

Switzerland's New Financial Market Architecture (3rd Edition | 2019)

Publication 21

NKF Banking, Finance & Regulatory Team

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Zurich, December 2019

NIEDERER KRAFT FREY

In memory of our dear friend and partner Urs Pulver.

In the **NKF series** of publications, an informal sequence of articles and essays is published that deal with issues related to the business activity of Niederer Kraft Frey Ltd.

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Foreword

The Swiss financial industry is going through interesting times. In addition to the changing economic environment and political views on how to govern financial market activities, the Swiss regulatory framework is amended in a fundamental and comprehensive way. Regulation will no longer have a mere sector-focused approach. Rather, henceforth, the financial markets legal architecture will have a focus on different levels of regulation with the aim of applying the same rules to similar products and services across the industry; nonetheless certain sector specific legislation will remain effective.

Niederer Kraft Frey Ltd (NKF) is not only one of the oldest business law firms in Switzerland, but it also has very strong and widely-recognised banking and finance experience and expertise. Lawyers of our firm are advising clients on regulatory developments and act on expert commissions for new legislative proposals. Therefore, regulatory developments and proposals prepared by the Federal Administration (*Bundesverwaltung*) are closely monitored by our practice groups.

The present publication is a joint effort of NKF's Banking, Finance & Regulatory Team consisting, inter alia, of PD Dr. Sandro Abegglen, Dr. François M. Bianchi, Dr. Thomas A. Frick, Marco Häusermann, Dr. Christoph Balsiger and Dr. Bertrand Schott (Partners), Luca Bianchi, Yannick Wettstein, Dr. Martin Schaub and Christine Hohl (Senior Associates), Thomas Hochstrasser, Dr. Florian Steiner, Dr. Simon Bühler and Melanie Wyss (Associates), as well as Jael Leutwyler and Anja Bürgisser (Junior Associates). The publication does not intend to be a comprehensive discussion of the new legislation, but rather aims to provide an overview with a focus on what Swiss and foreign market participants need to be aware of in view of the currently discussed proposals and developments.

The publication takes into account all respective drafts, proposals and final versions published until December 2019. It should be noted that, in addition to the legislation considered in this publication, further implementing decrees, such as FINMA ordinances, FINMA-Circulars or implementing decrees from self-regulatory organisations will be published which will contain additional provisions of practical relevance.

Zurich, December 2019
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Abbreviations

ACLA	Federal Act of 22 March 1974 on Administrative Criminal Law
AEI	Automatic exchange of information
All	Alternative instrument identifier
AML	Anti-money laundering
AMLA	Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing
AMLO	Ordinance of 11 November 2015 on Combating Money Laundering and Terrorist Financing
AMLO-FINMA	FINMA Ordinance of 3 June 2015 on Combating Money Laundering and Terrorist Financing in the Financial Sector
AOV	Ordinance of 6 November 2019 on the Supervisory Organisation of the Financial Market Supervision (Supervisory Organisation Ordinance)
BA	Federal Act of 8 November 1934 on Banks and Savings Banks
BBl	Bundesblatt
BIB	Basic information sheet (Basisinformationsblatt)
BIS	Bank for International Settlement
BO	Ordinance of 30 April 2014 on Banks and Savings Banks
BVG	Federal Act of 25 June 1982 on Occupational Benefits, Old-Age and Survivors
CAO	Capital Adequacy Ordinance of 1 June 2012
CC	Swiss Civil Code of 10 December 1907
CCP	Central counterparty
CDB 08	SBA Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence 2008
CDB 16	SBA Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence 2016
CDB 20	SBA Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence 2020
CFTC	Commodity Futures and Trading Commission (US)
CIS	Collective investment schemes
CISA	Federal Act of 23 June 2006 on Collective Investment Schemes
CISO	Ordinance of 22 November 2006 on Collective Investment Schemes

CO	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: Code of Obligations)
CPC	Code of 19 December 2009 on Swiss Civil Procedure
CSD	Central securities depository
CSDR	EU Central Securities Depository Regulation of 23 July 2014 (Regulation (EU) no 909/2014)
D	Draft
DEBA	Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy
DLT	Distributed Ledger Technology
DSFI	Directly subordinated financial intermediaries
ECB	European Central Bank
EFSF	European Financial Stability Facility
EFTA	European Free Trade Association
EMIR	EU Regulation on OTC Derivatives, Central Counterparties and Trade Repositories of 4 July 2012 (Regulation (EU) No 648/2012)
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
FAOA	Federal Audit Oversight Authority
FATF	Financial Action Task Force on Money Laundering
FC	Financial counterparty
FDF	Federal Department of Finance
FGB	Federal Gaming Board
FIDLEG	Federal Act of 15 June 2018 on Financial Services
FIDLEV	Ordinance of 6 November 2019 on Financial Services
FINFRAG	Federal Act of 19 June 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINFRAV	Ordinance of 25 November 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINFRAV-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority of 3 December 2015 on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading
FINIG	Federal Act of 15 June 2018 on Financial Institutions
FINIV	Ordinance of 6 November 2019 on Financial Institutions
FINMA	Swiss Financial Market Supervisory Authority

FINMAG	Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority
FINMAV	Ordinance of 13 December 2019 on the Swiss Financial Market Supervisory Authority
FINRA	US Financial Industry Regulatory Authority
FISA	Federal Act of 3 October 2008 on Intermediated Securities
FMI	Financial market infrastructure
FSB	Financial Stability Board
GLEIS	Global legal entity identifier system
HNWI	High-net-worth individuals
HTC	Hague Trust Convention of 1 July 1985
ICA	Federal Act of 2 April 1908 on Insurance Contracts
IMF	International Monetary Fund
ISA	Federal Act of 17 December 2004 on the Supervision of Insurance Companies
ISDA	International Swaps and Derivatives Association
ISIN	International Securities Identification Number
KIID	Key investor information document
KmGK	Limited Partnership for Collective Investment
KYC	Know your customer
LEI	Legal entity identifier
LP	Limited partnership
L-QIF	Limited Qualified Investor Fund
LSEG	London Stock Exchange Group
MCAA	OECD Multilateral Competent Authority Agreement on the Automatic Exchange of Finance Account Information
MiFID I	EU Markets in Financial Instruments Directive of 21 April 2004 (Directive 2004/39/EC)
MiFID II	EU Markets in Financial Instruments Directive of 15 May 2014 (Directive 2014/65/EU)
MiFIR	EU Markets in Financial Instruments Regulation of 15 May 2014 (Regulation (EU) No 600/2014)
MROS	Money Laundering Reporting Office Switzerland
MTF	Multilateral trading facilities
NBA	Federal Act of 3 October 2003 on the Swiss National Bank
NFC	Non-financial counterparty
NZZ	Neue Zürcher Zeitung
ODRG	OTC Derivatives Regulators Group
OECD	Organisation for Economic Co-operation and Development
OTC	over-the-counter

OTF	Organised trading facilities
PC	Swiss Criminal Code of 21 December 1937 (Penal Code)
PD	Preliminary draft
PEP	Politically exposed person
PFIO	Ordinance of 18 November 2009 on the Professional Practice of Financial Intermediation
PMCA	Federal Act of 20 June 1933 on the Control of the Trade in Precious Metals and Precious Metal Articles
RAIF	Luxembourg Reserved Alternative Investment Fund
ROC	Regulatory Oversight Committee
SAAM	Swiss Association of Asset Managers
SAR	Suspicious activity report
SBA	Swiss Bankers Association
SESTA	Federal Act of 24 March 1995 on Stock Exchanges and Securities Trading
SESTO	Ordinance of 2 December 1996 on Stock Exchanges and Securities Trading
SFAMA	Swiss Funds & Asset Management Association
SFBC	Swiss Federal Banking Commission
SICAF	Investment company with fixed capital
SICAV	Investment company with variable capital
SIX	SIX Swiss Exchange
SNB	Swiss National Bank
SOGC	Swiss Official Gazette of Commerce
SRO	Self regulation organisation
TAAA	Federal Act of 28 September 2012 on International Administrative Assistance in Tax Matters
TOB	Swiss Takeover Board
TR	Trade repository
UPI	Unique product identifier
WAK-N	National Council's Commission for Economic Affairs and Taxes

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I. From Old to New: An Overview

- (1) It is important to note that the term “old” (Chapter I.A. below) refers to the Swiss financial market architecture as in force up until the end of the year 2015. As for the term “new” (Chapter I.B. below), we will refer to the regulatory architecture after the full implementation of the three new financial market acts (FINFRAG, FINIG and FIDLEG). With a view to the timeline, it is further important to note that the first of these new pieces of legislation, FINFRAG, has already been in full force and effect since 1 January 2016, whereas FINIG and FIDLEG will enter into force on 1 January 2020 (with a transition period for some of the requirements under FIDLEG and FINIG). Thus, the “current” Swiss financial market architecture continues (for certain aspects) to be a transitional one featuring elements of both the “new” and the “old” architecture.

A. The Old Swiss Financial Market Architecture

- (2) The regulation of the Swiss financial market started as early as 25 June 1885 with the adoption of a supervision act on private insurance companies that was repeatedly revised and restated and finally resulted in the current Insurance Supervision Act of 17 December 2004 (ISA). In addition to the (public law) regulation of private insurance companies, the Insurance Contract Act of 2 April 1908 (ICA) regulates and will continue to regulate the (private law) relationship between such insurance companies and their clients.
- (3) However, the most fundamental Swiss financial market regulation dates back to the entry into force of the Swiss Federal Banking Act (BA) on 8 November 1934 which was the first significant attempt by the Swiss legislators to capture the complexity and importance of financial markets. As with many pieces of financial market legislation, the enactment of the BA was linked to and driven by a crisis, in this case the Great Depression. Along with the BA came the creation of the Swiss Federal Banking Commission (SFBC) as the former supervisory body of banking institutions.
- (4) As in the sector of insurance and banking, subsequent sector-specific legislation was passed if and when a need for regulation in a specific

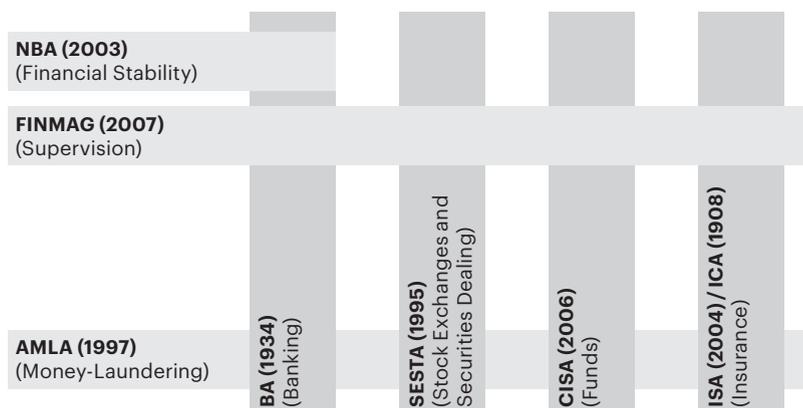
sector became evident. Thus, an act on investment funds was passed in 1966, ultimately leading to the current Collective Investment Schemes Act of 23 June 2006 (CISA). Similarly, by the adoption of the Stock Exchange Act (SESTA) on 24 March 1995, stock exchanges and securities dealers (other than those being or belonging to banks, whose respective activities were subject to the BA as so-called “indifferent business”) – previously subject to cantonal regulation – finally became subject to federal regulation.

- (5) As a consequence, the old Swiss financial market architecture has organically grown over time and used to be, to a large extent, product- or sector-specific. While some financial products, services and institutions – in particular in the areas of banking, insurance, funds, and securities dealing – were regulated by various separate acts and ordinances and were, at least until 2009, sometimes even subject to supervision by different supervisory authorities, other financial products, services, and institutions – such as in the areas of asset management, advisory services and structured products – remained entirely, or at least largely, unregulated. Such a regime did not only raise issues with regard to financial conglomerates that offered products and services across different sectors, but had also led to concerns with regard to the principle of “same business, same rules”.
- (6) CISA, taken as an example, did comprehensively regulate the following areas, however only in relation to collective investment schemes:
- i. Mandatory licensing requirements for certain key actors as well as the licensing conditions;
 - ii. product rules and requirements;
 - iii. transparency and documentation requirements;
 - iv. code of conduct duties at the point of sale; and
 - v. cross-border inbound offerings.

There is little harmonisation of these areas with the regulation of related topics in other pieces of financial market legislation. For example, while the cross-border inbound offering of collective investment schemes is subject to Swiss regulation, the same is – until 1 January 2020 – not the case (at least in absence of a permanent physical presence in Switzerland) in relation to cross-border inbound offerings of banking or securities dealing services.

- (7) Figuratively speaking, the old architecture was based on a vertical pillar model. With the entire house being the Swiss financial market, the legislator deemed it sufficient to only build (i.e. regulate) certain pillars under the old architecture. Each pillar has been given its own shape and form. As such, plenty of empty spaces have remained in between those pillars.
- (8) A notable exception to this conceptual model is FINMAG, whose adoption established the Swiss Financial Market Supervisory Authority (FINMA) – a single, integrated supervisory authority across different sectors, which carries out the functions of the former SFBC, the Private Insurance Supervision Authority and the Anti-Money Laundering Control Authority. Similarly, the Anti-Money Laundering Act of 10 October 1997 (AMLA) and the National Bank Act of 3 October 2003 (NBA) regulate and will continue to regulate issues of money laundering and financial stability horizontally across different sectors.
- (9) The following chart serves as an illustration of the old Swiss financial market architecture:

The Swiss financial market regulation architectural structure until 2015



B. The New Swiss Financial Market Architecture

⁽¹⁰⁾ After roughly 130 years of more or less unsystematic organic growth, it was undoubtedly time to consider re-designing the Swiss financial market architecture. The effective launch of such considerations was not entirely coincidental with the impact of the 2007 financial crisis, which in many respects was meant to mark a turning point in the formerly liberal Swiss financial market regulation.

⁽¹¹⁾ However, during the consultation process for FIDLEG and FINIG, the architecture of the Swiss financial market regulation was re-worked substantially first by the Administration that presented the proposal and thereafter by the Swiss Parliament which led to the actual architecture of the Swiss financial market regulation, which will now enter into force with the implementation of FIDLEG and FINIG (see section 2 below), deviating considerably from what was originally envisaged (see section 1 below).

1. The New Swiss Financial Market Architecture as Originally Envisaged

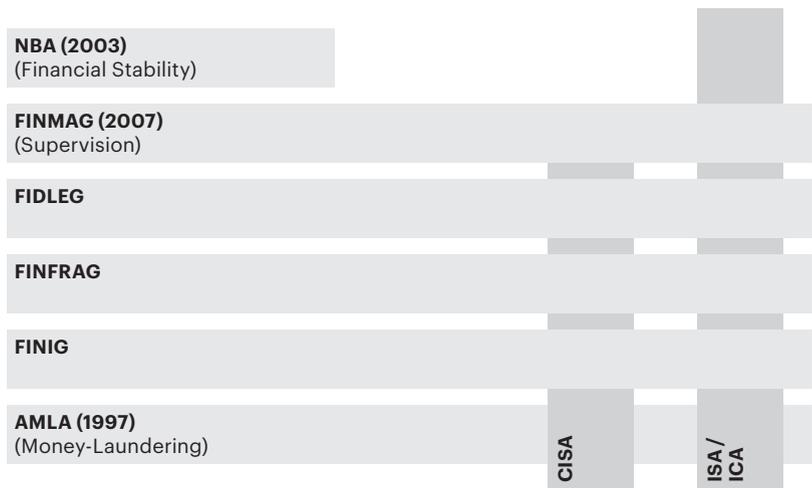
⁽¹²⁾ While a new architecture *per se* would not necessarily require substantially new content (i.e. the pillars and beams to become bigger), the envisaged reform project was intended to be accompanied by substantially new content in certain areas – particularly in view of harmonising Swiss regulations with existing and upcoming EU regulations such as the Prospectus Directive, MiFID II and MiFIR to ensure the access of Swiss financial institutions to the European single market by (hopefully) fulfilling the equivalency requirements under MiFID II.

⁽¹³⁾ In contrast to the existing pillar model, the envisaged new Swiss financial market architecture would, figuratively speaking, have worked with both vertical pillars and horizontal beams. The principle idea was that areas suitable for harmonised regulation across different sectors should be carved out of the vertical product- or sector-specific regulations and be incorporated into the new horizontal financial market acts. The difference among the horizontal financial market acts is that they each address a different level of regulation: supervision, infrastructure (the question of how the proper functioning of the infrastructures used in relation to financial products may be ensured), institutions (the question

of who may offer which financial products), point of sale (the question of how financial products may be offered) and products (the question of what requirements apply to the products offered). This level concept would, for example, facilitate subjecting certain financial services providers, such as client advisers, to point of sale duties while not introducing a licensing requirement at the institutional level.

- (14) The following chart illustrates the above described “pillar & beam” model as originally envisaged by the administration:

Originally envisaged new Swiss financial market architecture



- (15) The following four pieces of legislation were intended to constitute the core of this new horizontal regulation:
- i. The Financial Market Supervision Act (FINMAG): supervision;
 - ii. the Federal Financial Services Act (FIDLEG): products¹ / point of sale;
 - iii. the Financial Market Infrastructure Act (FINFRAG): infrastructure; and
 - iv. the Financial Institutions Act (FINIG): institutions.

¹ Note that the products level will continue to be partly regulated by vertical acts such as CISA. Newly, FIDLEG will, however, also provide for certain harmonised requirements on product level (such as the prospectus obligation).

- ⁽¹⁶⁾ If the above concept had been followed strictly, very little would have remained within the vertical acts. In fact, it was indeed originally the intention to completely integrate both the BA and the SESTA into the new horizontal acts (mainly into FINIG and FINFRAG)². Although the integration of the BA would not – at least not as per the wording of the respective provisions – have led to major material changes, many participants in the consultation process voiced concerns that abandoning the concept of a separate BA may create unnecessary legal uncertainty and potentially lead to unwanted material changes (e.g. by having the same wording interpreted differently in another systematic context). These concerns combined with the fact that the BA is both of paramount importance for the Swiss financial services industry as well as up-to-date (having been subject to various major revisions recently) led the Federal Council to abandon its original intentions. Based on similar considerations, the insurance sector will continue to be subject to its sector-specific regulations and the ISA (and ICA) will therefore remain in place³. As regards the funds sector, CISA will be subject to substantial carve-outs but will continue to exist and provide for certain product-specific regulations. Thus, the SESTA is the only vertical act that will cease to exist in its entirety with the entry in force of all new horizontal acts.
- ⁽¹⁷⁾ However, there will nevertheless be a harmonisation of the rules within the BA, CISA and the ISA, on one hand, and FIDLEG and FINIG on the other (e.g. as regards licensing requirements). Moreover, both service providers in the banking and in the insurance sector may be additionally subject (either directly or by way of reference) to the code of conduct duties of FIDLEG and the analogous duties in the ISA.

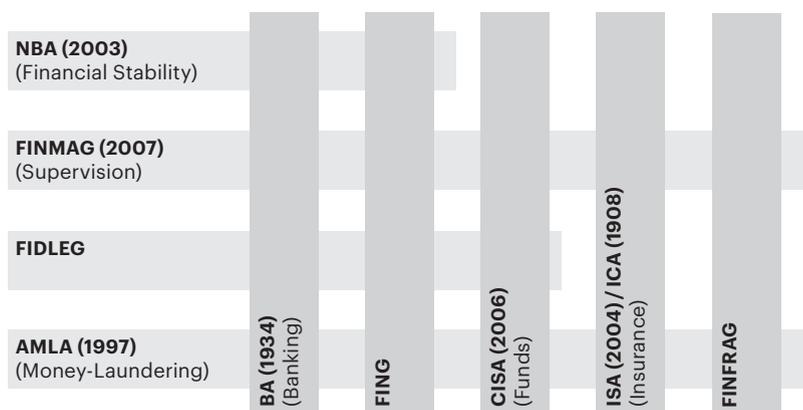
2. The Actual New Swiss Financial Market Architecture

- ⁽¹⁸⁾ The following chart illustrates the revised architecture which will enter into force with the implementation of FIDLEG and FINIG on 1 January 2020:

² As regards the arguments for this initial intention, cf. FEDERAL DEPARTMENT OF FINANCE, Explanatory Report to the Consultation Draft of FIDLEG and FINIG, 25 June 2014, p. 23.

³ Different to the BA, the idea of completely or at least largely integrating the ISA into the new horizontal acts was abandoned at a very early stage (well before elaborating and publishing the consultation drafts). The ICA regulating the (private law) relationship between the insurance companies and their clients would not have been much affected anyway.

Swiss financial market architecture after implementation of FIDLEG and FINIG



3. Advantages and Disadvantages of the New Swiss Financial Market Architecture

- (19) From a conceptual point of view (not yet accounting for content), the main advantage of the new architecture is that it will allow for greater coherence and adherence to the principle of “same business, same rules”. However, the fact that both the BA and the ISA will continue to stipulate separate sector-specific rules, also in areas which could have been integrated into one of the new horizontal acts, of course bears the risk that these advantages may not fully be achieved (even if harmonised).
- (20) A disadvantage, however, might be that market participants will be required to consult various acts to ensure compliance in their day-to-day operations. For example, a company exclusively active in the fund business (e.g. as an asset manager and distributor of funds) which, under the current regime, does not need to consult many acts other than CISA and its implementing ordinances (note, however, that this comes along with the need to consult and be aware of the corresponding circulars, public notices, fact sheets and FAQs of FINMA and the Swiss Funds & Asset Management Association (SFAMA) as well), will now, under the new regime, have to consult FINIG and its implementing ordinances (regarding the organisational requirements on institutional level), FIDLEG and its implementing ordinances (regarding code of

conduct duties when marketing funds to potential investors), FINMAG (when dealing with the supervisory bodies) and, finally, CISA and its implementing ordinances (for sector-specific regulations).

- (21) A further disadvantage, which is relevant, in particular, to internationally active companies, is the fact that the entry into force of the three financial market acts did *not* lead to equivalence with the requirements under MIFID II. While local financial services providers, of course, welcome a more flexible and less strict regime as compared to EU regulation, larger internationally active Swiss financial services providers are likely to regret such a facilitation given that they will have to implement processes ensuring full compliance with EU regulations in every case and any Swiss law deviating therefrom will simply add an additional layer of complexity and lead to additional compliance costs. The most important new rules and differences to EU regulations will be discussed in the individual Chapters.

II. Supervision – FINMAG

A. Overview

⁽²²⁾ The Federal Financial Market Supervision Act (FINMAG) entered into force on 1 January 2009 and is, therefore, not a new piece of legislation. However, FINMAG was and will be partially amended through the introduction of FINFRAG, FINIG and FIDLEG and its provisions be further specified by the new executing ordinance on the Financial Market Supervision Act (FINMAV) as well as the Supervisory Organisation Ordinance (AOV). Against this background, the publication at hand will not focus on FINMAG in general, but rather on the afore-mentioned changes introduced to FINMAG by way of the three new financial market acts, as well as FINMAV and the AOV. In particular, FINMAV is currently under revision, which may lead to certain changes to the competences of FINMA. In addition, the revision of the CAO and FINMA's small banks regime (regulatory easements for certain small banks) will become effective on 1 January 2020.

1. **The Content of the Current FINMAG**

⁽²³⁾ FINMAG established FINMA, a single, integrated supervisory authority across different sectors. FINMA carries out the functions of the former SFBC (banking supervision), the Private Insurance Supervision Authority (insurance supervision) as well as the Anti-Money Laundering Control Authority (anti-money laundering supervision of financial intermediaries). The creation of such an integrated supervisory authority was in line with similar developments in other European countries. However, certain Swiss supervisory authorities remain, and will continue to remain, outside and independent from FINMA, such as the Federal Audit Oversight Authority (FAOA; supervision of audit firms), the Swiss Takeover Board (TOB; supervision of e.g. public takeover offers), the Swiss National Bank (SNB; which has a joint supervisory mandate together with FINMA in certain areas relating to financial stability) and the Federal Gaming Board (FGB; supervision of casinos etc.). Moreover, self-regulatory organisations (SROs), such as the Swiss Bankers Association (SBA), the Swiss Funds & Asset Management Association (SFAMA) as well as the many SROs active in the area of anti-money

laundering supervision of financial intermediaries which are not or only partially directly supervised by FINMA play a key role in Swiss financial market regulation. In particular, Art. 7 para. 3 FINMAG allows FINMA to publicly acknowledge a directive issued by an SRO as being a minimal standard and to declare compliance with such directive mandatory for all affected market participants regardless of whether they are members of the respective SRO. External prudential audit firms which are responsible for the first level of prudential supervision in many areas and which will report relevant findings to FINMA (i.e. by way of prudential audit reports or reports on special investigations) will also continue to play a key role in the general supervisory setup⁴.

- (24) FINMAG governs (a) the competences and structure of FINMA (Arts. 1 et seq. FINMAG), including its organisation (Arts. 8–23 FINMAG), its enforcement tools (Arts. 24–37 FINMAG) and its co-operation with other Swiss and foreign authorities (Arts. 38–43 FINMAG), (b) criminal sanctions and the corresponding procedures in case of violations of certain key requirements under Swiss financial market regulation (Arts. 44–52 FINMAG), and, finally, (c) the applicable administrative procedures and legal recourse system (Arts. 53 and 54 FINMAG). The content of FINMAG can be classified as procedural financial law in contrast to substantive financial law being set forth in the BA, ISA, CISA, FINFRAG, FIDLEG etc.

2. The Amendments of FINMAG as Part of the Introduction of FINFRAG, FIDLEG, FINIG, AOV and FINMAV

a) Introduction of FINMAV, changes to the CAO and the Small Banks Regime

- (25) During its session of 1 May 2019, the Swiss Federal Council (*Bundesrat*) started the consultation process on a new ordinance to FINMAG, FINMAV. FINMAV will enter into force as per 1 February 2020 (decision of the Federal Council of 13 December 2019).

⁴ Cf. for example the related IMF finding in IMF, Switzerland – Financial System Stability Assessment: Reports on Observance of Standards and Codes, April 2014, p. 51: “FINMA has sufficient inspection and investigation powers vis-à-vis supervised entities and other persons, but has outsourced the exercise of these powers to a significant extent to audit firms and investigating agents. [...] FINMA’s own supervisory reviews are very limited.” Although such reviews have been expanded in the last years, the statement is in general still valid.

- (26) The new ordinance intends to specify the tasks of FINMA in international matters, its role as a regulator and the cooperation between FINMA and the Federal Department of Finance (FDF). Hence, FINMAV is not meant to provide FINMA with regulatory or supervisory competences but rather to formalise some of the current practices, at the same time limiting FINMA's discretion.
- (27) Among others, the draft FINMAV stipulates the following:
- FINMA shall have the explicit competence to conclude agreements that are not legally binding, e.g. a memorandum of understanding etc. (Art. 2 para. 2 FINMAV);
 - FINMA-Circulars are only to apply the law and may *not* contain any legislative provisions (Art. 5 para. 2 FINMAV);
 - the specific legal basis for any regulatory project must be documented and the legality and proportionality of the project must be demonstrated (Art. 6 para. 2 FINMAV);
 - as a rule, regulations must be designed to be competition- and technology-neutral; deviations from this principle must be justified (Art. 6 para. 4 FINMAV);
 - FINMA periodically reviews existing regulations for their necessity, appropriateness and effectiveness (Art. 6 para. 8 FINMAV);
 - within five years of the entry into force of FINMAV, FINMA will review all its regulations to ensure that they are fair at all levels and will make adjustments where necessary (Art. 16 FINMAV);
 - before recognising self-regulation as a minimum standard, the usual consultation procedure (i.e. consultation of interested administrative units *and* public consultation just as for amendments of FINMA-Circulars and ordinances) must have been completed (Art. 12 para. 1 FINMAV); and
 - FINMA shall inform the FDF of non-public information on certain financial market participants if it serves to maintain the stability of the financial system or in cases of potentially major economic or political significance (Art. 15 FINMAV).
- (28) The amendment to the CAO entering into force on 1 January 2020 will implement FINMA's planned small banks regime. Well-capitalised banks and security dealers in the supervision categories 4 and 5 may opt to become subject to a less complex regulatory regime. This will not necessarily ease the capital requirements but facilitate calculation of the required regulatory capital. FINMA also adapts eight of its circulars

to implement the facilitations. In addition, the changes to the ordinance also foresee additional capital requirements not only for systemically relevant banks but also for certain other group entities, as well as specifications on bail-in rules.

b) Amendments made to FINMAG as Part of the Introduction of FINFRAG

⁽²⁹⁾ The entry in force of FINFRAG as per 1 January 2016 introduced a series of amendments to FINMAG. However, these amendments were rather unrelated to the new Swiss financial market architecture or the remaining content of FINFRAG. They mainly concerned the co-operation and exchange of information between FINMA and other Swiss or foreign supervisory, regulatory, bankruptcy and judiciary authorities and were the result of both lessons learnt during the 2007 financial crisis (namely, the inefficient cooperation among several competent authorities from different nations impeding the development of solutions to “too-big-to-fail” concerns) and the tax disputes between Switzerland and countries such as the US, Germany, France, etc. (specifically, the narrow and rather restrictive framework of the existing Swiss administrative assistance procedures resulting in either FINMA acting beyond the wording of the law or foreign authorities angered by the delay and limitations of information received). Making concessions in the latter regard was also thought to increase the chances of the new Swiss financial market architecture to be granted the desired equivalency attestation by European authorities⁵.

⁽³⁰⁾ The following elements of the respective provisions governing the exchange of information with foreign authorities are particularly noteworthy:

- i. FINMA is newly entitled to spontaneously – thus, without a formal request – exchange information with foreign authorities (mainly but not limited to supervisory authorities); provided that such information exchange exclusively serves the purpose of enforcing financial market regulations (*Spezialitätenprinzip*, Art. 42 para. 2 lit. a FINMAG) and that the foreign authority is bound by official or professional secrecy (*Vertraulichkeitsprinzip*, Art. 42 para. 2 lit. b FINMAG). While this largely corresponds to prior FINMA practice, the

⁵ On the whole, cf. FEDERAL COUNCIL, Message FinfraG, BBl 2014, pp. 7610 *et seq.* and 7614; FEDERAL DEPARTMENT OF FINANCE, Explanatory Report to the Consultation Draft of FINFRAG, 29 November 2013, p. 108.

- amendments did relieve certain limitations on such spontaneous exchanges imposed by Swiss case law under the old regime;
- ii. regarding the provisions on the administrative assistance procedure (which are newly concentrated in FINMAG instead of being spread across different regulations), the most notable change was the option granted to FINMA not to conduct a so-called “client procedure” or at least not prior to the actual exchange of information. Such “client procedure” is normally applied if the information to be exchanged concerns or may affect a client – a client being defined as any person or institution that is not itself subject to supervision (i.e. an account holder but arguably also an external asset manager⁶). The affected client normally has to be informed about FINMA’s decision prior to the actual exchange of information and has the right to appeal such decision within 10 days to the Federal Administrative Court. In addition, under the old regime, pursuant to Swiss case law, such clients were granted a right of inspection with regard to the original request of the foreign authority. Thus, the old “client procedure” not only potentially delayed the exchange of information for months, but also provided the client with the necessary information to take concealment measures within the additional time bought (i.e. destroying evidence or transferring assets). These inadvertent consequences were not only a nuisance in view of FINMA, but have also been criticised by the International Monetary Fund (IMF)⁷. Against this background, FINMA now has the additional option not to inform the client prior to the actual exchange of information if and to the extent that such information may impede or frustrate the effective accomplishment of the foreign authority’s mission and generally not to grant a right of inspection with regard to the correspondence of the foreign authority;
 - iii. in recent years, information requests by foreign authorities directly addressed to financial services providers with a Swiss domicile or

⁶ Cf. Swiss Federal Court decision of 3 September 2001, BGE 127 II 323, c. 3b)bb). A view neither shared by FINMA nor the FEDERAL COUNCIL (cf. FEDERAL COUNCIL, Message FinfraG, BBl 2014, p. 7616).

⁷ Cf. FEDERAL COUNCIL, Message FinfraG, BBl 2014, pp. 7613 et seq. and Financial System Stability Assessment (FN 4), p. 52: “*The requirement to preserve client confidentiality consumes FINMA time and resources.*” Cf. also the corresponding recommendation on p. 63: “*The authorities should pursue the abolition of the strict client confidentiality requirements and the requirement to inform the client of foreign authorities’ requests for information.*”

headquarters (but with activities, subsidiaries or branches in the jurisdiction concerned) frequently triggered a difficult balancing act between the risk of infringing Swiss secrecy and sovereignty protection laws and the risk of being accused of withholding information or of obstructing effective supervision and enforcement. To address this, Art. 42c FINMAG now provides for an explicit legal basis for the exchange of non-public information between a Swiss financial services provider and the competent foreign supervisory authorities – compliance with which would eliminate the risk of criminal sanctions under the Swiss sovereignty protection laws (Art. 271 PC – Unlawful activities on behalf of a foreign state). As is the case with information shared by FINMA, such exchanges of information must exclusively serve the purpose of enforcing financial market regulations (*Spezialitätenprinzip*) and the foreign authority must be bound by official or professional secrecy (*Vertraulichkeitsprinzip*). In addition, a requirement stipulates that the “rights of clients and third parties shall be preserved” (Art. 42c para. 1 lit. b FINMAG). Hence, any client or third party information will still need to be fully anonymised or otherwise a secrecy waiver by such client or third party will need to be obtained as any such data may be protected by e.g. banking secrecy, data protection or employee rights. In case the information to be exchanged is of substantial importance, the transmission of information must be reported to FINMA beforehand (Art. 42c para. 3 FINMAG). FINMA may reserve administrative assistance channels or may make the transmission, publication or forwarding of documents related to its supervision subject to its approval if it is in the interest of the performance of its tasks and is not in conflict with overriding private or public interests (Art. 42c paras. 4 and 5 FINMAG).

**c) Amendments of FINMAG as Part of the Introduction of FIDLEG
Amendments of a Formal Nature**

- ⁽³¹⁾ FIDLEG provides – among various amendments of merely formal nature – for certain minor amendments to FINMAG, e.g. the introduction of a provision pursuant to which FINMA is the competent supervisory authority for ensuring compliance with FIDLEG (Art. 1 para. 1 lit. i FINMAG; the latter is, of course, also the case with regard to FINFRAG and FINIG, see Art. 1 para. 1 lit. e FINMAG).

(32) In its consultation procedure regarding FIDLEG, the Swiss Parliament decided that FIDLEG's code of conduct duties shall not apply directly to the insurance industry and that, instead, the ISA shall be amended to include specific provisions on this subject⁸. Thus, the originally envisaged amendments of the ISA based on the draft FIDLEG will not enter into force.

Regime Applicable to Non-Supervised Institutions

(33) Financial services providers that are only subject to a registration requirement and, in particular, the client adviser registration requirement under FIDLEG (i.e. foreign financial services providers offering their services in Switzerland on a pure cross-border basis) do not qualify as supervised institutions according to Art. 3 FINMAG and thus will not be subject to FINMA's supervision, including its enforcement tools. In our view, it is not entirely clear whether this also applies in relation to the possibility of FINMA to issue an occupational ban pursuant to the new Art. 33a draft FINMAG⁹. Such non-supervised financial services providers will, however, both be subject to the criminal sanctions set forth in the (old and new) Swiss financial market acts and the conduct duties of FIDLEG. On that basis, even in the absence of prudential supervision, compliance with prudential code of conduct duties by non-supervised financial services providers is thought to be achieved by the following two means:

- the threat of civil lawsuits (non-compliance with code of conduct duties being a strong indication of a violation of the contractual duty of care or loyalty); and
- the threat of criminal sanctions.

(34) The latter was also one of the reasons why the FDF originally intended to introduce far-reaching criminal sanctions going along with the new conduct duties under FIDLEG (even in case of mere negligence).

⁸ Cf. FEDERAL DEPARTMENT OF FINANCE, Explanatory Report to the Consultation Draft of ISA, 14 November 2018, p. 2, 4.

⁹ Extending the application of this enforcement instrument also to non-supervised client advisers would also make sense in light of the fact that the absence of an occupational ban is also one of the registration requirements applicable to client advisers and given that client advisers of supervised financial institutions would not need to be entered into such a register this (negative) requirement would no longer serve any meaningful purpose (those client advisers that would need to be registered could never be subject an occupational ban unless they had previously worked for a supervised financial service provider).

Confronted with both the resistance by the Swiss financial services industry (argument: inappropriate criminalisation of an entire industry) as well as by the Swiss Parliament regarding similar provisions originally intended in relation to FINFRAG, the criminal sanction provisions were, however, substantially mitigated in comparison to the original drafts.

- (35) In addition, the client adviser registration requirements under FIDLEG aim to ensure that the client adviser of such non-supervised financial services providers (a) have sufficient knowledge of the rules of conduct set out in FIDLEG and have specialist knowledge required for their work (Art. 6 FIDLEG) as well as (b) will not be able to be entered in the client adviser register in case they have been convicted of criminal charges in accordance with Articles 89 to 92 of FIDLEG or Art. 86 ISA or of offences under Articles 137 to 172ter of the Swiss Criminal Code (Art. 29 para. 2 letter a FIDLEG). While FINMA will not be directly involved in the registration process, it will, however, be responsible for the licensing and supervision of the respective registration authority (Art. 31 para. 1 in fine FIDLEG).

d) Amendments of FINMAG as Part of the Introduction of FINIG as well as the AOV

- (36) FINIG provides for a series of significant amendments to FINMAG. The following may be particularly noteworthy:

Extension of the Objectives of Swiss Financial Market Supervision

- (37) The purpose of financial market supervision is to protect creditors, investors and insured persons and to safeguard the functioning of the financial markets (Art. 4 FINMAG). The objectives of the Swiss financial market supervision have been extended to also ensure the sustainability of the Swiss financial market in addition to strengthening its reputation and competitiveness (Art. 4 in fine FINMAG). Furthermore, FINMA shall only regulate to the extent necessary with a view to fulfilling supervisory objectives and whenever possible on the basis of principles and by taking into account, in particular, the different sizes, complexities, structures, business activities and risks of the supervised entities (Art. 7 para. 3 draft FINMAG).

Establishment of a New Semi-Public Supervisory Authority

- (38) One of the most notable effects that the introduction of FINIG will have on FINMAG and on the current supervisory architecture is, however, that it will provide the legal basis for both the creation and the governance

of one or several new semi-public supervisory authorities with their domicile and management in Switzerland (Art. 43a para.1 FINMAG, Art. 43d para.1 FINMAG). These semi-public supervisory authorities will be responsible for the supervision of all those individuals or institutions which will newly become subject to prudential supervision under the new Swiss financial market architecture (i.e. regular asset managers, trustees and precious metal traders¹⁰). The inspiration for such semi-public supervisory authorities apparently came from the US, notably from the position held by the Financial Industry Regulatory Authority (FINRA).

- (39) The design of the new supervisory architecture in the areas concerned will be two-tiered: The first tier being the new semi-public supervisory authorities which will have direct supervisory responsibility over the newly to be supervised individuals and institutions, while, in turn, FINMA will be responsible for the licensing and supervision of these semi-public supervisory authorities on the second tier. The reasons why FINMA was not mandated with direct supervisory responsibilities in this area were, *inter alia*, (a) the large number of the newly to be supervised individuals and institutions (staffing and resourcing problem of FINMA) – roughly between 2,000 to 3,500 licensing applications are currently expected¹¹ –, and (b) the fact that a semi-public supervisory authority may provide for a more flexible and industry-focused and, thus, a more risk-adequate supervisory process. If and to the extent that no such new semi-public supervisory authority will be available – because no organisation has been granted a respective licence (yet) – Art. 61 para. 4 FINIG, nevertheless, assigns the regular supervision of asset managers

¹⁰ The term “precious metal traders” is used herein for simplification purposes. More precisely, only trade examiners pursuant to Art. 42^{bis} of the Federal Act of 20 June 1933 on the Control of the Trade in Precious Metals and Precious Metal Articles (as amended by the entry in force of FINIG) will newly be subject to supervision if and to the extent that they, in addition to their examination activities, also engage in precious metal trades on a commercial basis.

¹¹ Cf. also SCHLEIFFER PATRICK / SCHÄRLI PATRICK, Supervision of Portfolio Managers and Trustees, CapLaw 2016/1, p. 42 which estimate the number to be approximately 2300. An exact figure of the additional individuals/institutions that will be subject to supervision is not available. However, it is estimated to concern 2000 to 6000 individuals/institutions, although it is unclear whether the larger estimates also include asset managers, who are not working as asset managers on a full-time basis but engage in this activity as secondary employment. Based on the information provided by SROs, approx. 80 per cent of its members are micro-enterprises, i.e. companies with one to three employees only.

and trustees directly to FINMA. It is publicly known that the company FINcontrol Suisse Ltd. is, at the time of writing, applying for such a license.

(40) In order to become a semi-public supervisory authority, an organisation must submit an application to FINMA for a licence as a supervisory authority. In order to obtain such a licence, the articles of association, the organisational regulations and the choice of persons for the governing bodies of the organisation (i.e. the board of directors and the management) will have to be approved by FINMA (Art. 43c para. 2 FINMAG). The supervisory authority is required to be a legal entity under Swiss law (Art. 3 AOV). The organisation must have adequate corporate governance and must have the necessary financial and human resources, i.e. be organised in such a way that it can fulfil its obligations under FINMAG (cf. Arts. 43d–43f FINMAG and Art. 3 et seq. AOV regarding specific requirements on management, independence and proper business conduct as well as capital requirements and building of reserves). The oversight by FINMA is, however, limited to ensuring adequate corporate governance and financial resources of the new supervisory authorities as well as to monitoring whether such an authority lives up to the public mandate vested in it. FINMA's oversight does, however, not include the right to interfere with the day-to-day first level supervision process and activity. In this regard, the semi-public supervisory authorities will be independent. Nonetheless, FINMA will have the competence to specify which audit points the supervisory authority must audit or have audited as a minimum in its ongoing supervision (Art. 10 AOV).

(41) The semi-public supervisory authorities are required to assess the risks of the business activities of the supervised individuals/institutions as well as their organisational risks on an ongoing basis (Art. 10 AOV). The supervisory authorities may conduct an audit of the supervised individuals/institutions themselves or grant approval for an external audit company and its lead auditor to do so (Art. 43k FINMAG; Arts. 12–14 AOV). The supervised individuals/institutions are subject to a duty to provide information and a duty to report (Art. 43l paras. 1 and 2 FINMAG). Furthermore, the semi-public supervisory authorities will be authorised to increase the minimally required prudential audit frequency based upon risk considerations and grant the institutions supervised by them a prudential audit frequency of up to a maximum of four years. Hence,

an approach not un-similar to FINMA's new approach under the special regime for small banks.

- (42) The semi-public supervisory authority may also supervise financial intermediaries in accordance with Art. 2 para. 3 AMLA with regard to compliance with obligations under the AMLA, provided that it is recognised as a self-regulatory organisation in accordance with Art. 24 AMLA (Art. 43a para. 3 FINMAG). In such case, the supervisory authority is required to maintain two separate lists of its members from which it is apparent which members have been licensed by FINMA and which have not (Art. 9 para 1 AOV).
- (43) The supervisory authorities report periodically to FINMA on their supervisory activities (Art. 43h para.1 FINMAG), e.g. annually (by electronic means) on the deadlines set for rectification of any of its supervised individuals/institutions, the improvements achieved, the results of the ongoing supervision as well as the risk assessment of the business activities of the supervised individuals / institutions (Art. 11 paras. 2 and 3 AOV).
- (44) The semi-public supervisory authority must immediately notify FINMA in the following cases (Art. 11 para. 1 AOV):
- Serious breach of supervisory law or other deficiencies that cannot be remedied within the ongoing supervision period or for which the setting of a rectification deadline does not appear to be expedient;
 - or
 - the proper condition cannot be restored within the rectification deadline that has been set.
- (45) FINMA reviews whether the semi-public supervisory authority complies with the requirements set out in FINMAG and whether it performs its supervisory duties. In case of indications of maladministration or if the supervisory authority fails to restore the lawful situation, FINMA may (Art. 43i para. 4 FINMAG):
- Conduct an audit of the supervised entity itself;
 - appoint an audit commissioner pursuant to Article 24a FINMAG; or
 - revert to one of its enforcement tools.

As an *ultima ratio*, FINMA has the competence to liquidate the supervisory authority and transfer its mandates to another supervisory authority (Art. 43i para. 3 FINMAG).

Supervision of Asset Managers of Swiss Occupational Benefits Schemes

⁽⁴⁶⁾ FINMA will also be responsible for the supervision of asset managers of Swiss occupational benefit schemes given that they will be re-classified as “managers of collective assets” as per FINIG (Art. 24 para. 1 lit. b FINIG). FINMA’s supervisory responsibility will, however, be limited to their asset management activity and their compliance with Swiss financial market laws, while compliance with occupational pension regulations will continue to be monitored by the respective sector-specific supervisory authorities on both cantonal and federal level.

New Enforcement Tools

⁽⁴⁷⁾ Furthermore, FINMA is being granted several new enforcement tools:

- If an enforceable decree issued by FINMA is not complied with within the set period after a prior reminder, FINMA may carry out the ordered action itself or have it carried out at the expense of the defaulting party (Art. 32 para. 2 FINMAG);
- in addition to the already existing possibility to issue an professional ban vis-à-vis higher-ranking managers of financial services providers, FINMA is entitled to issue such a professional ban also vis-à-vis certain lower level employees, such as securities dealers, traders and client advisers (Art. 33a para. 1 FINMAG); and
- FINMA is henceforth automatically provided by all Swiss civil courts with a copy of any decision rendered in relation to disputes between supervised institutions and their creditors, investors or clients (Art. 41a para.1 FINMAG). FINMA, in turn, forwards the decisions to the responsible semi-public supervisory authority (if any) (Art. 41a para. 2 FINMAG).

B. Key Differences to EU Regulations

⁽⁴⁸⁾ FINMAG provides the basis for a modern supervisory authority (FINMA) endowed with similar competences, enforcement tools and responsibilities as other EU supervisory authorities that are constituted as a single, integrated supervisory body. There are some notable differences however. For example, the Swiss supervisory model is different from the twin-peaks approach applied in the UK where supervisory and regulatory responsibilities are shared between the

Financial Conduct Authority and the Prudential Regulation Authority. Different from certain EU supervisory authorities, FINMA does not have the power to impose pecuniary administrative fines, such as those imposed in the Adoboli case where the former UK Financial Service Authority fined UBS, whereas FINMA cannot impose any fines. The creation of one or several new semi-public supervisory authorities endowed with supervisory responsibility vis-à-vis regular asset managers, trustees and precious metal traders will be similar to the US concept but may differ from certain regimes in EU countries where such financial services providers are supervised by (fully) public authorities.

C. What Swiss and Foreign Market Participants Need to be Aware of

- ⁽⁴⁹⁾ All Swiss and foreign market participants, as well as their clients, need to be aware – in particular with regard to recent case law of the Swiss Federal Court – of the increased cross-border exchange of information among authorities as a consequence of the abolishment of certain limitations in the current Swiss administrative assistance procedure in the area of financial market regulation. This approach is consistent with the increase in the exchange of information in the areas of anti-money laundering or judicial assistance in criminal matters, but also in relation to tax offenses.
- ⁽⁵⁰⁾ Swiss financial services providers may benefit from Art. 42c FINMAG which provides a justification under Art. 271 PC to provide information to foreign authorities, even if proceedings are pending, as long as no third party data is affected.
- ⁽⁵¹⁾ All Swiss and foreign financial services providers should be aware that – even in case their activity would not be subject to a licensing requirement and therefore not subject to FINMA supervision under the new Swiss financial market acts – non-compliance with the new code of conduct duties may lead to criminal sanctions and provide grounds for civil claims.
- ⁽⁵²⁾ The Swiss industry of regular asset managers should closely observe the further process in the creation and setup of one or several new semi-public supervisory authorities.

III. Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading – FINFRAG

A. Overview

- ⁽⁵³⁾ The Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (as last amended on 1 January 2019) (FINFRAG), the Federal Financial Market Infrastructure Ordinance (as last amended on 31 August 2019) (FINFRAV) and the FINMA Financial Market Infrastructure Ordinance (as last amended on 1 September 2018) (FINFRAV-FINMA), which, in their initial versions, all entered into force on 1 January 2016, provide, *inter alia*, for a consolidated and comprehensive set of rules for the supervision of financial market infrastructures (FMIs), the duties of financial market participants in derivatives trading, the disclosure of shareholdings, public takeover offers and market conduct rules. The following section will focus on the regulation of FMIs and the regulation of the derivatives trading market. The other areas of law (now) covered by FINFRAG have been transferred into FINFRAG and its ordinances from the SESTA and hence were largely pre-existing law.
- ⁽⁵⁴⁾ The rules in FINFRAG on the regulation of FMIs have, to some extent, consolidated the previously fragmented regime for FMIs consisting of provisions that were included in a variety of different pieces of legislation (e.g. SESTA and NBA) and ordinances.
- ⁽⁵⁵⁾ The main reason for FINFRAG was to align the Swiss regime of regulating FMIs and derivatives trading with international standards, in particular, with EU regulations such as MiFID II, MiFIR, EMIR and CSDR in order to preserve Switzerland's global competitiveness.

**1. The New Regime for Financial Market Infrastructures:
Consolidated – Revised – Internationally Aligned**

⁽⁵⁶⁾ Under FINFRAG, the list of FMIs comprises (Art.2 FINFRAG):

- i. Trading Venues (Stock Exchanges and multilateral trading facilities (MTFs) but not organised trading facilities (OTFs, see below);
- ii. central counterparties (CCPs);
- iii. central securities depositories (CSDs);
- iv. Trade Repositories; and
- v. Payment Systems.

⁽⁵⁷⁾ Organised trading facilities (OTFs) are not considered FMIs but are nevertheless regulated under FINFRAG and its ordinances, however, primarily through regulation of their operators.

a) Swiss-based FMIs which must be licensed by FINMA

⁽⁵⁸⁾ The following *Swiss-based* FMIs need to obtain a licence from FINMA (Art. 4 FINFRAG):

- i. *Trading Venues* (i.e. Stock Exchanges and MTFs);
- ii. for *CCPs and CSDs*, previously supervised under a bank licence, FINFRAG introduced tailor-made licences. A licence will be needed irrespective of whether or not the relevant institution is deemed systemically important;
- iii. *Trade Repositories*; and
- iv. *Payment Systems* will be required to obtain a licence only if this is necessary for the proper functioning of the financial market or the protection of financial market participants and if the Payment System is not operated by a bank.

⁽⁵⁹⁾ An institution that meets all pertaining requirements as set forth in FINFRAG/FINFRAV is entitled to receive the relevant licence (Art.5 FINFRAG).

⁽⁶⁰⁾ Anyone who operates an OTF in Switzerland must be a Swiss bank, Swiss securities dealer or Swiss Trading Venue (i.e. a Swiss Stock Exchange or MTF) or be a FINMA-recognised foreign Trading Venue (i.e. a foreign Stock Exchange or MTF). No authorisation is required for the operation of an OTF in Switzerland within a financial group if the OTF is operated by a legal entity that (a) is controlled directly by a FMI and (b) is subject to consolidated supervision by FINMA (Art. 43 FINFRAG).

⁽⁶¹⁾ *Supervisory authorities:* FINMA is the competent authority for the ongoing supervision of FMIs and operators of Swiss OTFs and, in case of systemically important FMIs, also the SNB.

b) Recognition Requirements for Foreign Trading Venues, CCPs and Trade Repositories

⁽⁶²⁾ Foreign payment systems and CSDs are not subject to a recognition requirement by FINMA.

⁽⁶³⁾ *Trading Venues* domiciled abroad must obtain recognition from FINMA before granting Swiss participants supervised by FINMA direct access to their facilities (Art. 41 FINFRAG).

⁽⁶⁴⁾ A *CCP* domiciled abroad must obtain FINMA recognition before it (a) grants supervised Swiss participants direct access to its facilities, (b) provides services for a Swiss FMI or (c) enters into an interoperability agreement with a Swiss CCP (Art. 60 FINFRAG).

⁽⁶⁵⁾ FINMA shall grant recognition to a *foreign Trading Venue or CCP* (a) if the foreign Trading Venue or CCP is subject to appropriate regulation and supervision, (b) if the competent foreign supervisory authorities (1) do not have any objections to the cross-border activity of the foreign Trading Venue or CCP, (2) guarantee that they will inform FINMA if they detect violations of the law or other irregularities on the part of Swiss participants and (3) provide FINMA with administrative assistance.

⁽⁶⁶⁾ In addition, certain foreign Trading Venues can benefit from a “deemed” recognition process if FINMA finds that (a) the state in which the Trading Venue has its registered office regulates and supervises its Trading Venues adequately and (b) if the competent foreign supervisory authorities guarantee that they will inform FINMA if they detect violations of the law or other irregularities by Swiss participants.

⁽⁶⁷⁾ Also, FINMA may exempt a foreign CCP from the recognition requirement if this does not adversely affect the protective purpose of FINFRAG.

⁽⁶⁸⁾ A *Trade Repository* registered abroad must obtain recognition from FINMA before accepting reports in accordance with FINFRAG for derivatives transactions (Art. 80 FINFRAG). FINMA shall grant recognition (a) if the foreign trade repository is subject to appropriate regulation and supervision, (b) if the competent foreign supervisory authorities (1) do not have any objections to the cross-border activity of the foreign

trade repository, (2) guarantee that they will inform FINMA if they detect violations of the law or other irregularities by Swiss participants, (3) confirm to the competent Swiss financial market supervisory authority that (i) forwarding of the data by it to other foreign authorities is permitted only if, in case of a transfer to a criminal authority, mutual assistance in accordance with the Mutual Assistance Act of 20 March 1981 is possible and (ii) FINMA, the SNB, other Swiss financial market supervisory authorities and the Federal Electricity Commission have immediate access to the foreign trade repository.

(69) *Mutuality reservation:* FINMA may, even if the above criteria are met, refuse recognition to Trading Venues, CCPs or Trade Repositories if their home state does not grant Swiss Trading Venues, CCPs or Trade Repositories actual access to its markets or does not offer them the same competitive opportunities.

(70) The licensing and recognition requirements may be summarised as follows:

Organisation Lic. / Rec.	Trading Venues Stock (Exchanges, MTFs)	OTFs	CCPs	CSDs	Trade Repo- sitories	Payment Systems
License required?	yes	no, <i>but...</i> ^a	yes	yes	yes	yes, <i>but...</i> ^b
Recognition of foreign FMIs / OTFs required?	yes	no ^c	yes	no ^d	yes	no

^a The operator of an OTF operated in Switzerland must be a Swiss bank, securities dealer or Trading Venue or a foreign Trading Venue recognised by FINMA pursuant to FINFRAG.

^b A Payment System requires authorisation from FINMA only if it is necessary for the proper functioning of the financial market or the protection of financial market participants and if the Payment System is not operated by a bank. In any case, the Swiss Federal Council has been authorised, and has made use of such authorisation in FINFRAG, to define specific duties for Payment Systems, namely as regards operational aspects, security, equity capital, risk diversification and liquidity.

^c Foreign OTFs may voluntarily apply for a recognition in Switzerland pursuant to Art. 110 FINFRAG-FINMA in connection with Art. 41 FINFRAG in order to become an eligible foreign OTF for purposes of the platform trading obligation for derivatives transactions.

^d Note: Interoperability links (*Interoperabilitätsverbindungen*) and access links arrangements (*Zugangsverbindungen*) between CSDs (see N. (87)) need FINMA approval.

- (71) On 27 June 2019, the Swiss Federal Department of Finance (FDF) announced that it was activating the measures adopted by the Swiss Federal Council on 30 November 2018 under the Ordinance on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland to protect the Swiss Stock Exchange infrastructure in anticipation of the expiration on 30 June 2019 of the stock market equivalence granted by the European Commission. As a result of these protective measures, with effect from 1 July 2019, Trading Venues in the EU are prohibited under Swiss law from offering or facilitating trading in equity securities (including shares) of companies with registered offices in Switzerland where such equity securities are listed on a Swiss Stock Exchange or are traded on a Swiss Trading Venue. In essence, these protective measures are intended to remove potential legal barriers for EU investment firms to trade Swiss equity securities on Swiss Stock Exchanges and Trading Venues (where liquidity for Swiss equity securities is typically greatest) through the implementation of a recognition obligation for foreign Trading Venues that admit equity securities of certain Swiss companies to trading or facilitate such trading.
- (72) According to the ordinance, FINMA will only grant recognition to a foreign Trading Venue for such purpose if (a) it is subject to appropriate regulation and supervision and (b) the jurisdiction in which the foreign Trading Venue is registered does not restrict its market participants from trading equity securities of Swiss issuers on Trading Venues in Switzerland and thereby significantly adversely affects the trading in such equity securities at Swiss Trading Venues. If these conditions are not met, the foreign Trading Venue will not be granted recognition by FINMA; consequently, these venues will not be allowed under Swiss law to offer trading in equity securities of Swiss issuers. On 27 June 2019, the FDF also published an updated list of such jurisdictions that have not met the necessary conditions under the ordinance and such list currently comprises only the member states of the EU, the result being that no recognition can be granted to EU Trading Venues effective 1 July 2019. Notably, the protective measures do not impact companies with registered offices in Switzerland whose equity securities are listed and traded exclusively on exchanges outside of Switzerland. Also, there is a grandfathering provision for Swiss companies with dual listings.

c) Recognition Requirements for Foreign Trading Participants (Art. 40 FINFRAG)

⁽⁷³⁾ *Foreign trading participants (remote-member licence):* The licensing requirements for foreign participants, which previously only applied to securities dealers seeking membership of a Swiss Stock Exchange, have been extended to *any participants of any Trading Venues*. In contrast to the previous regulation, foreign trading participants with a branch in Switzerland may also be able to obtain a remote-member licence. The licensing requirements under FINFRAG are as follows:

- i. The participant (a) is subject to “appropriate” regulation and supervision, (b) is subject to “equivalent” conduct rules, recording and reporting duties and (c) ensures that any such activities are separated from activities of its Swiss licensed units (if any); and
- ii. the foreign supervisory authority (a) has no objection to the participant’s activity in Switzerland and (b) provides administrative assistance to FINMA.

⁽⁷⁴⁾ Further, FINMA may refuse to grant a licence in case the home state of the foreign participant does not grant reciprocal rights.

⁽⁷⁵⁾ A foreign participant that already participates in a Swiss Trading Venue must inform FINMA if it wishes to participate in another Swiss Trading Venue. In order to be allowed to do so, the foreign supervisory authority of the foreign participant has to confirm that it has no objection to the expansion of the foreign participant’s activity in Switzerland.

⁽⁷⁶⁾ Finally, FINMA authorisation is not required for participation in monetary policy transactions with the SNB.

d) General Requirements / Duties (Arts. 8–21 FINFRAG)

⁽⁷⁷⁾ FINFRAG provides for a variety of general requirements and duties FMI will be subject to, including the following:

- i. FMI will be required to maintain an *adequate organisation* and meet the “fit-and-proper-test”;
- ii. they will need sufficient *regulatory capital and liquidity*, both on a stand-alone and on a consolidated basis; the Federal Council determined in Art. 13 FINFRAG the minimum requirements;
- iii. a legal entity will be allowed to operate only one FMI at a time, except for (a) Stock Exchanges which may also operate an MTF and (b) CSDs which may run both a securities settlement system and a

- central securities depository. Ancillary business activities may trigger both licence / approval and capital / liquidity requirements;
- iv. the outsourcing of substantial tasks, such as risk management, will require prior approval by FINMA;
 - v. FINFRAG further provides for duties relating to the business continuity (strategy, technical systems); and
 - vi. FMI will be required to provide non-discriminatory and open access to their services and will be subject to documentation and disclosure duties.

e) Additional Rules Applicable to Systemically Important FMIs (Arts. 22–24 FINFRAG)

⁽⁷⁸⁾ The previous regime applicable to systemically important FMIs has been transferred into FINFRAG and the authority to establish the details will remain with the SNB. The scope of information FMIs will be required to provide to the SNB has been extended.

⁽⁷⁹⁾ *Recovery and resolution planning:* FINFRAG provides for a duty of systemically important FMIs to prepare a recovery plan (*Stabilisierungsplan*) that describes the measures to be taken in case of a crisis for ensuring the continuation of systemically important business processes. FINMA will, on the basis of the recovery plan, prepare a resolution plan (*Abwicklungsplan*) describing how an ordered restructuring or winding-up of a systemically important financial market infrastructure may be carried out.

f) Trading Venues (Stock Exchanges and MTFs) and OTFs (Arts. 26–46 FINFRAG)

⁽⁸⁰⁾ *Stock Exchanges* are defined as facilities for *multilateral securities trading where securities are listed and whose purpose is the simultaneous exchange of bids between several participants and the conclusion of contracts based on non-discretionary rules.*

⁽⁸¹⁾ *MTFs* have the same purpose as *Stock Exchanges* but do not offer the service of listing securities (“listing” means the admission of securities to trading on a Stock Exchange in accordance with a standardised procedure whereby the Stock Exchange’s requirements regarding issuers and securities are being verified).

⁽⁸²⁾ OTFs are establishments for the (a) multilateral trading in securities or other financial instruments whose purpose is the exchange of bids and the conclusion of contracts based on discretionary rules, (b) multilateral trading in financial instruments other than securities whose purpose is the exchange of bids and the conclusion of contracts based on non-discretionary rules or (c) bilateral trading in securities or other financial instruments whose purpose is the exchange of bids, but which do not qualify as Stock Exchanges or MTFs. OTFs are defined to, for example, also cover internal multilateral trading facilities of banks. Operators of an OTF will be permitted to trade securities on their platform for their own account (*Eigengeschäfte*) but they have to ensure that client interests are comprehensively protected when conducting proprietary transactions on the OTF operated by them.

Feature	Trading	Exchange of bids	Rules	Listing
Tr. Venue				
Stock Exchange	multilateral (bilateral possible)	simultaneous	non-discretionary	yes
MTF	multilateral only	simultaneous	non-discretionary	no
OTF	multilateral / bilateral	simultaneous	non-discretionary / discretionary	no

⁽⁸³⁾ *Duties of Trading Venues and trading participants:* Among various other duties, FINFRAG requires Stock Exchanges, MTFs and operators of OTFs to provide *pre-trade and post-trade transparency* (in case of OTFs, pre-trade transparency is required only if there is a liquid market and, in case of bilateral trading, where no liquid market exists, price quotes on demand are sufficient; post-trade transparency is required in case of multilateral trading whereas in case of bilateral trading, aggregated publication at the end of the trading day is sufficient). The current duty of Stock Exchange participants to *record* transactions and *report* them to the trading platform will be extended to Stock Exchanges and MTFs.

g) Central Counterparties (CCPs) (Arts. 48–55 FINFRAG)

⁽⁸⁴⁾ As counterparty risk is not eliminated by interposing a CCP, but rather concentrated, and the failure of a CCP is deemed to pose a greater risk for the stability of the financial system than a system of bilateral trading,

FINFRAG subjects CCPs to a comprehensive regulatory regime. The main requirements for CCPs under FINFRAG are as follows:

- i. *Obtaining collateral and determination of a “default waterfall”*: In order to mitigate credit and liquidity risks, CCPs are required to obtain adequate collateral from the participants, in particular, in the form of initial margin, variation margin and participation in a default fund. The CCP needs to determine the “waterfall” of collateral proceeds and its equity in case of a defaulting participant (pursuant to the requirements as set forth in FINFRAG);
- ii. *limited means of payment*: CCPs and their participants are required to settle payments by transferring sight deposits held with a central bank or, if not possible or practicable, using a means of payment with minor credit and liquidity risks;
- iii. *maintaining of liquidity buffer*: The liquidity buffer, as further determined by FINFRAG, needs to consist of cash or liquid financial instruments bearing only minor market or credit risks;
- iv. *adopting measures to mitigate risks arising from defaulting participants and segregation of accounts* (as set out in FINFRAG);
- v. *segregation*: CCPs must segregate their own assets from the assets of participants and segregate assets from different participants as well as offer participants to further segregate the assets of indirect participants; and
- vi. *portability*: Finally, an important but complex requirement is that a CCP must ensure that, in the event of a participant’s default, the collateral and positions held by the participant on behalf of an indirect participant can be transferred to another participant indicated by the indirect participant.

⁽⁸⁵⁾ *Interoperability arrangements* between CCPs will be subject to approval by FINMA. In order to avoid restraints of competition, FINFRAG requires a CCP to accept the request of another CCP to enter into an interoperability arrangement, except if it would jeopardise a secure and efficient clearing.

h) Central Securities Depositories (CSDs) (Arts. 61–73 FINFRAG)

⁽⁸⁶⁾ A CSD is a facility *that operates as a central custodian and / or a securities settlement system*. A central custodian is an entity for the central custody of securities and other financial instruments based on uniform rules and procedures. A securities settlement system is described as a facility that is based on uniform rules and procedures and that serves the

purpose of clearing and settling transactions in financial instruments, in particular, securities.

⁽⁸⁷⁾ The primary task of a CSD is to ensure proper and lawful custody, recording and transfer of securities. For such purposes, it must set the deadlines for participants to settle their securities transactions in their system in line with international practices and its participants' needs. The CSD must also monitor whether transactions are settled within the allocated deadlines and must impose contractually agreed sanctions in the event of late settlement. Also, it has to cover risks relating to the granting of credit (in particular, by obtaining collateral) and needs to maintain sufficient liquidity, adopt measures mitigating a participant default and segregate accounts.

⁽⁸⁸⁾ An element of paramount importance for the cooperation between CSDs are so called link arrangements (*Verbindungen*). They can be entered into between CSDs as *agreements relating to (a) the mutual execution of payment and transfer orders (interoperability links) or (b) the direct or indirect participation of a CSD in another CSD (access links)*. Interoperability links and certain types of access links between CSDs are subject to approval by FINMA.

⁽⁸⁹⁾ A participant of a CSD must *separate* the securities, receivables and liabilities of its indirect participants from its own assets, receivables and liabilities with the CSD and those held in its own accounts. Indirect participants must be given the option to keep and record securities, receivables and liabilities together with those of other indirect participants (omnibus customer accounts) or separately (individual customer accounts) with the respective consequences for the participant with respect to margin requirements, costs and the level of protection granted by the respective custody arrangement.

i) Trade Repositories (Arts. 74–80 FINFRAG)

⁽⁹⁰⁾ Similar to the description in EMIR, Trade Repositories under FINFRAG are described as *institutions that centrally collect, manage and retain data relating to derivative transactions*.

⁽⁹¹⁾ SIX Trade Repository AG is the only licenced Trade Repository domiciled in Switzerland. It uses the reporting technology of the London Stock Exchange Group's (LSEG) UnaVista platform. DTCC Data Repository (Ireland) PLC (Ireland), DTCC Derivatives Repository PLC (DDRL) (UK) and

REGIS-TR (Luxembourg) also have obtained recognition by FINMA as foreign Trade Repositories. However, it must be checked whether these foreign Trade Repositories accept reporting under FINFRAG and/or respective EU rules (based on equivalence) only.

⁽⁹²⁾ Trade Repositories are required to regularly disclose relevant transaction data. Data access for Swiss and foreign authorities and private individuals is a central piece of the regulation of Trade Repositories and FINFRAG imposes various obligations on how to deal with such data access and data transmission, also in view of existing and potentially conflicting data protection and banking secrecy issues.

j) Payment Systems (Arts. 81 and 82 FINFRAG)

⁽⁹³⁾ FINFRAG describes Payment Systems as *entities that clear and settle payment obligations based on uniform rules and procedures*.

⁽⁹⁴⁾ FINFRAG does not provide for any specific duties relating to Payment Systems but authorised the Federal Council to do so if and to the extent necessary to implement generally accepted international standards. Accordingly, FINFRAG provides for the following:

- i. Clearing and settlement principles, e.g.: The Payment System shall specify the time after which a payment order is irrevocable and may no longer be changed (finality) as well as when a payment is settled. It shall settle payments in real time if possible, but at the latest at the end of the value day;
- ii. collateral, e.g.: The Payment System is required to use appropriate measures to cover risks arising from the granting of credit and it shall accept only liquid collateral with low credit and market risks;
- iii. fulfilment of payment obligations, e.g.: The Payment System shall enable the settlement of payments by transferring sight deposits held with a central bank. If this is impossible or impractical, it shall use a means of payment which carries no or only low credit and liquidity risks;
- iv. liquidity requirements; and
- v. capital adequacy requirements for systemically important Payment Systems.

⁽⁹⁵⁾ The SNB may determine specific requirements for systemically important Payment Systems.

k) Transitional Periods (Arts. 159–161 FINFRAG)

⁽⁹⁶⁾ FMI that were already licensed or recognised at the time FINFRAG entered into force (1 January 2016) had to submit a new request for authorisation or recognition within one year. The authorisation or recognition procedure was limited to an assessment of the new requirements. The FMIs were allowed to continue their activity until the decision on their request was issued.

⁽⁹⁷⁾ FMI that needed a licence or recognition under FINFRAG (but did not need one under the previous regime) had to report to FINMA within six months of FINFRAG entering into force. Within one year thereof, they were needed to satisfy FINFRAG requirements and submit an authorisation or recognition request to FINMA. They were allowed to continue their activity until the authorisation or recognition decision was issued.

⁽⁹⁸⁾ In special cases, FINMA could extend the deadlines set out above.

⁽⁹⁹⁾ Special transitional periods applied to foreign participants of Trading Venues (Art. 160 FINFRAG) and interoperability agreements between CCPs (Art. 161 FINFRAG).

2. New Regulation of Derivatives Trading (Arts. 93–119 FINFRAG)

⁽¹⁰⁰⁾ The financial crisis revealed that the lack of transparency in the over-the-counter (OTC) derivatives markets could threaten the stability of the entire financial system. Since then, international efforts have been set in motion, in particular, by the Group of Twenty (G-20) and the Financial Stability Board (FSB) to improve transparency and stability in the OTC derivatives market.

⁽¹⁰¹⁾ In order to safeguard the competitiveness of Switzerland as a financial centre, strengthen financial stability, maintain the ability of Swiss market participants to access foreign markets and to enable Swiss counterparties to take advantage of certain exemptions granted under foreign regulations (in particular, under EMIR / MiFIR and the US Dodd-Frank Act), it was necessary for Switzerland to implement equivalent standards on derivatives trading in parallel with other financial centres.

a) Definition of Derivatives and Derivative Transactions in Scope

- ⁽¹⁰²⁾ OTC derivatives were the trigger for the new regulations. OTC derivatives are (a) traded bilaterally between counterparties (i.e. not over a trading facility), (b) rarely standardised (and hence generally more complex), (c) often not cleared over a CCP and (d) usually less collateralised. It is important to note that FINFRAG also partially subjects non-OTC derivatives (i.e. derivatives that are traded over a trading facility) to its regulations.
- ⁽¹⁰³⁾ FINFRAG defines derivatives as *financial contracts whose value depends on one or several underlying assets (Basiswerte)* and which are not cash transactions (*Kassageschäfte*) (Art. 2 lit. c FINFRAG, Art. 2 paras. 2–4 and Art. 80 FINFRAG).
- ⁽¹⁰⁴⁾ *Exemptions (Art. 94 para. 3 FINFRAG)*. FINFRAG sets forth that it does not consider the following products / transactions as derivatives in terms of the (specific) regulation of derivatives trading, i.e. Art. 93–119 FINFRAG: (a) *Structured products* (such as capital-protected products, capped return, products and certificates), (b) *securities lending transactions*, (c) *derivatives transactions relating to goods that (1) must be physically delivered, (2) cannot be settled in cash at a party's discretion and (3) are not traded on a Trading Venue or an organised trading facility,* (d) derivatives that are issued in certificated form (*Wertpapier*) or as an uncertificated right (*Wertrecht*) and (e) derivatives which are accepted in the form of a deposit (*Einlage*). As *repo transactions* are generally not considered as derivative transactions, they are not explicitly mentioned under the derivatives exemptions.
- ⁽¹⁰⁵⁾ In addition, FINFRAG delegated to FINMA the authority to specify (in FINFRAG-FINMA) the derivatives that are subject to a clearing obligation (*Abrechnungspflicht*) or platform trading obligation (*Plattformhandelspflicht*). As per 1 September 2018, FINMA has declared certain OTC interest derivatives and OTC credit derivatives to be subject to the clearing obligation (see Annex 1 of FINFRAG-FINMA). However, FINMA has not yet determined any derivatives classes to be subject to the platform trading obligation.
- ⁽¹⁰⁶⁾ All derivatives transactions – to the extent they are in scope of the derivatives trading regulation of Arts. 93–119 FINFRAG – must be reported to a Trade Repository (*Meldepflicht*). For OTC derivative transactions that are not cleared over a CCP authorised or recognised by FINMA,

certain risk mitigation obligations (*Risikominderungspflichten*) apply in addition.

⁽¹⁰⁷⁾ *Currency swaps or currency forward transactions* are not subject to the clearing obligation (Art.101 para.3 FINFRAG), the risk mitigation obligations (Art.107 para.2 (b) FINFRAG) or the platform trading obligation (Art. 113 para. 3 FINFRAG). For such purpose, currency swaps or currency forward transactions are deemed transactions for the exchange of currencies, irrespective of the settlement method, as long as an actual delivery is guaranteed (Art. 84 FINFRAG).

b) Counterparties Subject to the New Rules

⁽¹⁰⁸⁾ Subject to certain exceptions (see further below regarding extraterritorial effects), the derivatives trading rules are generally applicable only to so-called financial counterparties and non-financial counterparties (see definitions in N (108) and N (109)) domiciled in Switzerland (Art. 93 para.1 FINFRAG). Foreign branches of Swiss counterparties are treated as a Swiss domiciled counterparty while Swiss branches of foreign counterparties (unless specifically subjected to FINFRAG by the Federal Council due to a lack of equivalent regulation abroad) are generally not subject to FINFRAG.

⁽¹⁰⁹⁾ *Financial counterparties (FCs)* are defined as counterparties professionally involved in financial markets such as banks, securities dealers, (re-) insurance companies, parent companies of a financial or insurance group or conglomerate, fund management companies and asset managers of collective investment schemes, (Swiss) collective investment schemes, as well as certain pension funds (*Vorsorgeeinrichtungen*) and investment foundations (*Anlagestiftungen*) (Art. 93 para. 2 FINFRAG).

⁽¹¹⁰⁾ *Non-financial counterparties (NFCs)* are companies that do not qualify as an FC which, for example, includes regular asset managers and investment advisers (other than under EMIR) (Art. 93 para. 3 FINFRAG).

⁽¹¹¹⁾ FINFRAG provides for two sub-categories, i.e. small NFCs (Art. 98 FINFRAG) and small FCs (Art. 99 FINFRAG).

⁽¹¹²⁾ *Small NFCs* are NFCs that, for a period of 30 consecutive working days, have a rolling average gross position (*Durchschnittsbruttoposition*) in all relevant categories of OTC derivatives that is below:

- i. CHF 1.1 billion for credit derivatives (*Kreditderivate*);
- ii. CHF 1.1 billion for equity derivatives (*Aktienderivate*);
- iii. CHF 3.3 billion for interest derivatives (*Zinsderivate*);

- iv. CHF 3.3 billion for currency derivatives (*Währungsderivate*); and
 - v. CHF 3.3 billion for commodity derivatives (*Rohwarenderivate*).
- (113) Positions for the reduction of risks (hedging) directly relating to the NFC's business or the liquidity or financial management of the NFC or its group companies are disregarded for the calculation of the average gross positions.
- (114) These thresholds are very similar to the ones set by EMIR, whereby the EU has set the thresholds at EUR 1 billion for OTC credit derivative contracts and OTC equity derivative contracts and at EUR 3 billion for OTC interest rate derivative contracts, OTC currency derivative contracts and OTC commodity derivative contracts as well as other OTC derivative contracts. However, in June 2019, the EU introduced a relaxation for the clearing obligation of NFCs in connection with its "EMIR Refit" in the sense that NFCs will only have to clear derivatives of such derivative categories for which they actually exceed the clearing threshold and which are subject to mandatory clearing, whereas, under Swiss law, the clearing obligation applies to all derivative categories if the threshold for only one category is reached or exceeded.
- (115) *Small FCs* are FCs that have a rolling average gross position (*Durchschnittsbruttoposition*) of all relevant outstanding OTC derivatives for the past 30-day period of below CHF 8 billion. In the EU, in connection with the „EMIR Refit“, also a new „FC-“ category has been introduced (in connection with the clearing obligation) which is determined based on thresholds set for various derivatives categories similar to the ones applicable under Swiss law for the categorisation of NFCs and small NFCs (see N (111)). These thresholds are though different from the ones for the categorisation of FCs and small FCs under Swiss law, where the only test is the CHF 8 billion threshold for all OTC derivatives in aggregate. Therefore, the risk that Swiss small FCs will not fall within the category of FC- under EMIR is quite substantial and, *vice versa*, there is a substantial probability that "FCs+" under EMIR may still qualify as small FCs under Swiss law (which though is obviously less problematic).
- (116) *Relevance of other group companies*: If the counterparty is part of a fully consolidated group, all of the intra-group OTC derivatives transactions concluded by the counterparty or by other counterparties shall also be factored into the calculation of the average gross positions.

- ⁽¹¹⁷⁾ *Calculatory conditions:* The following rules apply when calculating the average gross positions of the outstanding OTC derivative contracts:
- i. The *actual exchange rates* shall be used;
 - ii. OTC derivative positions have to be taken into account also when they are *cleared on a voluntary basis*;
 - iii. positions of *Swiss and foreign fully consolidated group companies* have to be taken into account, irrespective of the domicile of the holding company, if such group companies would qualify as FCs or NFCs in Switzerland;
 - iv. *changes to the nominal amount* during the term of the transaction have to be taken into account if they have been pre-agreed at the beginning of the transaction;
 - v. *subsequent transactions* linked to a hedging transaction of a NFC are also considered hedging transactions;
 - vi. *set-off* is permitted for derivative positions that have the same underlying asset, are denominated in the same currency and have the same term; therefore, reference rates of positions with variable interest rates, fixed interest rates and the interest fixing dates must be identical; and
 - vii. *currency swaps and forward transactions*, provided they are settled on a payment versus payment basis (but see Art. 84 FINFRAG that broadens the scope again), must not be taken into account.
- ⁽¹¹⁸⁾ If a small FC / NFC exceeds a relevant threshold, it is deemed no longer a small FC / NFC four months after such threshold has been exceeded.
- ⁽¹¹⁹⁾ The classification of a party is its own obligation and counterparties may – absent clear indications to the contrary – rely on confirmations of a counterparty with regard to its status. Such a declaration is valid with respect to all obligations imposed under the Swiss derivatives trading rules. Counterparties changing their status must inform their counterparties in due time (*fristgerecht*) about such change (Art. 83 para. 2 FINFRAG).
- ⁽¹²⁰⁾ The Swiss Confederation, cantons, municipalities, the SNB and the BIS are not subject to the rules on derivatives trading (Art. 94 para. 1 FINFRAG).
- ⁽¹²¹⁾ *In addition*, the following establishments are not subject to the derivatives trading rules (except for the reporting duty if a derivatives transaction is entered into with such counterparties) (Art. 93 FINFRAG and Art. 79 FINFRAG): (a) multilateral development banks (e.g. the World Bank and

the European Investment Bank), (b) organisations, including social security institutions, belonging to the Swiss Confederation, cantons or municipalities or for which the Swiss Confederation, canton or municipality in question is liable and provided that they are not an FC. Similarly, derivatives transactions with the following counterparties are only subject to the reporting obligation but not the other derivatives trading obligations (Art. 79 FINFRAV): (a) foreign central banks, (b) the European Central Bank (ECB), (c) the European Financial Stability Facility (EFSF), (d) the European Stability Mechanism (ESM), (e) units of foreign states that are responsible for or participate in the governmental debt management and (f) financial institutions that have been established by a central government or a local government to grant promotional funds (*Förderdarlehen*) based on a governmental order and on a non-competitive and non-profit oriented basis.

(122) Derivatives transactions with central banks and units of foreign states that are responsible for or participate in the governmental debt management can be *exempt from the reporting duties* if they grant a reciprocal exemption to Swiss institutions. The FDF publishes a list of so exempt foreign bodies.

(123) The following chart indicates the duties allocated under FINFRAG to the various regulated market participants¹²:

Participants	Financial Counterparty (FC)	Small Financial Counterparty (small FC)	Non-Financial Counterparty (NFC)	Small Non-Financial Counterparty (small NFC)
Obligations				
Clearing	yes	no	yes	no
Reporting	yes	yes	yes	yes
Risk mitigation – operational risk	yes	yes	yes	yes
Risk mitigation – valuation	yes	no	yes	no
Risk mitigation – collateral	yes	yes	yes	no
Platform trading	yes	no	yes	no

¹² FEDERAL DEPARTMENT OF FINANCE, Explanatory Report to the Consultation Draft of FINFRAG dated 29 November 2013, p. 134.

c) Cross-border Transactions

⁽¹²⁴⁾ Like the corresponding US and EU regulations, the Swiss derivatives trading legislation in some points is also addressed to foreign counterparties. For example, the clearing or platform trading obligations will also apply in case of a transaction between a Swiss and a foreign counterparty if the foreign counterparty would be subject to the clearing and platform obligation if it were domiciled in Switzerland (“what if-test”) (Arts. 102 and 114 FINFRAG).

d) Key Obligations under the Derivative Trading Rules

⁽¹²⁵⁾ FINFRAG implements four areas of regulation, deemed to mitigate the risks associated with derivatives trading:

- i. Clearing obligation;
- ii. reporting obligation;
- iii. risk mitigation measures for uncleared derivatives transactions; and
- iv. platform trading obligation.

Clearing Obligation (Arts. 97–103 FINFRAG)

⁽¹²⁶⁾ The primary risk mitigating measure will be the obligation that OTC derivatives transactions must be cleared through a FINMA-authorized or recognised CCP. FINMA may allow clearing through a foreign non-recognised CCP in certain cases, provided this does not adversely affect the protective purpose of FINFRAG.

⁽¹²⁷⁾ The types of OTC derivatives subject to the clearing obligation are determined and published by FINMA. As per 1 September 2018, FINMA has declared certain OTC interest derivatives and OTC credit derivatives to be subject to the clearing obligation (see Annex 1 of FINFRAG-FINMA).

⁽¹²⁸⁾ Transactions involving small FCs / NFCs or transactions among them are generally exempt from the clearing obligation. Likewise, the Swiss Federation, cantons, municipalities, the SNB, the BIS, multilateral development banks and other organisations, including social security institutions, belonging to the Swiss Confederation, cantons or municipalities or for which the Swiss Confederation, canton or municipality in question is liable and which are not an FC, are exempt from the clearing obligation. Furthermore, transactions between parties that are (a) fully consolidated group members, and (b) subject to appropriate centralised risk evaluation, measurement and control procedures are also exempt from the clearing obligation, provided the transactions were not entered into to circumvent the clearing obligation.

If one of the counterparties to a derivatives transaction is a covered bond issuer or a legal entity of a cover pool for covered bonds, derivatives transactions do not need to be cleared if certain conditions are being met (Art. 86 para. 3 FINFRAV).

- (129) Clearing in connection with derivatives is a process whereby the positions of the counterparties are established through the calculation of the net positions by netting and the posting of collateral (margins) to secure the net obligations. A CCP is an organisation which puts itself in between the two counterparties, on the one side as a buyer and on the other side as a seller. A CCP must be able to model, measure and control the risks of a derivatives transaction, which is only feasible with standardised derivatives. In other words, only standardised derivatives are suitable for clearing through a CCP while non-standardised derivatives will continue to be bilaterally cleared. Since a significant portion of derivatives transactions do not meet the criteria for standardisation, the clearing obligation will not apply to them.
- (130) The requirements for becoming a direct member of a CCP (a clearing member) are high. Therefore, smaller FCs and most of the NFCs will clear their transactions indirectly through a clearing member (indirect participation).
- (131) Currently, there is only one CCP domiciled in Switzerland, the SIX x-clear AG, and the market is dominated by foreign CCPs such as LCH Limited or the Eurex Clearing AG, which are classified as systemically important by the SNB¹³. Accordingly, various foreign CCPs have obtained recognition by FINMA and a respective list, which is updated regularly, can be found on the FINMA website.
- (132) For cross-border transactions, the clearing obligation will also apply in case the foreign counterparty would be subject to a clearing obligation if domiciled in Switzerland (“what if-test”).
- (133) Clearing can also be effected pursuant to the rules of another jurisdiction if FINMA has recognised these foreign rules as being equivalent and the relevant (foreign) CCP that has been retained for such purpose is FINMA-recognised. FINMA, in its FINMA Guidance 01/2016 provisionally recognised the following regulations of the EU as equivalent: clearing of

¹³ SWISS NATIONAL BANK, Annual Report 2018, p. 98.

OTC derivatives transactions through a central counterparty (Art. 4 EMIR), reporting of derivatives transactions to a trade repository (Art. 9 EMIR) and risk mitigation techniques for OTC derivatives transactions (Art. 11 EMIR). In anticipation of Brexit and that the United Kingdom will, on the basis of the European Union (Withdrawal) Act 2018 in conjunction with the Over the Counter Derivatives, Central Counterparties and Trade Repositories Regulations 2018 (the “EMIR transposition act”), transpose EMIR into domestic UK law at the time of Brexit, FINMA in its FINMA Guidance 01/2019 provisionally recognised also the derivatives regulations of the United Kingdom with regard to the clearing obligation (Art. 14 EMIR transposition act), reporting obligation (Art. 19 EMIR transposition act) and risk mitigation obligation (Art. 21 EMIR transposition act) as equivalent to the relevant Swiss legislation.

- ⁽¹³⁴⁾ In its FINMA Guidance 03/2019, FINMA also recognised the law of the United States (i.e. part 23 of the CFTC Regulations) with regard to risk mitigation obligations concerning the timely confirmation, portfolio reconciliation, resolution of disputes, portfolio compression, valuation and initial and variation margin for transactions in non-centrally cleared OTC derivatives that are regulated and supervised by the CFTC as equivalent to the relevant Swiss rules.
- ⁽¹³⁵⁾ The EU and US regulations have similar concepts in place (i.e. “equivalence” and “substituted compliance”).

Risk Mitigation Measures for Uncleared Derivatives Transactions (Arts. 107–111 FINFRAG)

- ⁽¹³⁶⁾ Derivatives transactions not cleared through a FINMA-authorized or recognised CCP are subject to risk mitigating obligations consisting of (a) operational and counterparty risk mitigation measures (i.e. timely confirmation of terms of derivatives transaction, portfolio reconciliation procedures, dispute resolution procedures and regular portfolio compression), (b) the daily valuation of the derivative at market prices and (c) the exchange of appropriate collateral to mitigate the counterparty risk.
- ⁽¹³⁷⁾ Transactions with counterparties generally exempt from the derivatives trading rules (i.e. the Swiss Federation, cantons, municipalities, the SNB, the BIS, multilateral development banks and certain social insurance providers) are also not subject to the risk mitigating obligations because they do not create risks that need to be specifically mitigated.

- (138) Except for transactions with small NFCs, the counterparties to non-cleared derivatives transactions are required to *exchange adequate collateral (margins)* and such collateral must be segregated from other assets in order to allow for a swift and uncomplicated realisation of the collateral prior to the official liquidation of the counterparty. The collateral consists of an *“initial margin”* (covering the counterparty default risk and market fluctuations thereafter for the period until the replacement transaction is entered into) and a *“variation margin”* that shall protect the respective counterparties from market price fluctuations in the underlying assets after the trade has been entered into.
- (139) The requirement to post an *initial margin* applies only to counterparties that have, at the level of a financial, insurance or other group, an average gross position (*Durchschnittsbruttoposition*) of non-cleared OTC derivatives (including currency swaps and currency forwards) as per the end of March, April and May of each year in excess of CHF 8 billion. The collateral posting obligation then applies to such counterparties as from 1 September of such year until the end of August of the next year. See below for exemptions during transitional periods.
- (140) The requirement for the posting of an *initial or variation margin* can be waived if the collateral to be exchanged is less than CHF 500,000 or if a small NFC is involved in the transaction (as described above, see N (137)).
- (141) The requirement for the posting of an *initial margin* can be waived if such margin would have to be provided for the currency components of currency derivatives where the nominal amount and interest in one currency are exchanged against the nominal amount and interest in another currency at a predefined time and according to a predefined method.
- (142) If one of the counterparties to a derivatives transaction is a covered bond issuer or a legal entity of a cover pool for covered bonds, that counterparty may, subject to certain conditions being met, agree with its counterparty that no posting of initial margins will be required or the covered bond issuer or the legal entity of a cover pool for covered bonds will pay no variation margin, and the counterparty will pay a variation margin in cash.
- (143) *Initial margin reduction:* The counterparties to a derivatives transaction that requires the exchange of initial margin may agree to reduce the

initial margin by no more than CHF 50 million. The amount of the initial margin of a counterparty that belongs to a financial or insurance group or another group is determined by taking into account all of the group companies. In the case of intra-group transactions, the initial margin may be reduced by no more than CHF 10 million.

⁽¹⁴⁴⁾ The duty to exchange collateral in the case of *cross-border transactions* applies also, subject to certain exemptions (e.g. if the counterparty is subject to an equivalent requirement in its jurisdiction, if the possibility of netting is being ensured in such jurisdiction or there are certain legal obstacles regarding the separation of collateral and thresholds in the jurisdiction of such counterparty) if the foreign counterparty of the Swiss counterparty which has the duty to exchange collateral would also be subject to this duty if it had its registered office in Switzerland. Although *foreign counterparties* cannot be directly obliged to post collateral to a Swiss counterparty, it is the Swiss counterparty that will need to ensure that it receives adequate collateral, otherwise it is not allowed to conclude the transaction.

⁽¹⁴⁵⁾ *Measures mitigating operational risk* include the timely confirmation of the terms of the derivatives transaction, portfolio reconciliation procedures, dispute resolution procedures and regular portfolio compression, the details of which are described in FINFRAV.

⁽¹⁴⁶⁾ Derivatives transactions must further be *valued* daily on the basis of actual prices. If market conditions do not permit a valuation at market, a valuation based on appropriate models recognised in practice is permitted, subject to the conditions described in FINFRAV. Besides the generally exempt counterparties, transactions with small FCs and small NFCs are also exempt from the daily valuation obligation.

Reporting Obligation (Arts. 104–106 FINFRAG)

⁽¹⁴⁷⁾ The key terms of derivatives transactions (except for transactions between small NFCs) must be reported by a counterparty and, if cleared, by the CCP to a FINMA authorised or recognised Trade Repository.

⁽¹⁴⁸⁾ The reporting obligation is being allocated among the counterparties as follows:

- i. In the case of transactions between a FC and a NFC: the FC;
- ii. in the case of transactions between two FCs: (a) the FC which is not small or (b) the selling counterparty in the case of a transaction

- between two (non-small) FCs or between two small FCs whereby it shall be determined in accordance with market practice and recognised international standards who the selling party is; or
- iii. the counterparty which has its registered office in Switzerland if the foreign counterparty does not report.
- (149) In case of a transaction between NFCs, paragraph (ii) and (iii) above apply by analogy.
- (150) If transactions are entered into with counterparties that are exempt from the derivatives trading regulations, the non-exempt counterparty must report.
- (151) If the transaction is cleared centrally, the report has to be submitted by the CCP. If a recognised foreign CCP does not submit reports, the reporting duty shall remain with the counterparties; the counterparty closer to the CCP in the CCP-participants chain shall be obliged to make the reporting.
- (152) The reporting obligation can be delegated to third parties.
- (153) Counterparties and CCPs will need to ensure that the details of any derivative transaction they have concluded and any amendment or termination of the transaction are reported to a Trade Repository. The details will need to be reported no later than the working day following the conclusion, amendment or termination of the transaction.
- (154) FINFRAG sets out the minimum content of the report while Annex 2 of FINFRAV sets out the content of the report in more detail. Given the aim to achieve greater transparency, efficiency, integrity and risk-recognition by implementing the reporting obligation, it is essential that the data delivered to the Trade Repositories globally can be effectively and efficiently shared, assembled and evaluated. This requires that the parties involved in the transaction and the type of the transaction are clearly identifiable and that the format is globally agreed upon and used by all Trade Repositories.
- (155) The Regulatory Oversight Committee (ROC), a stand-alone committee established following the recommendations of the FSB and subsequent endorsement by the G-20, oversees the Global Legal Entity Identifier System (GLEIS) pursuant to which a standardised identification system is being globally implemented by means of the so-called *legal entity*

identifier (LEI), a 20-digit, alpha-numeric code that connects to key reference information and enables the clear and unique identification of companies participating in global financial markets.

- (156) As part of the ongoing effort to improve the OTC derivatives infrastructure, the International Swaps and Derivatives Association (ISDA) has also developed a plan to define a *standardised taxonomy* (classification) for OTC derivatives and develop *unique product identifiers* (UPIs) with the aim of supporting regulatory mandates to increase transparency through public and regulatory reporting. If no UPI is available, the *ISIN* or, if no ISIN is available, the *alternative instrument identifier* (All) provided by ESMA will be used. Finally, if no All is available, the *exchange product code* allocated by the Trading Venue shall be used for the identification of the product.
- (157) The reporting of information about derivatives transactions by Swiss parties to foreign Trade Repositories raises data confidentiality and professional secrecy issues. FINFRAG states that the reporting of such data to foreign Trade Repositories is generally permitted so that no permission pursuant to Art. 271 PC (regarding unlawful activities on behalf of a foreign state) is necessary for each individual case. However, a consent/waiver must be obtained if the data delivered abroad contains personal data.

Platform Trading Obligation (Arts. 112–115 FINFRAG)

- (158) FINFRAG sets forth the obligation that certain standardised derivatives, to be determined by FINMA, have to be traded via a FINMA authorised or recognised Trading Venue or a (FINMA authorised or recognised) operator of an OTF. This is called the platform trading obligation. However, so far, no derivatives have been subjected to the platform trading obligation and hence this obligation is in practice not yet relevant. The platform trading obligation shall enhance pre- and post-trade transparency. When determining the derivatives (categories) subject to the platform trading obligation, FINMA will consider the derivatives' degree of legal and operational standardisation, liquidity, trading volumes, availability of pricing information in the given category and the counterparty risk associated with them. Also, FINMA will take into account recognised international standards and foreign legal developments. It may phase in the introduction of the duty to trade via a Trading Venue or a trading facility, depending on the relevant derivatives category. It is expected that FINMA will make such

determination as regards the scope of derivatives subject to the platform trading obligation and timing in line with the EU market. Transactions with or among small FCs/NFCs and, if certain criteria are met, group internal transactions will be exempt from such obligation.

e) Compliance Monitoring and Sanctions

⁽¹⁵⁹⁾ Compliance with the derivatives trading rules will be examined by the auditor of the respective counterparty. In case of regulated financial institutions, auditing conforms to the relevant financial market laws (Art. 116 FINFRAG).

⁽¹⁶⁰⁾ Violations of the rules on derivatives trading can be sanctioned by a penalty of up to CHF 100,000 (in case of an intentional breach) (Art. 150 FINFRAG). Negligent violations are not sanctioned.

f) Transitional Periods (Art. 162 FINFRAG, Arts. 85, 129–133 FINFRAV)

⁽¹⁶¹⁾ Clearing *obligation* (Art. 85 FINFRAV): The obligation to clear derivatives trades through an authorised or recognised CCP starts, counted from the date when FINMA publishes the relevant derivatives category:

- i. After 6 months for derivatives transactions that are newly concluded between parties that are participants of an authorised or recognised CCP;
- ii. after 12 months for derivatives transactions that:
 - (1) are newly concluded between a participant of an authorised or recognised CCP and other FCs that are not small, or
 - (2) are newly concluded between other FCs that are not small;
- iii. after 18 months for all other derivatives transactions that are newly concluded.

⁽¹⁶²⁾ For certain occupational pension schemes and investment foundations, the clearing obligation did not apply until 31 August 2019 to derivatives transactions that these institutions entered into with a view to reducing risk in accordance with Art. 87 FINFRAV.

⁽¹⁶³⁾ *Reporting obligations* (Art. 130 FINFRAV): The following transitional periods for the reporting obligation of derivatives transactions towards a Trade Repository authorised or recognised by FINMA generally commenced on 1 April 2017, i.e. the date when FINMA authorised / recognised the first two Trade Repositories:

- i. Within 6 months for open derivatives transactions where the party obliged to report is not a small FC or a CCP;
 - ii. within 9 months for open derivatives transactions where the party obliged to report is a small FC or a NFC which is not small; and
 - iii. from 1 January 2024: for open derivatives transactions in all other cases.
- (164) For transactions concluded over a Trading Venue or an OTF, the above deadlines are extended by an additional period of 6 months.
- (165) In extraordinary cases, FINMA can extend the transitional periods. FINMA made use of such right by way of its Guidance 05/2017 dated 18 October 2017 whereby the transitional period for reporting by small NFCs was extended from 1 April 2018 to 1 January 2019 before the Swiss Federal Council formally amended Art. 130 para. 1 lit. (c) FINFRAV on 14 September 2018 so that the reporting obligation for small NFCs was even further extended to 1 January 2024 together with an announcement that, due to international developments, the FDF will start a review of FINFRAG in 2019 for a potential need of amendments.
- (166) *Risk Mitigation Obligations:* For the operational and counterparty risk mitigation measures (i. e. timely confirmation of terms of derivatives transaction, portfolio reconciliation procedures, dispute resolution procedures and regular portfolio compression), the following effective date mechanism applies after FINFRAV became effective on 1 January 2016:
- i. After 12 months, for outstanding derivatives transactions among counterparties that are not small as well as for outstanding derivatives transactions with a small FC; and
 - ii. after 18 months, for all other then outstanding derivatives transactions.
- (167) The obligation to make a *daily valuation of the derivatives at market prices* has become effective, for all then outstanding derivatives transactions, 12 months after FINFRAV became effective (i. e. 1 January 2017).
- (168) The obligation to *exchange appropriate collateral* to mitigate the counterparty risk will only apply to transactions with counterparties if and when such counterparties have become subject to the following obligations:

- i. The obligation to exchange *variation margins (Nachschusszahlungen)* will become effective:
 - (A) As from 1 September 2016: for counterparties whose aggregate month-end average gross position (*aggregierte Monatsend-Durchschnittsbruttoposition*) of non-cleared OTC derivatives at the level of a financial or insurance group or another group (*Konzern*) for March, April and Mai 2016 is greater than CHF 3,000 billion; and
 - (B) as from 1 September 2017 for all other counterparties,
- ii. the obligation to exchange initial margin (*Ersteinschusszahlungen*) applies to all counterparties whose aggregate month-end average gross position (*aggregierte Monatsend-Durchschnittsbruttoposition*) of non-cleared OTC derivatives at the level of a financial or insurance group or another group (*Konzern*):
 - (A) For March, April and May 2016 is greater than CHF 3,000 billion: as from 1 September 2016;
 - (B) for March, April and May 2017 is greater than CHF 2,250 billion: as from 1 September 2017;
 - (C) for March, April and May 2018 is greater than CHF 1,500 billion: as from 1 September 2018;
 - (D) for March, April and May 2019 is greater than CHF 750 billion: as from 1 September 2019;
 - (E) for March, April and May 2020 is greater than CHF 50 billion: as from 1 September 2020; and
 - (F) for March, April and May 2021 is greater than CHF 8 billion: as from 1 September 2021.

⁽¹⁶⁹⁾ For non-centrally cleared OTC derivatives transactions that are options on individual equities, index options or similar equity derivatives such as derivatives on baskets of equities, the duty to exchange collateral applies only as from 4 January 2021.

⁽¹⁷⁰⁾ FINMA may extend the above-outlined transitional periods in order to align them with recognised international standards and foreign legal developments.

3. Insolvency Measures / System Protection (Arts. 88–92 FINFRAG)

⁽¹⁷¹⁾ FINFRAG subjects not only regulated FMI to *FINFRAG insolvency regime* but also *group parent companies* of a financial group which have their registered office in Switzerland or group companies which have their

registered office in Switzerland and perform significant functions for activities which require authorisation (*significant group companies*). Group companies are considered to provide significant functions for activities which require authorisation if they are necessary for the continuation of important business processes, namely in the area of liquidity management, treasury, risk management, core data administration and accounting, personnel, information technology, trade and settlement as well as legal and compliance. FINMA will identify significant group companies and keeps a list of said companies which is publicly accessible on its website. Similar concepts had been introduced in the Swiss banking and insurance laws.

(172) FINFRAG insolvency regime consists of the following:

- i. The *insolvency rules of the BA* relating to insolvency measures (*Massnahmen bei Insolvenzgefahr*) (i.e. securing measures, segregation of assets into good and bad bank, bail-in of debt, protection of netting provisions, postponement of termination of contracts) and bankruptcy liquidation proceedings (other than the rules on privileged deposits and certain debt enforcement proceedings against Swiss business establishments of foreign financial market infrastructures) are stated to apply by analogy to financial market infrastructures unless FINFRAG contains provisions to the contrary;
- ii. *rules regarding the protection of the financial system* whereby, *inter alia*, (a) FINMA is given powers to inform central counterparties, central securities depositories and Payment Systems in Switzerland and abroad of the insolvency measures it intends to take against a participant and which limit the participant's power of disposal and (b) rules are determined as to when orders given to a central counterparty, central securities depository or Payment System by a participant shall be legally enforceable and binding despite any insolvency measures against such FMIs;
- iii. rules on the *impact of insolvency measures* that are ordered against a participant of a central counterparty with respect to previously concluded agreements between the central counterparty and the participant regarding (a) the offsetting of receivables, including the agreed method and valuation, (b) the direct realisation of collateral in the form of securities or other financial instruments whose value can be objectively determined and (c) the transfer of receivables and liabilities, collateral in the form of securities or other financial instruments whose value can be objectively determined;

- iv. rules on the *impact of insolvency measures* that are ordered against an indirect participant of central counterparty or an indirect participant of another indirect participant which shall also have no effect on previously concluded agreements between the participant and the indirect participant covering the matters set out in (iii) above; and
- v. rules on FINMA's right to *postpone the termination of contracts* and the exercise of rights to terminate them; in this context, it should be noted that financial market infrastructures are required to ensure that new agreements or amendments to existing agreements which are subject to foreign law or envisage a foreign jurisdiction contain a clause whereby the counterparty contractually recognises such right of FINMA.

B. Key Differences to EU Regulations

1. Financial Market Infrastructures

⁽¹⁷³⁾ While, in the EU, there is a trend to limit self-regulation of Trading Venues, the Swiss rules adhere to the concept of self-regulation. This different approach results in a number of deviations from the MiFID II / MiFIR regulation. For example, under FINFRAG the compliance with listing requirements regarding securities is determined by the Trading Venue, whereas in the EU the relevant supervisory authority is the relevant competent authority.

⁽¹⁷⁴⁾ Under MiFID II, the operator of an OTF is not allowed to trade on its platform for its own account, whereas there is no such prohibition in FINFRAG. However, the operator of a Swiss OTF must ensure that client interests are comprehensively protected when conducting proprietary transactions on the Swiss OTF operated by him.

⁽¹⁷⁵⁾ As opposed to the CSDR, FINFRAG does not require the immobilisation or dematerialisation of securities. A Swiss CSD, however, will be required to enable participants to hold their securities in form of book-entry securities within the meaning of FISA.

⁽¹⁷⁶⁾ Unlike the CSDR, which imposes an implementation period of two days on CSDs for the settlement of transactions in securities, FINFRAG will provide that the CSD itself determines the settlement period for its

system (however, FINFRAG requires CSDs to take into consideration international practices and the needs of its participants).

- (177) Unlike the CSDR, FINFRAG also regulates link arrangements between CSDs in the context of which a CSD has an account with a depository that does not qualify as a CSD.

2. Derivatives Trading

- (178) In order to ensure the access of Swiss participants to the EU market and in order for Swiss participants to be eligible for EU / US exemptions, FINFRAG has been drafted with a particular focus on ensuring compliance with the EU / US regulations. However, there are certain deviations.
- (179) Under EMIR, the clearing, risk mitigation and platform trading obligations also apply (a) to contracts between non-EU entities having a “direct, substantial and foreseeable effect” within the EU or (b) where necessary to prevent the evasion of EMIR. The Swiss regulations do not contain analogous rules.
- (180) FINFRAG establishes the concept of “small FCs”. While this concept was originally not included under EMIR (but was included in June 2019 in connection with the “EMIR Refit” for purposes of exempting small FCs from the clearing obligation), it is also reflected under the Dodd-Frank Act in the US. In addition, under FINFRAG, regular asset managers and investment advisers will qualify as NFCs, whereas under EMIR they qualify as FCs.
- (181) The intragroup exemption for the clearing obligation under FINFRAG will also apply in cross-border situations, whereas, under EMIR, the exemption is available only in case the relevant jurisdiction of the other group member has an equivalent derivatives regulation and the competent EU regulator has approved the exemption. In Switzerland, compliance with such exemptions will not be controlled by the regulator but rather by the auditor of the Swiss participant.
- (182) The Swiss reporting obligations will not require the disclosure of the beneficial owner, whereas such disclosure is required under EMIR.
- (183) Discrepancies also exist between the US (Dodd-Frank Act) and the EU (EMIR) regulations and the US and the EU are currently engaging in a

dialogue to overcome these discrepancies. International harmonisation efforts (involving Switzerland) are also under way and are being published, *inter alios*, by the OTC Derivatives Regulators Group (ODRG) on a continuing basis, for example in the latest report prepared in November 2015 under the title “Report of the OTC Derivatives Regulators Group (ODRG) to G20 Leaders on Cross-Border Implementation Issues”.

C. What Swiss and Foreign Market Participants Need to be Aware of

1. Financial Market Infrastructures

⁽¹⁸⁴⁾ Under the old regime, Swiss Trading Venues were divided into “Stock Exchanges” and the rather vague category of “facilities similar to Stock Exchanges” (*i.e.* exchange-like facilities). Institutions qualifying as exchange-like facilities were only required to obtain a licence if FINMA determined that this was required. FINFRAG, in accordance with the EU regulation, introduced a new concept consisting of three categories (Stock Exchanges, MTFs and OTFs), replacing the catch-all category of exchange-like facilities by MTFs and OTFs. Swiss Trading Venues, especially exchange-like facilities, therefore, had to closely examine the scope of the new licensing requirements.

⁽¹⁸⁵⁾ While Swiss exchanges, MTFs and OTFs are always subject to regulation, foreign exchanges and MTFs are only subject to a FINMA recognition requirement if they grant direct access to their facilities to Swiss participants. OTFs operated outside of Switzerland (and their operators) are not subject to any Swiss licensing or recognition requirements.

⁽¹⁸⁶⁾ FINFRAG provides for tailor-made licences for CCPs, CSDs, Trade Repositories and Payment Systems for which new requirements apply.

⁽¹⁸⁷⁾ Participants admitted to a Trading Venue are subject to record-keeping and reporting duties and foreign participants must obtain a FINMA licence before they are allowed to become a participant in a Swiss Trading Venue.

2. Derivatives Trading

- ⁽¹⁸⁸⁾ Both FCs and NFCs are subject to the new rules.
- ⁽¹⁸⁹⁾ The new rules, to some extent, also apply to foreign counterparties. In addition, Swiss counterparties have to ensure that foreign counterparties meet certain criteria.
- ⁽¹⁹⁰⁾ The trading in derivatives has become more complex and expensive.
- ⁽¹⁹¹⁾ Compliance with the derivatives trading obligations requires (significant) administrative and operational adjustments and their implementation takes time.
- ⁽¹⁹²⁾ Together with the Swiss regulations, corresponding EU, US and other comparable foreign regulations must be analysed given their extraterritorial effect and applicability in Switzerland. There are numerous transitional periods to be taken into account before the respective obligations must be complied with but many obligations have already become effective. These transitional periods depend on FINMA publishing the relevant derivatives categories, the qualification of the counterparty as a (small) FC or NFC or even the requirement for the Federal Council to formally enact certain provisions.

IV. Institutions – FINIG

⁽¹⁹³⁾ The Financial Institutions Act (FINIG) is one of the new pieces of legislation that has emerged as a result of the authorities' endeavours towards achieving cross-sectorial regulation. All Financial Institutions (as defined in N (198)) providing asset management services are now regulated in a uniform act (with the exception of banks which are still regulated in the Banking Act (BA) and not subject to this Chapter). While the provisions concerning asset managers of collective investment schemes, fund management companies and securities houses have basically been transferred from the Collective Investment Schemes Act (CISA), respectively, the Stock Exchange Act (SESTA) to FINIG in an essentially unchanged form, FINIG, as one of its main new features, also regulates asset managers of occupational benefits schemes, (independent) asset managers and trustees (including their prudential supervision). In addition, the Financial Institutions Ordinance (FINIV) specifies the authorisation requirements and other regulatory duties for Financial Institutions. The requirements for managers of individual assets and trustees, who are now subject to prudential supervision, are less stringent than those for managers of collective assets, fund management companies and securities houses. The date of the entry into force of FINIG / FINIV is 1 January 2020.

A. Overview

1. **Aim and Scope of the New Law (Art. 1 FINIG, Art. 1 FINIV)**

⁽¹⁹⁴⁾ The new FINIG introduces a differentiated supervisory and regulatory regime for Financial Institutions that provide certain financial services (especially, asset management) to third parties. It is a piece of framework legislation that governs the licensing requirements and further organisational conditions for Financial Institutions. The aim of FINIG is to (a) enhance the protection of investors and clients of Financial Institutions and (b) ensure the functionality of the financial market (Art. 1 para. 2 FINIG). Furthermore, FINIG shall provide for a harmonised, cross-sectorial regulation in order to "create a level playing field for the

supervised institutions”¹⁴. A particular motive for the introduction of FINIG was to increase the attractiveness of Switzerland as a financial centre.

- (195) The following aspects relevant to Financial Institutions are regulated under FINIG:
- i. Organisation of Financial Institutions;
 - ii. licensing requirements;
 - iii. regulatory duties of Financial Institutions;
 - iv. supervision of Financial Institutions;
 - v. foreign Financial Institutions operating in Switzerland;
 - vi. insolvency measures; and
 - vii. criminal sanctions.
- (196) Before the introduction of FINIG, not all Financial Institutions were regulated or subject to prudential supervision. Now, all asset managers are subject to licensing duties and prudential supervision (Art. 5 para. 1 and Art. 58 FINIG). This expansion of the scope of the regulation has a direct impact on regular asset managers (previously only subject to the AMLA), asset managers of occupational benefits schemes, trustees and precious metal traders¹⁵.
- (197) The term „regular asset manager“ used herein serves to provide for a clear distinction to the next higher regulatory (licensing) status, namely the status as manager of collective assets (FINIG itself simply uses the term „asset manager“). Under the previous regime, these newly regulated regular asset managers were labelled as „independent“ or „external“ asset managers. These labels indicated the independence of these asset managers from the (regulated) banks and client dealers (Art. 3 para. 5 SESTO) where the respective client assets they manage are deposited. The term, however, also comprises managers of collective assets that fall under the *de minimis* exemption (cf. N (229)).
- (198) Precious metal traders that professionally trade in precious metals themselves or through a group company will not be deemed Financial Institutions for the purposes of FINIG. Nevertheless, they are subject to a licensing requirement and prudential supervision by a supervisory organisation. The licensing requirements of FINIG apply *mutatis mutandis*

¹⁴ FEDERAL COUNCIL, Message FIDLEG / FINIG, BBI 2015, p. 8926.

¹⁵ Cf. FN 10 for a more precise definition of the term “precious metal traders”.

by way of a reference contained in Art. 42^{bis} para. 3 of the PMCA (as amended by FINIG).

2. Financial Institutions (Art. 2 FINIG, Art. 2 FINIV)

⁽¹⁹⁹⁾ FINIG applies to the following financial services providers (collectively, the Financial Institutions), irrespective of their legal form, operating in or from Switzerland:

- i. Regular asset managers;
- ii. trustees;
- iii. managers of collective assets (asset managers of collective investment schemes and asset managers of Swiss occupational benefits schemes);
- iv. fund management companies; and
- v. securities houses.

⁽²⁰⁰⁾ Art. 2 para. 2 FINIG contains a list of exemptions from the scope of application of FINIG. FINIG does not apply to certain closely affiliated persons providing services to (single) family offices (Art. 4 para. 1, lit. a FINIV), persons managing assets in the framework of employee participation plans (Art. 5, lit. b FINIV), lawyers, notaries and their assistants (lit. c), persons managing assets on the basis of a mandate regulated by law (Art. 6, lit. d. FINIV), the SNB and the BIS (lit. e), occupational benefit schemes and other institutions whose purpose is to serve occupational benefit schemes (including investment foundations¹⁶) (called “occupational benefit schemes” in FINIG¹⁷); (lit. f), social security institutions and compensation funds (lit. g), insurance companies in the sense of the ISA (lit. h), public insurance institutions in terms of the BVG (lit. i), and banks in the sense of the BA (lit. j).

⁽²⁰¹⁾ Besides, FINMA may fully or partially exempt managers of collective assets from FINIG / FINIV regulations where there are legitimate grounds for doing so (Art. 7 FINIV), if:

- i. the protective purpose of FINIG is not impaired; and
- ii. the management of collective assets has been delegated to them solely by the following persons:
 1. authorised parties in accordance with Art. 2 para. 1 lit. c and lit. d as well as para. 2 lit. f–i FINIG;

¹⁶ FEDERAL COUNCIL, Message FIDLEG / FINIG, BBI 2015, p. 9019.

2. authorised parties in accordance with Art.13 para.2 lit.b–d CISA; or
3. foreign companies which – with regard to organisation and investor rights – are subject to rules that are equivalent to the provisions of FINIG and CISA.

3. Adaptation of Previous Legislation

- (202) Provisions concerning Financial Institutions that were already subject to prudential supervision under previous legislation remained basically unchanged and were incorporated into FINIG (with the exception of the relevant provisions of the BA). However, such provisions have been revised and enhanced in order to eliminate existing deficiencies due to the age of the provisions.
- (203) Against this background, the necessary adaptation required the review of the regulations concerning asset managers of collective investment schemes (to be re-classified as managers of collective assets), fund management companies and securities dealers (re-classified as securities houses), formerly regulated under CISA and SESTA, respectively.
- (204) The transfer of regulations regarding fund management companies into FINIG has been justified on the basis that such institutions conduct a qualified form of asset management. Despite the transfer of certain regulations into FINIG, the product specific regulations of CISA will continue to apply.
- (205) The majority of SESTA was transferred into FINIG, in particular, the provisions concerning securities dealers. The term “securities dealer” used under the SESTA has been replaced by the term “securities house” under FINIG.
- (206) The SESTA was repealed in its entirety since the provisions contained therein have been included in FINIG (Art.73 FINIG in connection with Section I of the Annex to FINIG, Art. 91 FINIV).
- (207) While the preliminary draft envisaged the application of FINIG to banks, such proposal was abandoned during the consultation process. As a consequence, banks continue to be subject to the provisions of the BA. The latter was, however, revised in order to ensure consistency between FINIG and the BA.

⁽²⁰⁸⁾ Since the rules governing asset managers of collective investment schemes and fund management companies were transferred from CISA to FINIG, the scope of CISA is now limited to the regulation of collective investment schemes on a product level.

B. Selected Features of the New Law

1. Harmonised Supervision of All Providers of Asset Management Services (Art. 61 FINIG, Arts. 83 et seq. FINIV)

⁽²⁰⁹⁾ Under the old legislation, not all Financial Institutions were prudentially supervised. In particular, regular asset managers, except for asset managers of collective investment schemes, could operate without a regulatory licence from the authorities¹⁷. This meant that their operations were not subject to any prudential supervision and no regulatory rules of conduct were imposed. The new integrated supervisory regime, which imposes a comparable regulation and supervision of all providers of asset management services for third parties, is the core aspect which has been established by FINIG.

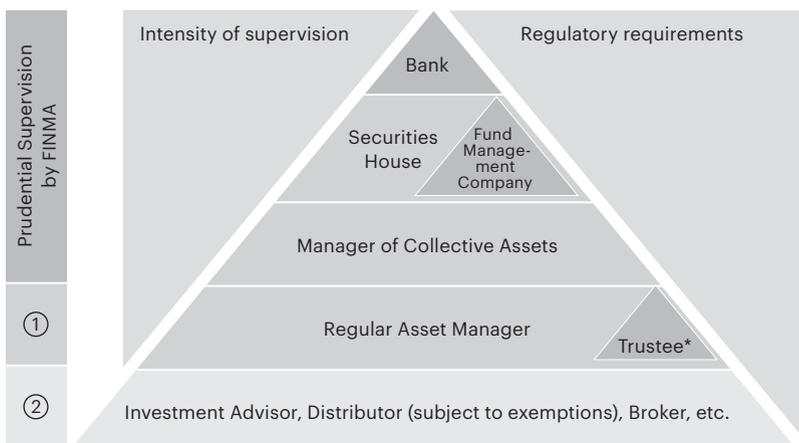
2. Licensing Provisions (Arts. 5–7 FINIG, Art. 9 FINIV)

⁽²¹⁰⁾ Financial Institutions require a licence from the competent supervisory authority (i. e. FINMA or, in case of regular asset managers and trustees, the supervisory organisation according to Art. 43a para. 1 FINMAG) and may not be registered in the commercial register until such licence has been granted (Art. 5 paras. 1 and 2 FINIG). FINIV specifies which information and documents are to be filed with FINMA (Art. 9 para. 1 FINIV). Financial Institutions already in possession of a licence according to Art. 1 para. 1 FINMAG at the time FINIG enters into force do not require a new licence; however, they must comply with the requirements of the new legislation within one year after its entry into force (Art. 74 para. 1 FINIG).

¹⁷ However, such regular asset managers are subject to licensing under the AMLA or must become a member of a recognised anti-money laundering SRO. FINMA's supervision of regular asset managers is limited solely to ensuring compliance with the due diligence requirements set out in the AMLA.

(211) FINIG further provides for a licensing cascade (with a similar pattern as previously set out in Art.13 para.3 CISA and Art.8 of the Collective Investment Schemes Ordinance (CISO), i.e. the higher licence types will also comprise lower licence types so that institutions will not necessarily need multiple licences). A licence to operate as a bank as per the BA does also include the authorisation to operate as a securities house, manager of collective assets, regular asset manager and trustee (Art. 6 para.1 FINIG). Likewise, a licence to operate as a securities house includes authorisation to operate as a manager of collective assets, regular asset manager and trustee (Art. 6 para.2 FINIG). A licence to operate as a fund management company also comprises the ability to operate as a manager of collective assets and regular asset manager (Art.6 para.3 FINIG). Finally, a licence to operate as a manager of collective assets encompasses the authorisation to operate as a regular asset manager (Art. 6 para. 4 FINIG).

(212) The following chart illustrates the above described cascade as well as the new supervisory architecture¹⁸:



① Prudential supervision by semi-public supervisory authority

② Code of conduct rules enforced by civil and criminal courts

*While a license to operate as a Securities House also includes the authorization to operate as a Trustee, the same does not apply to a license to operate as a Manager of Collective Assets or the ability to operate as a Regular Asset Manager.

¹⁸ The chart is inspired by and a free translation of a similar chart contained in: FEDERAL COUNCIL, Raw Material to the Message on the Financial Services Act and on the Financial Institutions Act, 4 November 2015, <<http://www.news.admin.ch/NSBSubscriber/message/attachments/41563.pdf>>, p. 7.

- ⁽²¹³⁾ It should be noted that trustees have been included into the licensing cascade of Art. 6 FINIG only to a limited extent: A licence to operate as a bank or as a securities house also comprises the authorisation to operate as a trustee. This special regime is justified by the fact that, in addition to the qualifications necessary for regular asset management, a trustee's functions require additional skills specified by the applicable foreign law and such requirements are only covered by the comprehensive licensing requirements that need to be met by banks and securities houses due to their extensive business operations¹⁹.
- ⁽²¹⁴⁾ FINIG provides the conditions for the granting of licences (Art. 7 FINIG, Art. 9 para.1 FINIV). In general, Financial Institutions are required to meet the licensing requirements throughout the duration of their business operations. Licensing requirements that can – for practical reasons – only be fulfilled upon performance of the business activity must at least be achievable by the Financial Institution.

3. Organisation (Art. 9 FINIG, Arts. 37–38 FINIV)

- ⁽²¹⁵⁾ The Financial Institution must establish appropriate corporate governance rules and be organised in such a way that it can fulfil its legal obligations (Art. 9 para.1 FINIG). In particular, it must identify and monitor legal and reputational risks and ensure effective internal controls (Art. 9 para.2 FINIG). Portfolio managers and trustees are, in principle, subject to the accounting regulations of the Code of Obligations (CO) (Art. 25 para.1 FIDLEV). However, where portfolio managers and trustees are subject to specific, more stringent accounting standards, such special provisions apply (Art. 25 para.2 FIDLEV).

4. Assurance of Proper Business Conduct (Art. 11 FINIG, Art. 13 FINIV)

- ⁽²¹⁶⁾ In order to ensure client protection and business professionalism, a particular business conduct is expected and explicitly required from all Financial Institutions (Art. 11 FINIG). A distinct set of obligations applicable to all Financial Institutions has been established. In particular, the requirements of the new act regarding assurance of proper business conduct correspond to those stipulated in the BA, SESTA and CISA and

¹⁹ FEDERAL COUNCIL, Message FIDLEG/FINIG, BBI 2015, pp. 9020 et seq.

the licensing practice of FINMA (Art. 11 para. 1 FINIG). The professional qualifications required depend upon the individual person's function and responsibility (Art. 11 para. 2 FINIG). Furthermore, the provisions of FINIG ensure that the assurance of proper business conduct cannot be endangered by the influence of qualified shareholders (Art. 11 paras. 3–6 FINIG). FINIV specifies which information and documents are to be filed with the supervisory authority (Art. 13 FINIV).

5. Delegation of Duties (Art. 14 FINIG, Arts. 15 et seq. FINIV)

⁽²¹⁷⁾ Financial Institutions can delegate tasks only to third parties who have the necessary skills, knowledge and experience as well as the required licences (Art. 14 para. 1 FINIG). Only tasks which are not within the decision-making competence of the body responsible for the management, governance, supervision and control may be delegated to third parties (Art. 15 para. 1 FINIV).

⁽²¹⁸⁾ Furthermore, a delegation must not compromise the adequacy of the business organisation (Art. 16 para. 1 FINIV). In particular, it would not be considered as adequate if a Financial Institution (Art. 16 para. 3 FINIV):

- i. does not have the necessary human resources and expertise to select, instruct, monitor and manage the risk of the third party (lit. a); or
- ii. does not, or only to a limited extent, have the necessary instruction and control rights vis-à-vis the third party (lit. b).

In addition, Financial Institutions must carefully instruct and supervise the appointed third parties (Art. 14 para. 1 FINIG). It is to be highlighted that Financial Institutions remain responsible for fulfilling their supervisory obligations and safeguard the interests of their clients when delegating tasks (Art. 17 para. 1 FINIV).

⁽²¹⁹⁾ From a practical perspective, agreements with third parties concerning the delegation of tasks must contain the following key points (Art. 17 para. 2 FINIV):

- i. The competences and responsibilities (lit. a);
- ii. any powers to delegate further (lit. b);
- iii. the accountability of the third party (lit. c); and
- iv. the control rights of Financial Institutions (lit. d).

⁽²²⁰⁾ Such agreements must be concluded in writing or in any other form that allows verification of which tasks have been delegated (Art. 17 para. 2 FINIV).

⁽²²¹⁾ Moreover, Financial Institutions must refer to the tasks delegated by them and information on the possibility of sub-delegation in their organisational documents (Art. 17 para. 3 FINIV).

6. Ombudsman's Office (Art. 16 FINIG)

⁽²²²⁾ Financial Institutions must join an ombudsman's office before taking up their activities (Art. 16 para. 1 FINIG). The provisions of Title 5 of FIDLEG on ombudsman's offices apply by analogy (Art. 16 para. 1 FINIG).

7. Regular Asset Managers and Trustees (Arts. 17–23 FINIG, Arts. 19–33 FINIV)

⁽²²³⁾ Regular asset managers and trustees are newly subjected to a licensing requirement and prudential supervision (Art. 5 para. 1, Art. 2 para. 1 lit. a and lit. b, Art. 61 para. 1 FINIG). Pursuant to Art. 21 FINIV, asset managers and trustees are entitled to be subject to supervision if their internal regulations and business organisation ensure that the supervisory requirements are met. This new licensing requirement is one of the most fundamental changes introduced by the new financial market architecture in Switzerland, when compared to the previous regulatory regime.

⁽²²⁴⁾ In contrast to a financial adviser, a regular asset manager has the power to manage the investment of client assets independently (i.e. to make the investment decisions) and to do so on a commercial basis (Art. 17 para. 1 FINIG). The central characteristic of a regular asset manager is the professional exercise of such investment activity in the name and for the account of its clients. Typically, these services are rendered on the basis of an individual asset management mandate.

⁽²²⁵⁾ Trustees are defined in Art. 17 para. 2 FINIG as natural or legal persons that manage or dispose of assets for the benefit of the beneficiaries or for a specified purpose based on a trust deed in the sense of the Hague Trust Convention (HTC). One of the main features of such a trust is that, while being a legally autonomous unit of assets, it does not possess its own legal personality and can, thus, neither sue nor be sued. Rather, it is the trustee, being the owner of the trust assets, who has standing to sue and to be sued in civil bankruptcy matters. However, although ownership of the trust assets is conferred upon the trustee, it is important to bear in mind that the trust assets do not constitute part of, and, thus, have to be segregated from, the trustee's own patrimony (Art. 2 HTC).

- (226) It is to be noted, in this context, that the institution of a trust is a foreign legal concept which does not have an exact equivalent in the Swiss legal system. Nevertheless, trusts are an important economic and legal reality in Switzerland since trusts are frequently managed by Swiss banks and asset management companies, thereby acting as trustees. Given the specific duties of these trustees, which also include the management of assets, trustees are included in the list of Financial Institutions being governed by FINIG²⁰.
- (227) Regular asset managers and trustees are required to choose amongst legal forms that are suitable for the exercise of their asset management business (Art. 17 para. 1 FINIG). Unlike in certain Anglo-Saxon countries, natural persons may also act as regular asset managers or trustees. However, they always have to be registered in the commercial register (Art. 18 para. 2 FINIG). Like all other Financial Institutions, regular asset managers and trustees must possess adequate collateral or provide for adequate professional liability insurance coverage (Art. 22 FINIG). Regular asset managers and trustees who buy or sell securities for clients through their own account or deposit fall within the scope of provisions regarding securities houses and, thus, require a corresponding licence (Art. 41 lit. a FINIG).
- (228) While some, such as the SBA, have supported the new supervision of regular asset managers²¹, others have rejected it. Applying the same supervisory methods applicable to major banks to small- and medium-sized enterprises has, in particular, been heavily criticised as being inappropriate by the Swiss Association of Asset Managers (SAAM)²², mainly due to the financial burden it will place on small asset managers. It is estimated that initial licence costs may lie between CHF 70,000 and CHF 128,000 depending on a business's size, with additional costs

²⁰ FEDERAL COUNCIL, Message FIDLEG / FINIG, BBI 2015, p. 8928.

²¹ SWISS BANKING ASSOCIATION, Statement on the Publication of the Message in respect of FIDLEG and FINIG, Basel 4 November 2015, <<https://www.swissbanking.org/de/medien/statements-und-medienmitteilungen/statement-der-schweizerischen-bankiervereinigung-zur-veroeffentlichung-der-botschaft-zu-fidleg-und-finig>>.

²² SWISS ASSOCIATION OF ASSET MANAGERS, FIDLEG / FINIG: Unnötige Aufblähung des Kontrollapparats ohne Nutzen für die Anleger und ohne Verbesserung beim Marktzugang ("SAAM Media release"), Zurich 4 November 2015, <http://www.vsv-asg.ch/uploads/file/news/2015/20151104_fidleg-de.pdf>; see also UMBRELLA ORGANISATION OF SWISS SME, FIDLEG / FINIG: sgv gegen Diskriminierungsvorlage, Bern 4 November 2015, <https://www.sgv-usam.ch/media/2201/20151104_mm_fidleg-finig_de.pdf>, ("sgv media release"), and RABIAN ALEXANDER, Hohe Kosten und kein besserer Schutz, NZZ, 22 January 2016, p. 11.

between CHF19,000 and CHF 56,000 recurring annually²³. Such costs may financially cripple smaller institutions to the extent that they will no longer be able to continue operating. In conclusion, the new licensing requirement for regular asset managers could lead to a consolidation in the Swiss asset management industry.

8. Managers of Collective Assets (Arts. 24–31 FINIG, Arts. 34–48 FINIV)

⁽²²⁹⁾ Asset managers of collective investment schemes and asset managers of occupational benefits schemes are re-classified as “managers of collective assets” (Art.24 para.1 FINIG). Their compliance with Swiss financial market laws is supervised by FINMA (Art. 61 para. 3 FINIG) and they have to comply with stricter requirements than those applicable to regular asset managers. This largely corresponds to the previous regime in relation to asset managers of collective investment schemes (immaterial re-labelling) but not in relation to asset managers of occupational benefits schemes (material re-classification). The more stringent requirements placed on asset managers of occupational benefits schemes can be justified on the basis that they manage savings that secure the occupational pension benefits which finance the retirement of the respective end-investors²⁴. Compliance with occupational benefits regulations continues to be monitored by the respective sector-specific supervisory authorities. It should be noted that managers of collective assets who were already subject to prudential supervision in Switzerland do not require an additional licence under FINIG, provided that such supervision is equivalent to that under FINIG (Art. 5 para. 3 FINIG).

⁽²³⁰⁾ Art. 24 para.2 FINIG in conjunction with Art.34 FINIV provides for *de minimis* rules according to which the following are deemed regular asset managers rather than managers of collective assets:

- i. Asset managers of collective investment schemes whose investors are qualified investors within the meaning of Art.10 para. 3 or 3^{ter} CISA and who fulfil one of the following conditions:

²³ ZÜRCHER HOCHSCHULE FÜR ANGEWANDTE WISSENSCHAFTEN (SCHOOL OF MANAGEMENT AND LAW), *Regulierungskostenanalyse zum Finanzinstitutsgesetz (FINIG)*, p. 47.

²⁴ FEDERAL COUNCIL, Message FIDLEG / FINIG, BBl 2015, p. 8927.

- (A) the assets of the collective investment schemes under their management, including the assets acquired through the use of leveraged finance, amount to no more than CHF 100 million; or
 - (B) the assets of the collective investment schemes under their management do not exceed CHF 500 million in total and do not include leveraged financial instruments, provided that such collective investment schemes do not give a right to redemption in the first five years after making the first investment;
- ii. asset managers of Swiss occupational benefits schemes who manage the assets of occupational benefits schemes totalling no more than CHF 100 million and who manage no more than 20 per cent of the assets of an individual pension scheme.

⁽²³¹⁾ Asset managers that are subject to the above *de minimis* rules may request authorisation as managers of collective assets provided that this is required by the jurisdiction where the collective investment scheme is established or offered or where the occupational benefits scheme is managed (Art. 24 para. 3 FINIG in conjunction with Art. 36 FINIV).

9. Fund Management Companies (Arts. 32–40 FINIG, Arts. 49–64 FINIV)

⁽²³²⁾ Fund management companies frequently carry out a qualified form of asset management (in addition to their sector-specific fund administration responsibilities such as the handling of subscriptions and redemptions). In particular, they manage collective assets in their own name and for the account of collective investment schemes. They may, however, also act as asset managers in the name of a third party. For this reason, it was considered appropriate to transfer the regulation of fund management companies to FINIG. In principle, the previous provisions regulating fund management companies in CISA were adopted in FINIG substantially unaltered.

⁽²³³⁾ Fund management companies are defined as institutions that manage investment funds in their own name for the account of investors (Art. 32 FINIG in conjunction with Art. 49 FINIV). Just like previously under CISA, fund management companies have to be organised as companies limited by shares with their registered office and main administrative office in Switzerland (Art. 33 para. 1 FINIG in conjunction with Art. 50 FINIV). For this reason, as well as due to the fact that the primary object of the fund management company is statutorily limited to conducting

fund business, a licence to operate as a bank does not include the authorisation to operate as a fund management company²⁵.

(234) With regard to the delegation of duties, FINIG also adopts the respective CISA provisions: Fund management companies may delegate investment decisions as well as specific tasks, provided this is in the interest of efficient management (Art. 35 para.1 FINIG in conjunction with Art. 56 FINIV). In addition, Art. 35 para.1 FINIG now explicitly stipulates the principle that the executive managerial function of the fund management company may not be delegated to third parties. Moreover, it is to be noted that (as is the case under CISA), for collective investment schemes subject to simplified distribution in the European Union under a specific treaty, investment decisions may not be delegated to the custodian bank or to other companies whose interests may conflict with those of the fund management company or the investors (Art. 35 para. 2 FINIG).

10. Securities Houses (Arts. 41–51 FINIG, Arts. 65–75 FINIV)

(235) Like fund management companies, securities houses may conduct a qualified form of asset management. As a consequence, the regulatory licensing requirement for securities houses including the related provisions (formerly included in the SESTA) have been transferred to FINIG (Art. 5 para. 1 and Art. 2 lit. e FINIG).

(236) The definition of a securities house according to Art. 41 FINIG comprises (a) those who engage in commercial securities trading for the account of clients but in their own name (client dealers), (b) those who engage in short term commercial securities trading for their own account and are active mainly in the financial market, provided that they could potentially endanger the functionality of the financial market or that they are active as a member of a Trading Venue (proprietary dealers), and (c) those who engage in short term commercial securities trading for their own account and who publicly, either permanently or on request, quote prices for individual securities (market makers). Art. 65 para.1 FINIV specifies that a commercial activity exists if the securities house directly or indirectly holds accounts or securities for more than 20 clients.

(237) These categories largely correspond to the former categories of securities dealers under the SESTA. However, issuing houses and

²⁵ FEDERAL COUNCIL, Message FIDLEG / FINIG, BBI 2015, p. 9030.

derivatives companies pursuant to Art. 3 paras. 2 and 3 SESTO have, in the past, never played an independent role in practice; such activities have typically been performed by banks and client dealers. Therefore, the latter is not subject to a separate licence, given that their activities may, according to FINIG, only be conducted by banks or securities houses (Art. 12 FINIG).

⁽²³⁸⁾ Due to reasons of legal certainty, FINIG now explicitly states that securities houses domiciled in Switzerland must have the legal form of a commercial company (Art. 42 FINIG). In particular, a cooperative is not regarded as a suitable legal form for a securities house.

11. Foreign Financial Institutions (Arts. 52–60 FINIG, Arts. 76–82 FINIV)

⁽²³⁹⁾ FINIG harmonises the licensing obligation for branches of foreign Financial Institutions. A foreign Financial Institution has to obtain a licence from the supervisory authority if it employs persons who perform any of the following activities on a continuous and commercial basis on the institution's behalf in Switzerland (Art. 52 para. 1 FINIG in conjunction with Art. 76 et seq. FINIV):

- i. Regular asset management or activity as a trustee;
- ii. asset management for collective investment schemes or occupational benefits schemes;
- iii. securities dealing;
- iv. conclusion of business transactions; or
- v. client account management.

⁽²⁴⁰⁾ As an exception, foreign fund management companies are not allowed to establish branch offices in Switzerland (Art. 52 para. 2 FINIG).

⁽²⁴¹⁾ With regard to the licensing requirements, FINIG basically incorporates the prior respective regulations concerning branches in the areas of securities dealers and collective investment schemes regulation (Art. 53 FINIG in conjunction with Art. 77 FINIV). Namely, authorisation to establish a branch is granted if:

- i. The foreign Financial Institution is sufficiently organised and has adequate collateral and qualified personnel to operate a branch in Switzerland, is subject to appropriate supervision that includes the branch and proves that the business name of the branch can be entered in the commercial register;

- ii. the competent foreign supervisory authorities do not raise any objections to the establishment of a branch, undertake to notify the competent supervisory authority immediately if any circumstances arise that could seriously prejudice the interests of the investors or clients and provide FINMA with administrative assistance; and
- iii. the branch fulfils the conditions set out in Arts. 9–11 FINIG and has a set of regulations in place that accurately describes the scope of its business and defines an administrative or operational organisation corresponding to its business activity and fulfils the additional authorisation conditions under Arts. 54–57 FINIG.

⁽²⁴²⁾ FINMA may make the granting of the licence for a foreign Financial Institution to open a branch in Switzerland subject to reciprocity from the country in which the foreign Financial Institution or its qualified shareholders have their domicile (Art. 54 FINIG). Furthermore, the supervisory authority is permitted to make the creation of a branch of a foreign regular asset manager, trustee or manager of collective assets in Switzerland conditional upon the provision of adequate collateral, if such measure is warranted for the protection of investors or clients (Art. 56 FINIG).

⁽²⁴³⁾ Similar provisions apply to representative offices of foreign Financial Institutions. Foreign Financial Institutions have to obtain a licence from the competent supervisory authority if they employ people in Switzerland who operate a representative office for such Foreign Financial Institution on a continuous and professional basis in Switzerland (Art. 58 para. 1 FINIG). Foreign fund management companies, however, are not permitted to establish a representative office in Switzerland (Art. 58 para. 2 FINIG).

⁽²⁴⁴⁾ The provisions regulating branches and representative offices, as described above, have to be contrasted with the rules applicable to the mere offering of financial services on a pure cross-border basis (thus, without the establishment of a permanent physical presence in Switzerland by way of a branch or a representative office). Previously, such pure cross-border activity was, in principle, not subject to regulation in Switzerland (except for the distribution of foreign collective investment schemes into Switzerland which is subject to CISA). Under the new regulatory regime, namely under FIDLEG, certain foreign financial services providers seeking to provide cross-border financial services into Switzerland may need to be registered in the client adviser

register and need to comply with the code of conduct duties stipulated in FIDLEG. However, despite this potential registration requirement, they will continue not to be subject to a licence requirement or to prudential supervision by FINMA (or any other Swiss supervisory authority).

12. Supervision (Arts. 61–67 FINIG, Arts. 83–89 FINIV)

⁽²⁴⁵⁾ While the supervision of managers of collective assets, fund management companies and securities houses will remain within the competence of FINMA (Art. 61 para. 3 FINIG), one or several new semi-public supervisory authorities may be established for the authorisation and supervision of regular asset managers, trustees and precious metal traders (Art. 61 para. 1 FINIG). Please refer to Chapter II “Supervision – FINMAG” for further details.

13. Insolvency Provisions (Art. 67 FINIG, Art. 90 FINIV)

⁽²⁴⁶⁾ While initially, FINIG envisaged an independent regulation of insolvency measures for banks, fund management companies and securities houses, such proposal has been dropped in the course of the Federal Council’s consultation and has, instead, been replaced by a general reference to the insolvency provisions of the BA (Art. 67 FINIG). By making these provisions not only applicable to banks and securities houses but also to fund management companies – which were, under the previous legislation, subject to the special regulatory provisions of CISA concerning liquidation proceedings (Arts. 137 et seq. CISA) – the new provisions substantially lead to the same result as the original draft. Along with the general insolvency provisions, the initially planned provisions concerning safeguards and restructuring proceedings (Arts. 92 and 93 of the preliminary draft) have also been abandoned in the course of the consultation process. The new regulation does, however, include a provision that makes the BA provisions on deposit protection and dormant assets applicable to fund management companies (Art. 67 para. 2 FINIG).

⁽²⁴⁷⁾ The insolvency measures of the BA do, however, not apply to regular asset managers, trustees and managers of collective assets since they act in the name and for the account of third parties and, thus, assets of the clients are always separated from the assets of the asset manager and, consequently, not affected by insolvency or restructuring proceedings in relation to the latter.

14. Criminal Sanctions (Arts. 69–71 FINIG)

⁽²⁴⁸⁾ The provision of FINIG relating to professional confidentiality (Art. 69 FINIG) corresponds to former Art. 43 SESTA, Art. 148 para.1 lit. k, para. 2 and para.3 CISA as well as to Art. 47 BA. Imprisonment of up to 3 years or a monetary penalty shall be imposed on any person who wilfully (a) discloses a secret entrusted to them in their capacity as a director or officer, employee, agent or liquidator of a Financial Institution or of which they have become aware in said capacity, (b) attempts to induce a violation of professional secrecy, or (c) discloses a secret that was entrusted to them in violation of (a) above or exploits such a secret for their own benefit or for the benefit of others (Art.69 para.1 FINIG). Imprisonment of up to 5 years or a monetary penalty shall be imposed on any person who obtains a pecuniary advantage for themselves or another person through an action set out in (a) or (c) above (Art.69 para.2 FINIG). Persons who commit an offence under FINIG through negligence shall be penalised with a fine of up to CHF 250,000 (Art.69 para.3 FINIG).

15. Transitional Provisions (Art. 74 FINIG, Arts. 92 and 93 FINIV)

⁽²⁴⁹⁾ Managers of collective assets, fund management companies and securities houses that are already in possession of a licence for the relevant activity upon the legislation's entry into force will not be required to apply for a new licence but must comply with the new law within a year of its entry into force (Art.74 para.1 FINIG).

⁽²⁵⁰⁾ Financial Institutions newly subjected to a licensing requirement will need to report to the supervisory authority within six months and must meet the regulatory requirements and request a licence to operate within three years of FINIG's entry into force (Art.74 para.2 FINIG). However, they may continue their operations until a decision regarding the licence is rendered.

⁽²⁵¹⁾ "Independent" or "external" asset managers and trustees that assume their activity within one year after the entry into force of FINIG must report immediately to FINMA and must fulfil the authorisation requirements when commencing their activity, with the exception of Art.7 para.2 FINIG (Art. 74 para.3 FINIG). No later than one year after FINMA has authorised a supervisory organisation in accordance with Art. 43a FINMAG, they must affiliate to such an organisation and submit an application for authorisation (Art. 74 para. 3 FINIG). They may perform

their activity until a decision has been made concerning authorisation, provided that they are affiliated to a self-regulatory organisation in accordance with Art. 24 AMLA and are supervised by said organisation with regard to compliance with the corresponding duties.

(252) In special cases, the supervisory authority will have the power to extend the deadlines set out in Art. 74 paras. 1 and 2 FINIG (Art. 74 para. 4 FINIG).

C. Key Differences to EU Regulations

(253) A major difference between FINIG and current EU regulations relates to their structure. FINIG produces a harmonised and comprehensive regulatory structure, whereas, in EU jurisdictions, a strong fragmentation of the relevant legal sources still remains. Furthermore, financial institutions in the EU are not subject to supervision by two specific bodies, as envisaged in FINIG. They are instead supervised by European supervisory bodies according to their functions, e.g. in case of banks by the European Banking Authority and the competent authorities in the home member state of the institution.

(254) According to national laws of EU member states, financial institutions are generally subject to prudential supervision and licensing requirements in a manner similar to that foreseen by FINIG. However, apart from the registration duties for client advisers under FIDLEG, pure advisory services are not subject to an obligation to obtain a licence by a supervisory authority under FINIG.

(255) In the context of the prudential supervision of trustees, it is to be noted that, unlike in certain Anglo-Saxon countries, the prudential supervision set forth in FINIG will not only apply to legal persons, but also to individuals acting as trustees.

D. What Swiss and Foreign Market Participants Need to be Aware of

⁽²⁵⁶⁾ Due to the scope of FINIG, the majority of Financial Institutions becomes subject to the regulation. In order to comply with the new law within the time frame provided, it is important for Financial Institutions to be aware of their obligations thereunder.

1. Swiss Market Participants

- i. All Financial Institutions need to be in possession of a licence from the competent supervisory authority and comply with the requirements regarding assurance of proper business conduct. Notably, the definition of Financial Institutions also encompass regular asset managers (including both “independent” asset managers as well as those asset managers of collective investment schemes that previously benefited from the *de minimis* exemption) and trustees which were previously not subject to prudential supervision.
- ii. Asset managers of collective investment schemes and asset managers of Swiss occupational benefits schemes are newly classified as “managers of collective assets” and subject to stricter requirements.
- iii. Fund management companies are subject to stricter insolvency regulations.
- iv. Transitory provisions and deadlines need to be observed.

2. Foreign Market Participants

- i. As under the previous legislation, a continuous physical presence of foreign Financial Institutions in Switzerland will lead to a requirement to obtain a licence for the respective branch or representative office in Switzerland.
- ii. Irrespective of the licensing requirement, foreign Financial Institutions need to comply with the same rules of conduct as Swiss Financial Institutions.

V. Services and Products – FIDLEG

A. Overview

1. Purpose, Definitions, Client Segmentation (Arts. 1–5 FIDLEG; Arts. 1–5 FIDLEV)

⁽²⁵⁷⁾ The purpose of the Financial Services Act (FIDLEG) is to protect clients and to establish a regulatory level playing field for the provision of financial services. It defines the requirements for the loyal, diligent and transparent provision of financial services and for the offering of financial instruments (Art.1 FIDLEG).

⁽²⁵⁸⁾ FIDLEG applies to financial services providers, client advisers as well as issuers and producers of financial instruments (Art.2 para.1 FIDLEG). It does not apply, *inter alia*, to pension schemes and, to the extent that their activities are subject to the ISA, insurance companies and insurance brokers (Art. 2 para. 2 FIDLEG).

⁽²⁵⁹⁾ Art. 3 FIDLEG defines the following terms which are key for the application of the law:

- i. *Financial instruments* are shares, non-voting equity securities, participation certificates, securities that can be converted or exercised into shares, debt securities, shares of/units in CIS, structured products²⁶, derivatives according to Art.2 lit. c FINFRAG, deposits with redemption value or interest that depends on risk or market prices, as well as bonds (participations in a collective loan with uniform conditions);
- ii. *insurance products / solutions* do not qualify as financial instruments and are, therefore, not subject to FIDLEG. However, the ISA will be aligned with FIDLEG, in particular regarding the code of conduct duties (see Chapter VIII);
- iii. *securities (Effekten)* are unified securities, value rights, derivatives and intermediated securities suitable for mass trading;

²⁶ In our view, this includes all structured products on the Swiss Structured Products Association's Swiss Derivative Map, <<http://www.svsp-verband.ch/en/structured-products-pro/>>.

- iv. *financial services* are the following activities provided for clients: (a) the acquisition or disposal of financial instruments²⁷, (b) the receipt and transmission of orders in relation to financial instruments, (c) the management of financial instruments (portfolio management), (d) the provision of personal recommendations in relation to transactions with financial instruments (*i.e.* investment advice) and (e) the granting of loans for carrying out transactions in financial instruments;
- v. *financial services providers* are persons providing financial services on a commercial basis²⁸ either in Switzerland or for clients in Switzerland;
- vi. *client advisers* are natural persons providing financial services on behalf of a financial services provider or in their own capacity as financial services providers. The definition includes, for example, the sales desk of a bank, investment advisers, relationship managers, and natural persons distributing financial instruments. Employees without client contact or with a subordinated support function only are not deemed client advisers;
- vii. *issuers* are persons issuing or intending to issue securities;
- viii. an *offer* is an invitation to acquire a financial instrument which includes sufficient information on the terms and conditions of the offer and the financial instrument;
- ix. a *public offer* is an offer addressed to the public; and
- x. the *producers* of a financial instrument are the persons structuring a new or amending an existing financial instrument, including by amending its risk and return profile or the costs associated with an investment in the financial instrument.

(260) FIDLEG introduces a MiFID-inspired client segmentation, distinguishing between private, professional and institutional clients:

- i. *Private clients* are negatively defined as all clients who are not professional clients (Art. 4 para. 2 FIDLEG);

²⁷ Art. 3 para. 2 FIDLEG specifies that “any activity directed directly at specific clients that is specifically aimed at the acquisition or disposal of a financial instrument” is deemed an “acquisition or disposal of financial instruments” within the meaning of Art. 3 lit. c number 1 FIDLEG. Thus, also marketing activities not involving a personal recommendation (investment advice) may, in certain cases, qualify as a financial service within the meaning of FIDLEG.

²⁸ This criterion is deemed fulfilled in case of an independent economic activity pursued on a permanent, for-profit basis (Art. 3 lit. d FIDLEG *in fine*).

- ii. *professional clients* are: (a) regulated Swiss financial intermediaries, (b) insurance companies pursuant to the ISA, (c) foreign clients under equivalent prudential supervision as those pursuant to (a) and (b), (d) central banks, (e) public entities with professional treasury operations, (f) occupational pension schemes, and other institutions established for the purpose of providing occupational pension plans, in each case, with professional treasury operations, (g) companies with professional treasury operations, (h) large²⁹ companies, and (i) private investment structures established for HNWI, with professional treasury operations (Art. 4 para. 3 FIDLEG); and
- iii. *institutional clients* are professional clients according to Art. 4 para. 3 lit. a–d FIDLEG as well as supranational and national public-law bodies with professional treasury operations (Art. 4 para. 4 FIDLEG).

⁽²⁶¹⁾ A company to which another company belonging to the same group renders a financial service is not considered a “client” in that context (Art. 4 para. 6 FIDLEG).

⁽²⁶²⁾ HNWI, as well as private investment structures established for them, may opt to be deemed professional investors (“opting-out” (Art. 5 para. 1 FIDLEG). HNWI are natural persons who credibly declare that they (a) have – based on their education and professional experience or a comparable experience in the financial sector – the knowledge necessary to understand the risks of the investment, and have at their disposal eligible³⁰ assets of at least CHF 500,000 or (b) have at their disposal eligible assets of at least CHF 2 million (no knowledge / experience necessary in this case) (Art. 5 para. 2 FIDLEG).

⁽²⁶³⁾ Professional clients within the meaning of Art. 4 para. 3 lit. f and lit. g FIDLEG may opt to be treated as institutional clients (Art. 5 para. 3 FIDLEG). This choice is also available to Swiss and foreign CIS and their management companies which are not already deemed institutional clients under Art. 4 para. 3 lit. a or lit. c in conjunction with Art. 4 para. 4 FIDLEG (Art. 5 para. 4 FIDLEG).

²⁹ A company is deemed large if it exceeds two of the following thresholds: (a) balance sheet of CHF 20 million, (b) sales revenue of CHF 40 million and/or (c) equity capital of CHF 2 million (Art. 4 para. 5).

³⁰ Cf. Art. 5 FIDLEV.

⁽²⁶⁴⁾ Professional (but not institutional) clients may opt to be treated as private clients (“opting-in”; Art. 5 para. 5 FIDLEG). Institutional clients may request to be treated as professional clients (Art. 5 para. 6 FIDLEG).

⁽²⁶⁵⁾ Eligible clients must be informed of their options (Art. 5 para. 7 FIDLEG).

2. Requirements for the Provision of Financial Services (Arts. 6–34 FIDLEG; Arts. 6–42 FIDLEV)

a) Client Advisers: Knowledge and Expertise / Client Adviser Register (Arts. 6 and 28–34 FIDLEG; Arts. 31–42 FIDLEV)

⁽²⁶⁶⁾ Client advisers (see above, N. (258) lit. vi) are required to have sufficient knowledge of FIDLEG code of conduct duties and the necessary expertise to perform their activities (Art. 6 FIDLEG).

⁽²⁶⁷⁾ Only persons which are either employed by a FINMA supervised Swiss financial services provider or registered in the client adviser register (see Art. 28 et seq. FIDLEG) are permitted to act as client advisers (Art. 28 para. 1 FIDLEG). Importantly, the registration requirement does not only apply to client advisers of unregulated Swiss financial services providers, but also to client advisers of (both regulated and unregulated) foreign financial institutions servicing clients in Switzerland (even if on a(n) (inbound) cross-border basis only). No registration is required, however, for client advisers of foreign financial services providers which are subject to prudential supervision abroad if they provide their services in Switzerland exclusively to professional or institutional clients (Art. 31 FIDLEV).

⁽²⁶⁸⁾ In order to be registered in the client adviser register, client advisers must prove that they (a) satisfy the requirements set out in Art. 6 FIDLEG (see N (265) above), (b) have taken out professional liability insurance or that equivalent collateral exists and (c) are affiliated to an ombudsman’s institution within the meaning of Art. 74 FIDLEG (Art. 29 para. 1 FIDLEG). In addition, client advisers must not have a criminal record regarding violations of relevant criminal provisions and must not be subject to an occupational ban under Arts. 33 or 33a FINMAG (Art. 29 para. 2 FIDLEG).

b) Code of Conduct Duties (Arts. 7–20 FIDLEG; Arts. 6–22 FIDLEV)
General Remarks

⁽²⁶⁹⁾ When providing financial services on a commercial basis in Switzerland or for clients in Switzerland (see Art. 2 para. 1 FIDLEV), financial services providers within the meaning of FIDLEG (see N (258)(v) above) are obliged to comply with the code of conduct duties pursuant to Art. 8 et seq. FIDLEG (Art. 7 para. 1 FIDLEG). Importantly, these duties do not only apply if financial services are provided on the territory of Switzerland (“in Switzerland”) but also if financial services are provided to clients in Switzerland on a cross-border (inbound) basis. Hence, as a general rule, also foreign financial services providers are obliged to comply with FIDLEG code of conduct duties when providing financial services to clients in Switzerland. FIDLEG does not apply, however, in case of reverse solicitation, i.e. to (a) the provision of financial services by foreign financial services providers in the context of client relationships which were entered into at the express initiative of the client and (b) individual financial services requested from a foreign financial services provider at the client’s express initiative (Art. 2 para. 2 FIDLEV).

⁽²⁷⁰⁾ The core FIDLEG code of conduct duties are the point of sale information and enquiry duties (Arts. 8–14 FIDLEG). In addition, the law imposes documentation and accountability requirements (Arts. 15 and 16 FIDLEG) as well as transparency and due diligence rules for the execution of client orders (Arts. 17–19 FIDLEG).

Information Duties (Arts. 8–9 FIDLEG; 6–15 FIDLEV)

⁽²⁷¹⁾ Financial services providers must inform their clients, *inter alia*, on (a) the general risks associated with financial instruments, (b) the financial services personally recommended and the associated risks and costs, (c) their economic ties to third parties in connection with the financial services offered and (d) the market offer taken into account when selecting financial instruments (Art. 8 paras. 1 and 2 FIDLEG). Clients must be informed before the contract is concluded or the service is provided, respectively (Art. 9 para. 1 FIDLEG). The information may be made available to clients in standardised form on paper or electronically (Art. 9 paras. 3 FIDLEG).

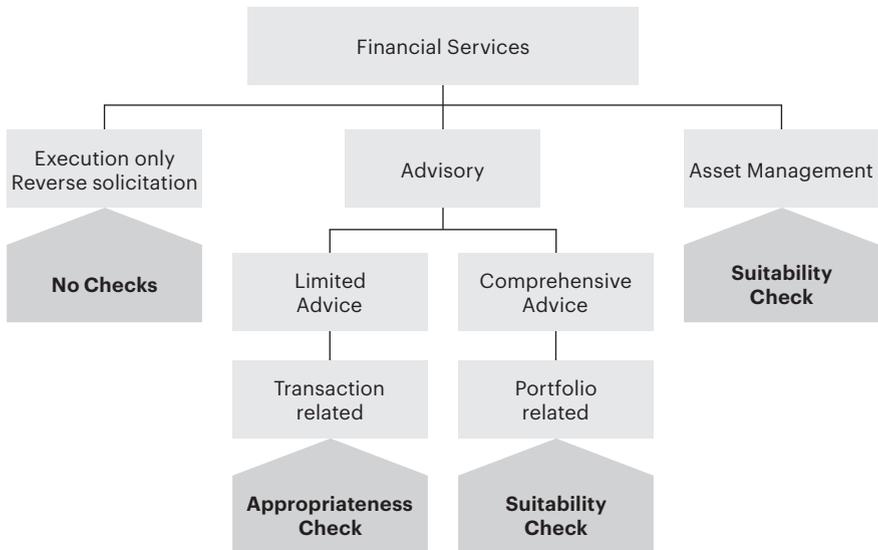
⁽²⁷²⁾ Where financial instruments are personally recommended, financial services providers are required to make the BIB available to private clients free of charge before subscription or conclusion of the contract, provided that a BIB is required to be produced (see Arts. 58 and 59

FIDLEG) for the financial instrument recommended (Art. 8 para. 3 and Art. 9 para. 2 FIDLEG). For the mere execution or transmission of client orders, this is only required if a BIB has already been produced for the financial instrument (Art. 8 para. 4 FIDLEG). In case advise is provided without the client being physically present and if, due to the means of communication used, it is not possible, with reasonable effort, to provide the BIB to the private client before subscription or conclusion of the contract (Art. 15 para. 1 FIDLEV), the BIB may be made available after conclusion of the transaction if the client consents thereto (Art. 9 para. 2 FIDLEG). With regard to the personal recommendation of a financial instrument for which a prospectus is required, the prospectus must be made available to private clients free of charge upon request (Art. 8 para. 5 FIDLEG).

(273) Material changes to the information must be communicated “in due time” (Art. 14 para. 2 FIDLEV).

**Appropriateness and Suitability
(Arts. 10–14 FIDLEG; Arts. 16 and 17 FIDLEV)**

(274) Financial services providers that provide investment advisory or portfolio management services must perform an appropriateness or suitability test (Art. 10 FIDLEG), as depicted here³¹:



³¹ Cf. FEDERAL COUNCIL, Message FIDLEG / FINIG, BBI 2015, p. 8956.

- (275) A financial services provider providing investment advice for individual transactions without considering the entire client portfolio must enquire about the client's knowledge and experience and must check whether financial instruments are appropriate for the client before recommending them (Art. 11 FIDLEG).
- (276) A financial services provider providing (a) investment advice under consideration of the client portfolio or (b) portfolio management services, must perform a suitability assessment, i.e. enquire about the client's financial situation and investment objectives as well as his knowledge and experience (related to the financial service as such as opposed to individual transactions) (Art. 12 FIDLEG).
- (277) A lack of knowledge and experience may be compensated by providing clients with information (Art. 14 para. 3 FIDLEG).
- (278) In case the information received by the financial services provider is not sufficient for assessing the appropriateness or suitability of a financial instrument for a particular client, the financial services provider must inform the client before providing the service that it cannot perform such assessment (Art. 14 para. 1 FIDLEG). If the financial services provider is of the opinion that a financial instrument is not appropriate or suitable for his clients, he must advise him against it before providing the service (Art. 14 para. 2 FIDLEG).
- (279) In the absence of contrary indications, professional clients may be deemed to have the required knowledge and experience and to be able to bear the investment risks associated with the financial service (Art. 13 para. 3 FIDLEG), *i.e.*, the financial services provider is only required to enquire about their investment objectives.
- (280) For institutional clients, no appropriateness or suitability assessment is required (Art. 20 para. 1 FIDLEG). The same is true for execution only transactions vis-à-vis all client segments – in contrast to MiFID II, regardless of the complexity of the financial instrument; however, the client must be informed about the absence of these checks (Art. 13 paras. 1 and 2).

Documentation and Reporting (Arts. 15 and 16; Arts. 18 and 19 FIDLEV)

- (281) Financial services providers are obliged to document (a) the financial services agreed with his clients and the information collected about them, (b) the notification according to Art. 13 para. 2 FIDLEG or the fact

that they advised the clients, in accordance with Art. 14 FIDLEG, against availing themselves of the service and (c) the services provided for clients (Art. 15 para. 1 FIDLEG). With respect to investment advice, the clients' needs and the reasons for each recommendation leading to the acquisition or disposal of a financial instrument also have to be documented (Art. 15 para. 2 FIDLEG).

- (282) If so requested, financial services providers are obliged to provide their clients with a copy of the documentation required under Art. 15 FIDLEG or shall make it accessible to them in another appropriate manner (Art. 16 para. 1 FIDLEG). Again at the clients' request, they must give an account of (a) the agreed and executed financial services, (b) the composition, valuation and development of the portfolio and (c) the costs (Art. 16 para. 2 FIDLEG; specified in Art. 19 FIDLEV).

**Best Execution; Securities Lending
(Arts. 17–19 FIDLEG; Arts. 20 and 21 FIDLEV)**

- (283) Financial services providers must act *bona fide* and treat clients equally when handling client orders (Art. 17 para. 1 FIDLEG). Art. 20 para. 1 FIDLEV specifies that they must have procedures and systems in place for handling client orders which (a) are appropriate in view of their size, complexity and business operations and (b) ensure the safeguarding of clients' interests and their equal treatment.
- (284) When executing client orders, financial services providers must ensure that the best possible outcome is achieved in terms of cost, timing and quality (Art. 18 para. 1 FIDLEG). Appropriate internal guidelines are required (Art. 18 para. 3 FIDLEG).
- (285) Financial services providers may borrow financial instruments from their clients' holdings as a counterparty or act as an agent for such transactions only if the clients have given their prior and express consent thereto in writing or in another form demonstrable in the form of text in an agreement that is separate from the general terms and conditions (Art. 19 para. 1 FIDLEG). The clients' consent is only valid if (a) they have been informed in a comprehensible manner of the risks associated with such transactions, (b) they are entitled to compensation payments for the proceeds due from the financial instruments borrowed and (c) they are compensated for the financial instruments borrowed (Art. 19 para. 2 FIDLEG). The uncovered borrowing of private clients' securities is prohibited (para. 3).

Institutional and Professional Clients (Art. 20; Art. 22 FIDLEV)

⁽²⁸⁶⁾ Vis-à-vis institutional clients, the code of conduct duties according to Arts. 7–19 FIDLEG are not applicable at all (Art. 20 para.1 FIDLEG), but parallel duties under civil law may still apply; however, the organisational and conflicts of interest duties, including the rules on inducements, are applicable (see c) below). Professional clients may waive Arts. 8, 9, 15 and 16 FIDLEG (Art. 20 para. 2 FIDLEG).

c) *Organisation, Conflicts of Interest (Arts. 21–27 FIDLEG; 23–30 FIDLEV)*

⁽²⁸⁷⁾ Financial services providers are obliged to ensure the fulfilment of their duties under FIDLEG by means of internal guidelines and an appropriate organisation of their operations (Art. 21 FIDLEG). Further, they must ensure that their employees have the necessary skills, knowledge and experience to perform their tasks (Art. 22 para.1 FIDLEG). Financial services providers not subject to FINMA supervision must also ensure that their client advisers are registered (Art. 22 para. 2 FIDLEG).

⁽²⁸⁸⁾ Financial services providers must take measures to prevent employees from misusing the information available to them only by virtue of their function for transactions for their own account (Art. 27 para.1 FIDLEG).

⁽²⁸⁹⁾ They are also obliged to take measures to avoid conflicts of interest or respective disadvantages for clients (Art. 25 para.1 FIDLEG). If disadvantages for clients cannot be excluded, this possibility must be disclosed to them (Art. 25 para. 2 FIDLEG). Art. 24 et seq. FIDLEV provides for further specifics, in particular, regarding (a) possible scenarios of a conflict of interest, (b) the necessary precautions to prevent them, (c) the disclosure requirements relating to Art. 25 para. 2 FIDLEG, (d) *per se* inadmissible conduct and (e) documentation requirements.

⁽²⁹⁰⁾ Financial services providers are permitted to accept compensation from third parties in connection with the provision of any type of financial services only if they (a) have expressly informed their clients of such compensation in advance and the latter have waived their claims to such compensation or (b) pass the compensation onto their clients in full (Art. 26 para.1 FIDLEG). The client information must include the type and scope of the compensation and must be provided before the financial service is provided or the contract is concluded, respectively. If the (exact) amount cannot be determined in advance, clients must be informed of the calculation parameters and range. Upon request, the amounts actually received must be disclosed (Art. 26 para.2 FIDLEG).

Compensation in terms of Art. 26 para.1 FIDLEG consists of payments such as brokerage fees, kickbacks, commissions, rebates, distribution remunerations, retrocessions and similar payments, including other financial benefits (e.g. soft commissions) (Art. 26 para. 3 FIDLEG).

3. Offering of Financial Instruments (Arts. 35–71 FIDLEG; Arts. 43–96 FIDLEV)

a) Prospectus (Arts. 35–57 FIDLEG; Arts. 43–79 FIDLEV) Prospectus Duty (Art. 35 FIDLEG; Art. 43 FIDLEV)

⁽²⁹¹⁾ Subject to certain exemptions (as described below), whoever makes a public offer in Switzerland for the acquisition of securities or requests the admission of securities to trading on a Trading Venue according to Art. 26 FINFRAG is required to publish a prospectus beforehand (Art. 35 para. 1 FIDLEG)³².

⁽²⁹²⁾ In case the prospectus duty does not apply, offerors or issuers are required to treat investors equally when providing them with essential information relating to a public offer (Art. 39 FIDLEG).

Exemptions by Type of Offer (Art. 36 FIDLEG; Arts. 44 and 45 FIDLEV)

⁽²⁹³⁾ No prospectus has to be published in case of public offers that (Art. 36 para. 1 FIDLEG):

- i. Are addressed only to clients which are deemed professional clients;
- ii. are addressed to less than 500 investors;
- iii. are only addressed to investors that purchase securities in an amount of at least CHF100,000;
- iv. have a minimum denomination of CHF100,000; or
- v. do not exceed the value of CHF 8 million calculated over a period of 12 months.

⁽²⁹⁴⁾ Each public offer for the resale of securities that were previously the subject of an offer falling under one of exemptions mentioned in N (292) qualifies as a separate offer (Art. 36 para. 2 FIDLEG).

³² NOBEL PETER, *Entwicklungen im Bank- und Kapitalmarktrecht / Le point sur le droit bancaire et des marchés des capitaux*, SJZ 2019/1, p. 15–21, p. 15: The prospectus obligations replace the previous ones, including the prospectus obligations in Art. 652a OR.

Exemptions by Type of Securities (Art. 37 FIDLEG; Art. 47 FIDLEV)

⁽²⁹⁵⁾ A prospectus does not need to be published if the following types of securities are offered publicly (Art. 37 para. 1 FIDLEG):

- i. Equity securities issued outside the scope of a capital increase in exchange for previously issued equity securities of the same class;
- ii. equity securities issued or delivered on the conversion or exchange of financial instruments of the same issuer or corporate group;
- iii. equity securities issued or delivered following the exercise of a right linked to financial instruments of the same issuer or corporate group;
- iv. securities offered for exchange in connection with a takeover, provided that information exists that is equivalent in terms of content to a prospectus;
- v. securities offered or allocated in connection with a merger, division, conversion or transfer of assets, provided that information that is equivalent in terms of content to a prospectus exists;
- vi. equity securities that are distributed as dividends to holders of equity securities of the same class, provided that information exists on the number and type of equity securities and on the reasons for and details of the offer;
- vii. securities that employers or affiliated companies offer or allocate to current or former members of the board of directors or management board or their employees;
- viii. securities issued by or with an unlimited and irrevocable guarantee from the Confederation or cantons, from an international or supranational public entity, from the SNB or from foreign central banks;
- ix. securities issued by non-profit institutions for raising funds for non-commercial purposes;
- x. medium-term notes (*Kassenobligationen*);
- xi. securities with a term of less than one year (money market instruments); or
- xii. derivatives that are not offered in the form of an issuance.

Exemptions for Admission to Trading (Art. 38 FIDLEG)

⁽²⁹⁶⁾ Further, no prospectus needs to be published if the following types of securities are admitted to trading (Art. 38 para. 1 FIDLEG):

- i. Equity securities that, over a period of 12 months, account for less than 20 per cent of the number of equity securities of the same category already admitted to trading on the same Trading Venue;

- ii. equity securities issued upon the conversion or exchange of financial instruments or following the exercise of rights linked to financial instruments, provided they are equity securities of the same category as those already admitted to trading;
- iii. securities admitted to trading on a foreign Trading Venue whose regulation, supervision and transparency are acknowledged as being appropriate by the domestic Trading Venue or whose transparency for investors is ensured in another manner; or
- iv. securities for which admission is sought for a trading segment open exclusively to professional clients trading for their own account or for the account solely of professional clients.

Content (Art. 40 FIDLEG; Art. 50–57 FIDLEV)

⁽²⁹⁷⁾ In order to enable investors to make an informed investment decision, the prospectus has to contain all material information on (Art. 40 para. 1 FIDLEG):

- i. The issuer, the guarantor and the collateral provider (as applicable), specifically information on their respective board of directors, management board, auditors and other governing bodies, the most recent semi-annual or annual report, the business situation and material prospects, risks and litigation;
- ii. the securities to be offered publicly or admitted to trading, specifically the rights and obligations associated with them and the relevant risks for investors; and
- iii. the offer, specifically the type of placement and the estimated net proceeds of the issuance.

⁽²⁹⁸⁾ The required minimum content of the prospectus is specified in Annexes 1–5 of FIDLEV (Art. 50 FIDLEV), which also provide for certain relaxations and permissible reductions of the content (Art. 57 para. 1 FIDLEV). The required content of prospectuses of collective investment schemes is set forth in Annex 6 of FIDLEV (see also paragraph b) below).

⁽²⁹⁹⁾ The prospectus has to be drawn up either in German, French, Italian or English (Art. 40 para. 2 FIDLEG). It must include a summary of the material information set forth in a comprehensible form (Art. 40 para. 3 FIDLEG). The summary contains, in particular, the most important information regarding the issuer (such as the name, legal form and registered office of the issuer), the securities, and the public offer or admission to trading, respectively (Art. 54 para. 1 FIDLEV).

⁽³⁰⁰⁾ With respect to debt securities issued by Swiss banks or issuance houses under an issuance programme, the prospectus may take the form of a base prospectus, in which case the final terms must be available at least in indicative form at the time of the public offer (Art. 45 para.1 and 3 FIDLEG).

Review of the Prospectus (Arts. 51–57 FIDLEG; Art. 59–79 FIDLEV)

⁽³⁰¹⁾ Prior to their publication, prospectuses within the meaning of Arts. 35 et seq. FIDLEG must be submitted to the reviewing body which will verify whether the prospectus is complete, coherent and understandable (Art. 51 para. 1 FIDLEG). If the reviewing body ascertains that a prospectus does not meet the statutory requirements, it notifies the person having submitted the prospectus accordingly within 10 calendar days from the time of receipt requesting the necessary improvements (Art. 53 para. 3 FIDLEG). The reviewing body decides on the approval of the prospectus within 10 (in case of new issuers: 20) calendar days of receiving the (rectified) prospectus (Art. 53 paras. 4 and 5 FIDLEG). Prospectuses of collective investment schemes do not have to be reviewed by the reviewing body (Art. 51 para. 3 FIDLEG).

⁽³⁰²⁾ Under the condition that a Swiss bank or securities house confirms that the most important information on the issuers and the securities is known at the time of publication, it is permissible in case of (a) bonds and (b) structured products with a term of 30 days or more to submit the prospectuses only after their publication (Art. 51 para. 2 FIDLEG; Annex 7 FIDLEV).

⁽³⁰³⁾ The reviewing body may approve prospectuses produced under a foreign regulation if (a) the prospectus was produced in accordance with international standards established by international organisations of securities regulators and (b) the applicable information duties are equivalent to those of FIDLEG (Art. 54 para.1 FIDLEG). The reviewing body can provide that prospectuses approved in certain jurisdictions are also considered approved in Switzerland (Art. 54 para. 2 FIDLEG) and publishes a list of countries whose prospectus approval is recognised in Switzerland (Art. 54 para. 3 FIDLEG).

⁽³⁰⁴⁾ Prospectuses remain valid for public offers or admission to trading on a Trading Venue for a period of 12 months after approval (Art. 55 para.1 FIDLEG). A supplement to the prospectus must be produced if any facts which could have a significant influence on the assessment of

securities arise or are established between the time of approval of the prospectus and final completion of the public offer or opening of trading on a Trading Venue (Art. 56 para.1 FIDLEG).

b) Special Provisions for CIS (Arts. 48–50 FIDLEG; Art. 58 FIDLEV)

⁽³⁰⁵⁾ The management companies of Swiss contractual investment funds as well as Swiss CIS structured as a SICAV must publish a prospectus which must contain the fund regulations (*Fondsreglement*) unless interested parties are notified as to where such regulations may be separately obtained prior to an agreement being concluded or prior to subscription (Art. 48 para.1 and 2 FIDLEG). The required minimum content of such prospectuses is set forth in Annex 6 of FIDLEV (see Art. 58 para. 1 FIDLEV).

⁽³⁰⁶⁾ The Swiss Limited Partnership for Collective Investments (*Kommanditgesellschaft für kollektive Kapitalanlagen*) must publish a prospectus which must contain the information that is included in the partnership agreement according to Art. 102 para.1 lit. h CISA (Art. 49 para. 2 FIDLEG).

⁽³⁰⁷⁾ The prospectus and any amendments to it must be filed with FINMA without delay (Art. 48 para. 4 FIDLEG). Prospectuses of CIS do not have to be submitted to the reviewing body (Art. 51 para. 3 FIDLEG).

c) Basic Information Sheet (Arts. 58–63 FIDLEG; Art. 80–91 FIDLEV)

⁽³⁰⁸⁾ Prior to an offer (regardless of whether it is public or not) of a financial instrument to private clients, the producer must produce a BIB (Art. 58 para.1 FIDLEG). No BIB is required, however, for financial instruments which may be acquired for private clients only within the scope of an investment management agreement (Art. 58 para. 2 FIDLEG). If the offer is made on a preliminary basis, at least an indicative version of the BIB has to be produced (Art. 58 para. 4 FIDLEG). The production of the BIB may be delegated to qualified third parties. The producer, however, remains responsible for the completeness and accuracy of the information contained in the BIB and for compliance with the obligations under Arts. 58–68 FIDLEG (Art. 58 para. 3 FIDLEG). An exemption from the duty to produce a BIB applies to shares, share-like securities granting participation rights and non-derivative debt securities (Art. 59 para.1 FIDLEG). Documents prepared in accordance with foreign legislation that are equivalent to a BIB may be used instead of a BIB (Art. 59 para. 2 FIDLEG). Annex 10 of FIDLEV contains a list of the relevant documents (Art. 87 FIDLEV).

⁽³⁰⁹⁾ The BIB is a stand-alone document that must be clearly distinguishable from advertising materials and easy to understand (Art. 61 paras. 1 and 2 FIDLEG). It has to contain the information that is essential for investors to take an informed investment decision and to compare different financial instruments (Art. 60 para. 1 FIDLEG). In particular, the following information is required (Art. 60 para. 2 FIDLEG):

- i. The name of the financial instrument and the identity of the producer;
- ii. the type and characteristics of the financial instrument;
- iii. the risk/return profile of the financial instrument, specifying the maximum loss the investor may incur on the invested capital;
- iv. the costs of the financial instrument;
- v. the minimal holding period and the tradability of the financial instrument; and
- vi. information on any authorisations and approvals associated with the financial instrument.

⁽³¹⁰⁾ Annex 9 FIDLEV contains a template for a BIB.

⁽³¹¹⁾ The BIB must be drawn up either in an official language (German, French, Italian), in English or in the private client's language of correspondence (Art. 89 para. 1 FIDLEV). The BIB for CIS must be produced in at least one official language or in English, however (Art. 89 para. 2 FIDLEV).

⁽³¹²⁾ The producer is required to check on a regular basis whether the information included in the BIB is still accurate and must update it in the event of material changes (Art. 62 para. 1 FIDLEG). Such checks and revision must take place at least once a year, for as long as the financial instrument is offered to private clients (Art. 91 para. 1 FIDLEV).

⁽³¹³⁾ The BIB produced for CIS as well as any changes to it must be filed with FINMA without delay (Art. 91 para. 2 FIDLEV).

d) *Publication (Arts. 64–67 FIDLEG; Art. 92–94 FIDLEV)*

⁽³¹⁴⁾ The offeror of securities or the person requesting their admission to trading is required to file the approved prospectus with the reviewing body and publish the prospectus no later than the beginning of the public offer or admission to trading, respectively (Art. 64 para. 1 FIDLEG). The publication requirement may be satisfied either by (a) publishing the prospectus in a newspaper or the Swiss Official Gazette of Commerce (SOGC), (b) providing hard copies of the prospectus free of charge at

the registered office of the issuer or from the body involved in the issuance, (c) publishing the prospectus electronically on the website of the issuer, the guarantor, the security provider, the Trading Venue or the body involved in the issuance, or (d) publishing the prospectus in electronic form on the website of the reviewing body (Art. 64 para. 3 FIDLEG). If the prospectus is published electronically, additional hardcopies must be made available free of charge upon request (Art. 64 para. 4 FIDLEG).

⁽³¹⁵⁾ If a financial instrument for which a BIB has to be prepared (see N (307) above) is offered publicly, the BIB must be published no later than the beginning of the public offer (Art. 66 para. 1 FIDLEG). Thus, in case of financial instruments for which a BIB has to be prepared but which are not offered publicly, the BIB does not need to be “published” pursuant to Art. 66 FIDLEG. Art. 64 para. 3 and 4 FIDLEG apply to the publication of the BIB by analogy (Art. 66 para. 2 FIDLEG).

e) Advertising (Art. 68 FIDLEG; Art. 95 FIDLEV)

⁽³¹⁶⁾ Advertising (*Werbung*) has to be clearly recognisable and labelled as such (Art. 68 para. 1 in conjunction with Art. 8 para. 6 FIDLEG) and must make reference to the prospectus and the BIB in question and where these can be obtained (Art. 68 para. 2 FIDLEG). Further, advertising and any other information on financial instruments directed at investors must be consistent with the information contained in the prospectus and the BIB (Art. 68 para. 3 FIDLEG).

f) Liability (Art. 69 FIDLEG)

⁽³¹⁷⁾ According to Art. 69 FIDLEG, any person who provides information that is inaccurate, misleading or in violation of statutory requirements in prospectuses, BIBs or similar communications is liable to the acquirer of a financial instrument for the resulting losses in case due care has not been exercised (Art. 69 para. 1 FIDLEG). However, with regard to information contained in summaries, liability is limited to cases where such information is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus (Art. 69 para. 2 FIDLEG). With regard to false or misleading information on main prospects (*wesentliche Perspektiven*), liability is limited to cases where such false information was provided or distributed against better knowledge or without reference to the uncertainty regarding future developments (Art. 69 para. 3 FIDLEG).

⁽³¹⁸⁾ The SFSC currently requires an overwhelming likelihood of the causation between the violation of a duty and the damage. Any natural or legal person that was involved in the production of these documents is liable to the purchaser of a financial instrument, unless he can prove that he is not at fault (due diligence defence).

g) Special Provisions for the Offering of Structured Products (Art. 70 FIDLEG; Art. 96 FIDLEV)

⁽³¹⁹⁾ Structured products may be offered in or from Switzerland to private clients *with whom there is no long-term portfolio management or investment advisory relationship in place* only if these structured products are issued, guaranteed or secured in an equivalent manner by a Swiss bank, insurance company, securities house or a foreign institution that is subject to equivalent prudential supervision (Art. 70 para. 1 FIDLEG). Remarkably, Art. 70 FIDLEG is the only FIDLEG provision regulating (also) offers of financial instruments from Switzerland to clients abroad, which raises the question whether such extraterritorial scope of application of Art. 70 FIDLEG was actually intended by the Swiss Parliament.

4. Return of Documents (Arts. 72–73 FIDLEG; Art. 97 FIDLEV)

⁽³²⁰⁾ Clients are entitled at all times to receive a copy of their file and all other documents relating to them that were produced by the financial services provider within the context of their business relationship (Art. 72 para. 1 FIDLEG). A refusal by the financial services provider to provide the requested documents may be taken into account by the competent court in any subsequent legal dispute when deciding on procedural costs (Art. 73 para. 4 FIDLEG).

5. Ombudsman’s Office (Arts. 74–86 FIDLEG; Art. 98–101 FIDLEV)

⁽³²¹⁾ Disputes regarding legal claims between a client and the financial services provider shall be settled by an ombudsman in mediation proceedings if possible (Art. 74 FIDLEG). The proceedings must be non-bureaucratic, fair, quick, impartial and inexpensive or free of charge for the client (Art. 75 para. 1 FIDLEG). The filing of a mediation request with an ombudsman’s office does not exclude or prevent a civil claim (Art. 76 para. 1 FIDLEG). After bringing proceeding before the ombudsman’s office, the plaintiff may unilaterally waive conciliation proceedings (*Schlichtungsverfahren*) under the CPC (Art. 76 para. 2 FIDLEG). Financial

services providers have the obligation to affiliate to an ombudsman's office at the latest on commencing activity (Art. 77 FIDLEG).

6. Supervision and Exchange of Information (Arts. 87–88 FIDLEG)

⁽³²²⁾ The competent supervisory authority monitors and enforces compliance with the requirements for the provision of financial services and for the offering of financial instruments by the financial services providers under its supervision (Art. 87 paras. 1 and 2).

⁽³²³⁾ FINMA, the supervisory organisation, the registration body, the reviewing body, the ombudsman's office and the FDF are entitled to exchange information which is not in the public domain and which they require to fulfil their tasks (Art. 88 FIDLEG).

7. Criminal Provisions (Arts. 89–92 FIDLEG)

⁽³²⁴⁾ Wilful violation of FIDLEG code of conduct duties may in certain cases constitute a criminal offence (Art. 89 FIDLEG). Specifically, a fine not exceeding CHF 100,000 may be imposed on any person who *wilfully* (a) provides false information or withholds material facts when complying with the duties to provide information under Art. 8 FIDLEG, (b) seriously violates the duties to assess appropriateness and suitability under Arts. 10–14 FIDLEG, or (c) violates the provisions on the forwarding of third-party benefits under Art. 26 FIDLEG.

⁽³²⁵⁾ A fine not exceeding CHF 500,000 may be imposed on any person who *wilfully* (a) provides false information or withholds material facts in the prospectus or BIB, or (b) fails to publish the prospectus or BIB by the beginning of the public offer (Art. 90 para. 1 FIDLEG). A fine of up to CHF 100,000 may be imposed on any person who *wilfully* fails to make the BIB available prior to subscription or conclusion of the contract (Art. 90 para. 2 FIDLEG).

⁽³²⁶⁾ Further, the unauthorised offering of structured products (e.g. an offer to private clients of structured products which are neither issued, guaranteed nor secured in an equivalent manner by an institution pursuant to Art. 70 para. 1 FIDLEG) is sanctioned with a fine of up to CHF 500,000 (Art. 91 lit. a FIDLEG).

⁽³²⁷⁾ Negligent violations of the provisions mentioned above does not constitute a criminal offense.

⁽³²⁸⁾ Importantly, the criminal provisions of Arts. 89–91 FIDLEG do not apply to persons supervised under Art. 3 FINMAG or to persons working for them (Art. 92 FIDLEG).

8. Final Provisions (Arts. 93–96 FIDLEG; Arts. 102–112 FIDLEV)

⁽³²⁹⁾ FIDLEG becomes effective upon its entry into force on 1 January 2020. However, the following transitional provisions apply (Art. 95 FIDLEG):

- i. Client advisers must comply with the requirements according to Art. 6 FIDLEG (i.e. have sufficient knowledge regarding FIDLEG code of conduct duties and have the technical expertise necessary for their activities) by 1 January 2022 (Art. 95 para.1 FIDLEG; Art.104 FIDLEV);
- ii. client advisers which are subject to the registration duty according to Art. 28 FIDLEG must request registration within six months from the later of (a) 1 January 2020 and (b) the licensing of a registration body by FINMA (or the designation of a registration body by the Federal Council, respectively) (Art. 95 para.2 FIDLEG and Art.107 FIDLEV);
- iii. financial services providers must join an ombudsman’s office according to Art. 74 FIDLEG within six months from the later of (a) 1 January 2020 and (b) the recognition of an ombudsman’s office by the FDF (or the establishment of an ombudsman’s office by the Federal Council, respectively) (Art. 95 para.3 FIDLEG and Art.108 FIDLEV);
- iv. financial services providers must ensure compliance with the code of conduct duties pursuant to Art. 7–18 FIDLEG and the organisational requirements pursuant to Art. 21–27 FIDLEG by 1 January 2022 (Art. 105 para. 1 and 106 para. 1 FIDLEV). Financial services providers who wish to satisfy these code of conduct duties and organisational requirements before 1 January 2022 must irrevocably notify their audit company of this in writing, indicating the chosen date (until which the “old” code of conduct duties and organisational requirements set forth in CISA and in SESTA, and in the pertinent self-regulation recognised by FINMA as a minimum standard, continue to apply) (Art. 105 para. 2 and 106 para. 2 FIDLEV);
- v. with regard to (a) securities for which a public offer or an application for admission to trading on a Trading Venue has been made before the entry into force of FIDLEG; or (b) financial instruments that have been offered to private clients before 1 January 2020, the provisions

- on the offering of financial instruments are subject to a transitional period until 1 January 2022; and
- vi. with regard to all other securities / financial instruments, the following transitional provisions apply: (a) The duty to publish an approved prospectus for public offers of securities or the admission of securities to trading on a Trading Venue starts to apply 6 months after the admission of a reviewing body by FINMA, but not earlier than on 1 October 2020 (until that date, Arts. 652a and 1156 CO and the prospectus requirements of the relevant Trading Venues will continue to apply) (Art. 109 FIDLEV); (b) for Swiss real estate funds, securities funds and other funds for traditional investments, until 1 January 2022, either a BIB or a simplified prospectus / KIID within the meaning of CISO (in the version before the entry into force of FIDLEG) may be created and published (Art. 110 FIDLEG); (c) for structured products, until 1 January 2022, either a BIB or a simplified prospectus within the meaning of Art. 5 para. 2 CISA (in the version before the entry into force of FIDLEG) may be created and published; and (d) for all other types of financial instruments, the requirement to create a BIB will be applicable as from 1 January 2022.

B. Key Differences to EU Regulations

⁽³³⁰⁾ The new alignment of European financial markets regulation after the financial crisis has led to a revision of MiFID which resulted in MiFID II. MiFID II enhances the legal prerequisites for portfolio management and advisory services. It also specifies the minimal duties in case of execution only transactions. Finally, it limits the possibilities to accept distribution fees, retrocessions and similar benefits from third parties. Besides, the duties of producers of financial instruments are largely harmonised in Europe. The European Prospectus Directive stipulates that securities may only be offered publicly or admitted to a regulated market if a respective prospectus has been previously published.

⁽³³¹⁾ MiFID II differs from FIDLEG, amongst others, in the following key points:

- i. Prospectuses are approved by the national supervisory authorities and not by a separate approval body;
- ii. it requires an *ex ante* prospectus approval whereas FIDLEG provides for the possibility of an *ex post* approval for some financial instruments (e. g. bonds);

- iii. it requires pure investment advisers to obtain a licence whereas, under Swiss law, only compliance with the code of conduct duties and organisational requirements set forth in FIDLEG and – where applicable – a registration of client advisers of such investment advisers is required;
- iv. it restricts execution only orders of private clients to non-complex financial instruments whereas FIDLEG allows private client execution only orders for any financial instruments, regardless of their qualification as complex or non-complex;
- v. it does not subject all types of financial services to the regime on inducements but only portfolio management and investment advisory services. However, the regime applicable to inducements is stricter than in FIDLEG; e.g. under MiFID II, inducements are absolutely prohibited in the context of discretionary mandates;
- vi. in contrast to FIDLEG, it provides for a distinction between dependent and independent financial services; and
- vii. it requires a product governance process whereas FIDLEG does not.

C. What Swiss and Foreign Market Participants Need to be Aware of

1. Swiss Market Participants

⁽³³²⁾ *Services*: Swiss financial services providers will have to consider the following key points:

- i. Client advisers of non-prudentially supervised financial services providers will be subject to a registration duty;
- ii. the code of conduct duties of FIDLEG will be applicable if financial services are provided on a commercial basis in Switzerland or to clients in Switzerland;
- iii. the code of conduct duties will not apply, however, in case of financial services provided to institutional clients;
- iv. the distributor licence for distributors of CIS will be abolished;
- v. how to implement the rules regarding appropriateness and suitability assessments;
- vi. how to handle client segmentation;
- vii. elaborating a strategy in connection with extended rules on inducements;

- viii. implementing the new, more extensive client information and disclosure duties; and
- ix. ensuring the effective dispatch of the offering documentation (prospectuses and BIBs) to private clients.

⁽³³³⁾ *Products:* Swiss producers and providers of financial instruments should be aware of the following issues:

- i. New rules concerning the prospectus for securities;
- ii. preparation of BIB templates;
- iii. preparation of marketing material templates; and
- iv. implementation of solutions for the efficient production and update of product documentation and marketing materials.

2. Foreign Market Participants

⁽³³⁴⁾ *Services:* Foreign financial services providers will have to consider the following key points:

- i. Registration duties for client advisers of foreign financial services providers;
- ii. key points for Swiss financial services providers (see above), including compliance with FIDLEG code of conduct duties, if financial services are provided on a commercial basis in Switzerland or to clients in Switzerland (subject to certain exemptions); and
- iii. assessing the delta between the pertinent code of conduct duties under foreign law and those under Swiss law.

⁽³³⁵⁾ *Products:* Foreign producers and providers of financial instruments should be aware of the following issues:

- i. New rules on the prospectus for securities that are offered in Switzerland;
- ii. preparation of BIB templates for Switzerland (or use of recognised equivalent documents); and
- iii. key points for Swiss financial instruments providers (see above).

VI. Anti-Money Laundering – AMLA

A. AMLA-Related Regulatory Amendments of Swiss Anti-Money Laundering Framework of 2015 / 2016

1. Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012

⁽³³⁶⁾ Switzerland has been a (founding) member of the intergovernmental organisation FATF since the latter's creation in 1989. In 2012, the FATF published its revised international standards concerning the combating of money laundering and terrorist financing (FATF Recommendations).

⁽³³⁷⁾ As a consequence of the FATF Recommendations, on 12 December 2014, the Swiss Parliament approved the Federal Act for Implementing the Revised FATF Recommendations which subsequently entered into force in two stages on 1 July 2015 and 1 January 2016, respectively. The amended provisions that were enacted per 1 July 2015 are contained in the CO, CISA and FISA, while on 1 January 2016 amendments to AMLA, CC, PC, the ACLA and DEBA as well as CDB 16 (replacing CDB 08) entered into force. Hence, the aforementioned implementing federal act modified a variety of legal and regulatory areas, the most important of which are discussed in more detail below.

2. Overview

⁽³³⁸⁾ In a nutshell, the most considerable amendments to the Swiss anti-money laundering regulatory framework that entered into force on 1 July 2015 and on 1 January 2016, respectively, affect the following areas:

- i. Inclusion of “serious tax crimes” as a predicate offence to money laundering;
- ii. improved transparency of not Stock Exchange listed legal entities having issued bearer shares;
- iii. stricter rules on the identification of the beneficial owner of (not Stock Exchange listed) legal entities (so-called “controlling person”);
- iv. extended qualification of politically exposed persons (PEP);
- v. implementation of due diligence obligations relating to cash payments to dealers (*Händler*); and
- vi. modifications of regulation on SARs.

⁽³³⁹⁾ Together with the AMLA, its implementing ordinances AMLO (replacing the former PFIO) and AMLO-FINMA were revised as well. Also, the CDB 08 was brought in line with the revised AMLA regulation and newly enacted per 1 January 2016 as CDB 16. Details on the CDB 16 can be found further below under Chapter VI.B.

3. Improved Transparency of Not Stock Exchange Listed Legal Entities Having Issued Bearer Shares

⁽³⁴⁰⁾ Based on the FATF Recommendations, countries are requested to implement measures to identify the beneficial owners of legal entities and enhance the transparency of unlisted companies that have issued bearer shares (in Switzerland, some 50,000 respective legal entities still exist). According to the new rules which entered into force on 1 July 2015, an acquirer of bearer shares in a privately held Swiss stock corporation must report the share purchase to the respective stock corporation (or, if so provided, to an instructed financial intermediary) within one month following the purchase. In addition, such obligation applies to any person who alone or by agreement with third parties acquires (registered or bearer) shares in a company whose shares are not listed on a Stock Exchange, and thereby reaches or exceeds the threshold of 25 per cent of the share capital or votes (Art. 697j CO). Failure to comply with such reporting obligations leads to the suspension of the respective shareholder's membership rights (including financial rights, such as rights to dividends). These reporting obligations are not linked to any specific threshold and companies listed on a Stock Exchange (also a Stock Exchange abroad) as well as subsidiaries of listed companies are excluded from such regulation. Also, bearer shares issued as book-entry securities according to FISA are not subject to the aforementioned reporting obligations.

⁽³⁴¹⁾ The stock corporation must register the holders of its bearer shares in the company's bearer share register, which must be accessible within Switzerland at any time. Further, the bearer share register and all related records are subject to a mandatory retention period of ten years. Thus, although legally still in existence, bearer shares of Swiss stock corporations are treated similarly to registered shares. Therefore, we believe it is fair to say that Swiss bearer shares have, factually, disappeared.

⁽³⁴²⁾ Notably, together with the above revision, the previous concept of allowing an operating company to be considered the beneficial owner

of its (or third party) assets was dropped. Since 1 January 2016, as a rule, only natural persons may be considered (and recorded in the AML files, e.g. Form A) as beneficial owners (see also Art. 27 para. 2 CDB 16).

4. Implementation of Stricter Rules on the Identification of Beneficial Owners

⁽³⁴³⁾ The FATF identified some unresolved deficiencies under Swiss law during its mutual review in 2005. One of these deficiencies related to the establishment of the identity of beneficial owners. As a consequence, the law now expressly stipulates in its key provision on the identification of the beneficial owner (Art. 4 para. 1 AMLA) that the financial intermediary has to identify the beneficial owner with the due diligence required by the circumstances. The financial intermediary must obtain a written declaration indicating the natural person who is the beneficial owner, particularly in cases where the contracting party is not the beneficial owner or where there is any doubt in this respect, and always when the contracting party is a domiciliary company or a legal entity that is operationally active (Art. 4 para. 2 AMLA). Hence, notably, the obligation to establish the beneficial owner's identity newly extends to operating legal entities and requires that the so-called "controlling person" (*Kontrollinhaber*) is identified. According to Art. 2a para. 3 AMLA, the controlling person(s) of an operationally active legal entity are the natural persons who are in control of the legal entity by participating, directly or indirectly, alone or by way of a bilateral arrangement with third parties, in the legal entity with at least 25 per cent of its capital or its voting rights or control it in another way. If these cannot be determined, the top member of the governing body of the legal entity must be identified. As mentioned above, to establish the identity of their beneficial owners, unlisted legal entities having issued bearer shares were required to implement a shareholders' register stating the beneficial owners, i.e. his/her first name, surname and address (Art. 697i CO).

⁽³⁴⁴⁾ The exception regarding the identification of beneficial owners applies to cases where the contracting party is a Stock Exchange listed company or an affiliate in which such company has a majority stake (Art. 4 para. 1 AMLA).

5. Qualified Tax Offences as a Predicate Offence to Money Laundering

- ⁽³⁴⁵⁾ As of 1 January 2016, the scope of Art. 305^{bis} PC has been extended to qualified tax offences, so-called “aggravated tax misdemeanours” (Art. 305^{bis} para. 1^{bis} PC). In order to qualify as a qualified tax offence as per the revised PC, the amount of evaded taxes in a given taxation period must exceed CHF 300,000 (Art. 305^{bis} para. 1^{bis} PC). Such offences include offences in the areas of individual income tax and wealth tax and, in case of legal entities, profit and capital gains tax. Furthermore, real property gains tax is subject to such offences while cantonal inheritance and gift taxes are excluded from the regulation. Lower thresholds may apply in case of evasion of indirect taxes.
- ⁽³⁴⁶⁾ An aggravated tax misdemeanour as a predicate offence for money laundering can also be committed with respect to taxes payable outside of Switzerland provided that (a) the relevant conduct constitutes an offence in the relevant country, (b) the relevant conduct constitutes a tax fraud from a Swiss law perspective and (c) the evaded tax amount exceeds the equivalent of CHF 300,000. Hence, tax offences committed to the detriment of a tax authority abroad may also qualify as predicate offences to money laundering in Switzerland if the respective conduct constitutes an offence in the relevant foreign jurisdiction. The amount of evaded taxes is calculated in accordance with the laws of the jurisdiction where the tax fraud occurred.
- ⁽³⁴⁷⁾ The newly implemented predicate offence of aggravated tax misdemeanour does not apply retrospectively. Thus, only aggravated tax misdemeanours committed as of 1 January 2016 are considered predicate offences for money laundering. Qualified tax offenses with respect to assets that came under the control of a financial intermediary prior to that date may be relevant for anti-money laundering purposes if committed after 1 January 2016.
- ⁽³⁴⁸⁾ Financial intermediaries may file an SAR with the MROS in case of observations indicating a qualified tax offence.

6. Inclusion of Domestic PEPs and International Organisations’ PEPs

- ⁽³⁴⁹⁾ Pursuant to the FATF Recommendations, for due diligence purposes, there should be an obligation to identify domestic PEPs, foreign PEPs and persons exercising or having exercised an important function at, or on behalf of, PEPs of international organisations.

⁽³⁵⁰⁾ Pursuant to the revised Art. 2a AMLA, a formal definition of national PEPs has been included in federal law. All financial intermediaries shall equally apply the PEPs regulations in terms of risk assessment. Relatives of PEPs are in a similar way concerned by such rules. Since 1 January 2016, the following categories of persons shall be considered PEPs: (a) persons who are or have been entrusted with governing public functions abroad; (b) persons who are or have been entrusted with governing public functions in Switzerland; and (c) persons exercising an important function within an international sports federation. In case of Swiss PEPs, the status as a PEP lapses 18 months after his retirement from the relevant function. Such pre-defined period does not apply to foreign PEPs and PEPs from international organisations.

7. Modification of Regulation on SARs

⁽³⁵¹⁾ Art. 305^{ter} para. 2 PC has been amended to grant financial intermediaries the right (*Melderecht*) to file an SAR with the MROS not only in case of observations indicating that assets may originate from a crime, but also if they are related to an aggravated tax misdemeanour or are under the control of a criminal organisation. Such right must be distinguished from the *duty* to file an SAR with the MROS pursuant to Art. 9 AMLA (*Meldepflicht*).

⁽³⁵²⁾ Furthermore, under the revised regulations, the following changes were introduced: (a) a period of 20 working days (instead of five) for the MROS to analyse the SAR and decide whether it will refer the case to the criminal prosecution authorities; (b) the assets are, as a rule, frozen if and when the MROS notifies the financial intermediary that it will pass the case on to the criminal prosecution authorities (immediate freezing is still required, however, where assets of a person are affected that appears on a list prepared by the FDF and was forwarded to the financial intermediary by FINMA, the FGB or the financial intermediary's SRO); and (c) as a principle, the client(s) affected shall not be informed of the communication of the suspicions vis-à-vis the MROS.

8. Involvement of a Financial Intermediary in Cases of Cash Payments in Excess of CHF 100,000 for Movable or Immovable Property

⁽³⁵³⁾ While an absolute ban of cash payments in excess of CHF 100,000 was refused by the Swiss Parliament, the Swiss legislator decided to impose due diligence obligations on natural persons and legal entities trading

professionally in movable assets or real estate that receive cash payments exceeding CHF 100,000 (“dealers” in the sense of Art. 2 para. 1 lit. b AMLA, i.e. natural persons or legal entities dealing professionally in goods and receiving cash payment in the context of a commercial transaction such as, e.g. art dealers, jewellers or real estate agents). The due diligence obligations envisaged include the verification of the identity of the contracting party, determination of the beneficial owner, preparation and safekeeping of documents, clarification of the background and purpose of the deal in cases where a specific transaction seems unusual or where there are grounds to suspect that the cash used to pay for the transaction originates from a felony or an aggravated tax misdemeanour and the obligation to report well-founded suspicions (Art. 8a paras. 1 and 2 and Art. 9 para. 1^{bis} AMLA). To avoid the foregoing due diligence obligations, dealers may choose to have payments made through a financial intermediary instead of receiving cash payments exceeding CHF 100,000 themselves (Art. 8a para. 4 AMLA). Dealers are required to appoint auditors to verify compliance with the aforementioned obligations (Art. 15 AMLA).

⁽³⁵⁴⁾ The revised AMLO entered into force on 1 January 2016. The new duties of care, due diligence obligations and reporting duties for dealers set out in the AMLA are further detailed in the new AMLO. Also, the old PFIO was incorporated into the AMLO.

B. CDB 16

1. General Overview

⁽³⁵⁵⁾ The SBA’s Agreement on the Swiss Banks’ Code of Conduct with Regard to the Exercise of Due Diligence (CDB 16) entered into force on 1 January 2016 (as well as the revised anti-money laundering regulations implemented by the various SROs in respect of their members, mirroring the revised AML provisions). While the CDB started as an agreement among almost all Swiss banks and, therefore, could be considered soft law, the CDB today represents the minimum regulatory standard of compliance with the most important due diligence and duty of care obligations (Art. 35 AMLO-FINMA) of financial intermediaries and, therefore, is one of the most important self-regulatory frameworks within the field of Swiss anti-money laundering regulation. According to

Art. 2 para. 1 CDB 16, it lays down binding rules for good conduct in banking in accordance with the code of professional ethics. It is designed to give specific effect to certain due diligence provisions governed by the AMLA (Arts. 3 to 5 AMLA) and the concept of “the diligence that can be reasonably expected under the circumstances” in accepting assets according to Art 305^{ter} PC. Almost equally relevant is the SBA’s commentary to the CDB 16 that was published in November 2016 (Commentary). It serves as the SBA’s guidelines to the interpretation of the CDB 16 while it does not form part of the CDB 16 itself. It should be taken into account when interpreting the CDB 16 (Art. 3 CDB 16).

(356) The Commentary summarises as follows (see p. 5 Commentary):

(357) “The revision of the FATF Recommendations and the legislative changes resulting from the revision of the AMLA made it necessary to introduce new concepts and provisions, mainly with regard to establishing the identity of beneficial owners. The new term “controlling person” has also been added in this context and a new Form K has been created for establishing the identity of the controlling person of operating legal entities, partnerships, foundations and trusts not quoted on the Stock Exchange. Forms K (controlling person), I (insurance wrapper) and S (foundation) are now appended to the CDB in addition to the familiar Forms A and T. It was decided that Form R would not be included in this version of the CDB.” (Form R is the form used by lawyers for accounts holding client assets.)

(358) In comparison to its previous version (CDB 08), the CDB 16 also provides for a new, simplified and more comprehensive structure split into chapters, sections and articles.

(359) The revised regulation summarised above focuses on the following areas:

2. Concept of the “Controlling Person”

(360) The concept of the controlling person has been newly implemented in the CDB 16. In previous versions of the CDB, beneficial owners of actively operating companies did not need to be determined. The term of “controlling person” refers to the beneficial owner of an operating legal entity, which is not listed on a Stock Exchange, who, in principle, must be a natural person and must either directly or indirectly ultimately control the legal entity. The Commentary’s appendix includes 11 practical

examples as to what type of “look through” is adequate by using Form A and/or Form K, in particular, as regards “multi-stage holding structures”.

- ⁽³⁶¹⁾ The cascade in determining the controlling person is threefold: (a) if an operating legal entity has one or more controlling person(s) directly or indirectly holding voting rights or share capital of 25 per cent or more in such entity, these are to be identified in writing by using the newly implemented Form K (forming an annex to the CDB 16), (b) if no such controlling person exists, the natural persons who exercise control over the legal entity by other discernible means shall be identified by using Form A and/or Form K, and (c) if no controlling person according to the foregoing tests can be determined, the top member of the governing body of the legal entity should be identified as a substitute for the controlling person(s) (Art. 20 paras. 1, 3 and 4 CDB 16).

3. Holding and Real Estate Companies

- ⁽³⁶²⁾ As a general rule, holding companies, i.e. “companies that hold a majority stake in one or more companies engaging in trading, manufacturing or other commercial operations and whose purpose is not primarily the management of third party assets” (p. 27 Commentary) do not qualify as domiciliary companies in the sense of CDB 16. However, as an exception from the foregoing rule, holding companies “that merely combine and/or manage the various assets (securities, real estate, commercial operations, etc.) of a family or another group of specified individuals or have the sole objective of enabling dividend distributions to be made to shareholders are to be regarded as domiciliary companies” (p. 27 Commentary) and, consequently, the financial intermediary is required to determine the beneficial owner(s) on Form A.

4. Identification of Ordinary Partnerships

- ⁽³⁶³⁾ As a new requirement, the identity of at least one of the partners of ordinary partnerships has to be verified. The incumbent rule, according to which the verification of the identity of the designated signatory is sufficient, will continue to apply only in exceptional cases. For all partners that are beneficial owners of the assets subject to the business relationship and whose identity was not verified in the first place, a corresponding written declaration such as a Form A is now required.

5. FINMA Circular 2016 / 07 “Video- and Online-Identification”

- ⁽³⁶⁴⁾ On 17 March 2016, FINMA published its circular 2016 / 07 facilitating video and online client identification. The circular came into force on 18 March 2016 and summarises FINMA’s specifications on AML due diligence requirements for digital businesses allowing client on-boarding via digital means. The facilitated applications are subject to certain particular requirements such as live-streaming between the contracting party and the financial intermediary, recording of the live-stream or special guidelines to be set by the financial intermediary. The circular was revised on 17 July 2018 and, in its new form, is effective as from 1 January 2020.
- ⁽³⁶⁵⁾ The circular’s chapters III and IV regulate digital specifications in cases of video or online client identification and chapter V addresses the determination on the beneficial owner in such circumstances. The procedures may be outsourced in accordance with Arts. 28 and 29 AMLO-FINMA.
- ⁽³⁶⁶⁾ The circular applies to institutions directly supervised by FINMA (via the AMLO-FINMA) as well as, by analogy, to the pertaining provisions of the CDB 16 (and now CDB 2020) and the regulations set by the SROs.

C. Introduction of the Automatic Exchange of Information (AEI) Starting From 2017 / 2018

- ⁽³⁶⁷⁾ Cross-border tax evasion should be prevented with the help of the new global standard for the AEI. To date, almost 100 countries, including most major financial hubs and Switzerland, have declared their intention to adopt the standard. Switzerland welcomes the new international standard, to which it has actively contributed. It allows for a level playing field in the competition between financial centres, as these regulations apply to all and is an important instrument in the international efforts to combat tax evasion. Domestic bank-client confidentiality will not be affected by the implementation of the new global standard.
- ⁽³⁶⁸⁾ On 5 June 2015, the Federal Council submitted the message on the OECD / Council of Europe Convention on Mutual Administrative Assistance in Tax Matters and the message on the required legal basis for implementing the standard for the automatic exchange of information

in tax matters to the Swiss Parliament. The Ordinance on the International Automatic Exchange of Information in Tax Matters (AEI Ordinance), which contains the implementing provisions for the AEI, was adopted by the Federal Council on 23 November 2016. The legal basis for the AEI was thus created and entered into force on 1 January 2017.

⁽³⁶⁹⁾ The AEI can be implemented by means of a bilateral treaty or on the basis of the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (MCAA) which is based on the OECD / Council of Europe Convention on Mutual Administrative Assistance in Tax Matters. By 1 January 2019, Switzerland had approved the introduction of the AEI with 89 states which include all EU and EFTA member states, almost all G20 and OECD states, Switzerland's most important economic partners and the world's leading financial centres. In particular, on 27 May 2015, Switzerland and the EU signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters. Switzerland and the 28 EU member states have been collecting account data from 2017 and started to exchange it at the end of September 2018. To date, financial account information has been successfully exchanged with 36 partner states, for the first time at the end of September 2018. Based on current international developments, a further 19 partner states are currently to be added to Switzerland's AEI network and the AEI should be implemented with them from 2020 / 2021 onwards.

D. AMLA-Related Regulatory Amendments of Swiss Anti-Money Laundering Framework of 2019 / 2020

1. FATF Mutual Evaluation Report on Switzerland of 2016

⁽³⁷⁰⁾ For the first time since 2005, the FATF carried out a full evaluation of Switzerland in 2016. In its mutual evaluation report of 7 December 2016 (FATF Mutual Evaluation Report), FATF acknowledged the progress in the prevention of money laundering that Switzerland has made since 2005, in particular, the introduction of qualified tax offences as a predicate offence to money laundering³³.

³³ FINANCIAL ACTION TASK FORCE, Anti-money laundering and counter-terrorist financing measures – Switzerland, p. 5.

⁽³⁷¹⁾ The FATF Mutual Evaluation Report also mentioned several shortcomings. In particular, FATF criticised the overall low number of SARs by financial institutions to the MROS as insufficient. According to FATF, most of the SARs were submitted “too late”, since they were filed based on press articles or requests by national or international authorities rather than on suspicious transactions identified by a monitoring system³⁴. Therefore, FATF urged FINMA to “increase supervision and sanctions regarding compliance with the reporting requirement”³⁵. Other areas of criticism were (a) the risk management of financial intermediaries operating through foreign branches³⁶, (b) the high thresholds for trading and cash transactions³⁷, (c) the long time period allowed for fulfilling the duty to document when the business relationship is established³⁸, and (d) that acts related to the creation of companies, legal persons and legal arrangements by lawyers, notaries and fiduciaries are generally outside of the scope of AMLA³⁹.

⁽³⁷²⁾ Based on the results of the FATF Mutual Evaluation Report, Switzerland is currently undergoing an intensified follow-up process. The identified deficiencies in the legislation must be remedied within three years. After five years, Switzerland will be subjected to a follow-up review.

2. AML Prevention as a FINMA Focus Area

⁽³⁷³⁾ In November 2016, FINMA announced its strategic goals for 2017 to 2020. Amongst others, FINMA aims to make “a sustainable positive impact on the conduct of financial institutions, especially in money laundering prevention”⁴⁰. In 2017, FINMA stepped up its supervision and investigations of reporting under the AMLA. It conducted 23 on-site supervisory reviews and filed seven criminal charges for violation of reporting obligations (including against General Counsels and Chief Compliance Officers)⁴¹. In 2018 and 2019, FINMA continued to conduct on-site supervisory reviews, with a focus on the topics “AMLA risk

³⁴ FINANCIAL ACTION TASK FORCE (FN 33), p. 102.

³⁵ FINANCIAL ACTION TASK FORCE (FN 33), p. 4.

³⁶ FINANCIAL ACTION TASK FORCE (FN 33), p. 92.

³⁷ FINANCIAL ACTION TASK FORCE (FN 33), p. 98, 237.

³⁸ FINANCIAL ACTION TASK FORCE (FN 33), p. 181, 237.

³⁹ FINANCIAL ACTION TASK FORCE (FN 33), p. 95, 238.

⁴⁰ FINMA, Strategic goals 2017–2020, p. 7.

⁴¹ FINMA, Annual Report 2017, p. 30.

management” and “consolidated supervision by Swiss banks of their foreign-based subsidiaries and branches”⁴².

3. Revisions of AMLO-FINMA

a) *Revision in Response to FATF Mutual Evaluation Report*

⁽³⁷⁴⁾ Another result of the FATF Mutual Evaluation Report was the revision of AMLO-FINMA which enters into force on 1 January 2020⁴³. The most relevant amendments are the following:

- i. Specification of the requirements for group-wide compliance with the basic principles of money laundering prevention and global monitoring of legal and reputational risks by financial intermediaries operating abroad (Art. 6 revAMLO-FINMA);
- ii. the obligation to clarify the reasons for the use of domiciliary companies (Art. 9a revAMLO-FINMA);
- iii. the extension and clarification of the criteria indicating business relationships with increased risks, taking into account the FATF criteria (Arts. 13 et seq. revAMLO-FINMA); and
- iv. the lowering of the threshold for cash transactions and the subscription of unlisted collective investment schemes without further KYC-obligations from CHF 25,000 to CHF 15,000 (Arts. 40 et seq. and Arts. 50, 56 and 61 revAMLO-FINMA).

⁽³⁷⁵⁾ FINMA is of the view that some of the amendments to the AMLO-FINMA merely clarify existing obligations. In particular, the Explanatory Report on the preliminary draft AMLO-FINMA expresses the view that the duty to clarify the reasons for the use of domiciliary companies already exists today pursuant to Art. 6 para. 1 AMLA⁴⁴.

b) *Introduction of Due Diligence Obligations for Holders of a Fintech Licence*

⁽³⁷⁶⁾ For holders of the new Fintech licence pursuant to Art. 1b BA, the AMLO-FINMA also introduced due diligence obligations. The rules are guided by the due diligence obligations for directly subordinated financial

⁴² FINMA, Annual Report 2018, p. 52.

⁴³ FINMA, Annual Report 2018, p. 7, 16; FINMA, Explanatory Report of 4 September 2017 on the partial revision of AMLO-FINMA, p. 3.

⁴⁴ FINMA, Explanatory Report of 4 September 2017 on the partial revision of AMLO-FINMA, p. 17 et seq.

intermediaries (DSFI). Whereas DSFIs only need to identify business relationships with an increased risk if they have at least 20 permanent business relationships, holders of a Fintech licence need to apply the risk criteria irrespective of the number of business relationships. If necessary, FINMA may require the introduction of an IT-based transaction monitoring system. The changes entered into force on 1 January 2019.

4. Federal Act for Implementing the Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes

a) Overview

⁽³⁷⁷⁾ As a consequence of the FATF Mutual Evaluation Report, on 21 November 2018, the Federal Council submitted the message on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes in its report on phase 2 of the Swiss Country Review OECD / Council of Europe Convention on Mutual Administrative Assistance in Tax Matters. On 21 June 2019, the act was approved by the Swiss Parliament. The amended provisions entered into force on 1 November 2019 and include changes to the CO, the PC, the TAAA and FISA.

b) De Facto Abolition of Bearer Shares

⁽³⁷⁸⁾ The most important change is the *de facto* abolition of bearer shares. For example, the new provisions of the CO stipulate that bearer shares are only permitted if the company has listed equity securities on a Stock Exchange or if the bearer shares are structured as intermediated securities and deposited with a custodian designated by the company in Switzerland (Art. 622 CO). If a company has bearer shares under the aforementioned conditions, it must have this fact entered in the commercial register within 18 months of the entry into force of the new regulations.

⁽³⁷⁹⁾ If the bearer shares do not meet the above conditions within 18 months after the new provisions have come into force, the company must convert its bearer shares into registered shares by then. If it does not comply with this obligation, the bearer shares it has issued will automatically be converted into registered shares. After such conversion, the company must make the necessary amendments the next time it amends its articles of association. The Commercial Register Office will

reject any application for registration of another amendment to the articles of association in the Commercial Register as long as this amendment has not been made.

⁽³⁸⁰⁾ After the conversion, the company will enter in its shareholders' register those shareholders who have fulfilled their reporting obligation. Shareholders who have not complied with their reporting obligation may apply to the court for entry in the shareholders' register within five years of the new provisions coming into force. However, such an application requires the prior consent of the company. If no application is filed within this period, the shares concerned will be legally null and void and will be replaced by treasury shares. The respective shareholders lose their rights associated with the shares.

c) *Changes to the Rules on the Identification of the Beneficial Owners of Legal Entities*

⁽³⁸¹⁾ In its implementation of the FATF recommendations in 2015, the Swiss Parliament still considered the suspension and forfeiture of shareholders' membership rights as a sufficient sanction for non-compliance with the duty to notify the beneficial owner. Since November 2019, violations of the duty under company law to report beneficial owners at shareholder level as well as violations of the duties under company law to keep shareholder registers and directories at company level are punishable by a fine (Art. 327 CC).

⁽³⁸²⁾ In addition, the revised legislation (Art. 697j para. 2 et seq. CO) specifies who is to be regarded as the beneficial owner and what must be reported if the shareholder is a company or a listed company. If the shareholder is a company, the beneficial owner must be a natural person who controls the shareholder by analogy to Art. 963 para. 2 CO. Accordingly, the same concept applies to the assessment of who controls the shareholder as to the determination of whether a company is obliged to prepare consolidated financial statements.

5. Amendment of AMLA

a) *Overview*

⁽³⁸³⁾ On 26 June 2019, the Federal Council submitted the message on the amendments to the AMLA. The aim of the amendments is to implement some of the main FATF recommendations from the FATF Mutual

Evaluation Report, in particular, on weaknesses in the legislation and the effectiveness of standards.

- ⁽³⁸⁴⁾ The draft law provides, in particular, for the following eight key measures:
- i. Obligations are to be introduced for persons providing certain services in connection with companies or trusts (advisers; *Berater*) (see below);
 - ii. the threshold for due diligence obligations relating to cash payments in the area of precious metals and precious stones trading is to be lowered;
 - iii. the verification of the identity of the beneficial owner is to be explicitly stipulated by law;
 - iv. a general obligation to update client data is introduced (see below);
 - v. adjustments to the reporting system for reporting suspicions to the MROS are proposed (see below);
 - vi. the transparency of associations with an increased risk of terrorist financing is to be improved;
 - vii. a control mechanism for the commercial purchase of precious metals is to be introduced; and
 - viii. the Central Office for Precious Metals Control is to assume the role of a money laundering supervisory authority.

b) Implementation of Obligations for Advisers

⁽³⁸⁵⁾ Services in connection with the incorporation, management or administration of companies or trusts are already subject to the AMLA and supervised in accordance with the existing regulation whenever third-party assets are accepted or stored or when assistance is provided to invest or transfer them. The aforementioned activities are those of a financial intermediary. Services in connection with companies or trusts in which no financial flows are involved are not subject to the AMLA, a fact which was criticized in the FATF Mutual Evaluation Report. It is now proposed to introduce obligations under the AMLA for specific services in connection with non-operating companies or trusts and for the function of the nominal shareholder. This will create a new category of persons referred to as “advisers” (*Berater*) who will be subject to the AMLA alongside financial intermediaries and dealers.

⁽³⁸⁶⁾ The draft contains a service-related approach. The due diligence obligations will apply to all natural and legal persons providing such service, regardless of their profession. Only services provided with respect to domiciliary companies incorporated in Switzerland or abroad

or trusts are subject to the new rules for advisers. The definition of services is very broad and includes (a) the establishment, management or administration of such entities, (b) the organisation of the procurement of funds related to the before-mentioned activities, (c) the purchase or sale of entities in scope of the new rules, (d) the provision of an address or premises as the domicile of entities within the scope of the new rules, or (e) exercising the function of a nominee shareholder.

⁽³⁸⁷⁾ The due diligence obligations for advisers are based on the existing due diligence obligations for dealers. They contain an identification obligation, the obligation to establish the beneficial owner, a documentation obligation as well as the obligation to clarify the background and purpose of the service provided. As an organisational measure, advisers are to be required to provide sufficient training for their staff and to carry out internal controls. In addition, the existing MROS reporting obligation for financial intermediaries and traders and the existing auditing obligation for traders will be extended to advisers. This is to be used as evidence of the effectiveness of the requirements within the framework of an audit by the FATF.

⁽³⁸⁸⁾ However, the existing exceptions for professional secrecy also apply to the services of advisers. An exception to the MROS reporting obligation, therefore, always exists if the service is provided by a lawyer or a notary and the data to be reported is subject to professional secrecy. In addition, a new exception states that there is no obligation to report if no financial transaction is carried out in the name or for the account of a customer within the scope of the activity. A reporting obligation, therefore, only exists if a financial transaction is carried out for the client in the course of the service and the data to be reported is not covered by professional secrecy.

c) *General Obligation to Update Client Data*

⁽³⁸⁹⁾ Art. 5 AMLA provides for the obligation to update customer data which financial intermediaries must obtain in the course of fulfilling their due diligence obligations. Today, the obligation is limited in two respects. It only applies if, during the course of the business relationship, doubts arise as to the identity of the contracting party or the beneficial owner, and it only concerns the re-identification of the contracting party or the re-establishment of the beneficial owner.

⁽³⁹⁰⁾ A new obligation is proposed to be included in the AMLA to periodically verify whether the due diligence documents relating to the client profile are still current and to update them if necessary (updating the client profile). The obligation to periodically check that client data is up-to-date applies to all business relationships regardless of their risk profile. However, a risk-based approach has been adopted with regard to the periodicity, scope and type of the review and the updating of customer data.

d) Adjustments to the Reporting System to MROS

⁽³⁹¹⁾ Switzerland has a particular reporting system for reports of suspected money laundering or terrorist financing, with the coexistence of a reporting obligation and a reporting right. In order to clarify the difference between the reporting obligation and the reporting right, the term “well-founded suspicion” of Art. 9 AMLA is specified in the AMLA, as is already the case with the reporting obligation of dealers (Art. 20 para. 1 AMLA). The clarification will take account of recent case law, which regards a suspicion as well-founded if it could not be dispelled by clarifications pursuant to Art. 6 para. 2 AMLA.

E. CDB 20

⁽³⁹²⁾ A revised SBA's Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence (CDB 20) enters into force on 1 January 2020.

⁽³⁹³⁾ The material changes of the CDB 20 are to “rectify the deficiencies identified by the FATF” (p. 6 Commentary). In particular, the threshold for cash transactions has been lowered from CHF 25,000 to CHF 15,000 and removed for trading transactions (Arts. 4, 20 and 27 CDB 20). In addition, the time period allowed for fulfilling the duty to document a newly opened account has been lowered from 90 to 30 days (Art. 45 CDB 20).

⁽³⁹⁴⁾ Furthermore, references to FINMA Circular 2016 / 07 “Video- and Online-Identification” are added (Arts. 9, 10, 21 and 28 CDB 20) which is now explicitly recognised as equivalent to the traditional CDB identification procedure.

VII. Collective Investment Schemes – CISA

A. Amendments to CISA as Part of the Introduction of FIDLEG and FINIG

⁽³⁹⁵⁾ The last major (partial) revision of the Federal Collective Investment Schemes Act (CISA), which became effective on 1 March 2013 (CISA Revision 2013), resulted, *inter alia*, in fundamental changes to the regulation of the distribution of foreign collective investment schemes (including both open-ended and closed-ended foreign investment funds) in and into Switzerland: Whereas prior to CISA Revision 2013, foreign collective investment schemes could be marketed to (all types of) qualified investors (within the meaning of CISA) without any Swiss regulatory requirements being triggered, it was no longer permitted after CISA Revision 2013 to distribute foreign collective investment schemes in or into Switzerland to certain types of qualified investors, unless a Swiss representative and a Swiss paying agent had been appointed for the relevant foreign collective investment schemes and compliance with the pertinent disclosure and code of conduct duties (as set forth in CISA and the relevant self-regulation of the Swiss Funds & Asset Management Association SFAMA) was ensured. Further, as a result of CISA Revision 2013, foreign collective investment schemes could only be distributed to qualified investors in or into Switzerland by duly licensed (Swiss or foreign) distributors on the basis of a distribution agreement (that had to comply with certain Swiss regulatory requirements) between the distributor and the Swiss representative of the foreign collective investment scheme.

⁽³⁹⁶⁾ The entry into force of FIDLEG and FINIG will, once again, lead to important changes to CISA, which shall be summarised in this Chapter. It is particularly noteworthy that certain regulatory requirements which had been introduced as part of CISA Revision 2013 will be amended or abolished again. For example, the requirement to appoint a Swiss representative and a Swiss paying agent for foreign collective investment schemes distributed to qualified investors in or into Switzerland will no longer exist (subject to certain exceptions). Another

important change consists in the abolition of the CISA distributor licence.

⁽³⁹⁷⁾ As outlined in Chapter I “From Old to New: An Overview”, the scope of CISA will be substantially reduced as a result of the entry into force of FIDLEG and FINIG. Namely, in essence, CISA will continue to solely contain the product-level requirements for Swiss collective investment schemes and for foreign collective investment schemes offered to investors in Switzerland, whereas, in contrast, the licence requirements for fund management companies and asset managers of collective investment schemes will be incorporated in FINIG, and the fund industry specific point of sale / conduct duties of CISA will be replaced by the new cross-sectoral code of conduct duties of FIDLEG.

1. From “Distribution” to “Offer”

⁽³⁹⁸⁾ Prior to the entry into force of FIDLEG / FINIG, the distribution of collective investment schemes was regulated comprehensively by CISA as a “vertical” (i.e. sector-specific) regulation. CISA contained (a) the requirements that collective investment schemes had to satisfy as products in order to be permitted for distribution in and from Switzerland, (b) the (licence) requirements for persons distributing collective investment schemes in Switzerland, and (c) the regulatory duties at the point of sale. These requirements and duties were (only) triggered in case of a “distribution” within the meaning of CISA.

⁽³⁹⁹⁾ Under FIDLEG / FINIG, the concept of regulated “distribution” will be abolished. All references in CISA to “distribution” will be replaced by references to “offer”. The term “offer” will, however, not have the same meaning and relevance as the term “distribution”: Whether a collective investment scheme is “offered” in Switzerland will only be relevant for the product-level requirements. In contrast, the answer to the questions whether the persons involved in the marketing of collective investment schemes vis-à-vis investors in Switzerland will have to meet any regulatory requirements (specifically, whether these persons will have to be registered in the FIDLEG client adviser register) and whether regulatory code of conduct duties apply when marketing collective investment schemes to investors in Switzerland depends on whether the relevant marketing activities qualify as a “financial service” pursuant to Art. 3 lit. c no. 1 FIDLEG.

⁽⁴⁰⁰⁾ During the legislative process, a heated debate arose with respect to the question whether the mere “distribution” of collective investment schemes (i.e. sales efforts not involving any investment advice) will be qualified as a “financial service” within the meaning of Art. 3 lit. c no. 1 FIDLEG. Since the funds and asset management industry was, historically, already accustomed to regulatory code of conduct duties and because it considered it sensible that “distribution” be subject to certain regulatory requirements, it supported a wide interpretation of the term “financial service”. In contrast, representatives from the capital markets side disagreed with this approach because Art. 3 lit. c no. 1 FIDLEG refers to all types of financial instruments (within the meaning of FIDLEG) and, accordingly, the interpretation supported by the fund industry would have led to the application of the code of conduct duties and the related duty to register as a client adviser of FIDLEG (where applicable) also to sales efforts “below” the level of a personal recommendation in relation to all types of financial instruments (e.g. also equity and bonds). This controversial debate has been resolved in the final version of FIDLEV which stipulates that the “acquisition or sale” of financial instruments pursuant to Art. 3 lit. c FIDLEG shall comprise any activity directly addressed to specific customers and specifically aimed at the acquisition or disposal of financial instruments (including the distribution of collective investment schemes) (Art. 3 para. 2 FIDLEV)⁴⁵. In other words: the mere “distribution” of collective investment schemes qualifies as a financial service under FIDLEG (even if it does not constitute personal transaction related advice according to Art. 3 lit. c no. 4 FIDLEG⁴⁶) and, thus, in principle, triggers the relevant regulatory duties for financial services providers such as the code of conduct duties and the registration of client advisers (where applicable). As an exemption therefrom, (traditional) capital markets transaction structures with “placements” of financial instruments by a lead manager (with or without firm underwritings) do not qualify as financial services (Art. 3 para. 3 lit. b FIDLEV)⁴⁷. However, this exemption does not typically apply to the distribution of collective investment schemes.

⁽⁴⁰¹⁾ As a consequence, the code of conduct duties and the registration requirement for client advisers in FIDLEG are, in principle, applicable to

⁴⁵ FDF, Explanatory Report to the FIDLEV, FINIV and AOV of 6 November 2019, p. 19.

⁴⁶ FDF, Explanatory Report (FN 45), p. 19.

⁴⁷ FDF, Explanatory Report (FN 45), p. 19. et seq.

mere distribution activities of distributors of collective investment schemes. However, the regulatory requirements of a suitability and appropriateness test do not apply to a mere distribution of collective investment schemes as long as such distribution does not qualify as asset management or investment advice). However, distributors which actually conduct activities that qualify as asset management or investment advice must comply with the suitability and appropriateness rules of FIDLEG at the point of sale (to the extent applicable) (Art. 10 FIDLEG).

2. Abolition of the Status of a FINMA Licensed Distributor

⁽⁴⁰²⁾ Under the revised CISA, distributors of collective investment schemes will no longer be subject to a licensing requirement, regardless of whether they distribute collective investment schemes exclusively to qualified or (also) to non-qualified investors. Instead, mere distributors of collective investment schemes will, in principle, be subject to the code of conduct duties and the client adviser registration requirement of FIDLEG (to the extent applicable) (Art. 3 para. 2 FIDLEG).

3. Changes to CISA Investor Categorisation

⁽⁴⁰³⁾ With the entry into force of FIDLEG, all *per se* professional (including institutional) clients (Art. 4 paras. 3–5 FIDLEG), as well as private clients (which notably are not limited to natural persons) having opted out under Art. 5 para. 1 or 4 FIDLEG, will, by way of reference in Art. 10 para. 3 CISA, be deemed qualified investors under CISA. It is, however, important to note that the qualified investor definition of CISA is broader than the professional client definition of FIDLEG. Specifically, Art. 10 para. 3^{ter} CISA provides that private clients having entered into a permanent written asset management or advisory agreement with regulated financial intermediaries are also deemed qualified investors under CISA (unless they opt in in writing or another form which is verifiable by text), while under FIDLEG, the mere existence of such agreements does not lead to the qualification as a professional client. This is logical, because the protection offered by FIDLEG code of conduct duties – which only fully apply in case of financial services provided to private clients within the meaning of FIDLEG – is the reason why a lesser level of additional protection is deemed to be required

under CISA in case such private clients are advised or their assets managed by a regulated financial intermediary.

⁽⁴⁰⁴⁾ In addition, the following changes apply in comparison to the previous regime: Previously, only clients with a written asset management agreement with regulated financial intermediaries or certain qualified regular asset managers were (automatically) deemed qualified investors (unless they opted in). The same did, however, not apply in case of a written advisory agreement. With the introduction of FINIG, the latter has changed and private clients having entered into a written advisory agreement with regulated financial intermediaries may now also benefit from having access to a larger product universe (Art. 10 para. 3^{er} CISA).

⁽⁴⁰⁵⁾ What remains to be seen, is whether the new possibility granted to all types of professional clients to opt in and require to be treated as private clients will lead to an automatic re-qualification of such clients to the status of a non-qualified investor under CISA and, thus, trigger the requirements at the product level set out above. If so, it will become more difficult to ensure that only eligible investors are targeted and accepted as investors in collective investment schemes given that any type of investor may at any time declare an opting-in and, therefore, become non-eligible in relation to qualified investor funds. Another follow-up question resulting therefrom is what would happen in case a (qualified) investor declares to opt in at a time when such investor is already invested in a qualified investor fund (i.e. after subscription). In our view, such investor may remain invested and no appointment of a Swiss paying agent and representative is required in such case for as long as such investor had the status of a qualified investor when subscribing units of the fund.

4. Swiss Representative and Paying Agent only Required for Retail Distribution and / or Distribution to HNWI

⁽⁴⁰⁶⁾ As outlined in N (394) above, as part of CISA Revision 2013, the scope of the requirement to appoint a Swiss representative and a Swiss paying agent had been extended to also apply to foreign collective investment schemes distributed in or into Switzerland exclusively to qualified investors. With the introduction of FINIG this change of regime will be reversed to a large extent. Under the revised CISA, the appointment of a Swiss representative and paying agent is only required in case of an offer to non-qualified investors and/or HNWI regardless of whether

such HNWI are non-qualified or qualified investors (Art. 120 paras.2 and 4 CISA). Only offers directed exclusively at qualified investors (as per CISA) other than HNWI will be exempt from the Swiss representative and Swiss paying agent requirement. This affects, in particular, offers to public pension schemes, companies with professional treasury operations and private individuals under a permanent written advisory or asset management agreement with a regulated financial intermediary (unless they opt in). In our view, this (partial) return to the *status quo ex ante* deserves merit, given that the existence of a Swiss representative and paying agent offered limited benefits for qualified investors, while causing considerable costs.

5. Swiss Jurisdiction in Case of Distribution to Retail Investors and / or HNWI

⁽⁴⁰⁷⁾ Before the entry into force of FIDLEG / FINIG, Art. 125 CISA provided that the place of performance in relation to the units in collective investment schemes being distributed in Switzerland is at the domicile of the Swiss representative. As a precondition for the approval of foreign collective investment schemes for distribution in, into or from Switzerland to non-qualified investors, FINMA additionally required a forum at the domicile of the Swiss representative. Whether a sufficient legal basis existed for this FINMA practice was controversially discussed in the doctrine. With the introduction of FINIG, Art.125 CISA was amended and now (a) contains an explicit legal basis for the aforementioned FINMA practice in relation to the distribution to non-qualified investors and (b) gives investors a choice of jurisdiction between the courts at the domicile of the Swiss representative or the courts at their own domicile. Given that this provision is integrated within the chapter of CISA which governs the Swiss representative, this jurisdiction regime would, in our view, not apply in case no Swiss representative needs to be appointed (i.e. in case of distribution exclusively to any type of qualified investor other than HNWI).

6. Point of Sale Duties vs. Product Transparency

⁽⁴⁰⁸⁾ Interesting legal questions arise with respect to the relationship of the cross-sectoral “point of sale” duties contained in FIDLEG (e.g. suitability, appropriateness, information duties, service transparency or the code

of conduct⁴⁸) and the sector-specific “point of production” duties relating to collective investment schemes in FIDLEG or CISA⁴⁹. The cross-sectoral rules of FIDLEG and FIDLEV must sometimes be applied in interplay with the sector-specific rules of CISA and CISO⁵⁰. Although this task is not easy to fulfil at all times, the combination of the point of sale duties and point of production duties constitutes a modern and well-designed regulatory framework that ensures adequate investor protection and represents a quality feature of collective investment schemes that are established or distributed into, in or from Switzerland⁵¹. Practical examples of cases that require a combined application of FIDLEG and CISA could be distribution related questions concerning the offer of collective investment schemes into Switzerland which may – depending on the target investors in Switzerland – require the application of the code of conduct duties of FIDLEG at the point of sale as well as compliance with product specific requirements such as product approvals, the appointment of a Swiss representative and paying agent (where applicable) or the drafting of Swiss selling restrictions for a private placement memorandum.

⁽⁴⁰⁹⁾ The SFAMA had published several model documents (e. g. prospectuses, distribution agreements or annex “information for investors in Switzerland”) which reflect the industry standard (and, with regard to certain aspects, the regulatory minimum standard) in terms of product transparency under CISA. Due to the significant changes introduced by FIDLEG and FINIG, many of these model documents require amendments. Implementing the revised SFAMA standard is an important task for the funds and asset management industry. It will be interesting to see how the SFAMA model documentation evolves under FIDLEG.

⁴⁸ Cf. ABEGGLEN SANDRO / BIANCHI LUCA, Regulation of the Point of Sale – An Update on the Rules of Conduct of Financial Services Providers under the proposed FIDLEG, CapLaw 2016/1, p.17 et seq.

⁴⁹ Cf. ABEGGLEN SANDRO / BIANCHI LUCA, Point of Sale Regulation – Consultation Draft of Financial Services Ordinance: Key Points, CapLaw 2018/5, p. 21; cf. Arts. 48 et seq. FIDLEG.

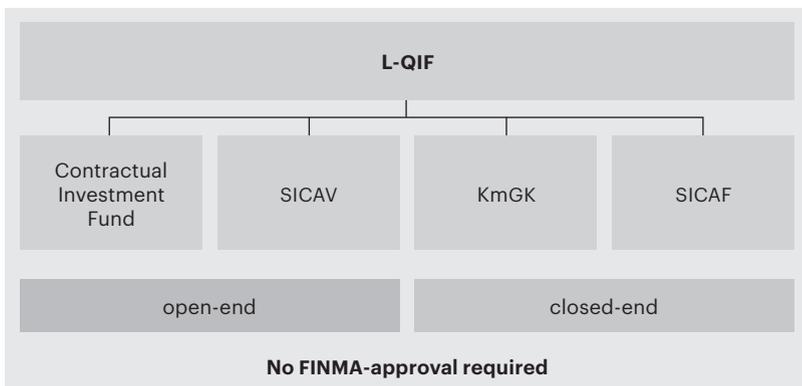
⁵⁰ Cf. ABEGGLEN / BIANCHI (FN 49), p. 21.

⁵¹ Cf. ABEGGLEN / BIANCHI (FN 49), p. 21.

B. New: Limited Qualified Investor Fund (L-QIF)

⁽⁴¹⁰⁾ A new Limited Qualified Investor Fund (L-QIF) shall be introduced in CISA (currently, expected in 2021) in order to increase the attractiveness of Switzerland as a domicile for the establishment of collective investment schemes⁵². The FDF has published a preliminary draft of the new CISA provisions (Preliminary Draft or PD) as well as an Explanatory Report to the Preliminary Draft concerning amendments to the Collective Investment Schemes Act regarding the L-QIF on 26 June 2019. This Chapter provides a brief overview of the proposed new L-QIF and its key features. It is based on the Preliminary Draft (which may still be subject to changes during the legislative process).

⁽⁴¹¹⁾ The following graph provides an overview of the L-QIF structuring options⁵³:



⁽⁴¹²⁾ The graph shows that an L-QIF can be set up in the legal form of open-end structures such as the contractual Investment Fund or the Investment Company with Variable Capital (SICAV) or closed-end structures such as the Limited Partnership for Collective Investment (KmGK), or the Investment Company with Fixed Capital (SICAF)⁵⁴. This

⁵² ABEGGLEN SANDRO / BIANCHI LUCA, *New Limited Qualified Investor Fund (L-QIF) – Innovation and Deregulation as Growth Catalyst for the Fund and Asset Management Industry in Switzerland*, CapLaw 2019/4, p.17.

⁵³ ABEGGLEN / BIANCHI (FN 52), p. 18.

⁵⁴ ABEGGLEN / BIANCHI (FN 52), p. 18.

means that the L-QIF must be structured in the legal form of one of the existing legal wrappers of CISA⁵⁵. However, the L-QIF has special key characteristics which are listed below.

1. Attention: Qualified Investors Only!

⁽⁴¹³⁾ L-QIFs are restricted to “qualified investors” in terms of CISA (Art. 118a para.1 lit.a PD-CISA). The term “qualified investors” includes “professional clients” according to Art. 4 paras. 3–5 FIDLEG (Art. 10 para. 3 CISA). Furthermore, it includes HNWI (and private investment structures without a professional treasury created for them) which opt to be treated as professional clients (Art. 5 para. 1 FIDLEG; Art. 10 para. 3 CISA). Moreover, investors with a permanent asset management or investment advisory agreement with a regulated financial intermediary according to Art. 4 para.3 lit.a FIDLEG (or a foreign financial intermediary with equivalent prudential supervision) are permitted, unless they declared in writing that they want to be treated as private clients (Art. 10 para. 3^{ter} CISA). Non-qualified investors are not allowed to invest in an L-QIF.

⁽⁴¹⁴⁾ It is noteworthy that the L-QIF may also be set-up as a single investor fund for insurance companies, public entities with professional treasury operations, occupational pension schemes or entities which serve the purpose of occupational pension schemes with professional treasury operations (Art. 7 para.3 CISA; Art.5 para. 4 D-CISO). Thus, a single investor L-QIF could be an interesting choice for the efficient and fast launch of tailor-made product solutions for large insurance companies or pension schemes or indeed for other private market offerings.

2. Flexible Investment Restrictions

⁽⁴¹⁵⁾ Special and more flexible investment restrictions apply for the L-QIF (Art. 118n et seq. PD-CISA). As a general rule, all types of investments shall be permitted for an L-QIF, including securities, units of collective investment schemes, money market instruments, real estate⁵⁶, derivatives, structured products, commodities, infrastructure projects, crypto currencies, wine, art, or vintage cars as examples of feasible

⁵⁵ ABEGGLEN/BIANCHI (FN 52), p.18.

⁵⁶ Cf. ABEGGLEN SANDRO/BIANCHI LUCA, Regulierung indirekter Immobilienanlagen – Ausgestaltungsmöglichkeiten und ausgewählte Unterstellungsfragen nach Schweizer Recht, GesKR 2017/2, pp.152 et seq.

investments of an L-QIF⁵⁷. Besides, the PD-CISA does not contain a diversification requirement (Art. 118o PD-CISA). The regular investment restrictions of supervised fund structures are, in principle, not expected to be applicable for the L-QIF⁵⁸.

3. Fund Management vs. Delegation of Asset Management

⁽⁴¹⁶⁾ An L-QIF must delegate its fund administration to a FINMA-authorized fund management company (*Fondsleitung*) (Art. 118g et seq. PD-CISA). However, an exception thereto applies for L-QIFs in the legal form of an LP if the general partner is a bank or insurance company (Art. 118h para. 3 PD-CISA).

⁽⁴¹⁷⁾ The fund management company (or general partner in the case of an LP) of an L-QIF is permitted – but not obliged by law – to delegate the asset management to (Art. 118g et seq. PD-CISA; Art. 6 FINIG):

- i. Banks;
- ii. securities houses;
- iii. fund management companies;
- iv. asset managers of collective investments (according to Art. 2 para. 1 lit. c FINIG);
- v. foreign asset managers of collective investments⁵⁹; or
- vi. insurance companies.

⁽⁴¹⁸⁾ Thus, the rules of the regulatory authorisation cascade apply, i.e. the asset management may be delegated not only to asset managers of collective investments but also to financial institutions with a higher regulatory standard (Art. 6 FINIG)⁶⁰.

4. No FINMA Approval or Supervision

⁽⁴¹⁹⁾ Similar to the Reserved Alternative Investment Fund (RAIF) in Luxembourg, the L-QIF does not require authorisation or product approval by FINMA (Arts. 13 para. 2^{bis} and 15 para. 3 PD-CISA). A mere notification of the FDF

⁵⁷ FDF, Explanatory Report to the Preliminary Draft of the Amendments of the CISA (L-QIF) of 26 June 2019, p. 27.

⁵⁸ FDF, Explanatory Report (FN 57), p. 16.

⁵⁹ If the foreign asset manager is subject to an equivalent regulation and supervision in its domicile country and a cooperation agreement exists between FINMA and the responsible foreign authority.

⁶⁰ FDF, Explanatory Report (FN 57), p. 23.

by the administrator is sufficient. Also, the L-QIF is not subject to an ongoing regulatory supervision by FINMA which reduces the costs in comparison to supervised fund structures. Consequently, the L-QIF has a short time-to-market and is a relatively cost-efficient investment vehicle.

5. Auditor

⁽⁴²⁰⁾ An L-QIF must appoint a regulatory auditor (the same as the statutory audit company) (Art. 118i PD-CISA). The audit company must determine whether the regulatory requirements of CISA are fulfilled and will continue to be fulfilled in the foreseeable future within a regulatory audit⁶¹. Furthermore, the audit company must conduct the regular accounting audit.

6. Investor Information

⁽⁴²¹⁾ The legal name of the L-QIF must include the designation “L-QIF” as well as the selected legal form (Art. 118e para. 1 PD-CISA). The designation must be pointed out on the first page of the fund documents as well as in advertisements (Art. 118e para. 2 lit. a PD-CISA). Further, a disclaimer is required which states that the L-QIF is not authorised, approved or supervised by FINMA (Art. 118e para. 2 lit. b PD-CISA). In addition, special risks of alternative investments must be pointed out in the designation, in the fund documents as well as in advertisements (Art. 118n para. 2 PD-CISA). There is no prospectus duty for an L-QIF from a regulatory perspective.

⁶¹ FDF, Explanatory Report (FN 57), p. 24.

VIII. Insurance – ISA

A. Current Regulation of the Private Insurance Sector

⁽⁴²²⁾ The two most important pieces of legislation governing the private insurance sector are (a) the Insurance Supervision Act (ISA), which regulates the supervision of insurance companies and insurance brokers (*Versicherungsvermittler*) and is designed to protect the insured persons from abuses and the insolvency risks to which insurance companies are exposed, and (b) the Insurance Contract Act (ICA), which contains provisions relating to insurance contracts. Both are currently being reformed.

B. Revision of the ICA

⁽⁴²³⁾ On 28 June 2017, the Federal Council published a message on the partial reform of the ICA. In a nutshell, the most considerable amendments affect the following areas:

- i. Introduction of a 14-day right of withdrawal for the policyholder at the time of conclusion of the contract;
- ii. rules on preliminary coverage are to be set out in the law;
- iii. introduction of the possibility of retroactive insurance under certain conditions;
- iv. extension of the limitation period for claims arising from the insurance contract from two to five years (with a few exceptions);
- v. introduction of a unilateral right to amend insurance contracts by insurers;
- vi. limitation of the scope of protection of the ICA for large risks or for professional policyholders in an appropriate manner; and
- vii. by introducing section titles, the ICA was formally given a well-organised structure.

⁽⁴²⁴⁾ Since the first quarter of 2018, the draft is subject to parliamentary debate. In October 2018, the majority of the National Council's Commission for Economic Affairs and Taxes (WAK-N) endorsed the Federal Council's draft. In May 2019, the National Council largely followed the Federal Council's draft and the recommendation of the

majority of the WAK-N. Probably the most significant changes were the deletion of the right to unilaterally amend insurance contracts (see v. above) and the introduction of consumer-friendly provisions, such as the extension of the right of withdrawal (see i. above) to substantial contractual amendments or the subsequent liability of health insurance providers under the ICA. In September 2019, the Council of States reversed many changes made by the National Council (in particular, the before-mentioned consumer-friendly amendments). However, the Council of States approved the deletion of the unilateral right to amend insurance contracts (see v. above). The ICA will now be returned to the National Council for further deliberation.

C. Revision of the ISA

1. Overview

⁽⁴²⁵⁾ When the Federal Council's message on FIDLEG was published in 2015, it was expected to include certain life insurance products under the definition of financial instruments (Art. 3 lit. b no. 6 FIDLEG) and, as a consequence, to subject life insurance companies and brokers to FIDLEG supervision. In June 2018, the Swiss Parliament decided that the code of conduct obligations in respect of insurance services should be regulated in the ISA only.

⁽⁴²⁶⁾ On 14 November 2018, the Federal Council initiated a consultation on a partial reform of the ISA. A message from the Federal Council is expected in spring 2020. The most considerable amendments affect the following areas:

- i. Introduction of a restructuring law for insurance companies (today, there is no legal basis for FINMA to apply restructuring measures);
- ii. foreign insurance companies (i.e. with registered office abroad) that have a branch in Switzerland will also be subject to supervision in respect of their insurance activities in or from Switzerland;
- iii. the degree of the duties under supervisory law differs according to client segmentation – introduction of the categories of non-professional, professional and intragroup policyholders;
- iv. introduction of code of conduct rules for insurance brokers and establishment of an ombudsman body;

- v. revision of the criminal provisions (in particular, decriminalisation of failure to report / to apply for approval of a change in business plan); and
- vi. regulatory facilitations for InsureTech (i.e. FINMA can exempt insurance companies with innovative business models from supervision).

2. Amendments to the ISA regarding Insurance Brokers

a) Insurance Brokers

⁽⁴²⁷⁾ Insurance brokers are persons who, irrespective of their designation, offer or enter into insurance policies in the interest of insurance companies or other persons (Art. 40 para. 1 ISA). Swiss supervisory law distinguishes between two types of insurance brokers, namely “tied” and “non-tied” insurance brokers. Non-tied insurance brokers (*ungebundene Versicherungsvermittler*) are those who have a relationship of trust with the insured persons and act in their interest (Art. 40 para. 2 ISA). All other insurance brokers are deemed to be “tied” (*gebundene Versicherungsvermittler*; Art. 40 para. 3 ISA).

b) Duty to Register

⁽⁴²⁸⁾ Under the current legislation, non-tied insurance brokers are obliged to be registered in the register of insurance brokers, a public register maintained by FINMA. For tied insurance brokers, such registration is voluntary, i.e. they have the right, but not the duty, to register if they fulfil the relevant requirements. Importantly, such registration does not lead to any prudential supervision by FINMA, which the Federal Council considered as a problem as, in the Federal Council’s view, a duty to register without any ongoing prudential supervision may lead to an expectation gap among policyholders and may generate unjustified trust in the supervision of the activities of those subject to the duty to register.

⁽⁴²⁹⁾ Under the amended legislation, tied insurance brokers can no longer register unless they can prove that they wish to take up an activity abroad for which the country in question requires an entry in the register in Switzerland (see Art. 42a ISA). This amendment consistently implements the distinction between tied and non-tied insurance brokers. Non-tied insurance brokers are in a relationship of trust with the insured persons and act in their interest. Thus, the goal of effective

consumer protection justifies FINMA being able to exercise appropriate supervision in a targeted manner (in particular, in respect of compensation from third parties; see N (433)). In the context of these legislative adjustments, FINMA has also clearly signalled that it will increase staffing levels for the supervision of non-tied insurance brokers in order to be able to actually meet the expectations placed on its activities vis-à-vis supervised persons.

c) Basic Training

⁽⁴³⁰⁾ Under the revised ISA, insurance brokers must have sufficient knowledge of the code of conduct duties set out in the ISA and the necessary expertise required for performing their activities (Art. 43 para.1 ISA). The Federal Council will define the basic training requirements (Art. 43 para. 2 ISA).

d) Duty to Provide Information

⁽⁴³¹⁾ All insurance brokers will be subject to a duty to provide information (Art. 45 ISA) analogous to the duty in Art. 8 FIDLEG. The existing duties to inform policyholders of the person liable for negligence, errors or incorrect information relating to the insurance brokers' activities as intermediaries and of the processing of personal data will continue to apply. In addition, insurance brokers must inform policyholders (a) how they can obtain information on the status of their training and further education (lit. c), and (b) that they have the option of initiating mediation proceedings before an ombudsman body (lit. f).

⁽⁴³²⁾ In particular, insurance brokers will be required to inform the policyholders in a transparent manner of the services and insurance products offered and the associated costs. The compensation received by tied insurance brokers for transactions, such as commissions or brokerage fees, does not qualify as costs and, therefore, does not have to be disclosed.

⁽⁴³³⁾ As a general rule, the information needs to be provided prior to the conclusion of an insurance contract (Art. 45 para. 3 ISA thus corresponds to Art. 9 para. 1 FIDLEG).

e) Compensation from Third Parties

⁽⁴³⁴⁾ The predominant type of remuneration among non-tied insurance brokers is based on the so-called brokerage system. For every insurance

contract concluded, they receive a brokerage fee (or commission) from the insurance company. This is included in the (gross) insurance premium. With their premium payments to the insurance company, policyholders therefore indirectly finance the fees of non-tied insurance brokers.

- (435) The brokerage system is inherently subject to a conflict of interest on the part of non-tied insurance brokers. Because of the contractual relationship, they are obliged to safeguard the interests of the policyholders vis-à-vis the insurance company. At the same time, however, they are paid by the insurance company for their referral activities. This constellation leads to a conflict between the interest of the policyholder in the most cost-effective insurance protection and the interest of the non-tied insurance broker in the highest possible compensation.
- (436) The new Art. 45a ISA clarifies that non-tied insurance brokers must expressly inform policyholders of any compensation they receive from third parties (e.g. insurance companies) in connection with the provision of their services (para. 1).
- (437) Non-tied insurance brokers who – in addition to the aforementioned compensation – receive remuneration from policyholders pursuant to the contractual relationship may only retain the compensation from insurance companies or other third parties if they (a) have expressly informed the policyholder in advance of such compensation and (b) the policyholder expressly waives its right to receive the compensation (para. 2 lit. a). A tacit waiver is not sufficient. If there is no waiver, any indemnification received must be passed on in full to the policyholder (para. 2 lit. b). These requirements correspond to Art. 28 FIDLEG (for cases in which the non-tied insurance broker receives remuneration from the policyholder).
- (438) Art. 45a ISA does not apply to tied insurance brokers, due to the absence of a relationship of trust between them and their clients.

3. Special Rules for Qualified Life Insurance Policies

- (439) The introduction of special conduct rules for insurance brokers and insurance companies with respect to “qualified life insurance policies” aims to create a level playing field with the investment products covered

by FIDLEG. According to Art. 39a ISA, the definition of qualified life insurance policies includes (a) life insurance policies in which the policyholder bears an investment risk, (b) capital redemption operations (*Kapitalisationsgeschäfte*) and (c) tontines (*Tontinengeschäfte*):

- i. Life insurance policies in which the policyholder bears an investment risk: The decisive criterion is the investment risk. For each product, it is to be assessed whether the policyholder bears an investment risk. If this is the case, the application of the information obligation and the appropriateness test (see N (439)) are justified;
- ii. a capital redemption operation (*Kapitalisationsgeschäft*) is a contractual agreement between a life insurance company and its client regarding the takeover of client assets and their management in accordance with a mathematical model. The agreement terminates on an agreed date or with the client's death. In contrast to conventional life insurance products, capital redemption operations involve no or very limited biometric risks (occupational disability, invalidity, death or survival), i.e. such products have predominantly an investment character and are therefore closer to a bank product than to a life insurance product (for this reason, such products may not be labelled as an insurance policy);
- iii. tontines (*Tontinengeschäft*) are transactions whereby a group of persons purchases a life-long annuity (*lebenslange Rente*). Annually, the insurance company distributes the total amount of that annuity among the persons that are still alive. As the number of beneficiaries decreases over time, the amount of the annuity per surviving insured person increases. Finally, one single person receives the entire amount of the annuity. Thus, tontines have a certain "lottery" character.

(440) The obligations applying to qualified life insurance policies largely correspond to those in FIDLEG. They can be summarised as follows:

- i. Basic information sheet (BIB) (Art. 39b ISA): The obligation to prepare a BIB applies to the insurance company offering a qualified life insurance. In the insurance sector, it does not make sense, as in Art. 58 FIDLEG, to make the producer of the financial instrument responsible for the BIB, since it is unlikely that an insurance company sells third-party life insurance policies;
- ii. additional information obligations (Art. 39e ISA): Insurance brokers have to inform policyholders about acquisition, debt-collection and administration costs (cost premium) when recommending qualified

- life insurance policies. The provision is based on the analogous provision on general information obligations for the recommendation of financial instruments in FIDLEG (Art. 8 para. 1 FIDLEG);
- iii. advertising (Art. 39f ISA): The provision basically incorporates Art. 68 FIDLEG which is applicable to financial services providers;
 - iv. appropriateness test (Art. 39g ISA): These rules are based on those that apply with regard to adequacy and suitability in the area of financial services (Arts. 10–14 FIDLEG). Analogous to FIDLEG, no adequacy test is necessary if the conclusion of a qualified life insurance policy is at the request of the policyholder and without personal advice (execution only);
 - v. documentation and accountability (Art. 39h ISA): These rules also derive from generally recognised principles of contract law, as specified in FIDLEG for financial services providers (Arts. 15 and 16 FIDLEG); and
 - vi. avoidance of conflicts of interest (Art. 39i ISA): This provision corresponds in substance to Art. 25 FIDLEG. Conflicts of interest shall be eliminated by the insurance companies or by the insurance brokers to the extent possible by means of appropriate measures. If they cannot be excluded, they must be disclosed before the conclusion of the insurance contract.

IX. Financial Technologies – FinTech

A. Overview

⁽⁴⁴¹⁾ The regulation of Financial Technologies (FinTech) has become a new chapter of the Swiss financial market architecture⁶². This topic is particularly challenging because it is located at the intersection of two global trends of strategic importance for the financial industry: regulation and digitalisation⁶³. The fundamental problem is, however, that these two trends may be incompatible at times⁶⁴. The regulatory mismatch between historically grown and, thus, often outdated laws on the one hand and new business models on the other hand caused legal uncertainty and led to a need to reduce the legal market entry barriers⁶⁵. Thus, the goal is to allow innovation and increase the attractiveness of Switzerland as a domicile for new (disruptive) business models and market participants (such as Facebook’s cryptocurrency project Libra or challenger banks)⁶⁶.

⁽⁴⁴²⁾ The (regulatory) developments in the area of FinTech must be understood in the context of the current economic environment with low interest rates, high demand for alternative investments (including venture capital and digital assets), innovation and the resurrection of entrepreneurship. In addition, a general “convergence” of different industries such as financial services, technology, telecommunication, media and e-commerce caused by technological developments further enhances strategic adjustments of market participants⁶⁷. Overall, the federal administration, the legislator and the regulator have reacted fast and are generally supportive of the rise of the new FinTech industry⁶⁸.

⁶² BIANCHI LUCA, *The Regulation of FinTech (Startups)*, CapLaw 2016/4, p. 2.

⁶³ BIANCHI LUCA, *FinTech Regulation (2.0): An Overview on the Proposed Three Element Solution*, CapLaw 2017/1, p. 10.

⁶⁴ BIANCHI (FN 63), p. 10.

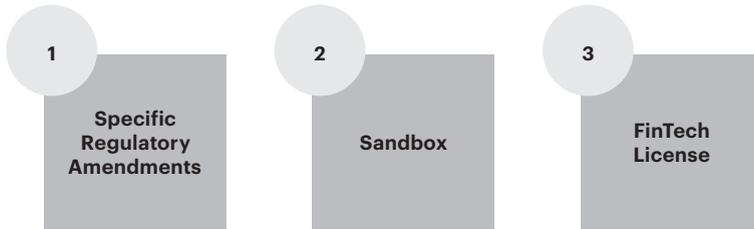
⁶⁵ BIANCHI LUCA, *Digital Assets – Proposed Amendments to the Legal and Regulatory Framework of Distributed Ledger Technology in Switzerland*, CapLaw 2019/2, p. 21.

⁶⁶ FRICK A. THOMAS/STEINER FLORIAN, *FinTech: Switzerland is gearing up*, IBA Banking Law Newsletter August 2017, pp. 26 et seq.

⁶⁷ BIANCHI (FN 62), p. 5.

⁶⁸ FRICK A. THOMAS (ed.), *The Financial Technology Law Review*, 2nd ed., London 2019, pp. 250 et seq.

⁽⁴⁴³⁾ In particular, the Swiss Federal Council and the FDF have developed a model for a FinTech (de)regulation, namely, a “Three Element Approach”⁶⁹:



⁽⁴⁴⁴⁾ The three elements described in the graph are further elaborated below. However, the explanations are limited to a high-level overview of the current approach of the Swiss legislator. It does not allow for a discussion of all current regulatory developments in the area of FinTech.

B. The three Elements of FinTech Regulation

1. Specific Regulatory Amendments (Element 1)

⁽⁴⁴⁵⁾ Under the BA, a banking licence is, in principle, required by an institution primarily active in the financial sector that (Art. 1a BA):

- i. *Accepts deposits* from the public in excess of CHF 100 million on a professional basis or that publicly advertises to do so (lit. a);
- ii. *accepts deposits* from the public up to CHF 100 million on a professional basis or that publicly advertises to do so, and which invests, or pays interest on, deposits received from the public (lit. b);
or
- iii. *refinances itself with loans from banks* that do not own any significant holdings in it *on a large scale in order to finance for its own account and in any manner possible any number of persons or companies with which it does not form an economic unit* (lit. c).

⁽⁴⁴⁶⁾ Innovative business models in the area of crowd lending and digital assets may be limited by potential banking licensing duties. Against this

⁶⁹ FDF, Background documentation on the reduction of barriers to market entry for FinTech firms, 2 November 2016, <<https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64356.html>>, p. 2; BIANCHI (FN 63), pp. 14 et seq.

background, a rather technical punctual deregulation has been completed in order to avoid such licensing duties. In particular, the extension of the maximum timeframe which is applicable to settlement accounts in order for them not to qualify as deposits has been extended from 7 days to 60 days (Art. 5 para. 3 lit. c of the Banking Ordinance (BO))⁷⁰. The exclusive purpose of these types of settlement accounts is the settlement of client transactions and no interest is paid on the deposits held therein. In this context, FINMA has updated the FINMA Circular 2008/03 “Public deposits with non-banks”. The above regulatory amendments allow certain crowdfunding or blockchain business models to hold assets for a longer period of time without requiring a banking licence⁷¹.

- (447) Further (general) exceptions from the requirement to obtain a banking licence have been introduced with the concept of the sandbox (Element 2) and the FinTech licence (Element 3). In addition, the next major milestone in terms of specific regulatory amendments on the regulatory agenda is planned in the area of digital assets (see below)⁷².

2. Sandbox (Element 2)

- (448) The new regulatory “sandbox” is essentially an expansion of activities that are exempt from the licensing requirement. Previously, client deposits could be accepted from a maximum of 20 people without triggering regulatory licensing requirements.
- (449) Many FinTech business models aim to be scalable and address the general public or at least more than 20 people. The sandbox will enable a provider without a banking licence to accept public funds up to CHF 1 million, without any restriction on the number of depositors (Art. 6 para. 2 lit. a BO).
- (450) The acceptance of public funds above this threshold would be subject to a separate approval by FINMA, either by granting a fully-fledged banking licence or the more easily obtainable new FinTech licence (see below).

⁷⁰ FRICK (FN 68), p. 252.

⁷¹ FRICK (FN 68), p. 252.

⁷² BIANCHI (FN 65), pp. 21 et seq.

⁽⁴⁵¹⁾ Thus, the sandbox permits the testing on the market of minimum viable products without the entry barrier of a banking licence (or even a FinTech licence) to the extent that a FinTech provider operates within the defined limitations of this innovative space.

3. FinTech Licence (Element 3)

⁽⁴⁵²⁾ The actual breakthrough is certainly the FinTech licence that represents a new category of a regulatory status for FinTech providers that do not provide typical banking services but whose business model includes certain elements of banking services (and that, therefore, have a lower risk profile) (Art. 1b para. 1 BA)⁷³.

⁽⁴⁵³⁾ FinTech companies that wish to conduct deposit-taking business and do not execute a credit business with maturity transformation may be subject to this new licensing requirement (Art. 1b para. 1 lit. b BA). Under the FinTech licence, public deposits may not exceed CHF 100 million in total (Art. 1b para. 1 lit. a BA). If client protection is ensured, FINMA may authorise a higher threshold.

⁽⁴⁵⁴⁾ The deposits must be held in one or more accounts in the name of the licence holder. No interest may be paid on such deposits. The minimum capital requirement for such regulated FinTech institutions shall be 3 per cent of the accepted deposits and at least CHF 300,000 (Art. 17a para. 1 BO).

⁽⁴⁵⁵⁾ Consequently, the new FinTech licence reduced regulatory (market entry) barriers for many FinTech providers, in particular, in the area of crowdfunding and blockchain.

C. Next Milestone: Digital Assets

1. Introduction of a New Federal Law

⁽⁴⁵⁶⁾ A blockchain can be understood as a digitally distributed, decentralised transaction ledger which records the assets that are held, and the transactions that are entered into, by investors, thereby allowing the

⁷³ Entry into force of this provision was 1 January 2019.

transfer of a broad range of assets or values between parties⁷⁴. It is composed of numerous blocks which store information and consist of the following key components: a message (e. g. a transaction including its content such as instructions or the parties involved), a block header comprising metadata, a time stamp and a hash (the entire process broken down into a single number). The potential of blockchain technology to transform industries has created a hype in Switzerland and worldwide.

(457) As a consequence, Switzerland has developed a pragmatic approach to blockchain regulation which suggests selective amendments to existing laws⁷⁵. However, there will not be a sector-specific regulation of blockchain in Switzerland⁷⁶. The Federal Council published a Report on the Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland on 14 December 2018. Subsequently, the Federal Council proposed related adjustments of the legal and regulatory framework for digital assets based on an Explanatory Report on the Consultation on the Preliminary Draft of the Federal Law on the Adaptation of Federal Laws to Developments in Distributed Ledger Technology (DLT) of 22 March 2019. On 27 November 2019, the Federal Council adopted the Message on the Adaptation of Federal Law to Developments in Distributed Ledger Technology.

2. Specific Amendments of Existing Laws

(458) In the area of financial market law, the following key points are to be amended. Firstly, a new type of regulatory licence shall be introduced in FINFRAG (Art. 73a D-FINFRAG). The licence to operate a DLT trading facility would allow for the non-discretionary, multilateral trading, settlement and clearing of DLT uncertificated securities and further DLT-based assets such as payment tokens and utility tokens as well as the central custody of these digital assets⁷⁷.

⁷⁴ BIANCHI LUCA, A (Legal) Perspective on Blockchain, CapLaw 2016/5, p. 25.

⁷⁵ BIANCHI (FN 65), pp. 21 et seq.

⁷⁶ FRICK (FN 68), p. 256.

⁷⁷ BIANCHI (FN 65), p. 25.

- (459) Furthermore, persons seeking to operate an OTF for the sole purpose of the proprietary trading of tokens that qualify as securities (e.g. asset tokens) would be allowed to obtain a licence as a securities firm under future regulation (Art. 41 lit. b no. 3 D-FINIG).
- (460) In addition, proposed amendments in the area of civil law include the following key points⁷⁸:
- i. DLT registered securities (a new legal wrapper for tokens);
 - ii. transfer of tokens; and
 - iii. tokenisation.
- (461) Moreover, provisions concerning the segregation of digital assets in bankruptcy, data access as well as special rules corresponding to the rules on the insolvency of banks have been proposed in the area of insolvency law.
- (462) Last but not least, the AMLA shall be revised and newly mention DLT trading facilities as financial intermediaries in terms of the AMLA. Furthermore, the AMLO is expected to comprise new provisions concerning payment tokens as well as DLT-platforms.

⁷⁸ BIANCHI (FN 65), pp. 22 et seq.

X. Timeline and Key Issues to Observe

A. Timeline

- ⁽⁴⁶³⁾ Under the currently envisaged timelines, the various new pieces of legislation may move at different speeds and become effective at different times.
- ⁽⁴⁶⁴⁾ FINFRAG and its implementing ordinances (FINFRAV and FINFRAV-FINMA) entered into force on 1 January 2016. However, various transitional periods apply that need to be monitored by participants (see N (95)–(98) and (160)–(167)). Thus, the effective implementation of FINFRAG provisions relating to FMI and derivatives trading occurs in several phases.
- ⁽⁴⁶⁵⁾ FIDLEG and FINIG become effective as of 1 January 2020. Both FIDLEG and FINIG contain transitional periods. The changes to FINMAG become effective together with the relevant acts they are proposed together with.
- ⁽⁴⁶⁶⁾ With regard to combating money laundering, the Federal Act for Implementing the Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes entered into force on 1 November 2019 and includes changes to the CO, the PC, the TAAA and FISA. The revised AMLO-FINMA and CDB 20 become effective in January 2020, while the amendment of the AMLA is still subject to parliamentary debate.
- ⁽⁴⁶⁷⁾ The ICA and ISA as the two most important pieces of legislation governing the private insurance sector are both being revised. The parliamentary debate on the ICA is well advanced and may realistically enter into force in January 2021. In contrast, the ISA will not be debated in parliament until mid-2020 and its implementation can be expected at the beginning of 2021 at the earliest.
- ⁽⁴⁶⁸⁾ Market participants will be well advised to closely observe the developments and the debates around the new acts in practice.

B. Key Issues to Observe

⁽⁴⁶⁹⁾ Key issues to be aware of include, in particular, the following:

Supervision

- i. Increased cross border exchange of information between *Swiss* and *foreign* authorities relating to market participants;
- ii. creation of one or several new semi-public supervisory authorities for the supervision of regular asset managers, trustees and precious metal traders; the newly supervised existing entities must register with FINMA by 30 June 2020 at the latest;
- iii. non-compliance with new code of conduct duties by non-supervised *Swiss* or *foreign* financial services providers may lead to criminal sanctions and provide grounds for civil claims; foreign entities may have to register their client advisers in Switzerland;

Financial Infrastructures and Derivatives Trading

- i. new licensing requirements for *domestic* FMIs / institutions: Trading Venues, operators of organised trading facilities, central counterparties, central securities depositories, trade repositories and Payment Systems;
- ii. new recognition requirements for *foreign* FMIs / institutions: Trading Venues, operators of organised trading facilities, central counterparties and trade repositories;
- iii. new rules applicable to derivatives trading, e.g. clearing obligation, reporting obligation, risk mitigation obligation and platform trading obligation;

Financial Institutions

- i. introduction of general licensing obligations for all institutions investing in or managing third party assets on a professional basis (including external asset managers);
- ii. subjection of asset managers of Swiss occupational benefit schemes to the same supervision and licensing requirements as asset managers of collective investment schemes;

Financial Services, Code of Conduct Duties and Offering Documentation

- i. new rules applicable to inbound cross-border business, in particular, that *foreign* financial institutions must comply with the same rules of conduct as Swiss financial institutions;
- ii. distinction between Swiss “internal” and “external” as well as “non-Swiss” client advisers and applicability of specific rules (and in case of Swiss “external” and “non-Swiss” client advisers, a registration duty) to each of them;
- iii. implementation of the appropriateness and suitability rules, obligation to perform client segmentation and to provide appropriate client information for asset management, advisory and, to a limited extent, execution only business;
- iv. scope of rules on inducements (retrocessions) extended to all financial services;
- v. new requirement to prepare, update and dispatch BIBs in case of offerings of financial instruments (except shares) to private clients;

Anti-money Laundering and Automatic Exchange of Information

- i. bearer shares will *de facto* be abolished; they are only permitted if the company has listed equity securities on a Stock Exchange or if the bearer shares are structured as intermediated securities and deposited with a custodian designated by the company in Switzerland (Art. 622 CO);
- ii. by 1 January 2019, Switzerland had approved the introduction of the AEI with 89 states which include all EU and EFTA member states, almost all G20 and OECD states, Switzerland’s most important economic partners and the world’s leading financial centres. The exchange of information started at the end of September 2018 and an additional 19 partner states are currently being added to Switzerland’s AEI network with an implementation of the AEI from 2020 / 2021 onwards;
- iii. the AMLA will be amended in the next few years and a new category of persons referred to as “advisers” (*Berater*) will be introduced who will be subject to the AMLA alongside financial intermediaries and dealers;

Collective Investment Schemes

- i. abolition of the licence for distributors of collective investment schemes, but introduction of a registration duty for all individual client advisers;
- ii. limitation of the requirement for foreign collective investment schemes to appoint a Swiss representative and paying agent to situations where there is distribution to Swiss retail investors and / or HNWI;

Insurance

- i. introduction of a 14-day withdrawal right for the policyholder at the time of conclusion of the insurance contract and limitation of the scope of protection of the ICA for large risks or for professional policyholders;
- ii. introduction of a restructuring law for insurance companies and new conduct rules applicable to non-tied insurance brokers;
- iii. foreign insurance companies (i. e. with their registered office abroad) that have a branch in Switzerland will become subject to supervision in respect of their insurance activities in or from Switzerland; and
- iv. introduction of special conduct rules for insurance brokers and insurance companies with respect to “qualified life insurance policies”.

FinTech

- i. introduction of a sandbox and a FinTech licence;
- ii. proposed new regulation with the purpose of selective adjustment of existing laws for DLT / blockchain.

⁽⁴⁷⁰⁾ In summary, any participant in the Swiss market, regardless of whether it is a Swiss or a foreign player, needs to review its current business model and evaluate whether and to what extent it needs to be adapted to comply with the comprehensive changes of the Swiss regulatory architecture.

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