

Amendments to Anti-money Laundering Act – consultation process initiated

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Introduction

On 1 June 2018 the Federal Council initiated the consultation on a number of amendments to the Anti-money Laundering Act. The draft bill marks the third bundle of legislative measures to comprehensively implement the recommendations of the Financial Action Task Force in its latest mutual evaluation report on Switzerland.[\(1\)](#)

As a first step, on 4 September 2017 the Financial Market Supervisory Authority published a draft amendment to its anti-money laundering ordinance that introduced:

- enhanced verification duties for establishing beneficial owners;
- a requirement to regularly review and update know-your-customer (KYC) information also in respect of client relationships not involving particular risks;
- new monitoring duties encompassing operations abroad; and
- new criteria for classifying a relationship or transaction as 'high risk'.

The revised ordinance is scheduled to come into force in 2018.[\(2\)](#)

A second bundle of legislative measures that focused on increasing the transparency of legal entities and proposed abolishing bearer shares was published for consultation on 17 January 2018.[\(3\)](#)

Key amendments

The consultation draft[\(4\)](#) of 1 June 2018 proposes the following key amendments to the Anti-money Laundering Act:

- extending the act's scope to include providers of services relating to establishing, managing or administering companies and trusts[\(5\)](#) – these service providers must comply with newly established due diligence duties;
- explicitly requiring financial intermediaries to verify information on beneficial owners[\(6\)](#) and thereby codifying current practice and existing case law – financial intermediaries must also regularly check that client data is up to date; and
- reducing the threshold for cash payments in precious metals and gem trading – currently, traders must obey specific duties of care when receiving a cash payment of Sfr100,000; this threshold will be adjusted to Sfr15,000.[\(7\)](#)

The consultation draft also addresses the risk of non-profit organisations (eg, associations) being misused for financing terrorism or money laundering.[\(8\)](#) Associations which are mainly involved in collecting or distributing assets abroad for charitable purposes must now be entered in the commercial register. In addition, the Federal Council may extend the duty of registration to other

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associations which it considers particularly at risk of being misused.

Further, the consultation draft repeals the right to report suspicion of money laundering under Article 305ter(2) of the Penal Code. Over time, Swiss court practice has constantly lowered the threshold triggering the duty to report suspicious transactions and relationships under Article 9 of the Anti-money Laundering Act, which has made the distinction between reporting rights and reporting duties increasingly blurred and confusing.[\(9\)](#)

In the interest of a coherent suspicious activity reporting system, the government has suggested eliminating reporting rights. Henceforth, even where there is a vague initial suspicion of unlawful conduct, financial intermediaries will have a duty to report, unless inquiries and background checks pursuant to Article 6 of the Anti-money Laundering Act clearly show that the suspicion is unfounded.

Advisers' due diligence duties

The most far-reaching amendment to the Anti-money Laundering Act is the extension of its scope to include certain service providers (defined in the consultation draft as 'advisers'). These services comprise:

- establishing, managing and administering foreign companies and legal arrangements (eg. trusts), as well as Swiss domiciliary companies;
- procuring funds relating to such activities;
- selling or purchasing such a company or trust;
- allowing one's address to be registered as the seat of such a company or trust;
- acting as nominee shareholder for a foreign company or helping another person to such a position; and
- preparatory (and hence advisory and consultancy) services relating to any of these activities.

Advisers' due diligence duties are set out in a general manner in Article 8b of the consultation draft. [\(10\)](#) When establishing a business relationship, advisers must verify customers' identities and establish beneficial owners' identities. [\(11\)](#) Further, advisers must keep records pursuant to Article 7 of the Anti-money Laundering Act and clarify the economic background and purpose of their customers' requested services.

Advisers which are unable to comply with their due diligence duties must not enter into or terminate business relationships with customers. [\(12\)](#) Equally, advisers must terminate business relationships if they know or have reasonable grounds to suspect that a business is connected to:

- a criminal organisation;
- financing terrorism; or
- money laundering. [\(13\)](#)

Failure to terminate the business relationship carries a fine of up to Sfr500,000. [\(14\)](#) The consultation draft does not foresee a specific duty for advisers to report suspicious transactions or relationships to the Money Laundering Reporting Office (in contrast to financial intermediaries and traders, which are subject to a respective duty pursuant to Article 9 of the Anti-money Laundering Act). However, the government's explanatory notes to the consultation draft underline that advisers should consider reporting criminal conduct to the Swiss penal prosecutions authorities pursuant to the Code of Penal Procedure. [\(15\)](#)

Comment

The proposed extension of the Anti-money Laundering Act's scope to include advisers marks a significant and highly problematic step. The looming clash of advisers' loyalty and (professional) secrecy duties on the one hand and the implied duty to share KYC and mandate-related information with prosecution authorities in case of suspected criminal conduct on the other will require thorough consideration.

Endnotes

- (1) The report of 7 December 2016 is available [here](#).
- (2) For further details please see "Fallout of FATF mutual evaluation report on Switzerland".
- (3) For further details please see "Proposed implementation of FATF and Global Forum transparency recommendations meets stiff opposition".
- (4) The consultation draft is [available](#) in German, French and Italian.
- (5) Article 2(1)(c) of the consultation draft.
- (6) Article 4(1) of the consultation draft.
- (7) Article 8a *4bis* of the consultation draft.
- (8) See FATF's mutual evaluation report on Switzerland at 192 and 256.
- (9) See the explanatory report to the consultation draft (available [here](#)) at 17.
- (10) Article 8b(3) of the consultation draft provides for the Federal Council to issue an ordinance specifying the advisers' duties of care.
- (11) See Articles 3 and 4 of the Anti-money Laundering Act.
- (12) Article 8c of the consultation draft.
- (13) Article 10b of the consultation draft.
- (14) Article 39 of the consultation draft.
- (15) Explanatory report (fn 6) p 37.