Banking regulation in Switzerland: overview

René Bösch & Franziska Balsiger-Geret
Homburger

LEGISLATION AND REGULATORY AUTHORITIES

Legislation

1. What is the legal framework for banking regulation?

The Swiss financial market legislation is spread over numerous laws and ordinances. The principal law is the Financial Market Supervisory Act (Finanzmarktaufsichtsgesetz) (FINMASA), which serves as an "umbrella law" for the other legislation regulating financial market supervision. Accordingly, it is of outstanding importance. Under this umbrella law, the following statutes are relevant:

- Mortgage Bond Act (Pfandbriefgesetz) (MBA).
- Collective Investment Schemes Act (Kollektivanlagengesetz) (CISA).
- Banking Act (Bankengesetz) (BA).
- Stock Exchange Act (Börsengesetz) (SESTA).
- Insurance Supervision Act (Versicherungsaufsichtsgesetz) (ISA).

These laws regulate the conditions for approval and licences for their corresponding activities, as well as their oversight and monitoring by the supervisory authorities.

The following additional laws are also relevant:

- National Bank Act (Nationalbankgesetz) (NBA), which primarily focuses on the stability of the Swiss financial system, but also contains regulations setting bank supervisory standards.
- Anti-Money Laundering Act (Geldwäschereigesetz) (AMLRA) and its related Swiss Financial Market Supervisory Authority FINMA (FINMA) Ordinance, which also provide for supervisory standards, but with more limited scope.
- Consumer Credit Act (Konsumkreditgesetz) (CCA), which provides regulatory standards for lending.

Regulatory authorities

2. What are the regulatory authorities for banking regulation in your jurisdiction? What is the role of the central bank in banking regulation?

Lead bank regulators

The Financial Market Supervisory Authority FINMA (FINMA) is the supervising authority for:

- Banks.
- Securities exchanges and other financial market infrastructures.
- Securities dealers.
- Collective investment schemes.
- Insurance companies.
- Mortgage issuance banks.
- Directly supervised financial intermediaries under the AMLA (see Question 1).

FINMA's supervision is focused on:

- Strengthening the protection of individuals (namely investors, depositors and insured persons).
- The proper functioning and stability of the overall financial system.

FINMA authorises the business activities of companies and organisations that are subject to its supervision. FINMA's role involves:

- Monitoring the supervised enterprises to ensure compliance with:
  - statutes;
  - ordinances;
  - directives;
  - regulations; and
  - conditions that must be fulfilled for conducting business.
- Imposing sanctions.
- Providing administrative assistance to other regulators, national authorities and international authorities.
- Taking regulatory actions.
- Participating in the drafting process of statutes and the corresponding ordinances.
- Issuing circulars, policies and standards.
- Promulgating its own regulations, as far as it is empowered to do so.
- Honouring self-regulation by the various institutions, distinguishing between:
  - voluntary (or autonomous) self-regulation (such as codes of conduct issued by professional associations);
  - self-regulation that is recognised by FINMA as a minimum standard; and
  - compulsory self-regulation based on a mandate from the legislator.

Other authorities

In addition to FINMA, the following organisations and agencies perform certain supervisory or supervisory-like functions:
• External auditors control compliance by banks with legislation and report to FINMA or other authorities on possible or actual infringements of law (system of indirect supervision).

• Self-regulated supervision, as provided for by the statutes, remains subordinate to the control and surveillance of the corresponding (state) agencies. For example, the SIX Exchange Regulation AG (a wholly-owned subsidiary of SIX Group AG) supervises the admission of stocks and bonds for trading on the SIX Swiss Exchange and the observance of the issuer’s obligations. This supervision is, in turn, subordinate to control and authorisation by FINMA.

• Banks and securities dealers are subject to further principles and requirements of self-regulation in the form of numerous recommendations, directives and guidelines issued by the Swiss Bankers Association (SBA). FINMA deems these rules to reflect minimum regulatory standards and supervision is controlled by external auditors and banking law auditors. If a bank violates such rules, it may be subject to sanctions by FINMA or the SBA (or both).

Central bank

The Swiss National Bank (SNB) is Switzerland’s central bank. It is entrusted with all matters of monetary policy and has the exclusive right to issue Swiss banknotes and coins. The SNB has a duty to control monetary supply and to provide the Swiss franc money market with liquidity. The money supply is controlled by giving commercial banks access to central bank money (deposit accounts) and therefore influencing the credit formation within the banking system. In this role it can also act as a “lender of last resort”, but it never communicates or comments on such interventions, neither in advance nor afterwards. Further, with price stability being a critical requirement for both the development and welfare of Switzerland, the SNB sets its monetary policy in accordance with these goals. It aims to achieve price stability by controlling the volume of money.

The SNB is also responsible for facilitating and securing the operation of cashless payment systems. It is the main player in the overall payment mechanism, together with PostFinance (a bank established by the Swiss government as a spin-off from the Swiss postal services), the cantonal banks, and the commercial banks.

The SNB also participates in international monetary co-operation, such as with the:

• World Bank.
• International Monetary Fund (IMF).
• Bank for International Settlements (BIS) (where the SNB also represents Switzerland in the Basel Committee on Banking Supervision together with FINMA).
• Organisation for Economic and Co-operative Development (OECD).
• Financial Stability Board (FSB).

BANK LICENCES

3. What licence(s) are required to conduct banking services and what activities do they cover?

Banks must obtain authorisation from FINMA before engaging in business operations. There are two types of licences for services which banks offer or intend to offer in Switzerland, which are the:

• Banking licence. A Swiss bank must apply for a banking licence for authorisation to take deposits from the public on a professional basis.

• Securities dealer licence. A securities dealer licence is required if a bank also intends to engage in the business of securities trading or the underwriting of securities.

Banks (as defined in the Banking Act) are enterprises that are active principally in the field of finance, and which:

• Accept or offer to accept deposits from the public on a professional basis (that is, from more than 20 persons) to finance any number of persons or companies with which they do not form an economic unit.

• Refinance themselves significantly with loans from more than five banks that do not own any significant holdings in them to finance any number of persons or companies with which they do not form an economic unit of their own.

Types of banks that need authorisation for their business activities are:

• Every bank legally organised and domiciled in Switzerland (including those whose business operations are conducted exclusively abroad, but whose entity is incorporated or its management is performed in Switzerland).

• Banks set up under Swiss law which are controlled by foreign shareholders. FINMA can make the grant of authorisation dependent on further conditions, such as the following:
  • either the country of residence of the foreign bank or the country of the foreign controlling corporate or individual shareholder (or both) must guarantee reciprocity (not applicable to member states of the General Agreement on Trade and Services (GATS) of the World Trade Organization (WTO)); and
  • the corporate name of the foreign-controlled bank in no way indicates or suggests that the bank is Swiss-controlled.

• Foreign banks that hold a bank licence in a foreign country or that apply the term “bank.” “banker” or “savings” in their company name, and accepting deposits from the public on a professional basis.

4. What is the application process for bank licences?

Application

Licensing applications must be submitted to FINMA in an official Swiss language. They must contain general information about the intended operation and supporting documentation. The FINMA Guidelines for licence applications for banks and securities dealers provide helpful information about the form required for the application and the required documents (https://www.finma.ch/en/authorisation/banks-and-securities-dealers/getting-licensed/banks/). There is no general application fee, but the procedural costs are payable by the applicant.

Requirements

The following information is required for a bank licence application:

• Information on the bank, including:
its purpose;
planned functional and geographical area of its business activities in Switzerland;
its place of business;
its existing history;
activities of the parent company and the group; and
a description of previous history (for a conversion from a securities dealer into a bank).

- Information on planned capitalisation and on direct and indirect shareholdings, including:
  - a list of persons holding all direct and indirect participations of 5% or more;
  - information about any agreements and owners of qualified or decisive participations; and
  - prescribed declarations from qualified shareholders.

- Information on the persons in charge of the administration and the management, including details about the board of directors and the management, such as:
  - CVs;
  - referrals;
  - criminal records excerpts; and
  - holdings in financial institutions.

- Information on the business activities and the internal organisation, for example:
  - a detailed description of the planned business activities and procedure;
  - articles of incorporation;
  - articles of association; and
  - business regulations.

- A business plan including budgets for the first three financial years after the grant of a licence.

- A report by the regulatory auditors on:
  - the organisation of the bank;
  - the bank’s risk regarding foreign-controlled banks;
  - evidence of the guarantee of reciprocity (unless a waiver through an international agreement exists); and
  - evidence of adequate consolidated supervision.

- For applicants belonging to a group operating in the financial business sector, information including:
  - a list of the consolidated participations;
  - names and addresses of the foreign authorities entrusted with supervision of the group on a consolidated basis; and
  - a description of the financial sector regulatory framework of the foreign country responsible for consolidated supervision.

- A current management report of the parent company and of the qualified or decisive participants in the applicant’s capital, letters of reference, and an original power of attorney.

FINMA can also request additional data or documents deemed necessary for its decision.

An applicant is entitled to the authorisation if it fulfils all conditions. If all requirements are met, FINMA issues a corresponding decree providing for the requested licence. A licensed bank is always required to notify FINMA of, and get approval for, all subsequent amendments to the:

- Business purpose.
- Scope of business.
- Capital.
- Internal organisation of the bank.

Foreign applicants

Foreign applicants must meet the same requirements as Swiss applicants. There is additional information required for foreign-controlled banks, including:

- Evidence of the guarantee of reciprocity or the existence of a contrary international obligation.
- Consent of the foreign regulator to the establishment of a banking presence in Switzerland.
- Potentially a description of the banking legislation and supervisory framework in the applicant’s jurisdiction.

Timing

The bank licensing process normally takes six to 12 months, depending on the quality and complexity of the application. A licence is granted once the requirements are met (see Question 4, Requirements).

Banks and securities dealers (as well as branches and representative offices of foreign banks and securities dealers that are supervised by FINMA) can request a certificate from FINMA confirming their licensed status, for which they are charged a fee.

Cost

For the licensing process, a bank or securities dealer is charged with a lump sum payment between CHF10,000 and CHF100,000 based on the effective costs (FINMA Fee Ordinance Appendix paragraph 1.1). For any modifications, FINMA charges a fee between CHF3,000 and CHF30,000 (FINMA Fee Ordinance paragraph 1.2). In complex cases, FINMA may invoice the procedural costs on an hourly basis.

5. Can banks headquartered in other jurisdictions operate in your jurisdiction on the basis of their home state banking licence?

Switzerland is not a member of the EU and does not accept any passporting of any foreign licence into Switzerland. Therefore, all foreign banks wishing to establish a presence must first obtain a licence under Swiss laws and regulations from FINMA.

FORMS OF BANKS

6. What forms of bank operate in your jurisdiction, and how are they generally regulated? Does the regulatory regime distinguish between different forms of banks?

State-owned banks

Switzerland has one state-owned bank on a federal level (which is a postal bank that was spun off from the former Swiss postal organisation) (see Question 2, Central Bank).

In addition, the cantons may own or operate banks (the so-called cantonal banks (Kantonalsbanken)) for their own political or economic goals. Cantonal banks are banks constituted on the basis of a cantonal law in the form of an establishment (Anstalt) or corporation. For a bank to qualify as a cantonal bank, the canton must hold a participation of more than one-third of the capital and possess more than one-third of the voting rights in the bank. In addition, the canton can guarantee the liabilities of the bank, either
in full or in part. Of the 24 existing cantonal banks, 21 benefit from a full guarantee. Cantonal banks are generally subject to the Banking Act (BA) as all other banks are (but some special cantonal regulations may apply).

Universal banks, commercial and retail banks

The Swiss banking system is based on the model of universal banking. This means that all banks can provide all core and ancillary banking services, such as:
- Deposit taking.
- Lending.
- Asset management.
- Investment advice.
- Payment transactions.

If combined, the engagement in these normally requires universal banks to obtain two licences, namely a banking licence and a securities dealer licence (see Question 3).

Investment banks

Swiss law does not recognise the concept of investment bank or any related licensing category. If investment banks conduct securities trading activities, they need a securities dealer licence. On the contrary, if their business is limited to unregulated activities (for example, mere advisory services) they do not need a licence. Investment banks that do not hold a banking licence must not use the term “bank” in their corporate or marketing name.

Private banks

There is a fundamental difference between so-called private banks (Privatbankiers) and private banks (Privatbanken):
- Private bankers according to Swiss statutory law are persons who run banks in the legal form of individual proprietorships or general and limited partnerships. The distinguishing feature of private bankers is that one or more members of the company bear unlimited and joint and several liability for the bank’s commitments.
- Private banks are usually organised as corporations. Like private bankers, they focus their business activities on asset management and investment advice for wealthy private clients, the term “private” describing the services or clients they focus on. Apart from that, private banks do not differ from other banks.

The main difference between private banks and private bankers is a matter of liability: the liability of private banks is limited through the legal form chosen, whereas private bankers have an unlimited personal liability.

Other banks

The Banking Act (BA) also mentions savings banks (Sparkassen), but the use of the term “savings” is not relevant to either the organisational form or to the liability of the bank in question.

Regulation of systemically important financial institutions (SIFIs)

After the financial crisis of 2007/2008, the Swiss legislator started to work intensively on a revision of banking regulation, and in particular of the Banking Act (BA), to include legal provisions for SIFIs. This comprehensive reform is known under the name "Too Big to Fail" (TBTF). The TBTF amendment to the BA came into force on 1 March 2012 and was subsequently significantly strengthened through amendments to the Banking Ordinance and the Capital Adequacy Ordinance. Banks, financial groups and bank-dominated financial conglomerates whose failure would do considerable harm to the Swiss economy and financial system are considered to qualify as SIFIs under the revised framework. SIFIs which are designated as SIFIs by the Swiss National Bank (SNB) are subject to particular requirements on the following:
- Capital.
- Liquidity.
- Large exposures.
- Organisation.

ORGANISATION OF BANKS

Legal entities

7. What legal entities can operate as banks? What legal forms are generally used to operate as banks?

All kind of legal entities (except limited liability companies "GmbH") can operate as banks in Switzerland (pursuant to the Banking Act (BA)). However, most of the banks in Switzerland are corporations, and a few banks operate as co-operatives. Most cantonal banks operate under cantonal public law.

Corporate governance

8. What are the legislative and non-legislative corporate governance rules for banks?

A proper internal organisation of a bank is one of the requirements for the granting and maintenance of a banking licence. According to the Banking Act (BA), a Swiss bank is required to have a functional and personal division between supervision and management (Funktionentrennung). This means that the board of directors and the management of the bank must be two separate corporate bodies with no personal overlaps (that is, no member of the board can be active in the management and vice versa). The board of directors must consist of at least three members and is responsible for:
- Major decisions.
- Supervision.
- Control.

Decisions on daily business must be taken solely by the management. The board of directors is not allowed to involve itself in daily business at all.

The directors and senior managers of a Swiss bank must have a good reputation, and must offer every assurance of proper business conduct (known as a fit and proper test (Gewährung)).

In order to comply with good corporate governance, at least two committees must be established: an audit committee and a risk committee. Banks also often establish a nomination committee and a remuneration committee. The executive board consists of the:
- Chief executive officer.
- Chief financial officer.
- Chief controlling officer.
- Chief risk officer.

FINMA can impose additional governance requirements on SIFIs, but only to the extent necessary to ensure a proper functioning of the bank in times of financial or operational stress.

9. What are the organisational requirements for banks?

A bank must precisely describe its field of business operations regarding the objectives and geographic reach of its activities in its articles of incorporation and business rules. More specifically, the
responsibilities of the different bodies of a bank, including the bank’s management, must also be properly defined in the articles of incorporation and the business rules. These two corporate documents must specify all duties and competencies of the directors and managers, including their responsibilities and signatory power (jointly by two). It must be assured that responsibilities within the bank can be assessed at all times on the basis of these documents (to enable appropriate supervision of the management). The bank must also provide for an effective internal segregation of functions between trading, asset management and back office, and establish an internal control system and internal audit.

The articles of incorporation and the business rules (and any amendments to them) must be filed with and approved by FINMA. An external audit firm must also review these compulsory organisational requirements on an annual basis and report its findings to FINMA (see Question 10).

FINMA can impose certain additional organisational requirements on SIFIs, but only to the extent necessary to ensure a proper functioning of the bank in times of financial or operational stress.

10. What are the rules concerning appointment of auditors and other experts?

Banks must establish an effective internal control system adapted to their size, complexity, structure and risk profile. For this purpose, banks must create an internal audit body that is independent of the management but reports to the board of directors or the audit committee.

A bank’s business is also subject to inspection and supervision by an independent regulatory auditing firm that must itself be recognised by FINMA. These regulatory auditors (which are generally appointed by the bank’s board of directors and do not need to be the same as the statutory auditors) must perform an audit of the bank’s financial statements and assess whether the bank is in compliance with the provisions of:

- The Banking Act (BA).
- Any other relevant regulations.
- Relevant self-regulatory guidelines.

The audit report must be submitted to the bank’s board of directors and to FINMA. If the audit reveals violations of applicable legislation or regulations (or other irregularities), the auditors must inform FINMA if this is not remedied within a time limit designated by the auditors (or immediately in the case of serious violations or irregularities that may jeopardise the security of the bank’s creditors).

Because of this function of the auditors, the supervisory system in Switzerland is often referred to as an “indirect (dual) supervisory system”.

11. What is the supervisory regime for management of banks?

Supervision and control of a bank’s management is ensured through the following levels or functions:

- A board of directors.
- A compliance function responsible for handling conflicts of interest and adherence to ethical behaviour, and ensuring the bank’s compliance with:
  - statutory, regulatory and internal provisions; and
  - commercially available standards and codes of conduct.

- An internal control system that controls daily business activities for compliance and correctness.
- Internal audit function.
- External audit function.

12. Do any remuneration policies apply?

Other than for SIFIs, Swiss banking laws do not contain specific provisions on the compensation of bank employees and organs. However, since 2011, specific requirements and procedures have been set out in FINMA’s circular entitled “Minimum standards for remuneration schemes of financial institutions” (Rundschreiben Vergütungssysteme 2010/01, version of January 2016).

The revised circular that came into force in July 2017 must be applied in full by the biggest banks and insurance companies, and explicitly prohibits hedging transactions. The circular is a key guideline for all banks and insurance companies. It requires the board of directors to design and implement a remuneration policy and to issue rules relating to it. The remuneration scheme must have a long-term focus and be:

- Simple.
- Transparent.
- Enforceable.

Control functions in a bank must be remunerated so as to avoid conflicts of interest. The structure and level of total remuneration must be:

- Aligned with the bank’s risk policies.
- Designed to enhance risk awareness.

Variable remuneration must be:

- Funded through the long-term economic performance of the bank.
- Granted according to sustainable criteria.

The board of directors must include a section about the implementation of the remuneration policy in the bank’s annual report.

For SIFIs, the Banking Act (BA) imposes an obligation to provide for a basis in the compensation schemes to refund certain variable remuneration in cases where they may receive state aid. Furthermore, it is likely that SIFIs will be asked not to pay out further variable bonuses and to reconsider their remuneration systems for the future.

13. What are the risk management rules for banks?

A bank must implement and maintain adequate and effective risk management procedures, so it can assess, limit and supervise all conceivable operational and legal risks, including the following risks in particular:

- Market risks.
- Credit risks.
- Default risks.
- Settlement risks.
- Liquidity risks.
- Reputational risks.
The risk management unit must be independent of any profit-oriented business unit within the bank and must report directly to the executive board.

**LIQUIDITY AND CAPITAL ADEQUACY**

*Role of international standards*

14. **What international standards apply? How have they been incorporated into domestic law/regulation?**

Switzerland implemented the internationally agreed capital adequacy rules of the Basel Accord (Basel I, II and III) by means of the Capital Adequacy Ordinance (CAO) (*Eigennutzeverordnung*) and subsequent FINMA circulars. For all Swiss banks, the new rules of Basel III were implemented in Switzerland from 1 January 2013, without any specific modification.

As a member of the Financial Stability Board (FSB), Switzerland contributes significantly to its work and adheres to its international standards and codes to strengthen financial systems. Switzerland was one of the first countries to introduce new FSB standards under the Total Loss-Absorbency Capacity (TLAC) Termsheet of 2015 (effective 1 July 2016).

**Main liquidity/capital adequacy requirements**

15. **What liquidity requirements apply?**

Swiss banks must maintain certain levels of minimum liquidity and reserves. The liquidity requirements must also be met both at the level of the standalone bank and at the level of the group.

The qualitative and quantitative requirements for liquidity to be held by Swiss banks are set out in the Swiss Federal Ordinance of 30 November 2012 on Liquidity for Banks, as subsequently amended (Liquidity Ordinance) (*Liquitätssverordnung*), which entered into force on 1 January 2013. The Liquidity Ordinance implements Basel III’s liquidity requirements into Swiss law (subject, in part, to further rulemaking). It applies to all Swiss banks and generally requires appropriate management and monitoring of liquidity risks. The requirements are tiered according to the type, complexity and degree of risk of a bank’s activities.

Banks must maintain certain levels of minimum liquidity and reserves. The minimum reserve requirement is measured by comparing a bank’s short-term liabilities with certain eligible liquid assets, such as:

- Coins.
- Banknotes.
- Sight deposits at the Swiss National Bank (SNB).

A bank’s eligible liquid assets must be maintained at a level of at least 33% of the short-term liabilities. Banks which hold deposits that are subject to depositor preferences (so-called privileged claims) must maintain higher levels of liquidity in relation to those claims. Moreover, Swiss banks must keep minimum reserves, which consist of Swiss franc denominated coins, banknotes and sight deposit accounts of the bank, with the SNB. This reserve requirement is set out in the National Bank Ordinance (*Nationalbankverordnung*) and currently amounts to 2.5% of the average Swiss franc denominated liabilities at the end of the three month relevant reporting period.

These liquidity requirements must be fulfilled on an individual and consolidated basis. Banks must report their liquidity levels quarterly to the bank regulatory auditors.

SIFIs must meet higher capital standards and have enough liquidity to be able to:

- Absorb a liquidity shock.

Meet their payment obligations at all times (even in an extraordinary stressful situation, such as a bank run).

Therefore, for SIFIs, a special regulatory framework for liquidity applies under the Liquidity Ratio. In accordance with the relevant Basel III rules, Switzerland introduced a 100% Liquidity Coverage Ratio (LCR) for SIFIs in 2015. For all other banks the LCR was introduced in 2018, but the introduction of Net Stable Funding Ratios (NSFR) has been postponed indefinitely.

16. **Is a leverage ratio applicable?**

Leverage ratio requirements were introduced for SIFIs from 1 January 2015, and were extended to non-SIFIs on 1 January 2018. Currently, the leverage ratio is calibrated at 3% of total capital for non-SIFIs and 4.5% for SIFIs, plus a potential add-on. For SIFIs at the maximum 1.5% there may be additional Tier 1 capital.

17. **What is the capital adequacy framework that applies for banks?**

A bank must maintain an adequate ratio between its capital resources and its total risk-weighted assets under the Banking Act (BA) and the Capital Adequacy Ordinance (CAO). This requirement applies to banks on both an individual institution basis and a consolidated basis. For non-systemic banks, the minimum regulatory capital must be increased over seven years from 8% to 10.5% of the risk-weighted positions (according to the Basel III rules, which were implemented in Switzerland by 2013).

Switzerland and other member jurisdictions can also implement a countercyclical capital buffer within the range of 0% to 2.5% of risk-weighted assets by January 2019. The Swiss Government increased the buffer (initially introduced in 2013) to 2% from 30 June 2014 to address overheating trends in the real estate sector.

Under an amendment to the CAO (effective 1 July 2016), the two Swiss SIFIs must hold going concern regulatory capital of at least 12.86% towards risk weighted assets, plus a further buffer (calibrated pursuant to market share and size) up to a total capital requirement of 14.3%. Of this total requirement, at least 10% must be held in the form of common equity tier 1, while the rest can be held in the form of high trigger additional tier 1 instruments, each in accordance with the Basel III standards.

In addition, as of 1 June 2016, Switzerland has introduced a requirement on internationally active SIFIs to build up a gone concern buffer in the form of Total Loss-Absorbency Capacity (TLAC) Instruments until 2019, in accordance with the 2015 Financial Stability Board (FSB) TLAC Termsheet. This requirement is calibrated in an amount equal to the going concern capital, currently 14.3% of risk-weighted assets.

**CONSOLIDATED SUPERVISION**

*Role and requirements*

18. **What is the role of consolidated supervision of a bank in your jurisdiction and what are the requirements?**

**Role**

As a result of the steady internationalisation of banking activities, consolidated supervision of a financial group is a universally accepted concept and embedded in Swiss banking laws. A financial group is defined as a group of two or more companies active primarily in the financial area (of which at least one is active as a bank or securities dealer) and which are either of the following:

- An economic unit.
• Seen as legally obliged or factually compelled to assist each other due to other circumstances.

Requirements
As a general principle, the same regulations apply to a financial group on a consolidated basis as they do to a bank on an individual institution basis. The subject matter of consolidated supervision is governed by the Banking Act (BA) and the Swiss Banking Ordinance (Bankenverordnung), and is further refined in a FINMA circular. The provisions can be subdivided into quantitative and qualitative elements, and must be satisfied at the consolidated level.

Under Swiss standards of consolidated supervision, the financial group must, among other things:
• Be adequately organised.
• Have adequate internal risk, capital adequacy and liquidity control systems.
• Be managed by persons who guarantee proper business conduct (Gewähr).

International co-ordination and co-operation

19. To what extent is there co-operation with other jurisdictions?

According to the “High-level principles for the cross-border implementation of the New Accord” (published in 2003 by the Basel Committee on Banking Supervision), the parent bank and the parent supervisory authorities must monitor:
• Risk exposure of the bank and the financial group for which they are responsible, including a perspective of concentrations of risk and of the quality of assets.
• The adequacy of the bank’s capital, based on the totality of its business wherever conducted.

As such, it is requested that the supervisory authorities of the countries involved co-operate with each other. These principles are embedded and the legal basis for such co-operation by or with FINMA is provided by the Financial Market Supervisory Act (FINMASA).

SHAREHOLDINGS/ACQUISITION OF CONTROL

20. What reporting requirements apply to the acquisition of shareholdings in banks?

Each natural person or legal entity must notify FINMA before acquiring or selling directly or indirectly a qualified participation in a bank. A person or entity holds a qualified participation if it holds at least 10% of the capital or voting rights of a bank or otherwise influences the bank in a significant manner. This duty to notify also exists whenever a qualified participation is increased or decreased so that the threshold of 20%, 33% or 50% of the capital or voting rights is reached, exceeded, or decreased below. As FINMA has the authority to refuse the person as a shareholder of the bank, it is highly advisable to obtain approval before the closing of a transaction. Further, the bank must also notify FINMA of persons who fall under this requirement as soon as it has knowledge and at least once a year.

An additional licence must be obtained if the bank comes under a controlling foreign influence (see Question 4). A new additional licence must also be obtained if a foreign-controlled bank experiences a change of its foreign shareholders holding a qualified participation. It is the duty of the Swiss bank to obtain this additional licence before completing a transaction.

21. What approval requirements apply to the acquisition of shareholdings and of control of banks?

Qualifying shareholders must grant assurance of proper business conduct (that is, a fit and proper test). Assurance of proper business conduct covers matters of personal character and professional qualifications required for the proper management of a supervised entity. The principal criterion used in assessing a person’s suitability is his or her past and present business activity and professional plans. FINMA can refuse to issue or (as a last resort) revoke a banking licence if the influence of a qualifying shareholder could jeopardise the sound and prudent business conduct of the bank.

Foreign investment

22. Are there specific restrictions on foreign shareholdings in banks?

A bank that is to be organised in accordance with Swiss law, but in whose case a controlling foreign influence exists, or a foreign bank seeking to obtain a banking licence from FINMA for a Swiss branch must meet the following additional requirements:
• Country of residence of the ultimate controlling legal or natural person(s) must guarantee reciprocity.
• Corporate name of the foreign-controlled bank cannot suggest that the bank is Swiss-controlled.
• If the bank is part of a group, appropriate consolidated supervision must be provided by the foreign supervisors.

The reciprocity requirement is not applicable to financial institutions from signatory countries of the General Agreement on Trade and Services (GATS) and the Fifth Protocol, such as member states of the EU and the US.

A controlling foreign influence is assumed when a foreigner holding a qualified participation in a bank directly or indirectly holds more than half of the voting rights of this bank, or exercises a controlling influence in another way. A foreigner is defined as either of the following:
• A natural person who is not a Swiss national and does not have a permanent residence permit in Switzerland.
• A legal entity with its registered office either abroad or in Switzerland, which is mainly influenced by a natural person who is not a Swiss national and does not have a permanent residence permit in Switzerland.

A new additional licence must be obtained if a Swiss bank experiences a change of its foreign controlling person(s) at a later date.

RESOLUTION

23. What is the legal framework for liquidation of banks?

The liquidation of insolvent banks is regulated by the Banking Act (BA) and the Bank Insolvency Ordinance of FINMA (Bankeninsolvenzverordnung FINMA) (BIO-FINMA).

If there is no prospect of restructuring or efforts for a restructuring have failed, FINMA withdraws the licence from the bank, decrees its liquidation and makes this public. Under this order, the bank is no longer entitled to dispose of its assets. FINMA then appoints a liquidator, who is responsible for conducting and implementing the liquidation proceedings or acts as liquidator itself.

global.practicallaw.com/bankingregulation-guide
Claims against the bank (which are recorded in the bank's books) do not need to be additionally logged by the creditors. They will be automatically considered by the liquidator when drawing up a schedule of claims. Claims of bank customers are privileged up to the amount of CHF100,000. These claims are treated with priority, meaning that they will:

- Be paid out immediately and without the right to set-off (if possible).
- Rank senior to general creditors in liquidation.

For privileged deposits held with Swiss branches of banks, a system-wide deposit protection scheme of up to CHF6 billion exists. Other than this, no creditor protection or creditor preference regime exists in Switzerland.

If FINMA decides that there is a prospect that a bank may be successfully restructured, it may order restructuring proceedings rather than liquidation (see Question 24).

24. **What is the resolution regime for banks?**

The resolution regime in Switzerland, allowing a bank to be restructured rather than liquidated, has continuously been amended over the past few years.

FINMA can order protective measures if:

- Recovery measures taken by the bank's management have failed; and
- There is a justified concern that the bank:
  - is over-indebted;
  - has serious liquidity problems; or
  - has violated capital adequacy provisions.

Such protective measures may include:

- Issuing directives to the governing bodies.
- Limiting the bank's business activities.
- Closure of the bank.

If there is a well-founded prospect of restructuring, FINMA can order a special resolution procedure known as a bank restructuring. Either FINMA itself or a restructuring commissioner appointed by it must draw up a restructuring plan (which requires FINMA's approval if set up by a commissioner). FINMA can only set up or approve a restructuring plan if essential safeguards are met, for example that:

- Creditors of the bank are likely to be better off under the terms of the plan than in liquidation.
- The interests of the bank's creditors must take precedence over the interests of its equity holders.

Under the resolution regime, FINMA can also impose any of the following measures (if no other less restrictive restructuring measure is suitable to effectively allow for the continuation of the systemically important functions):

- Debt-to-equity swap.
- Reduction of claims ("ball-in").
- Forced transfer of agreements, assets and liabilities of the insolvent bank to a bridge-bank ("lifeboat concept").

In the case of SIFIs, FINMA's approval of the restructuring plan is final. In other cases, a bank's creditors have the right to reject it.

Swiss courts may also play a role as the bank's creditors and can challenge FINMA's restructuring decisions in court to:

- Guarantee procedural fairness.
- Ensure observation of the principle of due process.

If the court finds that any principles of the Swiss restructuring law have not been complied with, it can require that the relevant creditors are compensated ex post. However, the challenge does not suspend the implementation of the resolution plan.

**REGULATORY DEVELOPMENTS AND RECENT TRENDS**

25. **What are the regulatory developments and recent trends in bank regulation?**

The Swiss legislator has been making various efforts to stabilise and strengthen the Swiss financial system after the financial crisis of 2007/2008. Efforts so far have focused on increased banking regulation and supervision.

With the entry into force of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) in 2016, Switzerland implemented a financial market infrastructure regulation which is modelled on Regulation (EU) 648/2012 on OTC derivatives, central counterparties and trade repositories (European Market Infrastructure Regulation (EMIR)). At the same time, Switzerland regulates the OTC derivatives trading in accordance with the principles announced at the G-20 Summit in Pittsburgh in 2009.

With two other new laws (that is, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA)) the government seeks to introduce new standards of conduct for all providers of financial services to improve client protection. These two laws have been approved by the Swiss Parliament in June 2018 and are expected to enter into force in early 2020.

FinSA contains conduct provisions modelled after Directive 2004/39/EC on markets in financial instruments (MiFID), and its successor "MiFID II", the Directive 2014/65/EU, with which financial service providers must comply with regard to their clients. In line with international standards (such as Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive), and its successor, the Prospectus Regulation, (EU) 2017/1129 of June 2017, and the standards of the International Organization of Securities Commissions (IOSCO)), FinSA contains provisions for prospectus duties and requires an easily understandable key information document for financial instruments

FinIA essentially seeks to harmonise the authorisation rules for financial service providers other than banks and will (for the first time) subject asset managers to licensing and prudential supervision requirements.

In conjunction with all relevant financial centres, Switzerland has also committed itself to the Automatic Exchange of Information (AEOI) to gain international tax transparency. The AEOI was implemented on 1 January 2017 and data will be exchanged for the first time in late 2018.

In 2014, Switzerland signed the FATCA agreement with the United States in order to disclose account details to US tax authorities if clients' consent is obtained.

Switzerland also introduced standards for SIFIs on the FSB TLAC Termsheet of November 2015 (see Question 17).
THE REGULATORY AUTHORITIES

Swiss Financial Market Supervisory Authority (FINMA)
T +41 31 327 9100
E info@finma.ch
W www.finma.ch

The Swiss National Bank (SNB)
T +41 58 631 0000
E snb@snb.ch
W www.snb.ch

ONLINE RESOURCES

Swiss Federal Law (Classified compilation)

Description. The official portal of the Swiss federal authorities provides general information about the Swiss law and a small English selection of Swiss acts and ordinances currently in force. The German, French and Italian versions of the current law in force are available under www.admin.ch/gov/de/start/bundesrecht/systematische-sammlung.html. English translations are provided for information purposes only.

Swiss Financial Market Supervisory Authority (FINMA)
W www.finma.ch

Description. The FINMA official website provides up-to-date information on authorisation, supervision, enforcement, and their associated documentation. Furthermore, the website provides information on the regulator itself. FINMA updates the website regularly.

The Swiss National Bank (SNB)
W www.snb.ch

Description. The official website of the Swiss National Bank (SNB) provides current information on the country's monetary policy, regulates the national currency circulation and facilitates payment transactions, and the central bank itself. Annual statistics on the monetary policy are also published.

SIX Swiss Exchange
W www.six-swiss-exchange.com

Description. The official website of the principal Swiss stock exchange provides current information on market data, issuers' information and statistics on indices, bonds, and shares.
Practical Law Contributor profiles

René Bösch, Partner
Homburger AG
T +41 43 222 1540
F +41 43 222 1500
E rene.boesch@homburger.ch
W www.homburger.ch

Professional qualifications. Lawyer, Switzerland

Areas of practice. René Bösch is a partner in both the Banking and Finance and the Capital Markets teams. An expert in capital market transactions and financial markets regulation, he is particularly focused on debt capital market transactions, and the structuring of equity-linked and regulatory capital instruments. He also specialises in advising clients on banking law and financial services regulation, including recovery and resolution planning.

Recent transactions
- Regularly advising Swiss and international financial institutions on financing transactions and regulatory matters.
- Experienced in assisting clients with internal investigations and representing them before Swiss authorities.

Languages. German, English

Professional associations/memberships. Member of the P.R.I.M.E. Finance Panel of Experts; member of the editorial board of CapLaw, an electronic newsletter on Swiss capital markets law; former member of the Council of the Legal Practice Division of the International Bar Association; former co-chair of the Securities Law Committee and the Capital Markets Forum; lecturer in the LLM. International Business Law Programme of the University of Zurich; member of the Cross-Border Resolution Working Group of the Institute of International Finance.

Publications
- The Financial Stability Board published its Guiding Principles on ITLAC, by René Bösch, Benjamin Leisinger, Lee Saladino, CapLaw 45/2015; CapLaw

Franziska Balsiger-Geret, Director
KPMG AG
T +41 58 249 6877
E f.balsiger@kpmg.com
W www.kpmg.ch

Professional qualifications. Advising national and international clients on various regulatory and compliance topics, mainly on anti-money laundering, client due diligence/on-boarding/remediation, outsourcing/data protection, cross border business, cooperation and exchange of information with Swiss and foreign authorities. Franziska gained comprehensive experience in conducting internal investigations in the regulatory field and in complex enforcement proceedings. Experienced in internal investigations and complex enforcement proceedings.

Areas of practice. Banking; finance and capital markets law; white collar crime and investigations.

Languages. German, English

global.practicallaw.com/bankingregulation-guide