Update

Newsflash June 2015

Reform of the Swiss Criminal Code and the Anti-Money Laundering Act – Introduction of qualified tax offences as predicate offences for money laundering and further amendments

Extension of financial intermediaries' duty to clarify and duty to report

In February 2012, the Financial Action Task Force (FATF – an international organization which has as its main objective to develop and promote standards for combating money laundering and terrorist financing) issued a revised version of its recommendations which are recognized as international standards for combating money laundering and terrorist financing. The Swiss legislation is selectively adapted to these recommendations with a federal law adopted by the Parliament on December 12, 2014. The most important changes concern the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA), the Criminal Code (CC) and the Code of Obligations (CO). The focus is on creating more transparency regarding the ownership of legal entities, the alteration of the scope of the definition of Politically Exposed Persons (PEP) and, in particular, the extension of the predicate offences for money laundering by including qualified tax offence. As the referendum period against the adopted federal law ended on April 2, 2015 without a referendum having been brought, the Federal Council has decided on a staggered implementation with the provisions regarding the transparency of legal persons and bearer shares entering into force on July 1, 2015 and the remaining provisions entering into force on January 1, 2016.

Qualified tax fraud as predicate offence for money laundering

Until now, predicate offences for money laundering were actions with regard to assets that resulted from a crime (crimes are criminal offences that are punishable with an imprisonment of more than three years) or with regard to assets that were under the control of a criminal organization.

The new wording of Article 305bis CC adds qualified tax offences to the existing predicate offences. Qualified tax offences means qualified tax fraud according to the Federal Act on Direct Federal Taxes (FDTA) and the Federal Act on the Harmonization of Taxes (FAHT), provided that the evaded tax amount in a particular tax period exceeds 300'000 Swiss francs. A qualified tax fraud in the sense of the above mentioned acts presupposes the use of false, falsified or untrue official documents (such as financial statements, salary certificates, etc).

As a consequence of the addition of qualified tax offences to the predicate offences, Article 305ter para. 2 CC is also amended. This enables financial intermediaries to file a suspicion report with the Money Laundering Reporting Office Switzerland (MROS) if there is an indication of a qualified tax offence, even if the perception of the financial intermediary concerned is not sufficient to trigger a duty to report under the AMLA.

Application to tax offences committed under foreign law
Qualified tax offences as predicate offences for money laundering can also be committed abroad, provided that the act also constitutes an offence in that country and the evaded tax amount exceeds the equivalent of 300'000 Swiss francs. The laws of the country where the person in question is subject to taxation are relevant for the calculation of the amount of evaded taxes. The taxes corresponding to the taxes provided for in Switzerland by the FDTA and the FAHT (income and wealth tax for individuals, profit and capital tax for entities and real estate gains tax) will be caught by analogy. A tax fraud committed abroad is, for the purpose of qualification as predicate offence for money laundering, treated as if it had been committed in Switzerland.

Temporal scope of application
Only qualified tax offences committed as of January 1, 2016 are considered predicate offences for money laundering. Preexisting assets trigger a duty to report to MROS, if the client commits a qualified tax offence in connection with the relevant assets as of January 1, 2016 and the amount of evaded taxes exceeds the threshold of 300'000 Swiss francs per tax period.

Practical relevance for the financial intermediaries
If financial intermediaries have reasons to believe that assets deposited with them originate from a qualified tax offence, the revised Article 6 para. 2 AMLA obliges them to clarify the background as well as the purpose of the transaction in question.

Even though the revised AMLA does not introduce a general obligation to check tax compliance before establishing a new business relationship, it is likely that, in the future, a risk-based approach will be applied to assess tax compliance at inception. The consultation draft of the Financial Institutions Act (FINIA) includes a similar risk-based examination. The duties of financial intermediaries would go even further if the FINIA, despite of the mostly negative feedback in the consultation process, was enacted in the form of the current draft as there is neither a threshold nor a limitation to tax fraud. In this context the planned participation of Switzerland in the automatic exchange of information within OECD as of 2018 is also of relevance. From then on, tax information for the calendar year 2017 about clients with residence in the EU or in another country having entered into an agreement with Switzerland for this purpose will be automatically transmitted to the foreign tax authority. This should be taken into account in the context of the risk-based approach to the review of tax compliance of clients.

The efforts to ensure that the Swiss financial market is tax compliant will in a first step require financial intermediaries to adapt their internal control systems in order to identify assets originating from qualified tax offences. In practice, financial intermediaries will face the following issues:

The duty to review whether a qualified tax offence has been committed and the calculation of the amount of evaded taxes requires that the financial intermediary has sufficient knowledge of the applicable tax laws including, depending on the facts of the case, foreign tax laws.

The periodicity with which a financial intermediary should check tax compliance with respect to assets under his custody is an open question, as a tax offence can also be committed following the establishment of a business relationship, i.e. after the assets have been deposited with the financial intermediary.

Tax evasion is usually committed if and when taxes are not included in the tax assessment and would have been due if the taxpayer had complied with his filing obligations. Depending on the facts and the applicable law, this may occur some time after the inflow of the relevant assets.

The text of the new law does not set out the precise duties imposed upon the financial intermediaries. More detailed rules are expected as part of the amendments to the regulations of the self-regulating organizations.

Further key points of the reform
Enhanced transparency of legal persons and bearer shares will be achieved by an **adaption of the due diligence obligations for identifying the beneficial owner of legal persons** and a **duty to report the acquisition of bearer shares** (see our separate June Newsflash on this topic).

The **extension of the definition of Politically Exposed Persons (PEP)** is another important part of the reform. Until now, only current foreign PEP were captured by the definition of PEP. The scope of the new definition of PEP now includes persons who are or have been entrusted with leading public functions in politics, administration, military and justice on a national level in Switzerland as well as members of the board of directors or of the management of state-owned enterprises with national importance as well as persons who are or have been entrusted with a leading function in intergovernmental organizations or international sport associations. In the case of Swiss PEP, the status as a PEP ends 18 months after the retirement from the relevant function. For foreign PEP and PEP from international organizations, no such predefined period is applicable. With regard to such persons, the continuation of the status as a PEP should be determined on a risk-based basis.

The revised **AMLA going forward will also apply to traders** (i.e. natural and legal persons who commercially trade with goods and in this context receive cash, except for real estate agents), **who accept cash in excess of 100'000 Swiss francs in the context of a commercial transaction**. These traders are to a large extent subject to the due diligence obligations of the financial intermediaries and have to identify the contracting party and the beneficial owner. In addition, the traders will be subject to a duty of documentation. If a transaction appears to be unusual or if there are indications that the assets could originate from a crime or a qualified tax offence or are under control of a criminal organization, the background and the purpose of the transaction have to be clarified and, where required, a report has to be filed with MROS. Traders who have to comply with the aforementioned due diligence obligations will have to appoint an auditor confirming their compliance with the relevant obligations. The auditor will control the trader's compliance with the AMLA obligations and produce a report for the attention of the responsible body of the trader.

Changes have also been made to the provision regarding the **freezing of assets** and the tipping off rule. Until now, a report to the MROS led to an immediate freezing of assets. Pursuant to the revised AMLA, the financial intermediary will, however, continue to execute client orders, despite having filed a report with MROS, provided that a paper trail is maintained. The assets should only be frozen upon notification by MROS to the financial intermediary that the report has been forwarded to a criminal investigation authority. An immediate freezing of assets is, however, required with respect to assets of persons the details of whom were forwarded to the financial intermediary by the Swiss Financial Market Supervisory Authority (FINMA), the Federal Gaming Board (ESBK) or the Self-Regulation Organization (SRO) due to a suspicion of being involved with or supporting terroristic activities. The prohibition to inform third parties has been decoupled from the freezing of assets and is now applicable with respect to any filing to the MROS. It has, however, been clarified that a report to FINMA, ESBK or the SRO by the financial intermediary is permitted. The notification of certain other financial intermediaries of the fact a report to the MROS has been filed remains allowed in certain circumstances.

Entry into force

The Federal Council has decided to enact the amendments in the CO, in the Collective Investors Schemes Act, and the Book Entry Securities Act on July 1, 2015 and to enact the other amendments on January 1, 2016.

Please do not hesitate to contact us for further information regarding the reform of the Swiss Criminal Code and the Anti-Money Laundering Act, respectively its consequences for financial intermediaries regarding their compliance with due diligence obligations.

Your contacts

Zurich
Stefan Breitenstein
stefan.breitenstein@lenzstaehelin.com

Patrick Hünerwadel
patrick.hunerwadel@lenzstaehelin.com

Nicolas Bonassi
nicolas.bonassi@lenzstaehelin.com

Alexander Greter
alexander.greter@lenzstaehelin.com

Telephone +41 58 450 80 00

Geneva / Lausanne
Shelby R. du Pasquier
shelby.dupasquier@lenzstaehelin.com

Frédéric Neukomm
frederic.neukomm@lenzstaehelin.com

Miguel Oural
miguel.oural@lenzstaehelin.com

Daniel Tunik
daniel.tunik@lenzstaehelin.com

Telephone + 41 58 450 70 00

Our offices

Zurich
Bleicherweg 58
CH-8027 Zurich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01
zurich@lenzstaehelin.com

Geneva
Route de Chêne 30
CH-1211 Genève 17
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
geneva@lenzstaehelin.com

Lausanne
Avenue du Tribunal-Fédéral 34
CH-1005 Lausanne
Telephone +41 58 450 70 00
Fax +41 58 450 70 01
lausanne@lenzstaehelin.com

www.lenzstaehelin.com