Private Banking & Wealth Management

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

2019

GETTING THE DEAL THROUGH

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Lenz & Staehelin

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This article was first published in August 2018
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Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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First published 2016
Third edition
ISBN 978-1-78915-052-0

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

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Preface

Private Banking & Wealth Management 2019

Third edition

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

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

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

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

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

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

GETTING THE
DEAL THROUGH

London
August 2018

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United Kingdom

Richard Small and William Robertson
Addleshaw Goddard LLP

Private banking and wealth management

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

The Financial Services and Markets Act 2000 (FSMA), as amended, is the main source of law relevant to private banking in the UK. The so-called 'general prohibition' in FSMA provides that a legal person may only carry out a regulated activity in the UK if it is either authorised to do so or is exempt from the need to be authorised. A breach of the general prohibition is a criminal offence.

Authorised persons are only able to carry out those activities for which they have permission. UK regulated activities are set out in the FSMA 2000 (Regulated Activities) Order 2001. Private banks typically carry out a number of regulated activities, including accepting deposits and providing investment management and investment advisory services in relation to specified investments (defined as including shares, debentures, futures and options, contracts for difference and units in collective investment schemes). Private banks wishing to carry out these activities in the UK must therefore obtain authorisation from the relevant regulator (see below) and ensure that they have the relevant permissions. It is a criminal offence for an authorised person to carry out a regulated activity for which they do not have permission.

Private banks, as authorised firms, are subject to various conduct of business and governance rules. These rules are primarily set out in the Financial Conduct Authority's *Handbook of Rules and Guidance* (FCA Handbook) and the Prudential Regulation Authority's Rulebook (PRA Rulebook). Private banks must also comply with certain European Union (EU) legislation that has direct effect in the UK, including, for example, the Markets in Financial Instruments Regulation and the Market Abuse Regulation.

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

On 1 April 2013, the UK adopted a 'twin peaks' model of supervision. The Financial Services Authority was replaced by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA). The PRA at the Bank of England is responsible for the prudential regulation and supervision of systemically important firms, including private banks and major investment firms. Certain wealth managers (eg, those that do not accept deposits and are not considered to be systemically important) are not regulated and supervised by the PRA (although they will be regulated and supervised by the FCA). The FCA is responsible for regulating the conduct of business of all authorised firms, regardless of whether they are also regulated by the PRA. Firms regulated by both the PRA and FCA are known as dual-regulated firms. The FCA is also responsible for the prudential regulation of authorised firms not otherwise regulated by the PRA. On 1 April 2014, the FCA took over responsibility for regulating firms that provide consumer credit from the Office of Fair Trading.

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

In the UK, private banks and asset managers are typically the principal providers of private wealth services. Some wealthy individuals, usually ultra-HNWIs, set up family offices. Some family offices provide services to a number of families. There has been a recent trend in the UK towards a dual provider model of independent financial advisors providing advice with platforms providing brokerage and custody services.

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

Neither 'private banking' nor 'wealth management' are defined terms in English law and regulation. Rather, they are broadly understood to be umbrella terms that capture firms offering wealth management services such as banking and deposit-taking, the provision of investment management and investment advisory and other similar related financial services to HNWIs. Some private banks and wealth managers also offer services that are not regulated, such as concierge services.

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

Private banks are dual regulated firms requiring authorisation from both the PRA and FCA. Applicants are required to provide a regulatory business plan detailing their proposed business, including financial forecasts. Information on governance structures, ownership (up to ultimate beneficial owners), IT and business contingency, and systems and controls also need to be provided. Applicants must be able to demonstrate that they can satisfy the applicable regulatory capital requirements.

The Senior Managers Regime, which came into force in 2016 for private banks and certain other large financial institutions, aims to improve corporate culture by holding individuals accountable for their conduct and competence. Under the regime, private banks need to demonstrate that those individuals undertaking senior management functions are fit and proper, with PRA and FCA approval being necessary for certain roles. Firms will be responsible for certifying that certain other individuals are also fit and proper.

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

Private banks must conduct their business in accordance with the requirements of the UK regulatory regime. In addition, they are required to meet, on an ongoing basis, the threshold conditions detailed in Schedule 6 of FSMA. The threshold conditions are designed to ensure that firms are effectively supervised, have appropriate financial and non-financial resources and meet the suitability requirements (including in relation to their business model).

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

Private banks are often structured as public limited companies, although they can be structured as private companies limited by shares. Foreign private banks can opt to provide services in the UK via a branch or a subsidiary. Although it is possible for a private bank to operate as a branch in the UK, there is generally a regulatory preference to provide services as a subsidiary authorised and regulated by the PRA and FCA, with separate capitalisation from its parent entity. As branches are not separate legal entities, they will, effectively, be regulated by both their home member state competent authority and the PRA and the FCA.

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

Private banks should expect the process to take approximately one year from first instructing counsel to prepare the application before

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they obtain authorisation, although this time frame will depend on the complexity and sensitivity of the proposed application. The process for obtaining a deposit-taking licence can be particularly time consuming and will likely involve considerable scrutiny by the PRA and FCA.

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

Firms that breach the UK regulatory regime can become the subject of an enforcement action by the PRA or FCA. FSMA grants regulators the power to vary a firm's permissions or even revoke their authorisation. Revocation of authorisation is generally limited to the most serious of breaches; for example, where a firm fails to meet its capital adequacy requirements on an ongoing basis. The regulators have a variety of other disciplinary measures at their disposal, including private warnings, fines and public censure.

10 Is wealth management subject to supervision or licensing?

Some wealth managers are subject to supervision and licensing. Typically, wealth management firms carry out a number of regulated activities, such as discretionary investment management, providing investment advice and arranging safe custody of client assets, requiring them to be authorised with the relevant permissions. Firms can opt to be subject to a lighter touch regulatory regime by limiting their regulated activities to the provision of investment advice and arranging transactions on behalf of their clients. Firms opting for the lighter touch regime can work under another authorised firm's regulatory umbrella and are subject to lighter regulatory capital requirements.

Some family offices structure themselves in such a way that authorisation is not required at all. This can be achieved by making use of the group exemption. The group exemption is available, for example, where one entity in the group is managing investments that are beneficially owned by another member of the group.

11 What are the main licensing requirements for wealth management?

Wealth managers are usually solo regulated firms, and are only regulated by the FCA. While the authorisation is broadly similar to that for private banks (see question 5), the time scales are generally shorter. In some limited circumstances, wealth managers may be able to 'borrow' a licence from a regulatory host to allow it to commence limited activities pending full FCA authorisation. The Senior Managers Regime will be extended to all regulated firms, including wealth managers, in 2019.

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

The main ongoing conditions of a wealth management licence are broadly similar to those for a private bank (see question 6).

Anti-money laundering and financial crime prevention

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

Private banks are required to establish and maintain effective systems and controls for the prevention of money laundering and financial crime. The Criminal Finances Act 2017 introduced a new corporate offence of failure to prevent the criminal facilitation of tax evasion, which potentially carries unlimited financial penalties. Private banks and wealth managers must put in place reasonable procedures to prevent their associated persons from committing tax evasion facilitation offences in order to have a defence where criminal facilitation by an associated person occurs.

In the UK, the relevant primary legislation can be found in the Terrorism Act 2000 and the Proceeds of Crime Act 2002 (POCA). These are supported by the anti-money laundering and financial crime requirements as set out in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs). The fifth Money Laundering Directive was adopted on 30 May 2018, with EU member states (including, subject to Brexit, the UK) being obliged to implement it by 10 January 2020.

Under the MLRs, private banks and wealth managers are required to undertake customer due diligence (CDD, formerly known as know your customer or KYC) before establishing a business relationship with a customer, including undertaking occasional transactions for customers, and at other times where the firm becomes aware of changed circumstances in relation to an existing customer or wherever money laundering or terrorist financing (including where documentation provided is inadequate or dubious) is suspected. The UK regime requires firms to take a risk-based approach to customer due diligence. Industry guidance designed to assist private banks and other firms to interpret and implement the relevant anti-money laundering and terrorist financing requirements has been published by the Joint Money Laundering Steering Group. This includes specific guidance in relation to CDD.

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

A PEP is defined in Regulation 35 of the MLRs as 'an individual who is entrusted with prominent public functions', but does not include a 'middle-ranking or more junior official'. Private banks are also required to determine whether an individual, even if not a PEP themselves, is a family member or known close associate of a PEP. Private banks are required to undertake enhanced CDD on PEPs, their family members and known close associates. This includes seeking additional information in relation to the source of their wealth and funds. Senior management should be involved when establishing a business relationship with a PEP, their family member or a known close associate, and this should be documented.

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Private banks and wealth managers should, at a minimum, obtain the following information when opening a new account for an individual: full name, residential address and date of birth. This information must be verified via reliable and independent sources. Identities should be verified based on either:

- a government-issued document which incorporates the customer's full name and photograph and either his or her residential address or date of birth; or
- a government- (or court or local authority) issued document without a photograph which incorporates the customer's full name supported by a second document, either government-issued or issued by a public sector body or authority, a utility company or an FCA-regulated firm, which incorporates the customer's full name and either his or her residential address or date of birth.

Firms may use external third parties for electronic verification purposes, although private banks should satisfy themselves that the information supplied by such third parties is reliable and accurate and is independent of the subject of the CDD.

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

A tax offence can be a predicate offence for money laundering purposes. Money laundering offences assume that the proceeds of crime are being laundered. A person can still be found guilty of a money laundering offence even where they have not been convicted of the predicate offence.

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

The International Tax Compliance Regulations 2015 (as amended in 2016 and 2017) (the Tax Regulations 2015) require private banks to establish which accounts are held for individuals who are tax-resident in certain other jurisdictions with which the UK has entered into an agreement to automatically exchange tax information, collect that information and then report it to Her Majesty's Revenue and Customs (HMRC). Private banks can outsource this due diligence to a third-party provider, although ultimate responsibility for the due diligence rests with the private bank and relevant accountable senior manager.

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

Broadly, there are three categories of money laundering offences under POCA. These are where persons:

- knowingly (i) conceal, convert or transfer criminal property, (ii) are involved in an arrangement which facilitates the acquisition or use of criminal property or (iii) acquire, use or possess criminal property (acquisition, use and possession);
- fail to report knowledge or suspicion of money laundering (including where there were reasonable grounds for knowing or suspecting); and
- tipping someone off that an investigation is contemplated or under way or prejudicing an investigation.

To the extent that an employee at a private bank promptly raises concerns with the firm's money laundering reporting officer (MLRO) they will not have committed the failing to report offence. The MLRO can be guilty of an offence if he or she fails to communicate concerns to the National Crime Agency without a reasonable excuse.

Private banks are required under the MLR and the FCA Handbook to establish adequate and appropriate systems and controls as well as policies and procedures to prevent money laundering. Both the firms, their officers and any individual controllers of the firm can incur liability in relation to the commission of money laundering offences by the firm. Failing to comply with these requirements is a criminal offence and as such can result in imprisonment, a fine or both.

Client segmentation and protection

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

Private banks are required to categorise new clients as a retail client, a professional client or an eligible counterparty for regulatory purposes. Retail clients are afforded the greatest protections. The private bank must notify the client of their classification and inform them that they have the right to request a different categorisation, although this may involve the loss of some protections. Some private banks do not have permission from the FCA to deal with retail clients.

HNWIs sometimes opt-up to professional client status. In order to opt-up from retail status, the private bank must undertake an assessment to ensure that the client has sufficient expertise, experience and knowledge to make their own investment decisions and understands the attendant risks. Where the private bank is undertaking certain services for the client (including providing investment advice), it must ensure that the client satisfies at least two of the following three criteria: the client has undertaken a certain number of transactions during the previous four quarters; the client's investment portfolio exceeds €500,000; and the client has worked in the financial industry as a professional for at least one year.

20 What are the consequences of client segmentation?

The regulatory regime affords the greatest level of protection to retail clients. As a result of the burden imposed on firms when dealing with retail clients, some firms choose not to offer services to them. Professional clients may not have the right to file complaints with the Financial Ombudsman Service or seek compensation from the Financial Services Compensation Scheme. In certain circumstances, firms are required to assess the appropriateness and suitability of products and services for clients. Such assessments, where required, are generally less burdensome when dealing with clients categorised as professional rather than retail.

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

Firms are required to consider the relevant consumer protection legislation, particularly the Consumer Rights Act 2015 (CRA), in addition to the requirements of the FCA Handbook. Private banks must ensure, under the CRA, that their communications with clients, including their terms of business, are fair and transparent.

Exchange controls and withdrawals

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

An exchange control is a governmental restriction on the movement of currencies between countries. Exchange controls were abolished in the UK in 1979 and as such there are currently no general exchange controls in place in the UK. Exchange controls may, however, be imposed with respect to the target state of sanctions imposed by the UK, either unilaterally or as part of its international obligations. There are sometimes notification requirements or limits on the amount of cash that may be carried to certain countries.

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

There are no restrictions imposed by English law on cash withdrawals, whether in sterling or, for foreign currency denominated accounts, foreign currencies. In practice, some banks may impose limits on the amount of cash that can be withdrawn. While private banks may apply bespoke cash withdrawal limits, high-street banks impose blanket limits on cash withdrawals for all customers. Limits on cash withdrawals from ATMs are usually imposed. Private banks would usually expect clients to contact the bank in advance where they wish to make large cash withdrawals so that the bank can ensure that it has the funds available. Banks may query the purpose of the withdrawal as part of their financial crime systems and controls.

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

There are no restrictions imposed by English law on cheque withdrawals or the withdrawal of bullion or securities from an account. Private banks may not honour requests for cash withdrawals, however, if there are insufficient funds available in the account or such withdrawal would exceed any pre-agreed overdraft limit. Requests for bullion withdrawals would depend on the client having sufficient bullion stored in safe deposit.

Cross-border services

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

Firms authorised in a member state of the European Economic Area (EEA) are able to provide their services in other EEA member states via a 'passport' under the Capital Requirements Directive (CRD). Firms can exercise their passport rights by notifying their home state regulator of their intentions. The home state regulator then notifies the PRA, which will liaise with the FCA in relation to the notification.

Wealth managers also have passport rights available to them under MiFID. The procedure for exercising the MiFID passport is broadly the same as the one under CRD. Private banks authorised outside of the EEA are generally required to set up a branch or subsidiary in the UK and would need to seek PRA and FCA authorisation to undertake the relevant regulated activities. Wealth managers may be able to conduct certain business in the UK in limited circumstances under the overseas persons exemption; otherwise they would be required to set up an FCA-authorised branch or subsidiary in the UK in order to undertake regulated activities here.

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

This is set out in response to question 25 above. Note that firms cannot commence their activities in the UK until the PRA has processed their notification.

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

A number of EU directives regulate the provision of cross-border services within the EEA. Banking services can be provided cross-border under the CRD and wealth management services under MiFID. Asset managers can market interests in their funds across the EEA via the marketing passport available under the Alternative Investment Fund Managers Directive (AIFMD).

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28 May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Employees of EEA firms who have exercised their passporting rights under the appropriate legislation may meet clients and prospective clients in the UK. Employees of EEA firms that have not so exercised their passporting rights or employees of non-EEA firms that do not have an authorised establishment in the UK should be mindful of the general prohibition in section 19 of FSMA and the restrictions on financial promotions contained in section 21 of FSMA. Section 19 prohibits the undertaking of regulated activities without authorisation and the relevant permissions. A breach of sections 19 or 21 is a criminal offence.

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

Foreign private banking institutions are subject to the restriction on invitations or inducements to engage in investment activities contained in section 21 of FSMA. Broadly, a foreign private bank that would like to communicate such an invitation or inducement to a UK-based prospective client must be FCA-authorised, must have the communication approved by an FCA-authorised firm or ensure that the communication falls within one of the exemptions or exclusions set out in the FSMA 2000 (Financial Promotions) Order 2005. There are, for example, exclusions available for clients who are investment professionals, or HNWIs or companies.

Tax disclosure and reporting

30 What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

In the UK, it is an individual's UK residence and domicile that determines their UK tax liability. UK residents who are higher rate tax payers (and those who are otherwise required to file a tax return with HMRC) are required to disclose any interest earned on UK accounts. Private banks are required to report information on accounts held with them to HMRC (see also question 17). While not strictly a requirement regarding the tax-compliant status of the accounts themselves, non-domiciled individuals claiming the remittance basis of taxation will need to maintain separate non-UK bank accounts for income, capital gains and clean capital so that they can demonstrate which funds represent UK tax-free resources if brought to the UK.

31 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

Under the Tax Regulations 2015, private banks must establish and maintain arrangements designed to identify 'reportable accounts'. For holders of reportable accounts from OECD Common Reporting Standard (CRS) jurisdictions, private banks must disclose to HMRC reportable information, including the name, address, jurisdiction(s) of residence, date and place of birth of the account holders, account number and balance. The reporting obligations placed on private banks where account holders are specified US persons (under FATCA) or another EU member state (under the Directive on Administrative Cooperation (DAC)) target broadly similar information, but are slightly different than for CRS jurisdictions.

Under POCA, employees at private banks are required to report any suspicious activity to their MLRO or the National Crime Agency if money laundering is suspected. It is an offence to tip off a client that a suspicious activity report is contemplated or has been made.

Under the disclosure of tax avoidance scheme rules, promoters are obliged to inform the UK tax authorities about certain tax avoidance arrangements that enable or might be expected to enable someone to obtain a UK tax advantage.

The UK tax authorities can issue third party notices requiring banks to provide information and documents in their power or possession that are reasonably required for the purpose of checking the tax position of clients whose identity is known to the tax authorities' issuing officer.

32 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

Private banks are required to notify a client of reporting obligations under the Tax Regulations 2015 or under the other reporting obligations noted in response to questions 30 and 31. It is standard practice for account-opening terms and conditions to expressly grant the private bank the right to make disclosures required by law and regulation and in any event, at the bank's sole discretion. Where a client fails to provide all the required information, the bank should usually file the incomplete reportable information with HMRC. In the usual way, HMRC will in turn share the information automatically with other tax authorities.

Structures

33 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

As a result of a number of changes to the tax regime in the UK, individuals are increasingly structuring their investments as private funds, family limited partnerships and family investment companies (FIC), which attract certain tax benefits. For example, profit on an investment held in a FIC is subject to the corporation rather than individual tax rate. Wealth can be passed on to future generations via a FIC without attracting inheritance tax, as value is passed on creation (although where FIC shares are gifted, inheritance tax may be relevant where the individual making the gift passes away less than seven years after the gift has been made). A FIC can have various share classes with different rights, which can assist with estate planning. Recent tax changes have limited the amount that wealthy individuals can hold in a pension fund (although pension funds remain the structure of choice for sub-threshold individuals).

Trusts are still a very common structure for entrepreneurs or family business owners due to the generous Business Property Relief (BPR) from UK inheritance tax available on the transfer of such assets into trust. By using BPR, or Agricultural Property Relief (APR) for farmland, an individual can transfer significant value into a lifetime discretionary trust. Where such reliefs are not available, and as a result of a number of changes to the tax treatment of trusts in 2006, there are limits as to the amount an individual can transfer into a lifetime trust. Nevertheless, a married couple can still get £650,000 out of their joint estates every seven years, trusts are still valid asset protection and tax planning tools.

For HNWIs, trusts are very common in wills as a means of providing flexibility, tax-planning opportunities (particularly with BPR or APR assets) and to consider asset preservation and succession planning issues. Non-domiciled UK residents do still establish (non-UK) trusts before they become UK-domiciled or deemed domiciled.

The civil law concept of a foundation does not map directly across to the UK. This creates an unwelcome uncertainty, as, depending on their exact structure, they are treated as trusts or corporations for tax purposes.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

The MLR specify that a beneficial owner of a trust means each of the following: the settlor; the trustees; the beneficiaries; or any individual with control over the trust. The identity of the trust must be verified on the basis of documents or information obtained from a reliable source which is independent of the customer. This may require sight of relevant extracts from the trust deed, or reference to an appropriate register in the country of establishment. The private bank must take reasonable measures to understand the ownership and control structure of the customer.

In respect of trusts, private banks should obtain the following information:

- the name of the settlor;
- the full name of the trust;
- the nature, purpose and objects of the trust (e.g., discretionary, testamentary, bare);

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- the country of establishment;
- the names of all trustees;
- the names of any beneficiaries (or, when relevant a description of the class of beneficiaries); and
- the name of any protector or controller.

It should be noted that private banks cannot satisfy their obligations to verify the identity of beneficial owners by relying only on information contained in a register. Finally, where there is a large number of trustees the private bank may take a risk-based approach to determining on how many, and which, in respect of whom they should carry out full CDD measures.

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

Beneficial owners are defined in the MLRs as including individuals owning or controlling more than 25 per cent of a body corporate or partnership. In relation to a trust, a person is deemed to have control where they may vary or terminate the trust, deal with trust property, add or remove a beneficiary of the trust, appoint or remove trustees or persons with control over the trust or direct or veto the exercise of any of these powers. Companies House maintains a public register of people with significant control (PSC) information.

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

There are a number of potential regulatory and tax obstacles to the use of certain structures to hold private assets. Family offices often seek to rely on the group exemption to avoid the need to be authorised under FSMA. The group exemption is, however, narrowly defined, so family offices should be careful not to offer services which would otherwise constitute a regulated activity to individuals or entities outside their group. Similarly, the AIFMD exempts from the definition of an alternative investment fund vehicles that do not raise external capital. This exemption would not be available where a family office seeks to manage funds raised from a number of different wealthy individuals or family offices.

Trustees of private family trusts will also have to consider their regulatory and compliance position in respect of FATCA, CRS and the new Trusts Registration Service in the UK.

The Finance Act 2006 introduced further tax obstacles to the use of trusts as a vehicle for holding private assets (although they are still highly effective in certain circumstances; see question 35). Transfers of wealth into trusts above the nil band rate now attract inheritance tax at the lifetime transfer rate of 20 per cent. Every 10 years trusts are subject to a charge. Trusts are also subject to income and capital gains tax. From April 2013, Companies and other 'non-natural persons' that hold high-value residential property in the UK are subject to an annual charge (Annual Tax on Enveloped Dwellings (ATED)) as well as capital gains tax (known as ATED-related CGT) when the property is sold.

Since April 2017, inheritance tax has been imposed on the owners of such companies in respect of the residential property held by the company. Historically, non-UK residents holding direct and indirect interests in UK immovable property were outside the scope of UK tax on capital gains. The position has changed in recent years, such that from April 2015 a non-resident capital gains tax applies to non-UK resident individuals, trustees, closely held funds and companies on the disposal of UK residential property.

Currently, the UK government is consulting on proposals to bring all gains on non-resident disposals of UK real estate within the scope of UK tax for gains accrued on or after April 2017, with an anti-forestalling measure to support this reform. More generally, there may be direct and indirect tax costs to setting up, dismantling or restructuring structures designed to hold private assets, and non-domiciled individuals in particular may wish to hold their assets in a way that clearly separates UK assets from non-UK assets.

Contract provisions

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

Depending on the nature of the services being offered by the private bank or wealth manager, clients are usually asked to enter into discretionary investment management agreements or non-discretionary investment advisory agreements. Under the former, the client typically grants the private bank or wealth manager discretion over the client's portfolio, allowing the firm to buy and sell specific investments without consulting the client, but in accordance with investment objectives and parameters set out in the agreement. Under the latter, the private bank or wealth manager can make recommendations regarding the client's portfolio, but can only buy and sell investments on the instructions of the client.

The governing law of these agreements is typically English law, although this is ultimately determined by the parties. Contracts generally provide that they may be varied at the written agreement of all parties to the agreement.

38 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

The liability standard at law is negligence, although gross negligence is becoming recognised by English courts. It is the client's responsibility to bring a negligence claim against the private bank or wealth manager. The exact terms of the contractual liability provisions are a matter of negotiation between the private bank or wealth manager and their client. The outcome of this negotiation is generally dictated by the relative bargaining powers of the parties involved – ultra-HNWIs and large family offices tend to have greater bargaining power than regular HNWIs. Typically in the UK, private banks and wealth managers seek to limit their liability to losses resulting from their negligence, fraud, wilful misconduct or a material breach of contract.

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

Private banks and wealth managers are required under the regulatory regime to include certain provisions in their contracts. These are generally set out in the FCA Handbook and include provisions relating to client categorisation, disclosures, complaints procedures and safeguarding client assets.

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

The Limitation Act 1980 (LA) provides for different limitation periods in respect of different causes of action. Of particular relevance to private banking and wealth management agreements will be the limitation period for simple contracts and certain actions in tort (six years) and breaches of obligations contained in deeds (12 years). These periods run from the date on which the cause of action accrued. Although the LA does not specifically prevent parties from altering or contracting out of these limitation periods, any attempt to alter the limitation period to a client's detriment could be subject to the reasonableness test set out in the Unfair Contracts Terms Act 1977.

Update and trends

At 23:00 GMT on 29 March 2019, the UK is scheduled to leave the EU. At the time of writing (August 2018), the terms of the UK's withdrawal from the EU had yet to be finalised. Absent an agreement to maintain the status quo for anything other than a temporary transitional period, Brexit will likely impact the way in which both UK and EU-based private banks and wealth managers market and deliver their services cross-border between the UK and the remaining 27 EU member states. However, many of the laws and regulations governing UK-based private banks and wealth managers' interaction with their UK-based clients will likely remain substantially unchanged in the immediate aftermath of Brexit.

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Confidentiality

41 Describe the private banking confidentiality obligations.

Private banks are usually bound by express confidentiality obligations contained in their terms of business and the contractual arrangements that they enter into with their clients. There is also the equitable doctrine of breach of confidence available to the clients of private banks under English law. Under this doctrine, where a private bank receives information in such a manner as to give rise to a duty of confidence on the part of the private bank, the latter may only use the information for the purpose for which it was given and the client may bring an action against the private bank where the private bank has disclosed this information other than for the purpose for which the information was provided and the client has suffered a loss as a result of the unauthorised disclosure.

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

Information which by its nature is confidential will generally fall within either the relevant contractual obligations or the equitable doctrine of breach of confidence. In the context of a private banking relationship, this would typically include personal and financial information.

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

The duty of confidentiality only applies to information that is confidential. As such, the duty of confidentiality generally does not apply to information that is already within the public domain or which the private bank obtained legitimately from a third party. In addition, requirements to disclose information under applicable law and regulation will override any contractual duty of confidentiality and the equitable doctrine of breach of confidence.

44 What is the liability for breach of confidentiality?

There are a number of remedies available to clients where private banks have breached their duty of confidentiality. These include a court injunction to prevent the private bank from making any further disclosures of the confidential information in question and damages. Damages can be sought either for breach of contract or for a breach of the equitable doctrine of breach of confidence. The quantum of damages depends on the circumstances of the breach. Although in some instances the client may be able to base its damages claim on the profits that the private bank has made as a result of its breach of confidentiality, more typically clients seek compensatory damages.

Disputes

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

The contractual arrangements and non-contractual obligations between private banks and wealth managers and their clients are typically governed by and construed in accordance with English law. Such arrangements typically provide for the English courts to have exclusive jurisdiction to settle any disputes or claims that arise out of or in connection with the agreement – including any non-contractual disputes. In some instances, the contractual arrangements may provide that disputes are governed by English law but are settled by way of arbitration. London is often, but not always, chosen as the seat of any such arbitration. Finally, clients classified as retail may bring complaints to the Financial Ombudsman Service.

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

Under Principle 11 of the FCA Handbook, authorised firms have a duty to deal with the regulator in an open and cooperative manner. As such, authorised firms have an affirmative duty to disclose to the regulator anything that the regulator would reasonably expect notice of. While private banks and wealth managers would not therefore be expected to disclose business as usual disputes, the regulator would expect disclosure of significant disputes or of a series or pattern of disputes which taken as a whole are significant (for example, a large volume of claims made by retail clients in connection with a particular product or service).

Under Principle 6 of the FCA Handbook, authorised firms are required to pay due regard to the interests of their customers and treat them fairly. As such, they should seek to resolve any complaints that arise. Where a client, including an HNWI, is classified as an eligible complainant under the FCA Handbook and is not satisfied with the authorised firm's proposed resolution of their complaint, they may have the right to complain to the Financial Ombudsman Service.

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ISBN 978-1-78915-052-0

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