence on its account holders and provide information to the Guernsey Director of Income Tax on Reportable Persons, including whether they have indicia of being a resident in a foreign jurisdiction, the income earned on assets held in custodial accounts and the amount of interest earned in depository accounts. There are lower due diligence thresholds for accounts existing before the implementation of the CRS Regulations under US$1 million and the reporting financial institution may elect not to report pre-existing accounts that remain under US$250,000.

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?

The CRS Regulations do not require client consent for reporting, but do require that clients be given at least 30 days' advance notice of their information being reported.

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.

Trusts are a common legal structure for holding private assets in Guernsey. The Trusts (Guernsey) Law 2007 applies to Guernsey trusts. English common law also strongly influences Guernsey trust law, while certain Guernsey customary law obligations are recognised, such as the requirement that a trustee act in utmost good faith and *en bon pere de famille* (ie, as the prudent head of the family would act). Discretionary trusts and purpose trusts are common. Non-remunerated private trust companies can be formed to act as trustee, which may in certain circumstances give clients additional ways to control the administration of the trust.

Guernsey foundations have been made possible since the coming into force of the Foundations (Guernsey) Law 2012. Foundations are flexible instruments for their founders, who may also be councillors and beneficiaries of the foundation. The rights of beneficiaries of Guernsey foundations are strictly those set out in the constitutional documents, giving the founder more flexibility than a trust settlor might have. Guernsey foundations have faced relatively little court scrutiny to date. Trust and foundation administration costs are determined by market forces, as there are over 150 companies licensed to provide trust and foundation services in Guernsey.

Guernsey holding companies often form part of an asset holding structure. Protected cell companies and incorporated cell companies are available for any type of industry including the holding of private assets; cells allow for segregation of assets at a lower cost than the establishment of separate companies. Protected cells do not have legal personality or their own boards of directors, while incorporated cells do. Most companies holding private asses have an annual 'validation' fee of £250, while cell companies have an annual fee of £750, with a £100 fee per incorporated cell and £10 fee per protected cell. Guernsey companies and cells require a registered office and registered agent in Guernsey, which licensed fiduciaries offer for fees determined by market forces.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

Financial services businesses must judge, on a risk-based approach, how much identification and verification information to ask for, what to verify, and how to verify, in order to be satisfied as to the identity of a customer, beneficial owner or underlying principal. The Handbook outlines a two-part process for meeting the identification and verification of identity requirement:

- Part one: the financial services business must collect relevant identification data on an individual, which includes their legal name, former names and other names used, their principal residential address, date and place of birth, nationality, occupation, name of employer and official identification number or other unique official identifier (eg, passport, driving licence) that bears a photograph. If a financial services business is establishing a face-to-face business relationship with an individual customer and the risk of ML/TF is low (eg, where information on the identity of the customer, beneficial owners and underlying principals is publicly available, or where adequate checks and controls exist elsewhere in national systems), simplified or reduced CDD measures may be taken and only the legal name (including any former names and any other names used), principal residential address and date, place of birth and nationality need be collected.
- Part two: the legal name, address, date and place of birth, nationality and official personal identification number of the individual

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Update and trends

Private banking has been a relatively stable industry in Guernsey over the past five years.

Guernsey was never a European Union member, but has close ties to the UK and European financial services industries. The withdrawal of the UK from the EU and the entailing uncertainty present both challenges and opportunities for Guernsey to act as a 'safe harbour' of private assets.

As in other jurisdictions, new regulatory and compliance regimes are developing, such as those associated with implementing Common Reporting Standards. The GFSC is studying the replacement of the unregulated financial services registration regime and the introduction of consumer protection legislation for financial services.

must be verified. A current passport, national identity card, or armed forces ID card with photo are preferred. There may be other documents of an equivalent nature which may be satisfactory. Documents including a bank or credit card statement or utility bill, commercial or electronic databases, or a letter of introduction from a financial services business supervised by the GFSC or a business carried on from certain specified jurisdictions with which the individual has an existing business relationship and which confirms the residential address or an electoral roll, are among those documents that may be used to verify the residential address of individuals.

Guernsey residents are also customarily asked to provide documentation under the Right to Work Law.

In the case of a body such as a trust or company, the customer, beneficial owner or underlying principal a financial services business must verify (i) the identity of the legal body (name, number, date and jurisdiction of incorporation if applicable); (ii) any registered office address and principal place of business where the risk presented by the legal body is other than low; (iii) the individuals ultimately holding a 25 per cent or more interest in the capital or net assets of the legal body or with ultimate effective control over the capital or assets of the legal body; and (iv) its legal status. Additionally, for foundations, the founders, councillors, guardians, beneficiaries and any other person with ultimate effective control over the assets must be identified and verified.

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

The CRS Regulations define 'controlling persons' as the natural persons who exercise control over an entity. In the case of a trust, such term means the settlors, the trustees, the protectors (if any), the beneficiaries or classes of beneficiaries, and any other natural persons 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 and must be interpreted in a manner consistent with the Financial Action Task Force Recommendations.

Under the Companies (Guernsey) Law 2008, 'control' means entitlement to exercise the majority of votes cast, at a partners meeting in the case of a partnership and at a members, directors or management body meeting in the case of a body corporate.

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

In general, there are no regulatory or tax obstacles to the use of structures to hold private assets for non-Guernsey residents with no Guernsey source of income. Guernsey corporate tax is zero per cent for most companies. Companies owned by non-Guernsey resident shareholders with no taxable Guernsey income are not required to submit financial statements.

Contract provisions

37 Describe the various types of private banking contract and their main features.

Guernsey private banks are subsidiaries or branches of banks in other jurisdictions, of which the largest number are from the United Kingdom. Private banking contracts tend to be based on the models of their parent banking institutions. Parties to a contract are free to choose the governing law for a contract, subject to the common law requirement that the choice of jurisdiction must be bona fide and legal.

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?

Guernsey is a common law jurisdiction and its liability standards are similar to the common law of England and Wales, although customary Guernsey law (influenced by Norman law) may also be relevant. Liability can be limited by contract, however the Trusts (Guernsey) Law 2007 provides that a trustee may not limit its liability for gross negligence, wilful misconduct or fraud. Guernsey does not have unfair contract terms legislation similar to that of the UK.

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

Generally, Guernsey does not have mandatory provisions in private banking contracts (but see implied confidentiality terms, below). The GFSC may review a licensee's standard banking contracts to ensure that the licensee conducts business with integrity and skill.

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

Guernsey has a prescription period of six years for most contracts. The end of the prescription period extinguishes the contractual right.

Confidentiality

41 Describe the private banking confidentiality obligations.

Common law confidentiality duties of a bank are implied in a banking contract to keep the affairs of its clients confidential. These duties are substantially similar to the banking confidentiality requirements of English common law.

Under the Banking Law, information received by a person in relation to the business or affairs of any person under or for the purposes of the Banking Law or information obtained directly or indirectly from another person who has received it, cannot be disclosed without the consent of the person to whom it relates or from whom it was obtained. This does not apply, inter alia, to information already disclosed to the public, summarised information not relating to any particular person, information disclosed to assist the GFSC or relevant regulatory body outside Guernsey to discharge its functions, disclosures required by law and disclosures to investigate crime.

The Data Protection (Bailiwick of Guernsey) Law 2001 requires that a data controller be registered with the Data Protection Commissioner. Data controllers must only process personal data if the data subject consents or as necessary for the performance of a contract, to take steps at the data subject's request with a view to entering into a contract, as necessary for compliance with legal obligations, to protect the vital interests of the data subject, for the administration of justice, the exercise of a function in the public interest or the exercise of official authority.

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

Potentially all information and documents are within the scope of confidentiality, subject to the exceptions and limitations discussed above and below.

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

The common law recognises that the duty of banks to keep their clients' affairs confidential is subject to the following exceptions: (i) when compelled by law; (ii) where there is a duty to the public to disclose information; (iii) where the bank's interests require it; or (iv) when the client permits it.

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44 What is the liability for breach of confidentiality?

Confidentiality is considered an implied term of the bank's contract with the client, so a bank that breaches client confidentiality is potentially liable to damages for breach of contract.

Disputes

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

The Royal Court of Guernsey is the competent judicial authority for dispute resolution.

The Channel Islands Financial Ombudsman was established in late 2015 to resolve complaints relating to the financial services industry in Guernsey, Alderney, Sark and Jersey. The Ombudsman may award complainants for financial loss or other compensation that it considers fair and reasonable, up to £150,000.

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 requirement to report private banking disputes to the GFSC. Some disputes may result in reportable events (eg, suspicion of money laundering or a material adverse change in the licensee's portfolio).

A client may inform the GFSC of a complaint, but the GFSC only investigates breaches of regulatory requirements and does not get involved in purely contractual disputes between banks and clients. The Banking Law gives the GFSC the power, if it considers it in the interests of depositors or potential depositors, to appoint an inspector to investigate the nature, conduct or state of the licensee's business or its ownership. The inspector has the power to compel the production of documents and information from the licensee. The GFSC can also compel documentation and information from a licensee where it has reasonable grounds to believe that a person has committed an offence under the Banking Law.

A client may make a complaint to the Channel Islands Financial Ombudsman (discussed in question 45).

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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;
- the Banking Ordinance 1941;
- 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;
- 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; and
- the Standard Form Contracts Law 1982.

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;
- the Israel Money Laundering and Terror Financing Prohibition Authority;
- the Institute of Certified Public Accountants in Israel;
- the Israel Bar Association (IBA); and
- the Bank of Israel.

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.

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 by the client to qualify for private banking services.

5 What are the main licensing requirements?

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. In contrast, portfolio managers are entitled to work solely as employees of licensed portfolio management firms.

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 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
- the applicant 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 it believes that circumstances exist that render the applicant unfit to be licensed (fit and proper tests) or if a criminal investigation is conducted against the applicant.

Licensing of corporations

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 in it;

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- 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 or to fulfil any other requirement under Israeli law. However, trustees of certain trusts must file tax reports with the Israeli tax authorities.

6 What are the main ongoing conditions of a licence?

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

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?

Under the Banking (Licensing) Law, 5741-1981, the Governor may, at his 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
- in 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.

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

Further to the answer to question 5 and 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 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?

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 requirements for private banking 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

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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 titled '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 program 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 financial assets;
- 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).

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 obligation 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 of money laundering or terrorist financing, and therefore requires broader KYC inspection.

The Israel Money Laundering and Terror Financing Prohibition Authority published a circular titled '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 process 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.

A due diligence process, which includes identity, utility bills, source of funds, 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 the following:

- 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 other than the taxpayer.
- 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 is to become effective 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 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 Institute of Certified Public Accountants in Israel, 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.

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

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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 regarding 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 mention in question 19.

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

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 may 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.

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.

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,

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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 employee 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?

Israeli residents are subject to tax and reporting obligations on worldwide income.

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 further detail 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. There is proposed legislation in the Israeli parliament to enable automatic exchange of information, which will not require any consent of the clients.

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 trust is not considered a legal entity, therefore an underlying company is usually established in order to hold the trust 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 trust can be used to limit the requirement for inheritance procedures, which are administratively complex. Such trust may also be used for asset protection purposes or to care for a family member with special needs. 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 with a 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);
- the origin of the funds. It must be established that they do not derive from a predicate offence; and
- confirmation of tax status. It must be established that the person or structure is tax compliant where it is resident for tax purposes.

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 has half or more of a certain means of control in the body corporate.'

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.

Contract provisions

37 Describe the various types of private banking contract and their main features.

There is no specific standard contract that relates to private banking in all banks, but rather each bank has its own designated contract. The banking 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 it is unusual. The governing law in any banking contract in Israel is the Israeli law, as dictated by all banks.

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.

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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 therefore can be disregarded.

39 Are any mandatory provisions imposed by law or regulation in private banking 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.

40 What is the applicable limitation period for claims under a private banking 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 proscribed (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 Guzlan 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 banks are subject to 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.

Update and trends

As mentioned in question 16, tax offences are now considered as predicate offences under anti-money laundering legislation.

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.

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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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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 principles regulating the carrying out of banking business in Italy;
- Legislative Decree No. 58/1998 (the Italian Consolidated Law on Finance (TUF)), which contains the principles regulating the provision of investment services in Italy; and
- Consob Regulation No. 16190 of 29 October 2007, which contains the TUF implementation rules for intermediaries (ie, banks and the other subjects, with particular reference to the Italian investment companies (SIMs), 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?

The two main regulatory and supervisory bodies are the Bank of Italy and Consob, whose objectives are common: the stability, efficiency and competitiveness of the financial system, the protection of savers and investors, and the observance of the provisions on financial matters.

The Bank of Italy is responsible for the sound and prudent management of banks and other intermediaries, for their prudential supervision and risk containment, as well as for the transparency and correctness of conduct in the provision of banking services. However, for banks when providing investment services, and for the other intermediaries, the authority responsible for the transparency and correctness of conduct is Consob.

Naturally, pursuant to the implementation of the Single Supervisory Mechanism (SSM), the Bank of Italy shares some of its tasks and cooperate with the European Central Bank (ECB) and the 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 regulated by a specific authorisation. However, considering that very often the way in which such services are carried out constitutes, subject to a case-by-case analysis, a reserved activity, it is then necessary to obtain a licence that allows the pursuit of such reserved activity.

Broadly speaking, private banking and wealth management services are usually performed as portfolio management or investment consultancy; according to TUF provisions, when such services concern financial instruments and are performed to the public on a professional basis, then they qualify as investment services, and therefore can only be carried out by licensed banks, SIMs or Italian asset managers (SGRs).

More precisely: (i) for banks, the authorisation to provide investment services is inherent to the licence to carry out banking activities, granted by the Bank of Italy; (ii) for SIMs, the authorisation to provide the several investment services is granted by Consob; and (iii) as to SGRs, the authorisation by the Bank of Italy for the provision of asset management services entitles them also to provide portfolio management and investment consultancy services.

In any case, the licence to provide investment services does not vary upon the different types of investors towards which it is carried out.

For completeness, it should be noted that banks, SIMs and SGRs may also carry out the promotion or placement of their investment services in a place other than their registered office, by way of employing financial advisers authorised to do 'door-to-door selling' and being listed on the single register of financial advisers. Moreover, investment consultancy may also be carried out by natural ('independent financial advisers') and legal persons ('financial consulting companies'), both having to be listed on the single register of financial advisers. For foreign entities, see questions 25 and 26.

As a consequence, the players in the Italian private banking market can be classified as:

- Italian banks, either having an internal 'private banking' division or specialised exclusively in private banking;
- foreign banks (organised both as branches or subsidiaries);
- SGRs, SIMs and financial advisers; and
- family offices, whose authorisation varies according to the activities performed. In particular, family offices could be divided into three categories: single-family office, offering their services to a single family, which also owns the vehicle; multi-family offices, offering their services to several families which may or not be shareholders of the vehicle; 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 a specific definition of 'private banking' or 'wealth management'.

5 What are the main licensing requirements?

As already outlined in question 3, the Italian legal framework does not provide for specific licensing requirements regarding 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 (that includes, as already specified, the provision of investment services, in which mainly consist the private banking and wealth management services).

Generally speaking, banks, SIMs and SGRs are obliged to respect requirements and conditions covering the following aspects:

- the legal form;
- the registered office;
- the paid-up capital;
- the submission to the supervisory authority of the articles of incorporation, the by-laws and of a programme of operations setting out the structural organisation and the types of business envisaged;
- suitability and financial soundness requirements for significant shareholders;
- suitability, experience, integrity and independence requirements for corporate officers; and
- effective exercise of supervisory functions.

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The licence will be granted if it is shown 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 suitability, 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?

In general, during the course of business, the mentioned subjects shall fulfil the conditions under which their authorisation was granted. Also, broadly speaking, they shall meet 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, the licence to carry out banking activities is unique, regardless of whether the bank would qualify as 'private' or not.

According to the SSM, the application for the banking licence shall be submitted to the Bank of Italy, which will then propose a draft decision to the ECB. Within 180 days of the Bank of Italy's receipt of the application and relevant documentation, the ECB shall take its decision.

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 shall, inter alia, not cease to engage in business for more than six months, not fail to adhere to a deposit guarantee scheme nor be excluded from it and not be subject to compulsory administrative liquidation.

Pursuant to the SSM, both the Bank of Italy and the ECB have the right to propose the withdrawal of a banking licence, and should consult between themselves. The bank is prompted to provide its own views on the matter and is given the right to be heard by the ECB, which is responsible for taking 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 requirements for private banking in your jurisdiction?

The main AML obligations set forth for banks and other intermediaries by Legislative Decree No. 231 of 21 November 2007 (the AML Decree) and further specified in the implementing Bank of Italy regulations reflect those contained into Directive 2005/60/EC (the AML Directive), and consist of the following:

- 'customer due diligence' 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 the intended nature of the business relationship; and (v) conducting ongoing monitoring in the course of the business relationship;
- record-keeping obligations. In particular: (i) a copy or the reference of the documents relating to the customer due diligence obligations, and (ii) the supporting evidence and records of the transactions and business relationships, shall be retained for a period of 10 years after the carrying out of the 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 called the Single Electronic Archive (Archivio Unico Informatico); and
- reporting obligations: banks and other intermediaries shall file a report to the competent authority (the Financial Intelligence Unit (UIF)) of any '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, 'politically exposed person' means a natural person, resident in other EU or non-EU countries, who is or has been entrusted with prominent public functions, as well as its immediate family members or the persons known to be its close associates; further clarifications are contained in article 1 of the Technical Annex to the AML Decree, which has transposed exactly the instructions contained in article 2 of Commission Directive 2006/70/EC.

In respect of transactions or business relationships with PEPs, banks shall: (i) before establishing a business relationship, obtain the approval either of the general manager or of a person performing an equivalent function; (ii) take any adequate measures to establish the source of wealth 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, the identification is carried out through the acquisition of the identification data (such as name, date and place of birth, residence, details of the identification document and the fiscal code) provided by him or her or taken from a 'valid document for identification'. 'Valid documents for identification' shall be intended as the identity card, the passport, the driving licence or any other identification document with a photograph of the holder and that has been released, on paper, magnetic or electronic medium, from an Italian public administration or other countries, allowing the personal identification of the owner.

When the customer is a legal person, the identification is carried out with respect: (i) to the customer, through the acquisition of its identification data (name, registered office and fiscal code) and of information on its type, legal form, business purposes and carried out activities; and (ii) to the executor, through the acquisition of its identification data and of information on its power of attorney.

The identification of the beneficial owner takes place on the basis of the identification data supplied by the customer, or in another way, for example, by making use of public registers, lists, records or documents that are publicly accessible.

In any case, the intensity and scope of customer due diligence will have to be calibrated to the risk of money laundering and terrorism financing associated with the individual case ('risk-based approach').

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

The Italian legal framework provides for two different definitions of 'money laundering', according to which the definition and scope of predicate offences changes correspondingly.

The definition of 'money laundering' as an offence is set forth in article 648-bis of the Italian Criminal Code; pursuant to that definition, every offence that has been committed with a subjective element other than negligence (ie, any 'delitto non colposo') is considered to be a predicate offence.

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Article 2 of the AML Decree has nevertheless chosen to set out a different definition of 'money laundering', to be used for the purposes of the decree itself (these being those of contrast and prevention of money laundering), and in such provision, 'predicate offences' are linked to the concept of 'criminal activity'. The AML Decree does not provide its own definition of 'criminal activity', which is instead defined by article 3(4) of the AML Decree as 'any kind of criminal involvement in the commission of a serious crime'; article 3(5) of AML Decree then provides the list of what shall be regarded as a 'serious crime'.

In line with international guidelines (eg, Financial Action Task Force guidelines), the prevailing Italian case law has confirmed that tax crimes qualify as predicate offences for AML purposes. In this respect, it should be considered that tax crimes may be triggered only in relation to income taxes and VAT, when: (i) the taxpayer has carried out specific violations (eg, the issuance of false invoices); or (ii) the relevant violation exceeds specific thresholds provided by the law (eg, the taxpayer has not paid income taxes for more than €50,000 and the omitted positive income is higher than 10 per cent of the overall taxable income).

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 customer due diligence 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: in fact, violation of AML provisions may lead to the commission of offences having either a criminal or administrative nature:

- as to the criminal offence committed by managers or employees in the interest or for the benefit of the bank or intermediary, the bank or intermediary itself can – subject to the occurrence of certain conditions – be held responsible. Although its responsibility is qualified as administrative by the law, the matter is dealt with in accordance with the rules of criminal procedure; and
- as to the administrative sanctions, in some cases the bank or intermediary is directly the addressee of the sanction, while in other cases the direct responsible would be the natural person committing the violation, but the bank or intermediary would nevertheless be held jointly and severally liable.

It should be noted, finally, that a client failing to provide all the information necessary to comply with customer due diligence obligations may be fined with a monetary sanction.

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) provisions, the Italian legal framework identifies three types of customer for investment services purposes:

- professional customers, classified into 'public' and 'private'. Private professional customers are further classified into two categories: (i) 'private professional customers by law' (such as, for example, banks, investment firms, large companies and institutional investors; and (ii) 'private professional customers on request', that is, customers that explicitly request to be treated as professional and that the intermediary can reasonably consider, given the nature of the planned transactions and services, are capable of making their own informed decisions and of understanding the risks assumed;
- eligible counterparties: these are the customers identified pursuant to article 6, paragraph 2-quater, letter d) of TUB and article 58 of the Consob Regulation on intermediaries, and to whom order execution, own account trading and receipt and transmission of orders services are provided. In particular, almost any private professional customers by law qualify as eligible counterparties; and
- retail customers: any other customer.

20 What are the consequences of client segmentation?

Broadly speaking, the intensity of the 'rules of conduct' to be adopted by banks and other intermediaries in the provision of investment services varies according to the three types of customer: maximum care towards retail customers, fewer 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 exception to the rules on the evaluation of adequacy and appropriateness set forth by articles 39 to 42 of the Consob Regulation on intermediaries. In particular, the knowledge and experience of professional customers is presumed.

Finally, with regard to eligible counterparties, banks or other intermediaries are not required, unless a different agreement with the client states otherwise, to respect the obligations set forth by articles 27 to 56 of the Consob Regulation on intermediaries.

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

The Italian legal framework imposes compliance with rules of transparency and fairness both in the provision of investment services and banking services:

- as to investment services, the main relevant obligations are set out in the 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 (see also questions 20 and 21); and
- as to banking services, Title VI of the TUB provides the principles, while more detailed provisions are contained in the Bank of Italy's Resolution of 29 July 2009; apart from some exceptions, they apply to all types of customers of a bank. The TUB also contains specific rules for the consumer credit sector. In addition, a specific section of Legislative Decree No. 206/2005 (the Consumer Code) sets forth certain requirements in respect of distance marketing to consumers of banks.

In general, high net worth individuals may fall within the definition of consumer (ie, 'a natural person acting for purposes outside his business, trade, craft or profession'), however the provisions in scope would not apply to loans towards consumers of an amount 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 in Italy, which has a liberalised system 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 bank or postal passbooks or bearer instruments in euros or in foreign currency, effected for whatsoever reason between different parties, shall be carried out by means of banks and other financial intermediaries 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 brought abroad. However, anyone entering or leaving the country and carrying cash of an amount equal to or greater than €10,000 shall declare that sum to the Customs Agency; and
- finally, for tax reporting requirements, see question 31.

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

The Italian law does not prescribe any limitation on the amount of cash withdrawals that may be carried out at the bank counter or at the ATM. In general, however, banks impose restrictions on cash withdrawals at ATMs, whose amount may often be negotiated with the customer.

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

The Italian law does not prescribe any such limitation.

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Cross-border services

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

Pursuant to the EU principles, the Italian legal framework complies with the principle of mutual recognition of the authorisation granted in another EU member state, with respect to both banking activities and investment services. In particular, according to the 'home country control principle', an EU bank or investment company will be primarily supervised by the authorities of its member state, while the Italian authorities assume only a complementary role.

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

EU banks may carry out banking activities in Italy simply by way of a notification (the 'passport procedure') to the competent authorities of its home member state, which subsequently shall pass that information to the Bank of Italy (which also informs Consob if the EU bank intends to also carry out investment services). There are two options, either through the establishment of a branch or the 'freedom to provide services' regime.

Differently, non-EU banks 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 SSM scope), within 120 days.

Likewise, EU investment companies may carry out investment services in Italy, either with or without the establishment of a branch, simply by way of the passport procedure. In this case, Consob is the authority that has to be informed. On the contrary, non-EU investment companies need to be authorised by Consob.

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

As detailed under question 26, portfolio management services, investment consultancy services and banking services may be 'passported' cross-border.

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?

In order not to be accused of performing a reserved activity, the private banking institution would need to first carry out the passport procedure, notifying its intention to operate in Italy under the freedom to provide services regime. Consob has quite a restrictive approach in this respect.

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?

The requirements on individual taxpayers provided by Italian tax law to disclose or establish 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 a rate of 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.

Requirements for foreign private banking accounts

The main reporting requirements on individual resident taxpayers to disclose or establish tax-compliant status for foreign private banking accounts are the following:

- to report in the relevant income tax return the nature and the value of the foreign private banking accounts having an overall value higher than €15,000, according to the Italian foreign assets reporting duties;
- to determine and pay the wealth tax on financial 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 a rate of 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 others, to the following reporting requirements:

- on a monthly basis, they have to communicate to the Italian tax authorities the opening and the termination of any financial relationship with a client;
- on an annual basis, they have to communicate to the Italian tax authorities, among others, 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 the overall deposits and withdrawals;
- they have to collect and transmit to the Italian tax authorities any data regarding the 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 have to act as a withholding agent, if applicable in relation to income paid to their clients and to 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, the 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 them 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. Italian foundations are not legal structures to hold 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 family estate, for pursuing of public aims, and for planning the maintenance and care of disabled persons.

In any case, the trust deed provisions shall 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,

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the reserved shares of spouses, children and relatives, or the domestic provisions on the creditors' rights.

The main costs related to such legal structure are (i) the fees to be paid for the establishment of the trust (ie, notary public and legal assistance, usually in the range of €10,000 to €30,000), (ii) the fee to be paid to the trustee (usually in the range of €10,000 to €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 in trust.

Under Italian tax law, non-commercial resident trusts are taxable persons for corporate income tax purposes (IRES, which applies at a rate of 27.5 per cent and, as of the 2017 tax period, at a rate of 24 per cent). 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 scenario, income realised by the trust may be directly allocated to the settlor or the beneficiaries and taxed accordingly; and
- the 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 an individual to invest its assets and obtain yield to provide to 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 legal structure are (i) the fees to be paid to the insurance company for the administration of the assets (usually a percentage over the invested amounts) and (ii) the penalties for early termination of the insurance policy (if any).

Trust and insurance policies may also be combined to ensure that the insured assets be 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 a 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, for example, to ensure the confidentiality of the beneficial ownership of the transferred assets, grant the coordination of the management of shareholdings held in several companies or allow the generational shift of the family assets, ensuring the continuity of management.

The owner has to continue to manage its assets giving instructions to the fiduciary company, which acts as an agent only. The fiduciary agreement is binding only in the relations between its parties and it is not enforceable against third parties.

The main costs related to such legal structure are the fees to be paid to the fiduciary company (usually in a 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, Italian individual taxpayers are not subject to tax reporting duties in relation to foreign assets held through a fiduciary agreement.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

In general, as to the information that has to be collected from their customers, banks and other intermediaries need to identify the essential elements related to their knowledge and experience, their financial situation and their investment objectives. Should the structure (for example, a trust) qualify as a professional customer, its knowledge and experience of professional customers would be presumed.

For the information required for AML purposes, see question 15.

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 of article 2359 of the Italian Civil Code, pursuant to which a company is deemed as 'controlled' when an entity either has the majority of the voting rights exercisable in the shareholders' meeting, has sufficient voting rights to exercise a dominant influence on the shareholders' meeting or is able to exercise its dominant influence by virtue of contractual constraints. Different definitions of 'control' apply in specific fields (eg, in case of acquisitions of shareholdings in banks or insurance companies).

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 to shelter funds and other assets from the payment of income tax and VAT amounting at least to €50,000, the taxpayer may trigger the crime of fraudulent misappropriation of taxes.

In this respect, it should be noted that this tax crime:

- may be triggered even if: (i) the relevant tax violations have not been assessed at the time of the contribution to the trust fund; and (ii) the taxpayer is able to pay the relevant taxes; and
- may be punished with imprisonment from six months to six years.

Contract provisions

37 Describe the various types of private banking contract and their main features.

The main private banking contracts are portfolio management, investment consultancy or a combination of the two.

Portfolio management means the management, on a discretional and individual basis, of portfolio investments that include one or more financial instruments and according to mandate conferred by customers. Investment consultancy means the provision of customised recommendations to a customer, regarding one or more transactions on an identified financial instrument.

Pursuant to the general principles of private international law, the governing law 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 of the TUF, in actions for damages in respect of injury caused to the customer in the performance of investment services, the burden of proof of having acted with the 'due diligence' required shall be on the intermediary. The detection of said 'due diligence' shall be carried out with exclusive respect to the technical rules governing investment services. In particular, the intermediary diligence consists in refraining from making operations that are inadequate – by type, subject, frequency, or size – to the actual needs of the customer.

As to the contractual provisions that intervene on liability, if the investor qualifies as consumer, they might be regarded as 'unfair terms' and therefore be potentially null and void.

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

The TUF and Consob Regulation on intermediaries provide for the specific requirements that investment services contracts shall comply

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Update and trends

Recent studies have shown that the number of high net worth individuals in Italy is increasing and that the private banking industry is growing. In order to focus on customers with large financial resources, over the past few years the major Italian banking groups have chosen to create structures of family offices, either by way of setting up new companies or of structuring appropriate internal divisions dedicated to wealth management services.

In this context, the main legislative intervention that will shortly take place in Italy is that of the national implementation of MiFID II. MiFID II will bring pervasive changes in the private banking business strategies, as it will require aiming at the protection of investors also through the governance of the distribution strategy.

with. As a general rule, apart from contracts for investment consultancy, they all need to be executed in writing and a copy has to be given to the investor. Additional conditions apply to contracts on the provision of portfolio management. However, most of the requirements relating to disclosure, form and content of the contracts do not apply with respect to professional customers.

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

Generally speaking, the liability for the intermediary for damages arising from the violation of rules of conduct is of a 'contractual' nature, and is therefore subject to the ordinary limitation period of 10 years. Since the limitation period is provided by law for general interest reasons, the parties cannot renounce it or alter its terms in advance; the limitation period may be waived only when it has elapsed.

Confidentiality

41 Describe the private banking confidentiality obligations.

The Italian legal system does not contain a provision that positively upholds a general obligation of bank secrecy, which is, according to the prevailing interpretation, more likely attributable to a custom. In any case, several exceptions apply, provided for by, for example, tax legislation, AML legislation or the TUB itself (which obliges banks to send to the Bank of Italy – which is held to professional secrecy – any data or document it requests). 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 prescriptions with reference to 'private banking'. However, private banking activity could lead to the collection of information that constitutes personal data, including sensitive and judicial as defined by the Privacy Code. In particular, note that '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 others, 'personal data allowing the disclosure of [...], membership of parties, trade unions, associations or organizations 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 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'.

General principles prescribed by the Privacy Code and some General Provisions adopted by the Italian Data Protection Authority apply to the private banking sector; in particular the 'Guidelines for the Processing of Customers' Data in the Banking Sector' (dated 25 October 2007); and the general authorisations No. 5 and 7 with reference to, respectively, the processing of sensitive and judicial data.

Pursuant to the general principles mentioned above, the collected information can only be processed for lawful purposes – for example, to fulfil contractual obligations or meet legal requirements – in compliance with all the provisions set out in the legislation in force concerning personal data protection. In particular, the Privacy Code states that the data can be processed: (i) only by the persons in charge of the processing (and/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 data subjects appropriately beforehand; and (iv) by requesting the data subjects' consent unless certain exemptions prescribed by the Privacy Code apply.

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

The principles mentioned above also apply to the processing of information aimed at identifying customers when establishing a contractual relationship or performing certain banking operations (eg, crediting of accounts, performing payments or other operations requested by customers, cashing of bank cheques and postal orders). For the documentation required for AML purposes, see question 15.

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

On the basis of the Privacy Code, the data subject's personal data could be collected and processed only with the data subject's prior consent, unless certain exemptions prescribed by the Privacy Code occurred. In particular, there is no need to obtain the client's consent in order to perform the private banking operations, while it is necessary to inform them (at least once and for all), when the data are processed pursuant to legal requirements, to fulfil contractual obligations or comply with specific requests made by the clients.

In addition, note that communicating a client's personal data to third parties is allowed either with the client's consent or if any of the

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conditions for processing the data without consent are fulfilled (article 24 of the Privacy Code).

Except where the data are communicated because this is instrumental to the activities requested or the services provided – in which case the data subjects' consent is unnecessary under section 24(1)b of the Privacy Code – the subject in charge of performing private banking operations must keep all of the data confidential.

44 What is the liability for breach of confidentiality?

The breach of the confidentiality obligations can be identified as an unlawful processing of personal data under the Privacy Code. In particular, an unlawful processing of personal is sanctioned according to articles 167 (criminal sanction) and 162, paragraph 2-bis of the Privacy Code, which provides an administrative sanction consisting in payment of a fine ranging from €10,000 to €120,000. In any case, 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, the competence to rule on disputes relating to banking and financial services is attributed to the ordinary courts. However, before referring the matter to the the judicial authority it is mandatory to have attempted a mediation procedure beforehand or, alternatively, to have referred the matter to either:

- the Arbitro Bancario Finanziario (ABF), whose activity has been regulated by the Bank of Italy, responsible for disputes relating to banking services; or
- the Arbitro per le Controversie Finanziarie (ACF), whose activity has recently been regulated by Consob, responsible for disputes relating to the provision of investment and asset management services.

For both of these ADR bodies, only the customer – subject to the prior lodging of a complaint towards the bank or intermediary's office – has right to access the body; however, access to the ACF is restricted only to retail customers. Their decisions are not binding but their enforcement is guaranteed through reputational sanctions.

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 of disclosing towards such authorities the outcome of private banking disputes.

The Bank of Italy and Consob may receive petitions with which customers and investors may report facts or misconducts that have occured in the relationship with banks and other intermediaries. They cannot provide immediate and direct protection to the rights of the individual, but may carry out inspections aimed at verifying what has been reported, in the general interest of the protection of savings.

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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?

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?

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.

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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 requirements for private banking 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.

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Update and trends

The most recent developments affecting private banking in Jersey are as follows:
- Jersey has been recommended by the European Securities and Market Authority for the granting of an AIFMD passport for Jersey funds and managers;
- there has been a significant growth of family offices in Jersey; and
- the establishment of a financial services ombudsman by the Financial Services Ombudsman (Jersey) Law 2014.

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?

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.

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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 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 with a 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 contract 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.

39 Are any mandatory provisions imposed by law or regulation in private banking 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.

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40 What is the applicable limitation period for claims under a private banking 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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Korea

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Private banking and wealth management

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

Under Korean law, there are no specific laws and regulations regulating private banking services offered to high net worth individuals (HNWI). Instead, there are laws and regulations applicable to different financial products and services offered to investors including HNWI. The Financial Investment Services and Capital Markets Act (FSCMA) governs matters relating to investment dealing and brokerage business, which deals with sales and purchases of financial investment products (equities, bonds and derivatives), sales of fund products (ie, collective investment business) and wealth management services (ie, discretionary investment management and investment advisory services, which are further discussed in question 10). In addition, matters relating to deposits and credit extension are governed by the Banking Act and matters relating to foreign exchange transactions are governed by the Foreign Exchange Transaction Act.

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

The relevant bodies are:

- the Financial Services Commission (FSC): a financial regulator that grants regulatory licences or approvals to financial institutions, establishes financial plans and strategies and has the authority to interpret finance-related laws;
- the Financial Supervisory Service (FSS): the executive arm of the FSC that conducts day-to-day supervision and management of financial institutions, conducts regulatory audits and monitoring, imposes sanctions and investigates unfair trades in capital markets;
- the Korea Financial Investment Association (KOFIA): a self-regulatory organisation of financial investment companies; and
- the Bank of Korea (BOK): the central bank of Korea, which formulates and implements monetary policies and supervises, monitors and approves foreign exchange transactions between residents and non-residents or foreign currency-denominated transactions.

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

Licensed local banks, securities companies and asset management companies offer their financial products and services to HNWI. In particular, since the credibility of the service-offering financial institutions and the diversity of products and services offered to investors are an important factor in private banking, large banks and securities companies are generally strong in the private banking area. Korean branches or subsidiaries of foreign financial institutions offer their products and services mostly to institutional investors and generally do not offer private banking services to HNWI in Korea.

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

Since there is no Korean law regulating private banking itself, there is no statutory definition of private banking in Korea. Certain large banks and securities companies offer private banking services to VIP customers, who are selected by their own standards (eg, size of assets under management), such as offering an exclusive consulting desk, reduced or waived fees on financial transactions, renting a personal safe-deposit box free of charge and other various services which are not typically offered to other general customers.

5 What are the main licensing requirements?

In order to obtain a licence to offer the businesses described in question 1 (banks, securities companies, etc), a foreign entity must:

- establish a Korean branch or a Korean subsidiary in the form of a joint-stock corporation;
- meet the minimum funding or equity capital requirement;
- have an appropriate and feasible business plan;
- have appropriate manpower and physical facilities;
- appoint representatives or officers with no disqualification;
- ensure that its head office or principal shareholder are not disqualified; and
- have appropriate systems such as an internal control system and a risk management system, etc to operate its business.

6 What are the main ongoing conditions of a licence?

In principle, the requirements to maintain a licence, once obtained, are identical to the licensing requirements described in question 5. However, the requirements relating to equity capital and the principal shareholder may be eased in certain circumstances.

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

Generally, major Korean banks or securities companies offer private banking services to HNWI. Since Korean branch offices of foreign financial institutions mostly conduct their business targeting institutional customers and do not offer banking services to individual customers in Korea, they generally do not offer private banking services to HNWI. However, there are two Korean subsidiaries of international commercial banks that offer banking services to individual customers and private banking business to HNWI.

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

A licence must be obtained from the FSC in order to establish a bank, securities company or asset management company in Korea. The time it takes to obtain a licence is slightly different for each of the entities. Generally, the relevant statute requires the FSC to complete its review and grant a licence within two to three months after a licence application is filed. In practice, however, it takes approximately six to 12 months to obtain a licence because it also takes time to have prior consultation with the regulator, to prepare the necessary documents and to discuss and address the questions and comments received from the FSC and the FSS.

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

An application for business closure may be filed with a regulator only after (i) all customer accounts are closed or transferred to another institution; (ii) all transactions with customers or service providers are terminated; (iii) all obligations are discharged; and (iv) employee

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agreements are terminated and salaries are paid out to employees. The regulator approves the business closure application after ensuring that there are no outstanding issues with clients, creditors or employees.

10 Is wealth management subject to supervision or licensing?

As for private banking, there is no Korean law regulating wealth management specifically and thus there is no statutory definition for wealth management in Korea. Assuming that wealth management in this survey means investment advisory (IA) business and discretionary investment management (DIM) business under the FSCMA, financial institutions are allowed to conduct IA business and DIM business only after obtaining the relevant licence from the FSC and are subject to the supervision of the FSS once the licence is obtained. On the other hand, non-discretionary advisory service is differentiated from DIM business and often called 'Specified Money Trust' (SMT), which can be conducted only after obtaining a licence for trust business from the FSC.

Financial institutions are allowed to conduct IA business, DIM business or trust business after obtaining the relevant licence on a stand-alone basis. Alternatively, such businesses may be conducted by a bank (licensed to conduct banking business) or a securities company (licensed to deal in or broker financial investment products) after obtaining an add-on licence (registration) for the relevant IA or DIM business.

11 What are the main licensing requirements for wealth management?

The licensing requirements for IA business and DIM business are identical to those described in question 5. On the other hand, a cross-border IA business licence (registration) is available to foreign IA companies so that a foreign IA company may offer IA services to Korean residents directly or through remote telecommunication methods, on a cross-border basis, without establishing a presence in Korea. In this case, all the licensing requirements described in question 5 must be met, other than the requirement to establish a subsidiary or a branch office in Korea. (A cross-border DIM licence (registration) is available to foreign DIM companies; however, a foreign DIM company registered as a cross-border DIM business company is not allowed to provide DIM services to individual Korean customers under Korean law.)

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

In principle, the requirements to maintain a licence, once obtained, are identical to the licensing requirements described in question 5. However, the requirements relating to equity capital and the principal shareholder may be eased in certain circumstances.

Anti-money laundering and financial crime prevention

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

The main anti-money laundering and financial crime requirements include: (i) establishing appropriate internal control systems; (ii) conducting customer due diligence (CDD); and (iii) filing suspicious transaction reports (STR) or currency transaction reports (CTR) to the Korea Financial Intelligence Unit (KoFIU) if applicable.

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?

Politically exposed persons (PEPs) mean:

- those who were or have been politically and socially influential in a foreign country (generally within one year after resignation from office) (ie, (i) senior officials of major political parties of a foreign country; (ii) senior executives of state-owned companies of a foreign country; (iii) royal or noble family members; (iv) religious leaders; and (v) companies or businesses associated with PEPs);
- their family members; and
- those who enter into a special financial transaction with PEPs.

Financial institutions must, in respect of foreign PEPs, (i) conduct enhanced due diligence; (ii) obtain approval from senior management to open a new account for a foreign PEP or to continue the business relationship with an existing customer who has been found to be a foreign PEP; and (iii) conduct 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.

In the case of individual customers, a financial institution must verify their name, date of birth, gender, identification number (eg, social security number), nationality, address or actual residential address and contact information with a photo identification document such as a residential registration card or driver's licence. In the case of customers who have been identified as having a high risk of money laundering, the financial institution must verify their identity using a government-issued document and must conduct enhanced due diligence by verifying additional information such as business type (for individual business operators), purpose of the proposed transaction, sources of funds and other information deemed necessary.

If a financial transaction is made by a proxy, a financial institution must conduct CDD for such proxy in the same manner and ensure that the proxy is duly authorised to conduct the financial transaction.

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 in Korea.

Under Korean anti-money laundering laws, money laundering activities mean:

- concealment of crime proceeds;
- concealment of illegally gained proceeds from drug trafficking;
- tax or customs evasion and fraud; and
- financing of terrorism.

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

There is no separate verification process for tax compliance, and financial intermediaries must go through the verification process described in question 15 for purposes of anti-money laundering including tax compliance.

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

A client who commits a predicate offence for money laundering may be subject to imprisonment of up to lifetime imprisonment and a criminal fine of up to five times the amount evaded, depending on the type and severity of the crime.

For failure to comply with money laundering or financial crime rules, an employee of a financial institution may be subject to imprisonment of up to five years and a fine of up to 50 million won and the financial institution itself may be subject to a fine of up to 10 million won based on the vicarious liability.

In addition, the financial institution may be subject to administrative sanctions such as business suspension and the officers and employees responsible for such failure may be subject to administrative sanctions such as dismissal.

Client segmentation and protection

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

In respect of the brokerage and dealing of financial investment products (eg, securities, derivatives), clients are distinguished between professional investors and general investors depending on the asset size. An individual client (i) who has a balance of financial investment products of 500 million won or more; (ii) whose account has been open for more than one year; (iii) who has an annual income of 100 million won or total assets of 1 billion won or more; and (iv) who submitted the relevant evidentiary material within the past two years, is considered as a professional investor. All other clients are considered as general investors.

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In respect of over-the-counter derivative transactions, an individual client, even if he or she satisfies the foregoing requirements, must notify to a broker or dealer his or her intention to be treated as a professional investor. All other clients are considered as general investors.

20 What are the consequences of client segmentation?

Depending on whether a client is a professional investor or a general investor, different rules may apply in respect of the relevant investment product (eg, products for investment or the financial institution's duty to explain).

First of all, where a financial institution intends to offer financial investment products only to professional investors, a lower equity capital amount is required when obtaining a licence.

On the other hand, when offering a financial investment product to a general investor, a financial institution is required to collect information on the general investor (eg, investment purpose, assets, experience in investment) (generally referred to as 'principle of suitability'), to sufficiently explain about such product (generally referred to as 'enhanced duty to explain') and if it determines that such product is not adequate for the investor, to notify the same to the investor (generally referred to as 'principle of adequacy'). Further, the financial institution must obtain confirmation from the investor that the foregoing has been properly explained to him or her and will be liable for the damage incurred by the investor due to a breach of any of the foregoing obligations.

Where a financial institution intends to make an over-the-counter derivative transaction with a general investor, the financial institution must confirm in advance that such transaction is for hedging purposes only (but not for speculation purposes).

Where a financial institution intends to enter into an IA or DIM agreement with a general investor, the financial institution must provide written materials first and include in the relevant agreement certain matters relating to the contemplated business and procedures. Further, a DIM report must be provided to the general investor at least every three months.

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

There is no consumer protection or similar legislation in Korea relevant to private banking only.

In general, the customer protection rules that are applicable to general investors (principle of suitability, enhanced duty to explain, principle of adequacy, etc), as explained in question 20, are eased for individual clients who are professional investors based on their asset size.

However, the FSCMA and the Banking Act have customer protection rules that are applicable to all types of clients, such as the requirements to prevent a conflict of interest, to prohibit inappropriate information sharing or improper use of information obtained in the course of business, to have their general terms and conditions reviewed by a regulator (to ensure the terms and conditions are not disadvantageous to customers), and not to engage in any unfair business activities.

On the other hand, the FSC proposed the enactment of the 'Basic Act on Financial Consumer Protection', which seeks to enhance customer protection in the financial business area, aiming to implement it in 2017. Its proposed draft includes customer protection rules that are applicable to each product type, and enhanced customer rights in mis-selling cases.

Exchange controls and withdrawals

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

A foreign exchange transaction means (i) a foreign currency related transaction between Korean residents (including but not limited to an individual having an address or residence in Korea); (ii) a transaction between a Korean resident and a non-Korean resident; or (iii) a won-related transaction between non-Korean residents. Foreign exchange transactions are subject to restrictions relating to transaction amount, reporting obligations and others.

Korean foreign exchange transaction law assumes that a foreign exchange transaction consists of two steps: (i) execution of the relevant agreement; and (ii) implementation of such agreement (ie, payment or receipt of the transaction amount). At the time of executing the relevant agreement, various restrictions apply depending on the type of transaction, such as the allowed transaction methods, transaction amount limits and applicable reporting obligations. At the time of payment or receipt of the transaction amount, restrictions relating to payment or receipt procedures and methods and applicable reporting obligations may apply.

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

There are no particular restrictions on cash withdrawals in won by Korean residents.

In the case of foreign exchange transactions, certain restrictions apply to cash deposits, remittance and withdrawals from or to won or foreign currency accounts held by Korean residents or non-Korean residents.

In principle, deposits, remittance and withdrawals are allowed only for the statutorily prescribed transaction purposes. However, such statutorily prescribed transaction purposes are quite broad and thus there is no significant impediment to cash withdrawals in won or foreign currency. For example, the funds held in a foreign currency denominated account of a non-Korean resident may be withdrawn in won or a foreign currency or be transferred to another account in or outside Korea (subject to anti-money laundering regulations).

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

There are no restrictions on withdrawals of checks, bullion, securities, etc. However, a remittance of cheques or securities exceeding US$10,000 to outside Korea is automatically reported to the customs office. Further, a transfer of gold or silver to outside Korea is considered as an export transaction and thus must clear customs in advance.

Cross-border services

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

In order to provide private banking services to Korean residents, banks, securities companies and asset management companies should be licensed in Korea in principle. A foreign financial institution located outside Korea is strictly restricted from offering private banking services to individual clients including HNWI on a cross-border basis (eg, through emails, courier, phone calls, or fly-in visits, etc) with very limited exceptions and is only allowed to provide private banking services through a locally licensed financial institution.

For wealth management services, as explained in question 10, a foreign IA company or a foreign DIM company may provide services (i) through a locally licensed IA company or DIM company, or (ii) through registration with the FSC as a 'cross-border IA company' or a 'cross-border DIM company' without a presence in Korea. In such cases, however, their business must be conducted only through remote methods except that they are not allowed to make a fly-in visit to Korea. However, if a foreign financial institution is licensed or registered as a cross-border DIM company, such foreign financial institution is allowed to provide services to Korean institutional professional clients only and not to individual clients regardless of the size of their assets under management.

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

See question 25 for licence or registration as a cross-border IA company. A foreign bank may register itself with the FSC as a cross-border IA company on the condition that it provides services to Korean clients only on a cross-border basis without a presence in Korea. Other than that, there is no separate licence or registration requirement for cross-border private banking.

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

Cross-border private banking services (eg, deposit, debt financing, securities sales or brokerage, fund sales, etc) must be provided to Korean individual clients through a locally licensed broker. For example, when

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an offshore private bank contacts a Korean client including HNWI by phone or email, any communication with the Korean client should be made together with a locally licensed bank, a securities company or an asset management company depending upon the nature of the relevant products or services. An exception may apply, however, if (i) the Korean investor client is a financial investment broker or dealer ('investment dealer exception') or (ii) the Korean client is a professional investor and contacts the offshore private bank to make an inquiry for specific financial products or services, after which the offshore private bank may provide detailed information about the inquired products or services without solicitation or marketing ('reverse inquiry exception'). However, these exceptions apply only to institutional clients in Korea, not to individual clients including HNWI.

Cross-border IA services may be provided to Korean clients from outside Korea without a presence in Korea to the extent that the offshore financial institution is registered as a cross-border IA company. See question 25 for details. A cross-border IA company may provide its services only through remote methods, without a presence in Korea, and must file a business report periodically with a Korean regulator and designate a financial institution, law firm or an accounting firm as its main contract and report the same to a Korean regulator.

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?

In the case of commercial banking services (eg, deposits, loans or foreign exchange spot transactions), in principle, a foreign private bank must be properly licensed in order to conduct banking business in Korea. In practice, however, they fly in and visit Korean individual residents in Korea for courtesy visit purposes, without being licensed or being accompanied by a locally licensed bank. During the visit, there may be occasions where the employees of the foreign bank discuss or explain their banking services with clients upon request. Unlike the financial investment products or services as we describe below, banking services are not subject to strict scrutiny by a Korean regulator if they do not engage in active marketing or solicitation towards multiple clients in Korea. It should be noted, however, that a fly-in visit to Korean individual clients, if it becomes known to the regulator by any chance, may raise an unlicensed business issue.

If accompanied and led by a locally licensed bank, a foreign bank's employees may visit Korean clients more freely and assist the accompanying local bank in marketing offshore banking products to them.

In the case of financial investment services (eg, purchase and sale of stocks, bonds, derivatives, mutual funds, investment advisory or discretionary investment management services, etc), more strict rules apply. Therefore, employees of a foreign investment business company must be accompanied and led by a locally licensed investment broker or dealer when they visit Korean resident clients for the purpose of marketing offshore investment products or services. However, if a foreign investment business company makes a courtesy visit to Korean clients and potential clients and provides general market updates or general information on the company, without any discussion, solicitation or marketing of specific products or services, it is allowed without restriction. Even in the case of such courtesy visits, the foreign financial investment company may not provide marketing materials or explain about specific products and services that it offers, even if the Korean client initiates such request or discussion. Marketing materials may be provided or specific products and services may be offered only when the foreign financial institution is accompanied by a locally licensed financial investment company.

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

Foreign financial institutions are not allowed to send documents to Korean-resident clients by courier or email from outside Korea due to the cross-border business restrictions as explained above.

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?

When an individual opens a new account, the relevant financial institution, for FATCA/CRS compliance purposes, must verify that the account holder is a resident of a country that has executed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA) with Korea or a resident of the US, and obtain an evidentiary document. Only where the account holder is a resident of such country must the financial institution obtain a confirmation letter from the account holder containing his or her date of birth and taxpayer number.

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 institutions must verify whether an account holder is a resident of a country that has executed the MCAA with Korea or a resident of the US and must collect certain information on the account holder (eg, name, address, residing country, taxpayer number, date of birth, account number, balance of the account) and report the same to the Korean National Tax Service by 31 July of each year.

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 for reporting the information listed in question 31.

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.

Since there is no particular tax benefit associated with a vehicle holding private assets such as a foundation or trust, HNWI generally directly invest in financial investment products or real estate, without going through a separate vehicle holding private assets. As such, HNWI most often invest in the financial investment products that are exempt from income tax as part of the government policy.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

Under Korean law, KYC rules apply to all financial customers including HNWI.

A financial institution must conduct a financial transaction with a customer under his or her real name. Accordingly, when entering into a transaction or opening a new account (including when making a single transaction exceeding a certain amount (US$10,000 or 20 million won)), the financial institution must conduct CDD by obtaining the name, ID number, contact information and address of the customer. Further, the financial institution must verify whether there is a beneficial owner and if so, obtain the real name of the beneficial owner. If the customer refuses to provide the requested information, the financial institution must not make a transaction with the customer or terminate any existing transaction. If there is a suspicion of money laundering, the financial institution must decide whether to file an STR. Further, a CTR must be filed with KoFIU if the financial institution has paid to or received from the other party to a financial transaction exceeding 20 million won during one trading day.

Separately from the KYC rules described above, a financial institution must verify whether a client is a general investor or a professional investor when offering a financial investment product (see question 20). In the case of general investors, the financial institution must collect certain information such as investment purpose, assets and

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experience in investment, and refrain from offering a financial investment product that is determined to be inadequate for the investor.

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

As part of CDD, a financial institution must (i) identify the individual customers who ultimately own or control the customer (ie, beneficial owners) through reliable sources, depending on the level of money laundering risk, and (ii) take necessary measures to identify beneficial owners if there is suspicion or concern that a corporate customer is not the beneficial owner and there is a risk of money laundering.

In the case of individual customers, if a beneficial owner is identified, the financial institution must collect the name and nationality (in the case of non-Korean customers) of the identified beneficial owner.

In the case of corporate customers, the financial institution must identify the beneficial owner as being one of the following:

(i) a person who owns 25 per cent or more in the corporate customer;
(ii) if a beneficial owner cannot be identified in step (i):
  - a shareholder (natural person) who has appointed the CEO or the majority of officers;
  - the largest shareholder (natural person); or
  - the person who exercises de facto control over the corporate customer; or
(iii) if a beneficial owner cannot be identified in step (ii), the CEO of the corporate customer.

The financial institution must collect the name and date of birth of the identified beneficial owner.

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

If investment is made through a vehicle such as foundation or trust, any income may be subject to corporate tax applicable to the vehicle and also to individual income tax applicable to the investor. Thus, individual investors generally directly invest in financial investment products or real estate, without going through a vehicle holding private assets. However, a single-investor SMT is sometimes used by a bank or a securities company because it is generally considered as a conduit for tax purposes.

Contract provisions

37 Describe the various types of private banking contract and their main features.

Korean financial institutions enter into a contract with their client (including HNWI) based on the relevant financial investment product (deposit, loan, fund, equity-linked security, etc). While they may separately enter into an IA service agreement or a DIM agreement, they rarely enter into a private banking contract separately. Service contracts are in the form of general terms and conditions, targeting multiple clients and are governed by Korean 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?

A financial institution may be held liable for the damage incurred by a client due to a breach of contractual obligations (eg, mis-selling) or the damage caused by a tort. Under Korean law, the burden of proof lies with the client who is the claimant, in principle. Thus, the client must prove the financial institution's breach of contractual obligations and the causal relationship between the existence of the breach and the resulting damage. However, with the increasing attention to the protection of financial customers, Korean courts often require a financial institution to prove that the financial institution has fulfilled its statutory requirements, such as the duty to explain.

In the event the damage was caused by a tort on the part of the financial institution, the client who is the claimant must prove the existence of wilful misconduct or negligence on the part of the financial institution, the occurrence of the damage and the causal relationship between the financial institution's tort and the damage. In this respect, however, the financial institution's liability may be affected by the level of sophistication of the client, the risk level of the relevant financial investment product, etc.

39 Are any mandatory provisions imposed by law or regulation in private banking 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 Korean law or regulation in private banking contracts. Generally, Korean financial institutions do not enter into a private banking contract separately and instead enter into a contract based on the relevant financial investment product.

In this respect, there are certain mandatory provisions that must be included in a contract for the relevant financial investment product. For example, in the case of contracts for IA or DIM services, such contracts must include provisions relating to the scope of the IA or DIM services, financial investment products for investment, name and key experiences of investment managers, etc. In the case of banks, their general terms and conditions and any amendment to the terms must be publicly disclosed.

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

Any claim for damages caused by a breach of contractual obligations or a tort by a financial institution is subject to the limitation period of five years pursuant to the Korean Commercial Code. However, a claim for interest payment (with the interest to be paid more frequently than annually) is subject to the limitation period of three years; provided, however, that the claim for interest payment the amount of which has been confirmed by a Korean court is subject to the limitation period of 10 years.

On the other hand, any claim for damages caused by a tort is subject to the limitation period of three years from the time the claimant becomes aware of the damage or the damage-causing party or 10 years from the time the tort occurred.

Waiving the limitation period is prohibited under Korean law.

Confidentiality

41 Describe the private banking confidentiality obligations.

Most of the information provided by a client to a financial institution in connection with private banking services is highly likely to be considered as 'financial transaction information' under the Act on Real Name Financial Transactions and Confidentiality and as 'personal credit information' under the Act on Use and Protection of Credit Information. (In this respect, please note that certain transaction information such as loan and insurance transaction information is covered by personal credit information but not by financial transaction information.) Employees of a financial institution offering private banking services are prohibited from providing or divulging financial transaction information or personal credit information without first obtaining consent from the relevant information subjects, with certain exceptions.

If a financial institution offering private banking services acts as a beneficiary bank in respect of wire transfers (a bank receiving wire transfers), under the Act on Reporting and Using of Specified Financial Transaction Information, employees of such financial institution must neither provide nor divulge any related information to another party or use such information other than for its original purpose.

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

In respect of financial transaction information under the Act on Real Name Financial Transactions and Confidentiality, all documents containing information on a financial transaction (eg, deposit, dealing and brokerage of equities or bonds), or information indicating such a financial transaction was made, are within the scope of confidentiality.

In respect of personal credit information under the Act on Use and Protection of Credit Information, since personal credit information means the information that is able to identify a certain credit

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Update and trends

There have been no particular regulatory developments other than those already discussed. However, as Korea's population is rapidly ageing, there are various discussions on the issues relating to the ageing society, heightening the need to properly manage retirement pensions. As more baby boomers move into retirement and as a result the size of their accumulated retirement wealth increases, the Korean private banking market is expected to grow over the coming years.

information subject (contents of transaction, credit rating, etc), any documents containing information on a financial transaction are within the scope of confidentiality.

The wire transfer-related information protected under the Act on Reporting and Using of Specified Financial Transaction Information includes the names and account numbers of the sender and the receiver. Thus, all documents containing such information (eg, SWIFT messages) are within the scope of confidentiality.

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

Under the Act on Real Name Financial Transactions and Confidentiality and the Act on Use and Protection of Credit Information, financial transaction information or personal credit information may be provided to a third party if written consent is obtained in advance from the information subject or there is an order from a Korean court or a customs authority.

Under the Act on Reporting and Using of Specified Financial Transaction Information, there is no applicable exception.

44 What is the liability for breach of confidentiality?

A breach of confidentiality in violation of the Act on Real Name Financial Transactions and Confidentiality, the Act on Use and Protection of Credit Information or the Act on Reporting and Using of Specified Financial Transaction Information may result in imprisonment of up to five years or a fine of up to 50 million won. If an employee of a financial institution committed a breach of confidentiality and his or her employer failed to exercise due care, the employer financial institution may be subject to vicarious liability.

Disputes

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

A dispute in respect of the damage caused by a breach of contractual obligations or a tort in connection with private banking services may be heard by a court. In this case, a general litigation procedure applies, which begins with the filing of complaint and other court documents, goes through court hearings, witness examination, etc, and ends with the court ruling.

Further, if agreed to beforehand, the dispute may be resolved through arbitration in accordance with the Commercial Arbitration Rules of the Korean Commercial Arbitration Board.

On the other hand, a financial customer may file an application for mediation of the dispute with the Financial Dispute Mediation Committee of the FSS. The Financial Dispute Mediation Committee consists of lawyers, officers or employees of a customer protection organisation or other external experts. The committee makes a decision after its fact-finding, review of relevant documents, etc, and the decision takes effect only where both parties accept it.

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 financial institution offering private banking services must report the following to the FSS: (i) when a civil action has been decided against the financial institution without a possibility of further appeal (with the claim amount of 300 million won or more for a bank, or the claim amount of 30 million won or more for a securities company); or (ii) when a civil action has been brought against the financial institution with a claim exceeding 1 per cent of equity capital (if equity capital is less than 1 billion won, then 1 billion won) or 10 billion won.

In addition, as explained in question 45, a financial customer may file an application for mediation with the Financial Dispute Mediation Committee of the FSS.

On the other hand, the FSS may conduct an examination of a financial institution regarding its business and financial status. If a complaint is filed by a financial customer against the financial institution and it is deemed necessary by the FSS, an investigation may be conducted over such financial institution and an administrative sanction may be imposed, if necessary.

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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 on exchange control of 14 April 1945 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 between the government of France and the government of Monaco on banking regulation of 20 October 2010 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.

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 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.

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 following:

- 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 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.

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

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assistance in discretionary asset management and reception and transmission of orders.

5 What are the main licensing requirements?

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 and the European Central Bank are in charge of granting licences for banking activities to Monégasque credit institutions. To obtain a licence for banking activities following requirements shall 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 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?

In the answer to 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 most common form of organisation of a private bank is a Monégasque limited company (SAM). 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 European Central Bank based on draft decisions sent by the ACPR.

The licensing decision must be taken within six months of receipt of a complete application.

If the application is incomplete, additional information may be requested and the review period extended. The total time allocated to the European Central Bank is 12 months from receipt of the initial application.

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

In the answer to 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 or by the European Central Bank 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 European Central Bank or the ACPR believes that all the conditions set by the current regulations are satisfied;
- at the date when the conditions precedent set by the European Central Bank or the ACPR with respect to the dossier are lifted; or
- after a period to be determined by the European Central Bank or 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;

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- 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 have an appropriate administrative and accounting organisation, and be 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 act with loyalty and act fairly in the best interests of its clients and the integrity of the market, perform its business with the 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 requirements for private banking in your jurisdiction?

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 its application.

In addition, in the Monetary agreement between the European Union and Monaco of 29 November 2011, article 11 paragraph 6 provides that the Principality of Monaco shall take measures equivalent in effect to the European Union directives mentioned in appendix B relating to the fight against money laundering in compliance with Financial Action Task Force (FATF) recommendations.

Companies providing banking services and companies carrying out financial activities regulated by Monégasque Law 1,338 of 7 September 2007 are subject to anti-money laundering obligations provided in Act 1,362 of 3 August 2009 on the fight against money laundering, terrorist financing and corruption and in Sovereign Order 2,318 of 3 August 2009.

The obligation to identify clients and due diligence

Companies carrying out banking and financial activities must, when forming business relations, identify clients as well as their agents and check the identity of each of them using substantiating documents of which they shall keep a copy.

Companies carrying out banking and financial activities must exercise constant due diligence with regard to business relations and identify and take all reasonable measures to check the identity of the person for whom the operation is carried out.

If the client is a legal person, a legal entity or a trust, the measures include the identification of the individual or individuals who, ultimately, own or control the client entity.

Obligations concerning internal organisation

The companies are required to keep for at least five years after ending relations with regular or occasional clients a copy of all substantiating documents used for identification.

The companies shall take the 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 on the fight against money laundering, terrorist financing and corruption.

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 sufficient reasons to suspect, must be submitted in writing, 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 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.

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 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

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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 persons and trusts identification and verification concerns the company 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.

For more details regarding 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 are included in the categories of offences covered by money laundering provisions in Monaco, only when 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 moveable 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 perspective. In practice banks and asset management companies mention in general terms and conditions their clients undertaking to provide justifications of their tax status.

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

Regarding administrative penalties, a warning may be delivered to professionals by a decision of the Director of the SICCFIN.

In a case of serious infringement of the obligations, the SICCFIN may submit the case to the Minister of State in order to have one of the following penalties ordered against the party in breach:

- a reprimand;
- a pecuniary penalty that is proportional to the seriousness of the infringement and the maximum amount of which cannot exceed €1.5 million;
- a prohibition against carrying out certain operations;
- temporary suspension of their authorisation to exercise their profession; or
- the withdrawal of their authorisation.

Regarding criminal penalties, directors or employees of financial organisations shall be punished with a fine of between €18,000 and €90,000 if they have:

- knowingly informed the owner of the sums, the originator of one of the operations or a third party of the existence of the declaration of suspicion or the sending of information relating to the said declaration; or
- disclosed to any party information concerning action taken as a result of the declaration.

Any person who provides or tries to provide an obstacle to the controls exercised by the SICCFIN shall be punished by imprisonment for one to six months and by a fine from €2,250 to €9,000 or only one of these two penalties.

Any person who, through disregard for the professional obligations of due diligence to which they are subject, contravenes the provisions regarding declaration of suspicion, shall be punished with a fine of between €9,000 and €18,000.

Any person who is laundering illicit money or provides assistance for money laundering shall be punished by imprisonment for five to 10 years and by a fine of between €18,000 and €90,000 or only one of these two penalties.

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.

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.

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

There is no 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.

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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.

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 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 customers 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.

Direct marketing of financial products by non-authorised companies in Monaco is prohibited.

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 subject to not performing in Monaco any activity considered as banking or financial activity (eg, investment advice).

In addition, Monégasque Law No. 1,144 of 26 July 1991 provides that any commercial activity conducted in Monaco requires a business authorisation.

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 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 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.
- Automatic exchange: the new automatic exchange of information standard issued by the OECD will be adopted by Monaco in the course of 2018. This common reporting standard requires the government to obtain detailed information on financial holdings from their financial institutions and automatically exchange this information with other jurisdictions of the EU on an annual basis.

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 hold 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 with a structure?

When identifying clients that are legal persons, verification must be carried out using the following documents:

- the original, 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 nature of the work 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.

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The professionals are to check this information using substantiating documents in written form of which they are to keep a copy.

If the client is a legal entity or trust, the obligations to identify the client and check identities of the guarantors of the legal entity or the trust as well as, if need be, the protectors of the legal entity or trust are also applicable.

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

There is no legal definition of controlling person.

Anti-money laundering legislation provides a definition of the beneficiary owner as being the individual or individuals who, ultimately, own or control the entity.

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 contract 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.

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?

Financial institutions have an information and advice obligation towards their clients. However, it is an obligation of means.

According to the case law, the courts appreciate 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 case of a well-informed client or if the client expressly accepted the risks related to the contemplated transaction.

Private banking contracts provide usually 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 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 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 negotiation carried out on its clients' behalf by the asset management company.

39 Are any mandatory provisions imposed by law or regulation in private banking 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 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 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. Previously, the limitation period for civil claims was 10 years. Transitional rules are provided for claims with a limitation period beginning before 21 December 2013.

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.

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

The information covered by secrecy must be confidential.

Covered by the scope of confidentiality are information regarding operations carried out on the accounts, existence of accounts in the name of a person and the nature of these accounts, the identity of agents or guarantors, as well as information relating to business secrets or privacy.

Therefore any 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.

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 one to six months' imprisonment and by a fine from €2,250 to €9,000, 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.

Update and trends

Professional certification

Financial institutions in Monaco are now obliged to ensure that the individuals placed under their authority have the appropriate qualifications and expertise and a sufficient level of knowledge. As a consequence, managers, salespeople, financial analysts and traders shall undergo a mandatory professional examination.

Exempt from proof of certification are professionals who started working before 2 May 2014. They shall be deemed to have the minimum knowledge required.

New bills to come

The draft law on multi-family offices

In order to implement in Monaco the common reporting standard to enforce the automatic exchange of information among European countries, a draft law is now being voted on by Parliament.

Disputes

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.

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.

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Peru

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Private banking and wealth management

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

In Peru, there is no specific regulation for private banking. In that sense, the general legislation provided by the Peruvian Banking Law, approved by Law No. 26702, as amended or modified (the Banking Law), applies when financial entities provide such services.

When the services provided by private banks include transactions with investment fund shares and other publicly traded securities, the Peruvian Securities Market Law approved by Supreme Decree No. 861 (Unified Text of the Law approved by Supreme Decree No. 093-2002-EF) and the Investment Funds Law also apply, as well as the rules related to those laws.

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

The relevant regulatory bodies for private banking are the Superintendency of Banking, Insurance and Private Pension Fund Managers (SBS) and the Superintendency of the Securities Market (SMV).

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

In Peru, the types of entity offering private wealth services have evolved over time and are still developing to adapt to the market demand. Traditionally, high net worth individuals have used the general services of international and national banks to make investments. Gradually new, more sophisticated ways to make investments appeared. Now the presence of multi-family offices is increasing, offering expert services regarding investments and management of estates. The market is still growing and at present there are approximately 15 family offices. In parallel, single-family offices dedicated to managing the estate of only one family are starting to be implemented. However, these single-family offices have not yet been completely developed. Lately, in order to recover a part of the market, the well-established national banks have created an independent department offering investment services and general management services of the estates of wealthy individuals. Beyond providing financial advice, these departments offer to their clients customised services such as high-end international medical advice, tailor-made international educational programmes or access to sophisticated leisure activities.

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

Peruvian law does not define the activity of private banking per se. In practice, it refers to the services provided by an entity to private clients regarding financial investments and other types of services related to the management of personal wealth.

5 What are the main licensing requirements?

Prior authorisations of organisation and of operation must be obtained from the SBS to be able to act as a financial entity performing the following activities established by the Banking Law: (i) receiving or obtaining money from third parties by deposit, loan or any other form, and placing it in form of credits, investments or habilitated funds; or (ii) issuing announcements or publications regarding the activities indicated in (i).

Companies wishing to perform such activities must be constituted as limited liability entities with a minimum capital established by the SBS (around US$4.84 million). Furthermore, they must submit to the SBS a detailed business plan including an analysis of the financial market, the certificate of a guarantee deposit for an amount that represents 5 per cent of the minimum capital, a complete disclosure about direct and indirect shareholders and their personal assets, and affidavits demonstrating the moral and economic solvency of the organisers, shareholders, directors, general manager and principle functionaries.

6 What are the main ongoing conditions of a licence?

A financial entity providing private banking services and duly authorised by the SBS must maintain during the operating period the conditions required to acquire the prior authorisations of organisation and of operation, as well as comply with the requirements of the Banking Law and other applicable regulations. Furthermore, they need to pay an annual fee to the SBS.

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

Regarding entities established under Peruvian laws and, when provided within the scope of the Banking Law, the most common form of organisation of private banking is the 'banking company'. It is also common for the establishments of subsidiaries to provide private banking services.

Entities established under foreign laws are strictly forbidden by the Banking Law from offering any kind of bank services within Peru through a domiciled representative, without prior authorisation of the SBS. Although the Banking Law does not address the case of a non-domiciled representative coming to Peru to promote banking services, his or her scope of action should be limited in time and extent.

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

Within the scope of the Banking Law, it takes between two and three years to obtain a licence. The legal term to obtain from the SBS the authorisation of organisation is 220 calendar days and 180 days for the authorisation of operation; nevertheless, these terms are suspended until the entity that applied for the licence sends the additional information and documents requested by the SBS.

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

Within the scope of the Banking Law, the SBS can withdraw the licence of a financial entity based upon an administrative resolution (i) for any infraction qualified as very serious or (ii) for causes of dissolution and liquidation established in the Banking Law (suspension of the payment of its obligations, loss or reduction of its minimum regulatory equity, among others).

Likewise, the process for withdrawal of licences by the SBS is made through an administrative resolution with a voluntary dissolution submission previously presented by the financial entity. The submission must specify under which applicable laws the liquidation will happen,

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the designated liquidators, a certified copy of the shareholders' meeting that has agreed upon the liquidation, the timetable of the voluntary process of dissolution and liquidation, the latest financial statements (closing balance) and other information required by the SBS.

10 Is wealth management subject to supervision or licensing?

In Peru, wealth management is only subject to licensing indirectly when the service is provided by a regulated entity. In other words, there is no special licence needed to provide private banking services. Financial institutions need a licence to provide bank services in general, private banking services being only one service among others.

Traditionally, wealth management is provided mainly by securities brokers or through investment vehicles such as investment fund managers. These entities provide a discretionary management service.

A few commercial banks also provided said services, but these have been aimed, mainly, at corporations with a surplus cash flow rather than at high worth net individuals. In such scenario, the regulation applicable will be the general rules applicable to financial companies as stated in question 1.

11 What are the main licensing requirements for wealth management?

Securities brokers and investment fund managers require an authorisation of organisation and authorisation of operation from the SMV. It is requested that such companies shall be incorporated as a corporation (a limited liability entity) with a minimum capital established yearly by the SMV.

Additionally, a complete disclosure about shareholders and their personal assets is required. Furthermore, principal officers must comply with fit and proper requirements.

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

A financial entity authorised by the SMV must maintain during the time of its operation the requirements for which it acquired the authorisation of organisation and operation. Additionally, there are risk management requirements on an ongoing basis under the supervision of the SMV.

Anti-money laundering and financial crime prevention

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

In Peru there are no specific anti-money laundering and financial crime requirements for private banking. The general requirements apply to this area.

Peruvian law requires all banks, mutual or investment fund management companies and asset managers to report any suspicious transaction detected based on the client's personal information, the type of operation and the specificities of the financial market, stock or trade market.

In the case of a financial company supervised by the SBS, the main anti-money laundering and financial crime requirements can be divided into three categories: (i) obligation to identify, verify and monitor the client ('know your customer'); (ii) obligation to record the operations, maintain records and report any suspicious transaction; and (iii) obligation to implement a system of prevention and detection of money laundering and financial crimes with compliance components and risk management to which the institution is exposed (AML/CFT compliance).

In the case of a company supervised by the SMV, such as a mutual or investment fund management company, the requirements are similar to those imposed on a financial company.

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 Peruvian law, a politically exposed person (PEP) is a national or foreign individual carrying out prominent public functions or prominent functions in an international organisation, within or outside Peru, and whose financial circumstances can be subject to public interest. The same definition applies in the case of a company supervised by the SBS that has carried out within the last five years such functions, and within the two last years in the case of a company supervised by the SMV.

When the client of a financial institution is a PEP, an increased due diligence regime applies. A strengthened regime involves, among other things, increased frequency of the review of the transactional operations of the client, conducting inquiries, enchanced identification and verification measures, and assigning responsibility for the relationship with the client to the highest management level of the financial company or equivalent powers.

The application of the strengthened regime extends to the spouse or partner of the PEP, to their relatives up to the second degree of consanguinity and second of affinity, to the corporations or legal entities in which the PEP owns 25 per cent or more of the share capital, capital contribution or participation, and to the partners, shareholders, associates and directors of such corporations or legal entities. Likewise, the strengthened regime applies if the PEP is the client of a company supervised by the SMV, the only difference being that it will apply to the legal entities in which the PEP owns at least 5 per cent of the capital contribution or participation.

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.

For financial companies, the AML regulation in Peru establishes three regimes of due diligence regarding knowledge of the client: the general regime, simplified regime and reinforced regime.

For the general regime, financial companies must request the following information from the client (individual or legal entity, as applicable): full name, identity document, nationality, residence, address, telephone and email, purpose of the relation to be established with the company, profession, identification of the legal representatives, among others.

The simplified regime allows financial entities with prior authorisation from the SBS to reduce some of the information requirements for identification of the client.

Finally, regarding the reinforced regime, the same requirements as those mentioned in question 14 are applicable.

Likewise, the company must request an affidavit explaining the origin of the funds of the clients in the case of transactions exceeding the limits established by the Transaction Registry.

With regard to wealth managers, in accordance with the Law on Anti-Money Laundering and Financing of Terrorism approved by CONASEV Resolution No. 033-2011-EF-94.01.1, the minimum required information for all clients and PEPs is the same as the information required by financial entities. Moreover, wealth managers must request from their clients an affidavit explaining the origin of the funds when considered necessary. In general, wealth managers should intensify their due diligence procedures in the case of PEPs and other special clients.

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

Yes. Peruvian criminal law expressly includes tax offences as a predicate offence for money laundering. The predicate offence can be any criminal behaviour generating an illegal capital gain.

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

There is no obligation related to minimum verification in connection with the tax obligations of their clients.

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

In the case of a financial entity supervised by the SMV, failure to comply with the provisions on the prevention and detection of money laundering incurs administrative sanctions that may be applied to the members of the board, the general manager, the compliance officer, the employees, internal or external auditors. Depending on the seriousness of the infringement, the sanctions can consist in a warning, fine, suspension of the operating licence, revocation of the operating licence and disqualification.

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In the case of a financial entity supervised by the SBS, failure to comply with the provisions on the prevention and detection of money laundering can lead to administrative sanctions that can be taken against the shareholders, directors, manager, employees and any representative. Likewise, the sanctions can consist in a fine, the suspension of the operating licence, the suspension, dismissal or disqualification of the manager or employee responsible, the intervention (Peruvian term meaning the taking over of control of the company by Peruvian regulatory agencies), dissolution and liquidation of the company.

The liability will be criminal in the event the company does not communicate (intentionally or recklessly) the suspicious transactions detected by the Financial Intelligence Unit or does not provide the required information in a criminal investigation regarding money laundering. The individuals take full responsibility, not the legal entities.

Client segmentation and protection

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

There is no regulatory framework in Peruvian legislation for the distinction of the type of clients in private banking.

20 What are the consequences of client segmentation?

Not applicable.

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

The main rules applicable to financial entities are:

- the Regulation on Information Transparency and Contracts with Financial System Users, approved by Resolution SBS No. 8181-2012, which establishes that financial entities must be completely transparent in the diffusion, application and modification of contractual conditions, compensatory interest rate, default interest rate or penalty applicable if any breach, commission and related costs;
- the Code of Protection and Consumer Defence approved by Law No. 29571; and
- the Complementary Law to the Law on Protection of the Consumer in Financial Services, approved by Law No. 28587, which establishes general rules regarding the rights of financial consumers and the procedures for their enforcement before the Peruvian competition authority, INDECOPI.

These rules require financial entities to be diligent in their descriptions of the products and services offered, in order to help consumers understand their characteristics, benefits, risks and conditions applicable and allow them to make informed decisions when taking advantage of such products or services.

Exchange controls and withdrawals

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

From a legal point of view there are no exchange controls or restrictions on the movement of funds; on the contrary, article 64 of the Peruvian Constitution establishes that the state guarantees the free possession and disposition of foreign currency. Other than the policies that private banks may have, the Peruvian government does not restrict the amount of foreign or local currency that can be traded or purchased.

The Central Bank of Peru only sells or purchases foreign currency to avoid excessive exchange rate volatility. This intervention only purports to reduce the volatility of the exchange rate, but does not intend to fix it – the latter depends on the economy itself.

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

Banks usually impose restrictions on cash withdrawals as a matter of security. Peruvian legislation does not impose any restrictions.

The amount of such restriction varies between 1,900 and 3,000 nuevos soles, and US$500 and US$800.

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

From the banking regulatory point of view, there is no restriction on other withdrawals from an account in Peru.

Likewise, there is no restriction for withdrawals of securities from an account in Peru.

Cross-border services

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

There is no general framework for cross-border private banking services; nevertheless, the Banking Law establishes the framework for financial foreign companies to perform promotional services through a representative domiciled in Peru with the prior authorisation of the SBS.

Additionally, when private banking services include operations involving securities, securities integrated markets rules could be applicable. Such rules will apply when the operations involve Chile, Colombia or Mexico.

The securities integrated markets rules (MILA) do not replace the local regulation but are designed to avoid double checks and requirements.

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.

Nevertheless, if a financial foreign company wishes to be represented in Peru by a legal person in order to perform promotional services, the company must obtain authorisation from the SBS. In this case, its representative only may perform the following activities:

- promote the services of its represented company among the national companies of similar nature, with the aim of facilitating the exchange of commerce and granting external financing;
- promote different offers of financing of its represented company between legal persons and entities interested in the purchase and sale of goods and services in the foreign markets; and
- promote the services of its represented company between the potential applicants of credit or external capital.

In this sense, the representative of the foreign financial company is prohibited from:

- making transactions and offering services proper of the activities of its represented company;
- obtaining funds or placing them directly in the country; and
- offering or placing directly, in national territory, securities and other foreign titles.

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

Only the cross-border services granted by domiciled representatives in Peru of foreign financial entities is regulated, for the promotional activities indicated in question 26.

When private banking services include operations with publicly traded securities, prior authorisation from the SMV will be required in order to provide such services.

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?

Yes, it is possible for employees of foreign private banking institutions to travel in order to meet clients and prospective clients in Peru. However, it is advisable to make clear that none of the products or services offered constitute public placement securities. Moreover, no solicitation for receiving deposits shall be done in Peru, as this constitutes a prohibition under the Banking Law. Finally, in the event such discussions involve handing documents of any kind of security, it is advisable to expressly inform the following in order to avoid sanctions when prospecting clients: (i) that such documents do not constitute a public offer of securities; (ii) that any placement activity will be understood to be made abroad; and that (iii) the securities will be not registered before the SMV.

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It is not necessary to obtain a licence from the SBS, as long as such employees are not domiciled representatives. If the employees enter the country for the purpose of conducting business or making legal arrangements, a business visa will be required.

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

Yes, the delivery of documents to clients and potential clients, is permitted in Peru. It is not necessary to obtain a licence from the SBS. Nevertheless, note that sending unsolicited materials though email may constitute a breach of the Spam Law, which establishes that the sender of unsolicited emails may be subject to fines imposed by the competent authority (which can vary according to the gravity of the infraction).

Such documents must not include offerings to buy, sell or transfer securities, without prior registration with the SMV.

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?

Individual taxpayers in Peru do not have to make disclosures such as those existing in countries such as the United States (eg, FATCA). However, since 1 January 2013, a regime inspired by the Controlled Foreign Corporation (CFC) rules, called the 'Regimén de Transparencia Fiscal Internacional', has been in force. This regime applies to resident taxpayers making passive investments through CFCs. If a number of listed conditions are met, the individual resident of Peru will have to report, at the end of every taxable exercise, on his or her Peruvian tax form, the passive incomes distributed to him or her by a CFC of which he or she holds directly or indirectly more than 50 per cent of the share capital.

The tax collecting entity in Peru – SUNAT – has issued a resolution according to which when the trustee of a foreign trust is a resident of Peru and the trust has been established in application of foreign laws, the latter has the obligation to report to SUNAT, starting next year (2017), some specific information concerning the trust, the settlors and the beneficiaries.

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 entities must present regulatory reports of their clients before the SBS and the Central Reserve Bank, including a debtors credit report, which must be sent monthly and opportunely to the SBS for its maintenance in the credit bureau.

Furthermore, from the point of view of the AML rules, the compliance officer of a financial entity must communicate to the SBS any transactions by its national or foreign clients that it considers to be suspicious. The report of the suspicious transaction must contain the identity of the persons involved, a list and description of the transactions, as well as the irregularities and information considered relevant.

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?

From the point of view of the AML rules, the consent of the client is not necessary in order to comply with the reporting obligation.

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.

It all depends on the intention of the investor or individual; the most common legal structures are privately held companies and Peruvian trusts.

Update and trends

Private banking has become important because of the economic growth in Peru and consequently the number of high net worth individuals, which leads to diversified investments and the need to require specialist advice from family offices.

Likewise, from a regulatory point of view, it has resulted in the classification of some high net worth individuals as 'qualified investors', facilitation of investment processes and allowing the development of a higher level of sophistication.

The trends in private banking for the coming years will be oriented towards the development of international banks providing highly specialised and professional services in Peru.

Until 2013, it was very common for Peruvian individuals to hold their assets through foreign companies or foreign trusts. However, since the incorporation of Peruvian CFC rules, the use of such structures has not been so common.

For a Peruvian individual, the trust allows the deferral of income tax (such tax is paid only upon distribution of benefits, and not when they are accrued). A privately held company allows the limitation of liabilities. The cost of incorporating a trust is much higher than incorporating a company (approximately 60,000 nuevos soles versus 8,000 nuevos soles).

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

For financial entities, the AML regulation establishes three regimes of due diligence regarding KYC requirements: the general regime, the simplified regime and the reinforced regime. For more detail, see question 15.

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

For tax purposes, the only reference to a 'controlling' person can be found in the chapter regulating the International Tax Transparency Regime (CFC Rules), which establishes that a controlling person is a person who has a direct or indirect participation in more than 50 per cent of the stock capital, the economic results or the voting right of an entity.

Generally speaking, in Peru it is understood that a controlling entity (i) owns, directly or indirectly, more than 50 per cent of the voting share capital or (ii) has the power to direct the management policies.

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

At present in Peru there are no such restrictions.

Contract provisions

37 Describe the various types of private banking contract and their main features.

The Peruvian legislation does not establish types of private banking contract. However, the Transparency Rule regulates the minimum information that has to be provided to the client regarding the effects of signing such contracts. Moreover, in application of this Rule, the general dispositions of those contracts must be previously approved by SBS.

Private banking services could also require contracts when involving operations with publicly traded securities. The most common contracts used in this case are (i) contract with a securities broker or dealer; (ii) contract with an investment fund management company (Peruvian SAFI); and (iii) contract with CAVALI (Peruvian settlement/custody/clearing institution).

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?

Peruvian legislation does not establish a liability standard. In that sense, financial entities must comply with the obligations determined

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in the Transparency Rule and the applicable regulation for the protection of databases (Law No. 29733 on Protection of Personal Data).

However, the general rules on liability established in the Peruvian Civil Code are applicable.

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

Considering that there is no specific regulation for private banking contracts, the applicable legislation is that for the financial system in general. The contractual conditions as agreed must be maintained in force for the offered term. The company has to inform the client about any applicable restrictions, the period of duration and the way to change or remove the conditions once the product or service has been contracted. If any contract is signed without fulfilling one of these obligations, the contractual conditions cannot be changed or removed.

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

There is no specific period for claims involving private banking contracts. In accordance with the Code on Protection and Consumer Defence approved by Law No. 29571, the limitation period for making a claim to INDECOPI is two years after the end of the service. That term cannot be changed contractually nor waived by the client.

Notwithstanding, the SBS has the faculty to determine the existence of infractions of the legislation that regulate supervised companies, for a term of four years since the infraction stopped.

Confidentiality

41 Describe the private banking confidentiality obligations.

In accordance with the Banking Law, it is prohibited for companies, their directors and workers to provide any information about passive transactions with their clients (bank secrecy).

Additionally, according to the Law on Protection of Personal Data (Law No. 29733), the financial company or the owner of the personal database of its clients is forced to maintain the confidentiality of the information and its background.

When involving transactions through a Peruvian stock exchange, stock exchange secrecy will be applicable, meaning that the names and identification data of the clients must be kept secret by the securities brokers and those involved in the transaction.

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

The main information within the scope of confidentiality is information that allows the identification of the customer, such as (i) name; (ii) Peruvian identity document number or passport number; (iii) addresses; and (iv) wealth of funds transferred to the bank, among others.

Confidentiality of personal data includes bank secrecy and all information obtained by the company.

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

Bank secrecy does not apply when written authorisation has been obtained from the client. Furthermore, banking secrecy does not prevent the provision of global information, particularly in the following cases: (i) when it is supplied by the SBS to the Central Reserve Bank or companies of the financial system for statistical purposes or the design of monetary policies and their follow up; (ii) when it is supplied to foreign banks or financial institutions for correspondent services; (iii) when it is requested by audit companies risk rating agencies; and (iv) when it is required by people interested in acquiring not less than 30 per cent of the share capital of a company.

In relation to the personal database, companies are exonerated from the obligation of confidentiality when prior informed, written and unequivocal consent of the owner is given, or when it is established through a final judicial resolution, or when there are well-founded reasons regarding national defence, public security or public health.

Finally, confidentiality is not applicable when a judge or court, in the exercise of its legal powers, requires the disclosure for jurisdictional purposes. Also, it does not apply to official authorities predetermined by law.

44 What is the liability for breach of confidentiality?

According to the Peruvian Banking Law and the Peruvian Penal Code, the violation of bank secrecy implies a criminal liability punishable by imprisonment for no more than two years and a fine.

Furthermore, breach of confidentiality regarding a client's personal data qualifies as a serious offence punishable by a fine of not less than 5 Peruvian tax units (UIT) and no more than 50 UIT (1 UIT in 2016 is equal to approximately US$1,200).

Disputes

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

Any controversy may be resolved through an administrative instance and/or arbitration, and judicial courts.

The clients of financial entities may submit complaints against these companies before the Financial Client Defender, an entity set up to provide an alternative method for the prevention, conciliation and resolution of claims between clients and financial entities.

Additionally, when there is no pending complaint before another entity, clients of a financial entity may file a complaint through the Consumer Attention Platform (PAU) when they consider that the company has infringed one of the legal dispositions that regulate its

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activities. Then, the regulator will initiate a sanction procedure against that company, if applicable.

Finally, the client could bring a complaint before INDECOPI, since it is the entity in charge of the protection of individual rights of the consumers of 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?

Once it has received a claim, PAU will carry out preliminary research to determine whether there are grounds to initiate a sanction procedure. If applicable, PAU will request an opinion from the authority in charge of the SBS in order to initiate the sanction procedure.

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Russia

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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 in Russia are:

- the Russian Tax Code, Federal Law No. 173-FZ 'On Currency Regulation and Control';
- Federal Law No. 46-FZ 'On Protection of Rights and Legal Interest of Investors on the Securities Market';
- Federal Law No. 39-FZ 'On the Securities Market';
- Federal Law No. 86-FZ 'On the Central Bank of the Russian Federation (Bank of Russia)';
- Federal Law No. 395-1 'On Banks and Banking Activities';
- Federal Law No. 156-FZ 'On Investment Funds'; and
- Federal Law No. 152-FZ 'On Mortgage-Related Securities'.

Fiduciary services are not expressly regulated by the Russian legislation.

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

The Central Bank of the Russian Federation (the Bank of Russia), the Ministry of Finance, the Federal Treasury, the Federal Tax Service and the Federal Financial Monitoring Service. In addition, there are several self-regulatory bodies (eg, the National Association of Securities Market Participants and the Professional Association of Registrars, Transfer Agents and Depositaries, etc).

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

Generally, private banking divisions of banks have the biggest share of the market. Family offices have a certain market share, but typically high net worth individuals (HNWIs) or affluent private clients have a sole dedicated person performing this role. Financial advisers, law firms and multi-family offices are also present on the market.

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

There is no statutory definition of private banking in the Russian legislation. Some facets of what is typically understood as private banking falls into financial services or banking industries, which are regulated separately.

5 What are the main licensing requirements?

Private banking itself is not subject to licensing requirements. However, it typically involves banking activities that are licensed by the Bank of Russia. The key requirements include having a share capital no less than 300 million roubles, and there are restrictions on the source of funds. Acquisition of 10 per cent or more in bank share capital requires consent of the Bank of Russia. Private banking may also involve financial services activities, such as brokerage or fiduciary management, which are also licensed by the Bank of Russia. The key requirements include capital level as well as qualifications and work experience of a director and officers, technical facilities necessary for conducting professional activity and employees' conformity with the qualification requirements (Central Bank Instruction No. 481-P dated 27 July 2015).

6 What are the main ongoing conditions of a licence?

The conditions for maintaining a bank licence include general compliance and maintenance of specific financial ratios imposed by the Bank of Russia, for example, the minimum amount of capital base (about US$4,770,300 (article 11 of Federal Law No. 395-1 'On Banks and Banking Activities')). The requirements for maintaining a financial services licence include general and specific compliance with the licensing requirements (see question 5).

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

The Russian bank (local or a foreign bank subsidiary) is the most typical form of providing private banking services. Some of these services are also provided by multi-family offices or law firms, but their scope is limited due to lack of a banking licence. Under Russian law a bank cannot perform any other activity save for banking and a branch of a foreign bank cannot perform banking activities in Russia. There are also some restrictions on foreign companies acting on the securities market (see question 20).

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

The statutory time frame is six months from the filing date (article 15 of Federal Law No. 395-1 'On Banks and Banking Activities'), but in reality it may take longer.

Obtaining a licence for conducting professional activities on the financial market (including fiduciary management) has a statutory time frame of 60 days from the filing date (section 2.9 of Central Bank Instruction No. 168-I dated 13 September 2015), but as mentioned above it may take more time.

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

Breaches that may lead to banking licence revocation at the Bank of Russia's discretion include violation of disclosure and filing obligations, delaying start of bank activities, etc. Mandatory grounds for revocation include violation of financial ratios imposed by the Bank of Russia (eg, capital adequacy, minimum capital base, etc). The revocation procedure includes an external audit by the Bank of Russia, optional financial rehabilitation, licence revocation and appointment of temporary administration and eventually dissolution.

Grounds for revocation of a licence for conducting financial services activities on the securities market include bankruptcy, revocation of the banking licence and non-performance of professional activity for the period of 18 months. The procedure includes an investigation by the regulator to decide whether there are grounds for the revocation. The Regulator may or may not provide the term for remedying violations prior to revoking a licence.

10 Is wealth management subject to supervision or licensing?

Wealth management per se is not regulated and not subject to licensing under Russian law, but some of its facets (banking operations,

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professional services on the financial market, etc) are subject to licensing (see question 5). The State Duma of the Russian Federation has passed in the first hearing a bill on financial advisers. This bill provides regulation of financial advisers, who will be obliged to be members of a self-regulated organisation.

11 What are the main licensing requirements for wealth management?

See questions 5 and 10.

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

See questions 5 and 10.

Anti-money laundering and financial crime prevention

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

Anti-money laundering and financial crime requirements are the same for private banking and 'regular' banking. The general requirements apply to banks and financial service providers and include in-house audit, mandatory control measures and a prohibition on tipping off clients on anti-money laundering measures (section 5 of Federal Law No. 115-FZ 'On the Counteraction of the Laundering of Proceeds of Crime and the Financing of Terrorism'). Specific requirements include identification of the client, his or her representative and beneficiary; obtaining information on the business purpose of the client; identification of the beneficial owners of the client; reviewing the information on the client once a year and in case of any doubt as to the credibility of information within seven days after the occurrence of such a doubt, filing information on transactions subject to mandatory control to the Federal Financial Monitoring Service (section 7 of Federal Law No. 115-FZ 'On the Counteraction of the Laundering of Proceeds of Crime and the Financing of Terrorism').

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?

Although there is no express definition of a PEP in Russian legislation, there are certain limitations imposed on public officers restricting them from setting up bank accounts, opening deposits of cash and assets in a foreign bank, placed abroad (ie, not in Russia), and owning and using foreign financial instruments (section 7.1 of Federal Law No. 273-FZ 'On Corruption Counteraction'). These public officers are defined in the statute and include federal judges, auditors of the Audit Chamber, members of the Central Election Commission, vice prosecutors, members of the board of directors of the Bank of Russia, and officers in state corporations and state-owned companies. There is an additional requirement of taking all available measures to identify such persons.

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.

In order for a natural person to open a bank account it is necessary to present an identification document (typically a national passport), signature specimen card and a tax registration certificate.

In order for a legal entity to open a corporate bank account it is necessary to provide the bank with the certificate of incorporation, charter, all the licences (if applicable), signature specimen card, resolution on the appointment of directors and tax registration certificate (section 4.1. of the Central Bank Instruction No. 153-I dated 30 May 2014).

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

Tax offences do constitute predicate offences for money laundering provided they constitute a criminal offence under Russian law. A tax offence may be a criminal or an administrative offence depending on the amount of unpaid taxes. The threshold for a criminal offence for natural persons is around US$13 711.33 of unpaid tax within three consecutive years provided arrears exceed 10 per cent of the total tax due; or alternatively if unpaid tax exceeds around US$40,817.90 (section 198 of the Criminal Code of the Russian Federation). For corporate tax evasion the thresholds are around US$75,700 if the part of unpaid taxes exceeds 25 per cent of the total tax due or exceeds US$227,100 (section 199 of the Criminal Code of the Russian Federation). Further, money laundering may be predicated on any other criminal offence.

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

Financial intermediaries, including banks, may only open a client account if the client provides a tax registration certificate (section 86 of the Tax Code) (see question 15 for additional documents). Banks are also required to apply a due prudence and diligence standard, which means that they shall take reasonable measures to establish that their counterparties (eg, clients) are acting in good faith and with due business purpose (in contrast to shell companies and sham operations aimed solely at tax evasion).

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

The client may face criminal charges for money laundering if he or she launders proceeds of a crime committed by him or herself (punishable by up to seven years in prison) (section 174.1 of the Criminal Code of the Russian Federation).

The client and the employees of a private banking and wealth management organisation may face criminal charges for money laundering if they launder the proceeds of another's crime. The punishment is the same as mentioned above (section 174.1 of the Criminal Code of the Russian Federation).

Legal entities are not subject to criminal liability under the Russian law but their officers and employees may be liable.

Furthermore, administrative liability for breach of anti-money laundering legislation varies from US$758.75 to US$1,517.50 in fines; if the offence is committed by a credit organisation, it may face a fine of up to US$3,035) (section 15.27 of the Code on Administrative Offences of the Russian Federation).

The offences mentioned above may also lead to revocation of the licence (section 13 of Federal Law No. 115-FZ 'On the Counteraction of the Laundering of Proceeds of Crime and the Financing of Terrorism').

Client segmentation and protection

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

Section 51.2 of Federal Law No. 46-FZ 'On the Securities Market' defines the term 'qualified investor' (QI). QIs enjoy extra opportunities in relation to the purchase of securities of foreign issuers (see question 20).

QIs include, inter alia, (i) professional participants of the securities market (brokers, dealers and managers); (ii) credit institutions; and (iii) certain types of investment fund. In addition, a legal entity or a natural person may be recognised as a QI under certain criteria.

An individual can be recognised as a QI if he or she meets any of the following criteria:

- owns eligible securities with a total value of no less than 6 million roubles;
- has work experience in an organisation that performed transactions with securities or other financial instruments, for two (if this organisation is a QI by law) or three years;
- during the last four quarters, has performed no less than 10 transactions of eligible securities per quarter and no less than one transaction per month, with the total value of transactions for these four quarters no less than 6 million roubles;
- owns financial assets (money on bank accounts, deposits, particular securities, etc) with a total value of no less than 6 million roubles; and
- meets specific education criteria.

20 What are the consequences of client segmentation?

Sections 51.1(13) and 51.1(14) of the Federal Law 'On the Securities Market' contain a general restriction on placement of securities of

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foreign issuers in Russia. Foreign financial instruments, which are not qualifying securities (ie, they do not have ISIN or CFI codes, or have not passed a qualification procedure in Russia), as well as qualifying securities not admitted to public circulation or public placement in Russia, may not be offered in any form and by any means, including by means of advertising to the public or to non-qualified investors.

However, such foreign financial instruments and qualifying securities may be offered in Russia to QIs (as defined in question 19).

Notably, QIs may not benefit from investors' protection provided by the Federal Foundation for the Protection of Investors and Shareholders Rights, which pays compensation to non-qualified investors if their rights have been violated in the financial market in a certain order.

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

The general statute on consumer protection in Russia (the Federal Law on Consumer Protection No. 2300-1, 1992) applies to banking and financial service activities. The most relevant is section 16 of the Federal Law, which prohibits terms and conditions onerous to a consumer being included into contracts between a business and a consumer. The courts apply this rule widely, and, for example, a unilateral termination clause may be considered as onerous.

Further there is a specific statute (Federal Law No. 46-FZ 'On Protection of Rights and Legal Interest of Investors on the Securities Market'), which governs, inter alia, the rights of the investor on:

- proper information from issuers of securities and professional participants of the securities market (section 4(1), (6), the Bank of Russia (section 8) and other sources (section 9); and
- compensation in the case of violation of their rights (see question 20).

Section 4(2) also prohibits onerous conditions that limit the statutory rights of investors. Federal Law No. 395-1 'On Banks and Banking Activities' sets up a number of special provisions relevant for financial services.

Another issue of general importance for various categories of consumers is protective measures against the false advertisement in the field of financial services and setting out specific requirements to advertising financial services (section 28 of the Advertisement Federal Law No. 38-ФЗ, 2006)

Exchange controls and withdrawals

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

Russian legislation in the area of currency and exchange controls imposes certain limitations on Russian residents, who for currency control purposes are defined as Russian citizens (and foreign citizens having a Russian residence permit) who have spent at least one day in Russia within the last 12 months.

The key obligations and limitations imposed on them are:

- an obligation to notify tax authorities on opening, closing or changing details of accounts within one month;
- an obligation to annually report fund movements on foreign bank accounts;
- the permitted operations for crediting funds to foreign accounts are limited;
- foreign accounts cannot be used to pay for goods or services in Russia;
- a breach may entail a fine in the amount of up to 100 per cent of illegal operation; and
- the limitation period is two years.

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

Formally speaking there are no statutory restrictions on cash withdrawals.

However, in accordance with the Russian anti-money laundering legislation, bank operations (with money and other property including securities, etc) amounting to more than 600,000 roubles are to be under control of the bank. The same concerns real estate transactions amounting to 3 million roubles or more and some other transactions involving companies deemed as having strategic importance by Russian legislation.

In the event the bank finds suspicious activity it shall report on the same to the authorities and may not perform such suspicious transaction.

In practice banks typically limit amounts of cash withdrawals for security reasons by imposing commissions, specifying the maximum cash amount to be withdrawn in one day and implementing other internal regulations (eg, individuals have to make a preliminary request to the bank before withdrawing a large amount of cash).

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

Banks may block suspicious transactions with other property withdrawals (not only cash) – cheques, bullion, securities, etc.

For securities one should bear in mind that registered (personalised) securities are dematerialised. This means that such securities may not be physically withdrawn but only transferred.

Withdrawal of bullion from metal accounts is allowed by legislation.

Cross-border services

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

As mentioned above, Russian legislation does not provide specific provisions governing private banking services. The most relevant piece of Russian legislation in relation to cross-border private banking services is Federal Law No. 173-FZ 'On Currency Regulation and Control'.

The Law contains key provisions regarding currency operations performed by Russian residents, inter alia, via their foreign and Russian bank accounts. Moreover, the Law obliges the residents to disclose particular information to the Russian tax authorities (see question 14).

Of some relevance may be Federal law No. 79-ФЗ, 2013, which sets forth restrictions for specified categories of Russian citizens in relation to purchase of foreign financial services (see question 14).

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

Only Russian companies are eligible to obtain a licence to perform banking services in Russia (Chapter II of Federal Law No. 395-1 'On Banks and Banking Activities'). If the foreign bank performs cross-border services through the correspondent agreement with a Russian credit organisation, the latter must possess a valid licence.

In addition, only Russian companies are eligible to obtain a financial services licence to act as brokers, dealers, forex-dealers or securities administrators in the Russian securities market (article 2 of Federal Law No. 39-FZ 'On the Securities Market').

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

Russian law regulates cross-border banking services. Article 12 of Federal Law No. 173-FZ 'On Currency Regulation and Control' contains an exclusive list of monetary transactions that may be performed with a foreign bank account of a Russian currency resident (see definition in question 22). While it is allowed to make payments from an account in a foreign bank without limitations, any incoming funds may only be credited to an account with Russian bank, unless one of the statutory exemptions applies. Failure to comply is punishable by a fine of 100 per cent of the transaction amount (section 15.25 of the Russian Administrative Offences Code) with a limitation period of two years.

There is a bill to regulate financial advisory services (see question 10).

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?

A foreign bank may open a representative office in Russia in order to consult actual and potential clients. However, a number of restrictions exist, including a general prohibition on advertising financial services (see question 29). It is also prohibited to offer by any means foreign financial instruments or securities, available only for qualifying investors (see question 20), to the general public.

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Therefore, it is advisable when offering foreign financial instruments (securities) in Russia that:

- press announcements and wide distribution of the offering memorandum or other marketing materials shall be avoided; and
- all communications shall be clearly addressed to a specified recipient, with a suitable disclaimer.

Representative offices must receive an obligatory accreditation from the Bank of Russia (see Central Bank Regulation No. 467-П dated 22 April 2015). Only those foreign banks that are properly licensed in accordance with the law of their domicile and operate successfully for not less than five years may apply for it. Moreover, the Bank of Russia is authorised to perform supervisory control over activities of such offices in a variety of forms.

Foreign employees of any representative office of a foreign bank in Russia are also subject to personal accreditation. They must possess a certain level of education or working experience and have a clean administrative and criminal record, among other things. Finally, it is generally allowed to invite only two foreign employees to each representative office.

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

Sending of such documents may be deemed as an advertisement of banking products and financial services. The Federal Law 'On Advertising' (sections 14 to 28) states that financial services may be advertised only by those credit organisations (banks) that have corresponding licences. Due to the fact that foreign banks may not be licensed (and may not be allowed to perform financial services directly) in Russia, this provision may be interpreted as a prohibition on them advertising their activities.

Because 'advertising' is defined as any information distributed to an unlimited circle of persons (section 3 of Federal Law No. 38-FZ 'On Advertising'), as a matter of precaution all communications must be clearly addressed to a specifically identified recipient, with a suitable disclaimer.

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 mentioned in question 22, Russian currency control residents are obliged to report on their bank accounts held in foreign banks with regard to opening, closing and change of details. They should also annually report on movement of funds at such accounts.

Individual taxpayers should calculate their personal income tax amount based on the income received to their bank accounts (coupon payments, interests, transactions with securities) and file a tax report on the same with tax authorities. In the event an individual obtains a loan denominated in non-Russian currency at a rate lower than 9 per cent per annum, he or she has to pay personal income tax upon the balance between 9 per cent and the interest rate.

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?

Banks incorporated in Russia are obliged to report to tax authorities on bank accounts opened and closed in such banks by their clients and also on changes to reference data of such accounts. Banks incorporated in Russia shall report to tax authorities on accounts opened for certain persons, on the balance of such accounts, and provide account statements and information on bank operations of individuals and legal entities upon request of tax authorities.

In accordance with article 6 of Federal Law No. 173-FZ of 28 June 2014 (known as the 'Russian FATCA'), foreign private banks are obliged to report to the Russian tax authorities annually on bank accounts opened for Russian citizens and legal entities controlled by Russian citizens.

Update and trends

Due to increased transparency on both domestic (new CFC rules and increased liability for currency control offences) and cross-border level (CRS reporting and automatic international exchange of tax information) there is increased demand on private banking services related to restructuring of structures created for holding and investment of private assets.

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?

There is no requirement for private banks to receive clients' permission for reporting to tax authorities since such reporting is obligatory for banks.

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 approach for holding private assets in Russia is holding assets directly in one's personal name (this means no structuring at all).

Affluent persons and HNWIs commonly use structuring through offshore companies, when shares are either held directly or via nominal shareholders.

Since the Russian Tax Code was supplemented by rules on controlled foreign companies (CFCs) in 2014, HNWIs have started to use private foundations (more rarely trusts), but private holding companies are still the most popular option for assets holding structuring.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

Banks are required to identify their clients, as was mentioned in question 15. Typically banks do not request any additional data from individual clients.

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

A controlling person of a CFC is defined as a Russian tax resident (individual or legal entity) with:

- an equity share in foreign company exceeding 25 per cent;
- an equity share in a CFC exceeding 10 per cent if cumulatively with other Russian tax residents the aggregate equity shares in the CFC exceeds 50 per cent); or
- the power to determine decisions of a CFC in its own favour or in favour of a spouse or underage children.

A controlling person of a structure is defined as a Russian tax resident (individual or legal entity) who is:

- settlor of the structure (while it complies with the following requirements);
- entitled to receive income of such structure;
- entitled to dispose of the structure's assets; or
- entitled to receive the structure's assets in case of its liquidation or cancellation.

Anti-money laundering legislation and tax legislation also use term 'beneficial owner', which means a person directly or indirectly owning a legal entity or structure or a person able to determine its decisions.

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

CFC rules oblige Russian tax residents to report on such structures and to pay income tax from income not only received by such structures, but also on any undistributed profits retained in the CFC level.

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Contract provisions

37 Describe the various types of private banking contract and their main features.

The types of private banking contract are bank deposit agreement, bank account agreement and fiduciary management agreement. These are governed by the Civil Code, but the freedom of contract principle also allows other contracts.

The parties to a contract are free to choose the governing law (section 1210 of the Civil Code of the Russian Federation), but if the contract is only related to one jurisdiction, the choice of law cannot affect its imperative provisions. If a party to a private banking contract acts as a consumer, the choice of governing law shall not deprive the consumer of the rights provided by the law of his or her residence. If the parties have failed to choose the governing law, the law of the bank's jurisdiction shall be applied (section 1211 of the Civil Code of the Russian Federation), but if it is a consumer contract the law of the latter's residence shall be applied.

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?

Russian law provides general rules that are applicable to all contracts. The Civil Code provides a negligence standard, which means due care and diligence expected from a reasonable person in similar circumstances is expected.

The injured party is entitled to claim for full compensation of damages if the smaller amount is not provided by the law or contract (section 15 of the Civil Code of the Russian Federation).

Full compensation of damages means that as a result of the compensation the injured party shall be put in the position they would be in if the contract had been performed.

There are two components of damages under Russian law: direct losses and lost profits.

The aggrieved party bears the burden of proof of the existence of damages, of the amount of damages and the chain of causation between non-performance or improper performance of the obligation and damages. The debtor is entitled to produce evidence to counter the creditor's argument and show another cause of the damages.

Liability may be limited by statute or agreement. However, exclusion clauses with respect to intentional breaches are void, and further any exclusion clauses in consumer contracts are also void.

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

Mandatory provisions apply to consumer contracts (see question 21).

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

The general limitation period is three years. The limitation period cannot be varied contractually.

The limitation period is interrupted and starts anew when the debtor acknowledges his or her debt (eg, by a letter or partial performance).

The limitation period does not run during litigation proceedings.

Confidentiality

41 Describe the private banking confidentiality obligations.

Russian law requires bank secrecy, that is, banks and other credit organisations are obliged to ensure the secrecy of operations, accounts and deposits of their clients (section 26 of Federal Law No. 395-1 'On Banks and Banking Activities'). Information classified as within the bank secrecy requirement may be provided only to the clients themselves and their representatives, credit bureaus and to state authorities if it is provided by the law (section 857 of the Civil Code) (see question 43).

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

The following information and documents evidencing this information are subject to bank secrecy: bank accounts (identification information), deposits (identification information), information on bank transactions and the client's personal data (section 857 of the Civil Code).

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

Exceptions and limitations to the duty of confidentiality are as follows: information on banking transactions and bank accounts may be given to the courts, the Audit Chamber of the Russian Federation, the tax service, the Fund of Social Insurance, bailiffs, and to investigators subject to approval of the head of investigative body if it is necessary for the performance of their powers. The information might also be provided under the anti-corruption legislation (section 26 of Federal Law No. 395-1 'On Banks and Banking Activities').

44 What is the liability for breach of confidentiality?

Breach of confidentiality may lead to criminal and administrative liability. Illegal disclosure or use of bank information without the consent of the owner is a criminal offence punishable by up to three years of imprisonment (section 183(2) of the Criminal Code). If this offence was committed with mercenary motives the punishment will be up to five years of imprisonment (section 183(3) of the Criminal Code).

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The illegal disclosure of bank information is also an administrative offence punishable by a fine of up to US$75.40 (section 13.14 of the Code on Administrative Offences).

Disputes

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

The competent authorities for dispute resolution in the private banking industry depend on the parties to the dispute and its nature. If the dispute is of a business nature the state arbitrazh courts shall hear the case (section 27 of the Arbitrazh Procedure Code).

If the dispute is not of a business nature it shall be heard by the court of general jurisdiction (section 22 of the Civil Procedure Code).

The procedure depends on the type of court system. In the courts of general jurisdiction there is no mandatory requirement of presentation of a claim to a debtor before instituting an action in the court. On the contrary, the Arbitrazh Procedure Code requires fulfilment of this obligation before bringing a suit before the court.

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?

The Bank of Russia performs the controlling functions in relation to banks, and there are reporting and disclosure obligations on the banks to the Bank of Russia. A client can file a complaint to the Bank of Russia via its official website and depending on the type of question it will be analysed by the corresponding department of the Bank of Russia, which is obliged to give an answer within one month from the date of filing of such a complaint.

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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 issued by the Association of Banks in Singapore (ABS) sets out standards of good practice on competency and market conduct expected of financial institutions that provide financial services to high net worth individuals.

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?

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 in all other cases (including RFMCs) are required to maintain a base capital of S$250,000. CMSL holders for fund management 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?

Licensed banks are required to comply with the ongoing compliance requirements under the Banking Act, 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, 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

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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, 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, 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, ensuring adequate disclosures to customers as well as regulatory filing obligations. 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.

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 requirements for private banking 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 (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 (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-N02 and Guidelines to MAS Notice SFA04-N02); and
- financial advisers (MAS Notice FAA-N06 and Guidelines to MAS Notice FAA-N06).

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:

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- 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; and
- 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).

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?

Save for the general obligation to have in place adequate internal policies, procedures and controls for the identification, detection and reporting of suspicious transactions, there are no specific requirements in relation to the tax compliance of customers of a private bank or financial intermediary.

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.

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, to 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.

Client segmentation and protection

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. 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.

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?

The provision of financial products and financial services is subject to the Consumer Protection (Fair Trading) Act (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 on the private banking industry has not been significant.

Exchange controls and withdrawals

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.

Cross-border services

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

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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.

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?

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. New regulations to allow Singapore to implement the CRS are intended to come into operation by 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 reason 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.

Client consent is also not required 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; 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 will have to 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 with a 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.

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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.

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 immoveable property 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 contract and their main features.

The main types of private banking 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 a 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.

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 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 high net worth individuals) 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 has published a Private Banking Code of Conduct (the Code of Conduct), which is supposed to 'provide guidance on standards of good practice' for private banks that provide services to high net worth individuals. 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 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.

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Update and trends

Money laundering concerns have featured prominently in the news recently. On 13 June 2016, the MAS issued a media release announcing that it will set up dedicated departments to combat money laundering and strengthen enforcement respectively.

The MAS has recently 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 status. The MAS stated that the legislative amendments implementing these changes are intended to be tabled in Parliament in 2016.

Separately, in the landmark decision of *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, the Singapore Court of Appeal has held that a non-reliance clause in private banking contracts is subject to the test of reasonableness in the Unfair Contract Terms Act (Chapter 396 of Singapore). Departing from the position in England, the Court of Appeal held that for the purpose of the Unfair Contract Terms Act (Chapter 396 of Singapore), there is no material distinction between a 'basis clause' and an 'exclusion clause'. The Court of Appeal said that, when applying the Unfair Contract Terms Act (Chapter 396 of Singapore), the courts should consider the substantive effect of a contractual provision, instead of its form or identification.

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 (Chapter 19 of Singapore). 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.

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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$50,000. 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) followed by adjudication (at the second stage, if the dispute is not settled by mediation).

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.

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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), 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.

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. By 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, the wealth manager offers securities dealing or brokerage services or manages assets of Swiss pension funds. Wealth managers that manage their clients' assets and/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), as well as (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 and family offices. 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?

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 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 irreproachable activity).

The granting of a banking licence is further subject to a minimum equity requirement. The fully paid-up share capital of a Swiss bank must amount to a minimum of 10 million Swiss francs and must not be

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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 Based 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?

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 couple of years. However, the Swiss Private Bankers' Association still counts six member banks, which 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.

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 requirements for private banking 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 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. 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, 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 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.

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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.

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.

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, salary certificates, etc).

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 been 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 tax compliance of their clients. Such initiative has been subject to intense discussions and debate 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, one may expect that, with the revision of the AMLA, a risk-based approach will be applied by financial intermediaries to assess tax compliance of clients' assets. In addition, the participation of Switzerland in the automatic exchange of information within the OECD as of 2018 is expected to alleviate to a certain degree the risks related to tax compliance. From then on, tax information about clients with residence in countries having entered into an agreement with Switzerland for this purpose will be automatically transmitted to the foreign tax authority through the Swiss tax authorities. According to the Automatic Exchange of Information Act, which will enter into force on 1 January 2017, financial institutions will 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 of 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 concept of 'clients' and 'public' does 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), the draft of which is currently being reviewed in Parliament.

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?

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.

Exchange controls and withdrawals

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.

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 settlements

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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 reporting 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 reporting (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.

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

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

Cross-border services

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.

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.

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, provided these do not comprise the distribution of collective investment schemes or the management of assets of Swiss pension funds.

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.

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

No licensing or registration requirements apply for the sending of documents to Swiss-resident clients, provided these do not constitute distribution of collective investment schemes (or assimilated investment products). However, pursuant to the Unfair Competition Act, commercial information sent to clients must not violate their privacy, nor use abusive, misleading or unfair methods.

Tax disclosure and reporting

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 of America 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). The new agreement implementing Model 1 will enter into force in 2018, at the earliest.

Financial intermediaries are further subject to reporting duties in relation to clients resident in the UK and Austria in accordance with specific bilateral agreements concluded with Switzerland called 'RUBIK'. These agreements provide for a reporting duty in the event the taxpayer opts for a regularisation of its tax situation, instead of a withholding tax applied on its assets. These agreements will, however, be replaced in the near future with the automatic exchange of information.

In view of the implementation of the automatic exchange of information, Swiss banks will 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 will have to collect and exchange foreign clients' information for the 2017 fiscal year (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 will 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 signed agreements for the introduction of the automatic exchange of information with the EU, Australia, Canada, South Korea, Guernsey, the Isle of Man, Iceland, Japan, Jersey and Sweden.

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

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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. Likewise, the reporting of information on Austrian and UK residents under the RUBIK agreements presupposes such consent. 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 will be further reduced in tax-related matters (tax transparency principle prevailing), insofar as customer consent will be 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.

As regards the costs, these 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 with a 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).

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 contract and their main features.

Private banking 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 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, wealth management contracts do not fall within this definition.

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Update and trends

On 27 June 2014, the Swiss Federal Council published two new drafts of the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). While the purpose of the draft FinIA is to provide for a 'new legal framework' governing all financial institutions, the objective of the draft FinSA is to regulate financial services, whether performed in Switzerland or on a cross-border basis. Following the hostile reaction of participants on certain aspects during the consultation procedure, the Federal Council requested that the Federal Finance Department significantly amend the drafts and prepare a dispatch by the end of 2015. On 4 November 2015, the Swiss Federal Council adopted its dispatch on both revised draft instruments. The preparatory commission of the Council of States has requested some further amendments and simplifications with a view to discussing them in the second quarter of 2016. At this stage, it is difficult to assess how long the legislative procedure will take prior to the entry into force of the FinSA and the FinIA, which is currently not expected before 1 January 2018.

According to the draft FinIA, independent asset managers who are currently not subject to prudential supervision will be newly supervised. Although they will not be directly subject to FINMA supervision, their supervision will be conducted by independent supervisory organisations approved and monitored by FINMA. Based on a risk approach, both types of supervisory authorities will have the power to determine the audit frequency of these independent asset managers.

The draft FinSA implements a new regime aiming at strengthening client protection by means of transparency provisions. In this context, financial services providers will have to perform an assessment of appropriateness when advising clients on individual transactions. By contrast, an assessment of suitability will be required when providing investment advice on their entire portfolio. Furthermore, the draft FinSA introduces client segmentation with two main segments (ie, retail clients and professional clients). The provisions on the various duties of the financial services providers, as well the offered financial products will be adapted to the protection needs of the respective client segment. The draft FinSA provides for both opting in and opting out systems 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 remain allowed subject to complying with the current transparency regime. The principles laid down in the Swiss case law and FINMA Circular 01/2009 should therefore be crystallised in the FinSA.

Another topic of current interest is the upcoming implementation of the automatic exchange of information, in particular, its practical implications in the wealth management field. In order to comply with the obligations imposed by the future legal framework Swiss financial intermediaries such as banks will have to collect and exchange foreign clients' information, including information on beneficial owners. As mentioned above, this constitutes a complete change of paradigm in Switzerland where banking secrecy does not allow the disclosure of any information outside the bank–client relationship (subject to certain exceptions). The impact of this significant change on the cross-border wealth management industry in Switzerland, which represents a market share of more than 25 per cent at the international level, is difficult to assess at the present time.

In view of the above, the Swiss legislative and regulatory framework applicable to the private banking industry will remain in a state of flux for the years to come with the objective of strengthening client protection and imposing enhanced transparency.

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

Under Swiss law, whoever causes damage, either intentionally or by negligence, may occur civil liability based both on 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 contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

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

On the topic of the retrocessions paid by third parties within asset management activities (ie, inducements), the Swiss Supreme Court held, in a landmark decision in 2006, that inducements are subject to a statutory restitution duty and are, as a matter of principle, payable to the client of the receiving financial intermediary. Nonetheless, an arrangement whereby the client agrees that a financial intermediary may retain inducements is valid, provided the client was duly informed of the 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 this 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 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 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.

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.

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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 is about to change as regards tax matters with the upcoming implementation of the automatic exchange of information (see question 31).

In principle, clients of independent asset managers do not benefit from the protection of the banking secrecy that applies to relationships entered into with banks and securities dealers within the meaning of the BA and SESTA. As a result, specific confidentiality provisions are usually incorporated in the contractual documentation in this respect.

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 the similar scope of information.

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 Swiss relevant 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.

44 What is the liability for breach of confidentiality?

Under Swiss law, a breach of the 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.

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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 that 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.

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. 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.

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 of 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.

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).

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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 and insurance companies – each of which may also offer a wide 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 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 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 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 regulator of FDIC-insured banks, the permissible activities for insured state banks, and receivership of failed institutions;
- the National Bank Act, providing for 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 their subsidiaries to regulation by the Board of Governors of the Federal Reserve (the Federal Reserve));
- the Bank Secrecy Act of 1970, as amended (BSA), establishing program, record-keeping, and reporting requirements for US financial institutions to assist the US government in the detection and prevention of money laundering;
- the Securities Act of 1933, prohibiting, inter alia, deceit, misrepresentation and other fraud in the sale of securities;
- the Securities Exchange Act of 1934 (the 1934 Act), requiring, inter alia, the registration of brokers and dealers in 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, investment advisers to register with the Securities and Exchange Commission (SEC);
- the Commodity Exchange Act, inter alia, regulating the trading of commodity futures in the United States and requiring the registration of the relevant market participants;
- the Employee Retirement Income Security Act (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, trusts, wills, fiduciary activities, contracts, securities and registration of certain investment advisers. State law also regulates insurance (including annuities and life insurance investment products).

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, investment advisers, commodities and futures;
- 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 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 primary supervisor of BHCs and member banks. The Federal Reserve also coordinates the supervision of foreign banking organisations' (FBO) US operations with other federal and state banking agencies;
- the FDIC, as regulator of FDIC-insured banks, and primary federal supervisor of state-chartered non-member banks;
- the OCC, within the Treasury Department, as primary supervisor of national banks;
- the Financial Crimes Enforcement Network (FinCEN), within the Treasury Department, collecting and analysing financial transaction data to combat financial crimes, including money laundering and terrorist financing;
- the Office of Foreign Assets Control (OFAC), within the Treasury Department, administering and enforcing economic and trade sanctions, including by imposing controls on transactions and freezing assets within the jurisdiction of the United States;
- the SEC, as regulator of the securities industry (broker-dealers, investment companies and investment advisers), including money managers, investment consultants and financial planners who qualify as investment advisers;
- the Financial Industry Regulatory Authority (FINRA), a self-regulatory organisation, as regulator of member broker-dealers and exchange markets;
- the Commodity Futures Trading Commission, as regulator of US futures, swaps and certain other commodity contracts, as well as related intermediaries and traders;
- 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 that are anticompetitive or deceptive or unfair to consumers; and
- the Internal Revenue Service (IRS), as the US tax collection agency, administrating the Internal Revenue Code.

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The 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, among other institutions; protects against financial fraud under state law; supervises insurance companies doing business in New York; and monitors real estate finance services, among other duties.

Additionally, federal and state prosecutors and state attorneys-general bring criminal and civil proceedings to enforce violations of the relevant financial laws and regulations.

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 and intermediaries 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 as relationship managers typically sitting in a securities affiliate to coordinate the various private banking services and products offered by the various group affiliates and business units.

A stand-alone investment adviser 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 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 anti-money laundering efforts.

5 What are the main licensing requirements?

The main licensing requirements are that an entity obtain a banking licence from the OCC or a state regulator, or a broker-dealer or investment adviser register with the SEC or state regulators, or both. 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 national bank requires an application to the OCC for a charter and 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.

Although registration as an investment adviser under the Advisers Act is required to provide investment advisory services, US banks and BHCs are generally excluded from the registration requirement. Additionally, notice filing may be required in states where an investment adviser has a place of business or a de minimis number of clients.

Each state has its own laws and regulations for licensing banks within the state as well as granting fiduciary powers to banks and other institutions.

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 both, depending on the amount of assets under management.

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. Though there is evidence 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 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 for the fiduciary activities, community needs and the adequacy of the operating plan.

6 What are the main ongoing conditions of a licence?

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 close national banks and revoke charters in order to protect the safety and soundness of the banking system. Other compliance issues include consumer protection, information security, privacy, anti-money laundering requirements 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.

Non-banks

Investment advisers and broker-dealers register with the SEC or one or more states, or both. Investment advisers and broker-dealers are subject to regular SEC examinations.

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 to determine whether it is a strength of 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 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 nine to 12 months or longer if the application constitutes a bank's first entry into the US market. A similar time frame is required to establish a federal branch.

An investment adviser registers by filing Form ADV with either the SEC or the state securities authorities. A broker-dealer files Form BD with the SEC. Although the SEC must grant or bring proceedings to

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deny the application within 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 national 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 charter. If a bank receives a poor examination rating (eg, for operating in an unsafe or unsound condition) and does not quickly remedy it, the bank will 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.

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 under applicable anti-fraud provisions. 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, 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 national trust bank 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 bank that provides discretionary fiduciary accounts is subject to 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. In addition to SEC exams (eg, Series 7 exam), individual wealth managers can have various professional credentials including that of a Certified Financial Planner (CFP) and 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 they are separately regulated from banks. Some states may have additional applicable regulations for banks with fiduciary powers.

Individual wealth managers generally 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 requirements for private banking in your jurisdiction?

The Bank Secrecy Act (BSA), a federal law, requires financial institutions (banks and broker-dealers but as of today, not stand-alone investment advisers) 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 anti-money laundering 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/AML compliance officer, training, independent testing of BSA/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 are generally expected to comply with the policies and procedures that apply to those organisations.

The Customer Information Program and Customer Due Diligence requirements apply to banks, broker-dealers, and others, and entail acquiring additional information from each customer 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'.

AML compliance has created difficulties for US financial institutions and has resulted in significant enforcement actions. Such difficulties often involve processing payments and providing specialised services to HNWIs, including politically exposed persons (PEPs).

In June 2016, the NYDFS adopted new regulations requiring certain financial institutions (notably banks, trust companies, branches, among others) 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 will be 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

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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 Customer Identification Program (CIP) requires a bank (including a non-US bank's 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, a passport number and country of issuance). Institutions are expected to obtain copies of the government-issued identification document used to establish a customer'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 under OFAC rules, called 'specially designated nationals.' 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 must obtain all relevant and appropriate information related to the customer to administer an effective anti-money laundering 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 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?

Both federal and state consumer protection laws apply to private banking 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, 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.

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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, anti-money laundering 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, lending, or opening or servicing bank accounts for customers in the United States will trigger licensing requirements. Approval is also required for bank representative offices, which only provides limited services compared to bank branches and agencies. 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 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 and Advisers Act, respectively, and have been penalised by the SEC for not doing so. There are no residency requirements, minimum educational requirements or capital 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$100 million in assets under management attributable to clients and investors in the United States, and (iv) they do not hold 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 many 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 can be 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 flow-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 federal or 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

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corporate level and is also subject to US federal income tax 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 partnership forms (limited partnerships and 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 flow-through entities, such that income derived by the trust is taxed as if 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 with a structure?

New regulations were recently issued by FinCEN in 2016 that will apply general KYC requirements to structures that are legal entities under US law (eg, LLCs, corporations, and partnerships); accordingly, all CDD requirements will apply starting in May 2018. 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.

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 50 per cent or more of a corporation's voting or outstanding shares.

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 contract and their main features.

Private banking services may entail various contracts depending on the products, services and intermediaries involved. Typically, the contractual relationship between a customer and a bank is fairly one-sided, in favour of the bank. 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 federal securities laws. Also, US registered broker-dealers under FINRA rules 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?

Liability under US law is provided either by federal statute or state law. The applicable standard will vary based on the type of claim brought against the financial institution. Generally, institutions owe a duty of care to their customers.

Negligence is the failure to use reasonable care which results in damage to a customer. 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.

Intentional torts require proof that the bank or its employee acted with specific intent and can lead to an award of punitive damages.

Fiduciary duty is the highest standard of care and is required in cases of investment management and other relationships of trust (which may include broker-dealers in a private banking context). When this duty is breached, a fiduciary must account for profits payable to his or her customer.

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 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 and investment advisers 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 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 (RFPA) applies to US government requests for financial records for most customers (ie, individuals, but not necessary all companies or partnerships) of banks, among other institutions. The RFPA 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

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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.

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.

Update and trends

In May 2016, FinCEN released a final rule on beneficial ownership in connection with customer due diligence, requiring verification of the beneficial owners of a legal entity when a new account is opened. See question 34. In August 2016, FinCEN proposed a rule to subject institutions that lack a federal regulator, including some private banks and trust companies, to the AML programme and beneficial ownership requirements. See question 13. This is consistent with the general trend of increased regulatory focus on AML issues, including KYC. A different proposed rule also would subject registered investment advisers to AML requirements under federal regulations.

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. Additionally, sanctions may be imposed including, for banks, the termination of FDIC insurance, as well as removal of the financial institution's management, and potentially barring those individuals from working in the banking industry.

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. However, the CFPB proposed a rule in May 2016 to curtail the use of mandatory arbitration clauses when consumers (eg, individuals, not entities and generally not investors (eg, brokerage accounts)) enrol for certain banking or 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?

OCC examiners will evaluate a national bank's exposure to litigation and its impact on the bank's risk profile. To do so, the examiner must know about significant pending or potential litigation against the bank.

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In addition, the Class Action Fairness Act requires national banks and federal branches (among others) to notify the OCC of proposed class action settlements involving OCC-regulated activities.

A broker-dealer and investment adviser must disclose on Form ADV facts about any legal or disciplinary event that is material to a client's evaluation of the business or its management, including material 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 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.

* *The authors would like to express their appreciation to their Mayer Brown colleagues, Jeffrey P Taft, Jerome J Roche, Laurence E Platt, Jonathan A Sambur, Alicia K Kinsey, Adam D Kanter and Matthew G Bisanz, whose expertise contributed to this chapter.*

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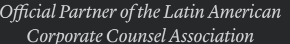

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