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The Switzerland Mutual Evaluation Report of December 2016 and the Anti-Money Laundering Ordinance (AMLO-FINMA) entering into force as of January 1st 2020

Introduction

Our Newsletter of September 2018 (Link) illustrated that Switzerland is currently in an «enhanced follow-up» process, because the Financial Action Task Force (FATF) identified deficiencies regarding the prevention of money laundering and financing of terrorism in its Switzerland Mutual Evaluation Report of December 7th 2016.

Therefore, the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB) and the Anti Money Laundering Ordinance-FINMA (AMLO-FINMA) had to be revised in order to implement the FATF's recommendations and pass the follow-up evaluation in 2021. Both will come into force as of January 1st 2020.

The first draft of September 4th 2017 contained new provisions regarding the update - if needed also retroactive - of customer data (Art. 9c, Art. 26 para. 2 lit. l and Art. 78a). Subsequent comments submitted to FINMA highlighted the fact that the Anti-Money Laundering Act (AMLA) does not contain the legal basis for the retroactive application of such requirements. However, as soon as the legal basis is created in AMLA, these requirements will likely be reintegrated in AMLO-FINMA.

If Switzerland does not pass the FATF's follow-up in 2021, then its framework for the prevention of money laundering and terrorism financing will be considered insufficient. Potential consequences Swiss Banks could face are denials or restrictions with regard to their market access abroad or the execution of international transactions.

Switzerland Mutual Evaluation Report of December 7th 2016 – noteworthy points

Our previous newsletter (Link) summarized the important points of the recommendations contained in the «Summary of Technical Compliance – Key Deficiencies» on page 236 of the Switzerland Mutual Evaluation Reports (Link: Mutualevaluations) most relevant for the revision of CDB and AMLO-FINMA

As a refresher, we refer again to six noteworthy points:

- *The threshold for occasional transactions is too high (CHF 25 000/USD 25 324/EUR 22 835).*
- *There is no general and systematic obligation to take reasonable measures to verify the identity of the beneficial owners of customers.*
- *There is no general and explicit obligation to ensure that the customer data remains up to date and relevant. For the FINMA intermediaries, there is no explicit obligation to verify the information concerning the originator (of wire transfers).*
- *There are no mandatory provisions that require that all financial institutions apply enhanced measures to business relationships exhibiting links with countries considered at risk by FATF.*
- *Requirements relating to the obligation to maintain current data about trusts are insufficient.*
- *Sector-specific regulations allow consolidated supervision of financial groups, including for AML/CFT, but do not require it.*

AMLO-FINMA – Implementation of the FATF Recommendations

Application of a risk-based approach

The importance of taking a risk-based approach is stressed by specifically mentioning it in the following new amendments:

- Art. 5 para. 1 lit. d: Foreign branch offices and/or group companies active in the financial industry use a risk-based approach for the risk classification of business relationships and transactions

- Art. 6 para. 1 lit. d: The compliance function regularly performs risk-based internal controls, including on-the-spot sample checks of business relationships in the branch offices and/or group companies.

Global supervision of legal and reputational risks

Art. 6 paragraph 1 has been amended by adding four specific obligations:

- Regular performance of a consolidated risk analysis by the competence center for money-laundering issues or another independent function

- Standardized yearly reporting with adequate quantitative and qualitative information regarding branch offices and/or group companies in order to allow the financial intermediary to reliably assess its legal and reputational risks on a consolidated basis

- Branch offices and/or group companies inform the financial intermediaries about risks with over-al relevance for onboarding and continuation of business relationships, transactions as well as substantial changes of the legal and reputational risks in a timely and proactive manner. This is particularly important if significant assets or politically exposed persons are involved

- The compliance function regularly performs risk-based internal controls, including on-the-spot sample checks of business relationships in the branch offices and/or group companies.

High-risk or non-cooperative jurisdictions

High-risk or non-cooperative jurisdictions are relevant in the following cases:

- As a criterium which flags a high-risk business relationship in connection with
  - the domicile or residence of the contractual party, the controlling person or the beneficial owner of assets resp. the nationality of the contractual party or the beneficial owner of assets (Art. 13 para. 2 lit. a)
  - the place of business of the contractual party or the beneficial owner of assets (Art. 13 para. 2 lit. b)
  - the countries of origin and destination of frequent payments (Art. 13 para. 2 lit. g)

- Business relationships with persons with domicile or residence in such countries, and where the FATF calls for increased due diligence, shall always be deemed to be high-risk (Art. 13 para. 3 lit. d). Thereby it is irrelevant whether the persons involved are the contractual party, a controlling person, a beneficial owner in assets or proxies (Art. 13 Abs. 5)

- As a criterium which flags a high-risk transaction in connection with the country of origin or destination of payments (Art. 14 para. 2 lit. d)

- Payments whose origin or destination is in such countries, and where the FATF calls for increased due diligence, shall always be deemed to be high-risk (Art. 14 para. 3 lit. b)

FATF homepage regarding high-risk and other monitored jurisdictions: List of Jurisdictions

Domiciliary companies.

The use of a domiciliary company with fiduciary shareholders or several domiciliary companies from intransparent jurisdictions without a comprehensible reason or for the purpose of short-term placement of assets may be considered as a criterion which flags a high-risk business relationship (Art. 13 para. 2 lit. h).

Payment orders and correspondent bank relationships with foreign banks

The following obligations are introduced:

- Art. 10: At the end of paragraph 1, a specific duty for banks has been added: to check whether the information regarding the remitter (which is normally a client) is correct and complete and with regard to the beneficiary is complete. The data which has to be collected regarding the remitter and the beneficiary remains the same.
- Art. 37 *Correspondent bank relationships with foreign banks*: According to paragraph 4 the financial intermediary ensures that the information received in order to perform the payment is complete and passed on.

Terminating a business relationship

- Art. 32 paragraph 3 has been reworded and now clarifies that the financial intermediary may not terminate a business relationship on its own initiative if the conditions for a notification to the Money Laundering
  Reporting Office Switzerland as per Article 9 AMLA are given or if the financial intermediary assumes its right to notify the MLRO as per Article 305ter (2) SPC8.

Detailed text comparison

You may find the detailed German text comparison using this link.

It contains all amendments to the AMLO-FINMA currently in force. In addition to the already mentioned changes, we would like to highlight the following points:

- Consistent talk of „branch office and/or group companies“: Art. 6 para. 1 lit. b, c and d as well as para. 2 lit. a and b have been amended.
- Recurring risk analysis (Art. 13 para. 2bis)
- Monitoring of business relationships and transactions: the last accessory sentence of Art. 20 para. 4 has been deleted.
- Responsibility for reports to the Money Laundering Reporting Office Switzerland (new Art. 25a)
- Simplified due diligence for issuers of means of payments (Art. 12 para. 2bis)
- Unchanged articles where only the references to the current version of CDB resp. "Self-Regulated Organization of the Swiss Association of Insurance Companies to Prevent Money Laundering" (Art. 42) have been updated

Indicators of money laundering

The appendix to AMLO-FINMA remains the same. It contains general and specific indicators as well as indicators that should trigger a heightened suspicion that a business relationship or transaction might be of higher risk.

First Draft of AMLO-FINMA of September 4th 2017 – dropped amendments

The first draft contained new provisions regarding the update - if needed also retroactive - of customer data (Art. 9c, Art. 26 para. 2 lit. l and Art. 78a). Subsequent comments submitted to FINMA highlighted the fact that the Anti-Money Laundering Act (AMLA) does not contain the legal basis for the retroactive application of such requirements. The following articles were removed:

- Art. 9c: The financial intermediary regularly updates the information regarding all business relationships by applying a risk-based approach.

- Art. 26 para. 2 lit. l: the internal directives on the prevention of money laundering and the financing of terrorism shall address the required frequency for updating customer data.

- Art. 78a Transitional provisions

  - Paragraph 1: The financial Intermediary documents the verification of the beneficial ownership of business relationships which are entered into on or after DDMMYYYY. For business relationships that have existed before DDMMYYY the verification of beneficial ownership is documented in the

course of the client information's update and if during the business relationship the identification of the contractual party or the establishment of the controlling person and beneficial owner of the assets has to be repeated.

- Paragraph 2: The provisions regarding the establishment of the controlling person in the course of the client information's update are also applicable to business relationships that have existed before January 1st 2016.

However, as soon as the legal basis is created in AMLA, these requirements will most likely be reintegrated in AMLO-FINMA. In addition, introduction or management of clients by other Financial Intermediaries (Art. 13 para. 2 lit. cbis) as criterium for a possible business relationship with higher risks has also been removed from the first draft.

Structure of the Anti-Money Laundering Ordinance-FINMA

Its structure has not been modified. Most amendments have been integrated in existing articles, only two articles have been added (Art. 9a and 25a). Number and denomination of chapters and sections have remained unchanged.

Conclusion

The new provisions of AMLO-FINMA and CDB complement each other and they will have an impact on the requirements of the Automatic Exchange of Information (AEI) and FATCA in respect to the documentation of business relationships.

As soon as the legal basis is created in AMLA, the new provisions regarding the update - if needed also retroactive - of customer data will likely be reintegrated into AMLO-FINMA. Specifically, for Banks with cross-border activities, which also have to consider the expectations of foreign regulators, the regular update of information and documentation regarding business relationships, for instance every 10 years, is an effective way to limit legal and reputational risks.

With regard to AEI and FATCA many clients have been documented based on CDB-documentation which is 10, 15 or even 20 years old. Understandably a compliance officer feels uncomfortable having a form A from the last century, even if there have never been any indications of a change in the beneficial ownership.

Thus, those banks updating the CDB-Documentation along with the AEI and FATCA documentation achieved the best results as – in case of changes- they didn't have to reach out for the clients a second time in order to re-document them according to the other regulation. Something many clients didn't understand.

The same consideration applies also to the update of CDB-Documentation, as its importance for the determination of a client's status according to FATCA and AEI is well-known.

Unfortunately, the consequences of regulatory «corrective actions» on honest and correct clients are often underestimated and sometimes completely ignored. The business relationship might finally be correctly documented, however in many cases at a cost: the beginning of a commercial "ice age" as the client is fed up and for some time he doesn't want to hear or read anything more from the bank.

Banking Concepts also understands the point of view of a Bank's client. Therefore, it applies a forward-looking approach enabling banks to correctly implement new regulations without damaging proper business relationships within the bank's scope.

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