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NKF Client Alert

NKF

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NKF Banking, Finance & Regulatory Team – Update 6/2017: Partial revision of AMLO-FINMA: Consultation process until 16 October 2017

I. INTRODUCTION

According to the Swiss Federal Council, based on the results of the Switzerland report by the Financial Action Task Force ("FATF"), a revision of the current FINMA Anti-Money Laundering Ordinance ("AMLO-FINMA") is required. On 4 September 2017, FINMA published and started the consultation process of the draft revised version of the AMLO-FINMA, in which the general duties of due diligence of financial intermediaries are amended or specified. The consultation process will last until 16 October 2017. The revised version of the AMLO-FINMA is expected to enter into force in 2019.

II. SUBSTANTIAL CHANGES

Substantial changes in the draft revised AMLO-FINMA include the duty to verify the information regarding the beneficial owner for all clients and the duty to update client information on a continuous basis. The draft revised ordinance also specifies the duties regarding supervision of legal and reputational risks of financial intermediaries with branch offices and group companies abroad.

The essential intended changes are:

1. General duties of due diligence

Based on the intended changes, a financial intermediary would have to adhere to the following duties with regards to business relationships without increased risks:

- verify with risk based measures that the person declared as beneficial owner is in fact the beneficial owner;
- clarify the reasons for the use of a domiciliary company;
- update information on all business relationships on a continuous basis (risk based approach);
- ensure that information on payment order clients (outgoing payments) is correct and complete and that information on the receiving party is complete.

2. Specific duties of due diligence

The example list of criteria for business relationships with increased risks will be largely extended and specified. The amended list includes the following criteria:

- domicile of the contracting party, the controlling person and the beneficial owner in a country which the FATF classified as "high risk" or non-cooperative.
- business activities of the contracting party or the beneficial owner in a country which the FATF classified as "high risk" or non-cooperative;
- introduction or management of client by a third party (service provider);

- payments in and from a country which the FATF classified as "high risk" or non-cooperative;
- complexity of structures in particular by the use of a domiciliary company (i) in relation to a further domiciliary company (ii) in relationship to an operational company (iii) with fiduciary shareholders (iv) domiciled a non-transparent jurisdiction (v) without understandable reason or (vi) for placement of assets on a short term basis.

3. Competence for reports to the Money Laundering Office ("MROS")

The draft stipulates that the competence for reports to the Money Laundering Office ("MROS"), such as the duty to report (Art. 9 AMLA) and the right to report (Art. 305ter para. 2 SCC) lies with the highest executive body of the financial intermediary. The highest executive body of the financial intermediary can delegate this task to one of its members (which must not be responsible directly for the business relationship in question) or to the specialist unit for money laundering or a third independent body.

4. Threshold for cash transactions and subscriptions of unlisted Swiss collective investment schemes

The draft revised ordinance includes a lower threshold of CHF 15,000 (currently: CHF 25,000) for cash transactions for directly supervised financial intermediaries with regards to the duty to identify the contracting party, and ascertain the beneficial owner as well as the controlling person. The same threshold of CHF 15,000 was set for the subscription of unlisted Swiss collective investment schemes. If this suggested amendment were to become law, the Swiss Banking Association will most likely amend their agreement on the Swiss banks' code of conduct with regards to the exercise of due diligence (CDB) accordingly.

5. Monitoring of legal and reputational risks of branch offices and group companies abroad

The draft revised ordinance includes significant specifications regarding the duties with regard to the monitoring of legal and reputational risks of branch offices and group companies abroad. The financial intermediaries in question would have to ensure that:

- the specialist unit for money laundering or another independent body of the financial intermediary prepares a risk analysis on consolidated basis;
- the financial intermediary is informed at least once a year by standardized reporting on the sufficient quantitative and qualitative information on branch offices and group companies, in order for them to assess the legal and reputational risks on a consolidated basis in a reliable way;
- branch offices and group companies abroad inform the financial intermediary on their initiative about timely opening and continuance of the most important business relationships globally (from a risk perspective) as well as the most important transactions globally and other substantial changes regarding legal and reputational risks, in particular if large amounts of assets and politically exposed persons ("PEP") are involved;
- the compliance department of the group conducts risk based internal controls (including sample tests) on individual business relationships on-site in the branch offices and group companies abroad.

III. POSITION OF FINMA

The explanatory report refers to a presentation of the FINMA Director, Mark Branson, in which he explained that in his opinion stricter rules will not solve the problems of the past and that these problems should be addressed with a consequent and consistent implementation of the existing rules. The fact that FINMA places - in its function relating to supervision and enforcement - a special focus on anti-money laundering-compliance was already indicated in the annual report of FINMA on page 30 et seq.

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