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Securitisation

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Pestalozzi

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

A securitisation of assets is structured as a true sale by way of assigning or transferring (underlying) financial assets (ie, any kinds of loans, mortgages or receivables) to a bankruptcy remote special purpose entity (SPE) in order to support the bankruptcy remoteness of financial assets from the originator's credit and bankruptcy risk.

The true-sale concept is not established under substantive Swiss laws. When claims are assigned or sold, the assignee (or SPE) becomes the owner of the claims, and in both types of transactions (true sale and secured finance) the assignee has full legal title to, and ownership rights in, the assigned claims and can, from a legal perspective, validly dispose of such claims.

An assignee (or SPE) is fully protected upon the opening of bankruptcy proceedings against an assignor (or originator) and no distinction is made between a true sale of financial assets and a loan secured by an assignment of claims as in both cases the claims are assigned and, therefore, separated from the assignor. In the case of a secured loan, the assignee (or SPE) is contractually bound and has a fiduciary duty towards the assignor to realise the assigned claims only in case of an event of default. In the case of a true sale, there is no such obligation.

Swiss insolvency laws affect a true sale for future claims. Future claims only come into existence after the date of entering into an obligation to assign such a claim. After the opening of bankruptcy proceedings (or similar insolvency proceedings) against the assignor (or originator), (assigned) existing claims have generally already been assigned and do not form part of the originator's bankruptcy estate, whereas (assigned) future claims that come into existence only after the assignor has been declared bankrupt will fall into the originator's bankrupt estate and will not be assigned to the assigned (ie, there will be no true sale of such future claims). With regard to transactions with future claims, the transfer of the entire underlying agreement can also be arranged instead of a mere assignment, so that the future claim arises directly vis-à-vis the assignee.

Thus, under Swiss insolvency law, the assignment of future claims will cease to be valid if bankruptcy proceedings (or similar insolvency proceedings) are opened against the assignor (or originator). By contrast, a true-sale securitisation of existing claims may remain in full force and entitle the assignee (or SPE) to freely exercise its ownership rights over the assigned claims.

In addition, the originator's bankruptcy administration (or the insolvency official) may have claw-back claims to avoid transactions or reverse assignments if they fall within a suspect period of between one and five years before the opening of bankruptcy proceedings (so-called actio pauliana). Circumstances that may put a true sale at risk during such a suspect period would be, for instance, if the assignor (or originator) had no right to dispose of the assigned claims, if the price of the financial assets was not determined at arm's length terms (ie, the loan's face value minus certain fees), or if the assignor (or originator) assigned the claims with the intention to disadvantage other creditors. Given these circumstances, the assignee (or SPE) must retransfer the claims or compensate the bankrupt estate (or creditors). As of 1 January 2020, claw-back claims become time-barred after three years following the opening of the bankruptcy proceedings (and not after two years as set out under current Swiss law).

As a general rule, so long as the assignor (or originator) transfers existing claims on an arm's-length basis to the assignee (or SPE), the assignor will have made a true sale of assets and it may not be affected by Swiss insolvency law.

The true-sale principle aims to ensure that the sale of assets from the seller to the purchaser is made on a non-recourse basis both from a legal and accounting perspective. The Swiss legal framework is able to satisfy all requirements which result from this concept even though it is not a recognised legal concept under Swiss law (but rather an accounting and tax concept). The question as to whether or not the true-sale requirement is met or not depends largely on the economic conditions and circumstances of each individual case.

The fact that the seller retains a credit risk, or an interest rate risk, or the control of the collection of the receivables is, as such, not a factor which may jeopardise perfection. The factors which could put a true sale at risk would be circumstances where the purchaser has no right to dispose of the purchased receivables, where the purchaser has an obligation to retransfer the purchased receivables or where the price is not determined at arm's length so that there is a risk of challenge by third-party creditors requesting a revocation in the event of insolvency of a seller on the grounds that they have been defrauded by the sale of the receivables. The risk of such a claim is generally considered to be excluded if the sale of the receivables is made at market value.

Swiss insolvency law applies equally to a true sale and a secured loan transaction. In both types of transaction the opening of bankruptcy proceedings (or similar insolvency proceedings) against the assignor (or originator) causes all obligations to fall due, and claims forming part of the bankrupt estate can no longer be validly discharged. The bankruptcy administration (or insolvency official) raises an inventory of the assets belonging to a bankrupt estate, and if it doubts the assignment of certain claims to be valid or perfected, the claims will be included in

that inventory. The bankruptcy administration (or insolvency official) may take all measures necessary to safeguard the claims, such as a stay of collection and enforcement actions.

As regards the (assigned) existing claims, the bankruptcy administration (or insolvency official) will not interfere with the exercise of ownership rights over the assigned claims by the assignee (or SPE) provided that the sale is valid and perfected. With respect to the (assigned) future claims, however, the bankruptcy administration (or insolvency official) may notify the originator's debtors of the bankruptcy proceedings opening against the originator and inform the debtors that payment to the assignee (or SPE) will not relieve them from payment obligations towards a bankrupt estate. Payment to the bankrupt estate by debtors is the sole legal way of discharging their payment obligations.

It is standard practice to obtain an opinion to support the bankruptcy remoteness of a transfer.

The opinion states that the sale agreement is valid, binding and enforceable and that the receivables have been validly assigned.

The assumptions and qualifications provide, for example, that a transaction was entered into on arm's-length terms (at market value) and for bona fide commercial reasons, the originator was not over-indebted, and/or the enforceability may be limited by applicable insolvency laws, unless otherwise expressly opined on.

As mentioned above, future claims may be validly assigned under Swiss law provided that the aforesaid requirements are met. As long as the originator is not insolvent, the assignment of future claims may also be regarded as a true sale. However, the assignment of future claims will cease to be valid if bankruptcy proceedings (or similar insolvency proceedings) are opened against the originator. Therefore an opinion cannot be offered that a true sale has occurred upon an originator's insolvency.

1.2 Special Purpose Entities

To insulate financial assets from an originator's financial risks, a bankruptcy remote SPE is usually an important part of a securitisation structure. A Swiss SPE is not required under Swiss law unless this is necessary to comply with certain Swiss regulations, such as banking secrecy and data protection. Due to withholding tax issues, the SPE is often set up outside Switzerland and often Luxembourg is chosen.

There is no special securitisation law or regulation on the establishment, organisation and management of securitisation SPEs in Switzerland. Thus, for the establishment of an SPE in Switzerland, the Swiss Code of Obligations mainly provides the legal framework that sets forth the requirements for establishing and organising the SPE, the management's status and the shareholders' or quota-holders' rights.

The SPE in Switzerland is incorporated as a newly established stock corporation (*Aktiengesellschaft* – AG) or limited liability company *(Gesellschaft mit beschränkter Haftung* – GmbH).

The principal distinctions when establishing a stock corporation rather than a limited liability company are that an AG requires initial share capital of at least CHF100,000 (of which a minimum of CHF50,000 must be paid-in), while the GmbH requires only CHF20,000. Furthermore, only an AG can issue non-voting stock (*Partizipationsschein*, "participation certificate"). For the purposes of a securitisation transaction, the corporate form of the issuer is immaterial from a tax perspective but may have corporate governance implications.

A fundamental principle of any securitisation is to legally isolate the securitised assets from the risks of insolvency proceedings. Specifically, if an SPE is properly structured to be bankruptcy-remote, it is less likely that the SPE will have to file for its own insolvency or have its assets and liabilities consolidated with those of its parent in the event that its parent becomes a debtor in an insolvency proceeding. Certain features of the issuer that may be implemented to ensure it is structured to be bankruptcy-remote include, inter alia, restrictions on its corporate purpose and of corporate form; mergers, etc; as well as, more generally, on the amendment of any corporate document, independent directors and shareholders and, most importantly, the separation of the SPE from its parent company (via the maintenance of separate books and records, having accounts in its own name, conducting its business in its own name, preparing its own financial statement, etc).

As a rule, Swiss law does not provide for a pooling of assets and liabilities for a corporate group in an insolvency. Furthermore, insolvency proceedings are conducted separately so that the insolvency of the SPE's shareholder(s) should not, as a matter of Swiss law, automatically trigger the insolvency of any of its subsidiaries (subject to extraordinary cases, such as piercing of the corporate veil due to abuse of rights).

However, in 2008 the Swiss Financial Markets Supervisory Authority (FINMA) extended the insolvency of a regulated financial institution to its non-regulated subsidiary (Lehman Brothers Finance AG). However, this appears to have been an exception resulting from the financial crisis and has not set a precedent for FINMA with respect to originators that are subject to its supervision.

As mentioned in **1.1 Insolvency Laws**, usually, an SPE is interested in obtaining a legal opinion as to the validity and enforceability of a true sale against the originator, its debtors and/or creditors in relation to its bankruptcy remote status.

1.3 Transfer of Financial Assets

There are no specific notification requirements with regard to the valid transfer of financial assets. The requirements for a valid assignment are that the assignment agreement must be in writing, the receivables must be determined and no law or contractual arrangement must forbid the assignment.

1.4 Construction of Bankruptcy-Remote Transactions

Please see **1.1 Insolvency Laws** for more on this topic.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

The following taxes should be taken into particular consideration by a Swiss SPE (ie, an SPE incorporated in Switzerland or an SPE with a permanent establishment in Switzerland): stamp duty; value-added tax; withholding tax; and income and capital tax.

Stamp Duty

No stamp duty will be imposed on the transfer of financial claims from the originator to the Swiss SPE unless these claims are regarded as bonds, debentures or money market papers.

The initial equity capital of the SPE upon incorporation is exempt from the 1% Swiss equity issuance stamp duty, provided that the initial equity capital is equal to or less than CHF1 million. Trading in notes on the secondary market is subject to a 0.15% security transfer stamp duty, provided a Swiss securities dealer is involved in the transaction and no exemption applies.

If a foreign (non-Swiss) SPE is to be established, it is not subject to Swiss federal-interest withholdings on interest payments thereof, as long as the issuer does not have a taxable presence in Switzerland (ie, is and remains effectively managed and administered outside of Switzerland). In the context of a securitisation transaction, the existence of a foreign (non-Swiss) SPE is respected and the issuance of debt instruments by that foreign issuer to the market is not constructively attributed to a Swiss originator (as its own capital raising transaction) if the transfer of assets from the originator to the foreign issuer meets the standard of a true sale for Swiss tax purposes.

Basically, the true-sale standard for tax purposes is met if:

- all economic risks linked to the portfolio have been transferred from the originator to the foreign issuer;
- the originator is not obliged to buy back non-performing assets;
- the originator does not grant a guarantee;
- the originator has no other obligation to cover any loss of the (foreign) issuer; and
- the originator does not grant any subordinated loans or any form of credit enhancement.

Value-Added Tax

No value-added tax (VAT) will be imposed on the transfer of financial claims from the originator to the Swiss SPE. The sale (assignment) of financial claims is exempt from VAT.

If services, such as collecting principal and interest payments, are rendered by a Swiss servicer to a Swiss SPE, VAT will be imposed on the fees paid by the Swiss SPE. A case-by-case assessment must be applied if a non-Swiss party is involved in the securitisation transaction, notably the involvement of a non-Swiss SPE. Under specific circumstances, the SPE may bear a secondary VAT-liability if assigned (claims) included VAT but the VAT remained unpaid in the insolvency of the originator.

A sole assignment or sale of the receivables may lead to the acceleration of Swiss VAT due on the underlying taxable supplies (ie, future receivables). Thus, Swiss VAT considerations impact the structuring of such assignments.

Withholding Tax

No withholding tax will be imposed on payments by Swiss debtors to the originator or (Swiss) SPEs on obligations made on arm's length terms. A deferred purchase price might be requalified as interest-bearing debt.

Interest and dividend payments made by the Swiss SPE on securities (such as shares, bonds, debentures or money market papers) will be subject to Swiss withholding tax at a rate of 35% per year. Swiss taxpayers may claim a refund of that withholding tax on their annual income tax return statement. Non-Swiss taxpayers may only claim for a partial or total refund if a double taxation treaty provides for such a refund claim. If the loan is secured by mortgages, a source tax or withholding tax will be imposed on interest payments.

Income and Capital Tax

No Swiss income and capital gains tax will be imposed on a non-Swiss SPE. Basically, the mere transfer of financial claims from the originator to the SPE, the appointment of the originator as the SPE's servicer or collecting agent, or the enforcement of the (assigned) claims against the debtors does not make the (non-Swiss) SPE subject to Swiss income tax. A Swiss SPE, however,

will be subject to income and capital tax. SPE's subject to income tax may deduct all expenses incurred during a business year.

2.2 Taxes on SPEs
Please see **1.2 Special Purpose Entities** for more on this topic.

2.3 Taxes on Transfers Crossing Borders
Please see **1.2 Special Purpose Entities** for more on this topic.

2.4 Other Taxes
Please see **1.2 Special Purpose Entities** for more on this topic.

2.5 Obtaining Legal Opinions
In the case of an SPE in Switzerland, tax rulings are requested from the cantonal and the federal tax authorities.

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules
The term "true sale", when used for accounting purposes, is not the same as for legal purposes. The accounting treatment of a securitisation transaction also follows legal considerations. Should the structure not provide for a true sale but be considered a financing, then from an accounting perspective, the transaction will not be considered a true sale.

3.2 Dealing with Legal Issues
Legal practitioners are required to give legal opinions. The accountants then use such opinions for their own assessment.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations
There are no securitisation-specific disclosure (and ongoing disclosure) requirements. The Swiss legal and regulatory environment for the issuance of any debt securities is favourable from an issuer's point of view. However, as from 1 January 2020, asset-backed securities transactions may become subject to the revised Swiss prospectus regime under the new Financial Services Act (FinSA), see **4.2 General Disclosure Laws or Regulations**.

4.2 General Disclosure Laws or Regulations
On 1 January 2020, new prospectus rules will enter into force that generally apply to all securities offered publicly into or in Switzerland, or admitted to trading on a trading platform in Switzerland. The obligation to prepare a prospectus under the Financial Services Act (FinSA) will apply to public offerings. The FinSA will, however, provide for a number of exemptions from this requirement. For example, an offering that is limited to a maximum of 500 investors will be exempt.

In the event of a private placement of debt securities in Switzerland (ie, the offering of debt securities exclusively to a restricted circle of investors), the issuer does not have to prepare an issue prospectus or any other offering document. In practice, however, a prospectus is often prepared on a voluntary basis. The content and style of the offering documentation in unlisted private debt securities offerings is determined by Swiss market standards. Irrespective of the type of investor, a placement is private if it is addressed to a limited number of potential investors.

4.3 Credit Risk Retention
In contrast to the EU and the USA, there are no laws or regulations on risk retention rules in Switzerland. However, in many securitisation transactions, originators are contractually obliged to retain some risk (skin in the game) to mitigate the risk of moral hazard. As far as capital requirements for investors in asset-backed securities are concerned, Swiss law generally follows the approach taken by Basel III but allows for specific bank internal models to the extent that they have been approved by the bank's auditors. If banks retain credit risk, such positions are subject to supervision by the auditors and FINMA. FINMA may request additional regulatory capital to be set aside for such positions.

4.4 Periodic Reporting
There are no specific laws or regulations requiring periodic reporting in relation to securitisation transactions. However, the general reporting rules, pursuant to the Swiss Code of Obligations and/or the Listing Rules, are applicable. A Swiss SPE must, for example, publish an annual report.

The Swiss financial reporting law applies to all corporate entities. Pursuant to the Swiss Code of Obligations, requirements differ, however, depending on the size of a company. Reduced requirements apply to small businesses and qualified (additional) requirements apply to large businesses. The rules require a detailed minimum structure of the balance sheet and profit and loss account, and they set out the following material principles: fair valuation or principle of prudence. Larger entities must provide, for example, additional information in the notes to the annual accounts (on long-term, interest-bearing liabilities), prepare a cash flow statement and a management report. Listed companies (if required by the stock exchange) must prepare financial statements in accordance with a recognised financial reporting standard (ie, Swiss GAAP FER, IFRS, US GAAP).

For non-listed companies there is no regulator, whereas for listed companies the SIX Regulatory Board has issued exchange-

related reporting rules that oblige companies to report periodically and disclose all significant business information. As regards listed companies, the SIX Regulatory Board may enforce the SIX Listing and Reporting Rules and charge fines or, in the worst case, demand the delisting of a company in cases of non-compliance.

4.5 Activities of Rating Agencies (RAs)

There is no specific Swiss regulation on credit rating agencies' securitisation activities and rating agencies (RAs) are not directly supervised by FINMA. FINMA adopted, however, a Circular on the recognition of RAs concerning ratings that are used by regulated institutions for regulatory purposes (notably banks). FINMA has also published tables mapping the risk classes to the risk weights pursuant to the Capital Adequacy Ordinance.

To date, there are only six credit rating agencies that are recognised by FINMA to provide credit ratings for regulatory purposes (they are DBRS, Fitch, Moody's, S&P, Scope Ratings and Fedafin). FINMA has no supervisory authority over these RAs, and it does not supervise the ratings in relation to the issuer of securitised products or ensure the correctness of such ratings.

As regards the process of recognition of RAs, the Circular 2012/1 sets out the requirements, which are based on the International Organization of Securities Commissions (IOSCO) code of conduct and which include, for example, the independence of RAs and their rating procedures, the objectivity of rating methods, and the transparency of the rating process.

Basically, the requirements apply equally to RAs domiciled in or outside Switzerland. FINMA assumes that Australia, the member states of the EU, Japan and the USA have implemented adequate regulations regarding RAs, and thus FINMA applies a simplified recognition procedure concerning RAs from those countries.

As mentioned above, FINMA has no ongoing supervisory authority and does not directly supervise RAs (cf, www.finma.ch/de/bewilligung/ratingagenturen). If, however, recognised RAs violate the recognition requirements, FINMA may request that the RA remedy deficiencies or revoke the recognition status of the RA. FINMA may also exchange information with foreign supervisory authorities in order to determine the deficiency and take adequate measures.

4.6 Treatment of Securitisation in Financial Entities

The principle regulations that apply to financial institutions, such as banks, are the Capital Adequacy Ordinance and Liquidity Ordinance. Article 49 of the Capital Adequacy Ordinance states that securitisation positions must be weighted according to their risk, with FINMA being competent to issue implementing provisions. FINMA has published the Circular 2017/7 (Credit Risks – Banks) that refers to, among other things, the Basel Capital Accord 2006, its Enhancements to the Securitisation Framework, the 2016 Basel Securitisation Framework and the "Revisions to the securitisation framework" dated 11 December 2014, revised in July 2016 and adjusted with the "Capital treatment for short-term "simple, transparent and comparable" securitisations" in May 2018.

The Basel Securitisation Framework applies, and exceptions or limitations are provided by the Swiss regulator. The Basel Securitisation Framework provides options for the Swiss regulator as to how to calculate and calibrate the regulatory capital, and as to how the Swiss regulator implements the rating approaches (hierarchy of approaches). According to the Capital Adequacy Ordinance the weighting of individual positions to determine the minimum own funds required for credit risk shall be based on either one of the following two approaches: the international standard approach for credit risks (SA-BIZ) or the internal risk approach (IRB). It is possible to combine the two approaches. Banks using the IRB to calculate risk-weighted positions and to determine the required own funds for credit risk have a choice between the foundation internal ratings-based (F-IRB) approach and the advanced internal ratings-based (A-IRB) approach, whereby the A-IRB is only available if banks that have expertise in securitisation transactions and do not mechanistically rely on external ratings. To be able to implement the A-IRB banks must obtain FINMA approval. The calculation and calibration of regulatory capital is thus complex and the determination of the capital charge for securitisation positions may vary. Depending on the approach taken and a bank's involvement in securitisations, a bank may consult with FINMA and the auditor.

Banks' regulatory capital is subject to the Capital Adequacy Ordinance (Eigenmittelverordnung). This Ordinance is enforced by FINMA.

As the Basel rules are applicable to the calculation of regulatory capital, this also includes the rules concerning "simple, transparent and comparable" securitisation transactions. FINMA may enforce and request additional regulatory capital if such rules are violated.

4.7 Use of Derivatives

There are no securitisation-specific laws or regulations. Please see **8.2 Engagement of Issuers/Originators**.

4.8 Specific Accounting Rules

This section is answered at the firm's discretion.

4.9 Investor Protection
There are no specific securitisation rules that provide for investor protection. See **2.2 Taxes on SPEs** for more.

4.10 Banks Securitising Financial Assets
The principle regulation that applies to banks is the Capital Adequacy Ordinance. Article 49 of the Ordinance states that securitisation positions must be weighted according to their risk, with FINMA being competent to issue implementing provisions. FINMA has published the Circular 2017/7 (Credit Risks – Banks) that refers to, among others, the Basel Capital Accord 2006, its Enhancements to the Securitisation Framework and the 2016 Basel Securitisation Framework.

Please see **4.6 Treatment of Securitisation in Financial Entities**.

There are no other securitisation-specific rules that apply to other types of entities. In principle, the Capital Adequacy Ordinance applies for banks and securities dealers and financial conglomerates, including the Circular 2017/7 (Credit Risks – Banks), Circular 2015/1 (Reporting – Banks) and Circular 2016/1 (Disclosure – Banks). The difference is that all these rules must be seen in conjunction with the regulatory capital that has to be set aside when securitisation positions are held in the banking book and/or trading book.

4.11 SPEs or Other Entities
Please also see **1.1 Insolvency Laws** and **1.2 Special Purpose Entities**.

Due to the debt issues of Swiss entities being subject to a 35% withholding tax, a foreign (non-Swiss) entity is often chosen to distribute those debt securities in Switzerland. An SPE in Switzerland is chosen when a listing on SIX is planned or in other specific circumstances.

To date, in Switzerland there is no issue regarding types of entities being regulated such that securitisation vehicles are structured to avoid becoming such entities.

4.12 Activities Avoided by SPEs or Other Securitisation Entities
In Switzerland, there are no activities that SPEs or other securitisation entities avoid in order not to be regulated in certain ways.

4.13 Material Forms of Credit Enhancement
Credit enhancement techniques deployed in the Swiss market are ones used in other jurisdictions: subordination (ie, equity, junior and mezzanine tranches), over-collateralisation, guarantees and credit default swaps. The main legal risk is that the transaction might be recharacterised if the economic risk is retained by the originator.

4.14 Participation of Government-Sponsored Entities
Swiss government-sponsored entities do not usually participate in the securitisation market.

4.15 Entities Investing in Securitisation
All types of investors invest in securitisations, such as, for example, financial institutions or pension funds. The relevant rules for financial institutions are contained in the Capital Adequacy Ordinance. As regards the investments of pension funds, for example, the rules on such investments are found in the Ordinance on Occupational Retirement and Disability Insurance No 2. Pursuant to which, investments in asset-backed securities and synthetic securitisation transactions qualify as alternative investments. Such investments are capped at 15% of the entire investment.

As of 1 January 2020, financial service providers offering or selling asset-backed securities to their clients will be subject to point-of-sale obligations (eg, they will be obliged to perform suitability and appropriateness checks, depending on the relevant client).

5. Documentation

5.1 Bankruptcy-Remote Transfers
In general, documentation may consist of a subscription agreement; servicing agreement; sale (assignment) agreement; asset purchase agreement; collateral management agreement; liquidity agreement; credit enhancement agreement; swap agreements; and opinions as well as comfort letters. As regards a true-sale securitisation transaction, it is imperative to have a written assignment agreement, including the transfer of the assigned rights (present and future rights); the administration of the receivables; the communication with the obligors; and representations and warranties, such as the existence of the underlying claims, the assignability of the claims or that the underlying claims are in force and enforceable against the obligors.

5.2 Principal Warranties
Typically, warranties, as in financing documentation, are included and specify that certain attributes of the underlying assets or pool can be relied upon by investors, such as a loan documentation, loan origination, collateral quality and compliance with Swiss law. Normally, it includes the due incorporation and its ability to enter into documentation which is legal, valid and binding. If representations and warranties are secured by guarantees or funds, by the originators or by third parties, they will

be directly enforced against the guarantor and/or by realising the collateral.

5.3 Principal Perfection Provisions
Please see **1.1 Insolvency Laws** for more.

5.4 Principal Covenants
Principal covenants are very similar to the ones in financing documentation. The originator may, for example, agree on clauses to maintain books and records or disclose financial information, on restrictions concerning its ability to incur indebtedness or change the nature and scope of its business, or on clauses that require compliance with relevant laws (eg, data protection, confidentiality). Principal covenants may further require transfer of collections in accordance with the servicing agreement and other transaction documents, provision of all reasonably necessary information in relation to the transferred assets, maintenance of approvals and registrations, earmarking of all transferred assets in the systems of the originator, and no further encumbrance or transfer of the relevant assets. In cases where the originator is also the servicer, covenants may usually include that the originator shall not sell receivables or grant security over receivables without the permission of the SPE, or change payment instructions, or credit and collections policies. These provisions may be enforced by the SPE against the originator by filing a claim with the competent civil court.

5.5 Principal Servicing Provisions
Servicing provisions usually set out that the servicer is obliged to collect the receivables, manage and distribute the funds, and report to the SPE and the finance providers any relevant information on the underlying pool. The servicer may usually act as proxy for the SPE to take all measures necessary to protect the SPE's interest until the occurrence of a servicer termination event. The servicing agreement will also contain representations and warranties as well as undertakings. These provisions may be enforced by the SPE against the servicer by filing a claim with the competent civil court.

5.6 Principal Defaults
Typically, default clauses include as events of default, for example, non-payment of any amount due under a swap agreement; breach of financial covenants, or any other obligation, or any security documents; cross-default; insolvency of the originator; or a material adverse change. These provisions may be enforced by the SPE against the originator/servicer by filing a claim with the competent civil court.

5.7 Principal Indemnities
In securitisation transactions, indemnities are usually promises by the originator/servicer to pay the SPE for any losses, damages, claims, liabilities, costs and reasonably documented expenses that occur due to specific acts or omissions of the originator. Such indemnities are limited to gross negligence or wilful misconduct. Indemnities typically include failure to comply with applicable laws, or to abide by any term of the transaction agreements or relevant representations, warranties and covenants. Further examples are commingling of assets, additional cost for SPEs or any dispute with, or claim by, an obligor of the portfolio.

5.8 Other Principal Matters
There are no other principal matters covered in the securitisation documentation.

6. Enforcement

6.1 Other Enforcements
There are currently no other enforcement aspects relevant for securitisation transactions in Switzerland.

6.2 Effectiveness of Overall Enforcement Regime
There are currently no other enforcement aspects relevant for securitisation transactions in Switzerland.

7. Roles and Responsibilities of the Parties

7.1 Issuers
The issuer, an SPE, buys the assets from the originator in a true-sale securitisation, therefore becoming the legal owner of the assets, or only takes risk positions in a synthetic securitisation transaction. Either the issuer manages the assets by itself or delegates such management to a servicer, which is often identical to the originator. In order to finance the purchase of the assets, the SPE will issue asset-backed securities to investors. By issuing different security tranches, the issuer tailors the tranches' risk-return profile to the risk tolerance of investors.

Usually, the issuer is an entity established by a bank to purchase the assets so that the bank may benefit from off-balance-sheet treatment for regulatory and accounting purposes. By publicly or privately offering bonds or notes, the issuer is not required to obtain a banking licence or a licence for collective investment schemes.

7.2 Sponsors
As in other jurisdictions, the sponsor is the party that is usually the initiator of a securitisation transaction. The sponsor is often a bank that is responsible for originating and servicing the underlying assets. Also, the sponsor can be a parent company of the originating bank or any other group company responsible for managing the group's consolidated capital and liquidity

situation. As such, the sponsor, as originating bank, normally contributes the assets to an SPE or a multi-seller conduit and often continues to service the payments and customer relationship within specified terms. In cases where the sponsor arranges the transaction, the originating affiliate may not be party to the securitisation transaction, for example, as originator, underwriter or servicer.

7.3 Underwriters and Placement Agents
The underwriter is responsible for structuring the asset backed security, including the composition of tranches, credit and liquidity enhancements. Underwriters are also responsible for securities sales. If they buy the securities from the SPE to resell, they will also bear risks in relation to the transaction. Underwriters are usually banks.

7.4 Servicers
Often the originators of assets also enter into servicing agreements as servicers with the SPEs. Servicers are mainly responsible for collecting the cash flows (in a timely manner) that are generated by the underlying assets and relaying them to the SPEs where they are allocated to the different groups of investors. Further tasks are, for example, the provision of cash flow reports, liquidations of defaulted obligors (respectively assets) or replacing assets from the portfolio. The servicers are usually banks, but also sometimes large industrial corporations with finance entities.

7.5 Investors
Investors provide funds to the SPE and effectively take the role of a lender to the SPE. Investors are, for example, financial institutions or pension funds.

7.6 Trustees
Trustees in securitisation transactions typically issue asset-backed securities, respectively securitised products. However, Swiss law does not specifically set out a concept of trusts or trustees akin to the concept in common law jurisdictions. Consequently, if trust structures are used in a securitisation transaction, those structures, including the responsibilities of trustees, will be established in a foreign common law jurisdiction and usually recognised as such by parties in Switzerland. Despite this, Switzerland has recently seen a trend towards more domestically oriented structures with a Swiss entity taking on the responsibilities of the trustee. Therefore, concepts that are usually present under foreign trust laws need to be replicated contractually under Swiss law.

8. Synthetic Securitisations

8.1 Synthetic Securitisation
In general, synthetic securitisation is permitted in Switzerland.

8.2 Engagement of Issuers/Originators
Issuers/originators may choose synthetic securitisation for reasons of cost efficiency and for the avoidance of asset transfer due to legal difficulties; for example, in relation to non-assignment clauses, banking secrecy and data protection.

8.3 Regulation
There is no specific regulation of synthetic securitisation in Switzerland.

8.4 Principal Laws and Regulations
Basically, there are no specific laws and regulations on synthetic securitisation. However, depending on whether the company qualifies as a non-regulated or regulated entity (ie, bank, insurer or asset manager) and whether the company operates in the financial sector or not, different laws may apply that affect its involvement in synthetic securitisation transactions. For example, the provisions on a bank's regulatory capital or the provisions on the funds' investment policies may limit the involvement of such intermediaries in securitisation transactions. Furthermore, as derivatives are deployed in synthetic securitisation transactions, as opposed to true-sale securitisations, care must be taken as to whether over-the-counter derivatives deployed in the transaction fall within the scope of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA), thus imposing different obligations, such as reporting obligations, risk mitigation obligations or trading obligations. Furthermore, FinSA, which enters into force on 1 January 2020, will introduce prospectus rules that shall apply to all securities offered publicly into or in Switzerland, or admitted to trading on a trading platform in Switzerland. Having said this, FinSA will, similarly to the EU Prospectus Regulation, contain a number of exemptions from the requirement to prepare a prospectus (see **4.2 General Disclosure Laws or Regulations**).

Apart from that, Swiss-law governed synthetic securitisations are, like true-sale securitisations, transactions governed by the Swiss Code of Obligations. Furthermore, the parties must also take the Swiss Debt and Enforcement Act and the Data Protection Act into consideration.

8.5 Principal Structures
One principal format used for synthetic securitisation is the funded structure. In order to synthetically transfer credit risk the originator (the protection buyer) usually enters into a credit default swap (CDS) with an SPE (the protection seller) and pays

a risk premium to the SPE. The SPE issues credit-linked notes to investors and uses the proceeds of the issuance to purchase safe asset classes, such as government bonds (treasuries). The risk premium and the interest earned by the SPE on the safe-assets classes are used to service the investors' returns. In contrast to funded structures, only credit derivatives or guarantees are deployed in an unfunded synthetic structure.

8.6 Regulatory Capital Effect

In general, as the protection buyer in a synthetic securitisation transaction, a bank may reduce its credit risk against one or more counterparties. By using credit derivatives, such as CDS, the bank may deploy the risk weight of the protection seller, and thus reduce the regulatory capital that would be required in a credit-financing transaction without a synthetic credit risk transfer. As regards the issuance of credit-linked notes, the risk weight would be 0% for regulatory purposes. For regulatory purposes therefore, the credit derivatives have to fulfil certain requirements in order for the synthetic securitisation transaction to have a positive effect on the banks' regulatory capital. For example, the credit risk transfer under derivative contracts must be irrevocable and unconditional.

If the bank is engaged in a synthetic securitisation transaction as a protection seller under a CDS-contract, for regulatory capital purposes the bank must treat the credit risk position (respectively use the risk weights) as if it had a direct claim against the underlying debtor. Concerning credit-linked notes, for example, the bank is required to deploy the higher risk weights either of the underlying debtor or the SPE (issuer of the notes) in order to determine the regulatory capital.

9. Specific Asset Types

9.1 Common Financial Assets

To date, the most common financial assets that have been securitised are collateralised loan obligations, auto leases, credit card receivables and trade receivables.

9.2 Common Structures

Collateralised loan obligations or credit-linked notes are usually based on credit default swaps and different loss-tranches structures as mentioned in **8.5 Principal Structures**.

Auto leases, credit card receivables and trade receivables securitisations are usually based on a true sale-securitisation structure.

Pestalozzi is a multicultural Swiss business law firm that has focused on high-end work for domestic and international clients since 1911. Pestalozzi lawyers are strong and empathic personalities who are singled out by a truly independent approach in their advice and representation of their clients' interests. The firm guides and supports its clients in their strategic business decisions, anticipates their future challenges and helps them solve their critical issues. Being fully integrated, Pestalozzi encounters no internal limits in shaping the most adequate and efficient teams for the clients' needs. With over 100 professionals in Zurich and Geneva, the firm is at home in Switzerland's two main commercial hubs – and has developed a wealth of experience in its key industries of banking, life sciences, commodity trading and insurance. While being locally embedded, Pestalozzi has also developed a sought-after expertise in dealing with multi-jurisdictional transactions and disputes.

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