

Update

Newsflash December 2016

New Swiss Bankers Association (SBA) guidelines on the identification of discretionary beneficiaries of trusts and foundations

The Swiss Bankers Association (SBA) issued a revised version of the "*Commentary on the Swiss banks' code of conduct with regard to the exercise of due diligence*" (CDB16 Commentary). The new version of the CDB16 Commentary introduces, amongst other clarifications and comments, a set of new guidance in relation to the establishment of Form T or Form S by Swiss banks and the identification of discretionary classes of beneficiaries of trusts and foundations.

Background

By its Circular No 7908 dated 25 November 2016, the Swiss Bankers Association (SBA) issued the German version of the revised "Commentary on the Swiss banks' code of conduct with regard to the exercise of due diligence" (CDB16 Commentary). The French, English and Italian versions were made available on the website of the SBA on 22 December 2016 (http://www.swissbanking.org/en/services/library/guidelines?set_language=en) and Circular No 7914.

This revision of the CDB16 Commentary, which constitutes the main source of interpretation of the CDB 16, was primarily intended to integrate the new rules and ability to use certain technology tools under the FINMA Circular 2016/7 "*Video and online identification*". The SBA has, however, taken this opportunity to make some other adjustments and clarifications.

Apart from some welcome clarifications, stylistic changes and incorporation of the most

recent practice, the revised CDB16 Commentary introduces a significant change in practice for the identification of discretionary classes of beneficiaries for trusts and foundations.

No changes to the CDB16 itself were introduced.

Identification of classes of beneficiaries – New rules

The revised CDB16 Commentary requires banks to identify the names of (a) all beneficiaries who are entitled to fixed interests in the trust or foundation's assets, as well as (b) all living discretionary beneficiaries:

- › who have received distributions in the past and who are not excluded from any future distributions;
- › who are individually identified as beneficiaries within the constitutional documents of the trust or foundation (i.e., by-laws, supplementary by-laws, regulations, trust deed, letter of wishes, etc.); and

- › who belong to a class of beneficiaries as per the constitutional documents of the trust or foundation (e.g., descendants of the settlor / founder) and are alive and individually identifiable at the time of establishment of Form T / Form S.

This does not apply to persons that only become entitled following the occurrence of a condition precedent or when a particular date has been reached, i.e. "prospective beneficiaries", nor in situations where a class of beneficiaries comprises more than 20 living and identifiable persons. In those situations, beneficiaries may still be listed as a class (i.e., without reference to any individual person), with one exception though, namely where there are no current beneficiaries at a given time, the persons or groups of persons which will become beneficiaries once the condition has been met or the date reached must be listed on Form T or Form S in accordance with the rules above.

What has changed as compared to the previous version of the CDB16 Commentary?

Previously, a discretionary class of beneficiaries could be designated as such on Form T or Form S, without identifying any living members of the class before them being designated as a beneficiary or receiving a distribution.

With the amended CDB16 Commentary, discretionary beneficiaries designated by class are now required to be individually identified (i.e., all personal indications as per Section 4 (a) for Form T), unless the entitlement of the class is purely conditional (i.e., prospective future class) or subject to a date or timing requirement.

When will the above changes enter into force?

The date of entry into force of the new version of the CDB16 Commentary has not been specified in the revised document. Therefore, the new CDB16 Commentary applies as from the date of the issuance of the changes by the SBA on **25 November 2016**.

Absent any transitional provisions in the CDB16 Commentary, our view is that Swiss banks should apply by analogy rules applicable to an amendment of the CDB 16 itself, namely that:

- › new business relationships established with trusts or foundations after 25 November 2016, as well as upon any new identification or refresh of due diligence procedures as per the CDB 16, shall apply the new rules; and
- › there is no independent requirement to re-document existing relationships (absent any renewal of KYC procedures or change in circumstances).

It is to be noted that the new rules for the identification of beneficiaries of trusts or foundations also apply whenever an operating unlisted company is controlled by more than 25% directly or indirectly by a trust or foundation (see new comments to Article 20 CDB 16).

What does this mean for trusts and foundations holding bank accounts in Switzerland?

In view of the revised SBA guidelines, trusts and foundations shall expect, when entering into new business relationships with Swiss banks or renewing the due diligence documentation with a Swiss bank, to be required to provide more information on beneficiaries as per the requirements above with respect to living members of classes of discretionary beneficiaries. In practice, this will require trusts and foundations to start recording the relevant information on the composition of a discretionary class, something which may present challenges depending on the structure of the trust or foundation.

In certain instances, structures may need to be reviewed and/or classes of beneficiaries restructured in order to avoid onerous information gathering exercises.

It is to be noted that the change to the CDB16 Commentary only requires the collection of information on the relevant individuals, as opposed to the collection of documents (e.g.,

identity documents, self-certification forms, etc.). This is, however, to be reviewed on a case-by-case basis with regard to the actual policies and procedures of each Swiss bank.

The change in AML/KYC requirements for the identification of beneficiaries of trusts and foundations, as well as similar legal arrangements, is to be read in conjunction with the most recent changes to the draft Guidelines of the Swiss Federal Tax Authorities on the Automatic Exchange of Information (see here: <https://www.estv.admin.ch/estv/de/home/internationales-steuerrecht/fachinformationen/aia/publikationen/wegleitun.html>, in German only), which in its current form requires the identification of controlling persons the mandatory reliance on AML/KYC documentation and information (see §§ 4.8, 4.8.7 and 4.8.8 of the draft Guidelines), namely information obtained pursuant to CDB 16 insofar as Swiss banks and securities dealers are concerned.

What does this mean for Swiss banks?

Swiss banks should expect an additional identification burden to obtain and process new information as described above as regards classes of discretionary beneficiaries for new business relationships opened after 25 November 2016 and upon any renewal of KYC or change in circumstances.

Finally, the impact of the new requirements needs to be reviewed by each Swiss bank and securities dealer in order to assess compatibility with the other policies and procedures of the financial institution, as well as its IT systems (e.g., identification and recording of additional "roles", collection of information and documents on members of discretionary classes, etc.).

For further questions regarding this matter please do not hesitate to contact us.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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