Association of Foreign Banks in Switzerland
Verband der Auslandsbanken in der Schweiz
Association des banques étrangères en Suisse
Associazione delle banche estere in Svizzera

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FINMA AML-Ordinance – Comments AFBS

Dear Madam

On 4 September 2017 FINMA opened the consultation on the draft revision of the aforementioned Ordinance. We take up the opportunity to comment on aspects which are of particular relevance for foreign banks in Switzerland. We have also participated in the drafting of the Comments to be handed in by the Swiss Bankers' Association. We support their remarks and suggestions.

General Appreciation

The draft FINMA AML-Ordinance responds in an appropriate and pragmatic way to the remarks of the FATF-GAFI experts and adjusts to the practice of the last two years developed by both the FINMA and the Federal Department of Finance. We support the revision, but take up the opportunity to suggest some clarifications.

Art. 6 Global Management of legal and reputational risks

Art. 6 Par. 1 lit. c requires branches and subsidiaries to inform the financial intermediary on the globally significant transactions and material changes of the legal and reputational risks. However, a branch or subsidiary is not in a position to evaluate whether a fact or a circumstance is "globally" (i.e. on group-level) significant. The branch or subsidiary can judge relevance and significance of such risks on its own level. It is up to Group Compliance to evaluate whether the fact or circumstance is pertinent from a global perspective.

We propose to re-write lit. c as follows (we take the French text):

« L'intermédiaire financier qui possède des succursales à l'étranger ou dirige un groupe financier comprenant des sociétés étrangères doit déterminer, limiter et contrôler de manière globale les risques juridiques et les risques de réputation liés au blanchiment d'argent et au financement du terrorisme auxquels il est exposé. Il s'assure notamment, en fonction de l'organisation de son groupe, ainsi en particulier que de leur pays d'implantation et de leur activité : (…)

c. que les succursales et les sociétés du groupe l'informent en outre d'elles-mêmes et en temps utile des faits et circonstances les plus significatifs du point de vue des risques à son niveau, que cela soit en lien avec des relation d'affaires, des transactions ou ~~de l'établissement et de la poursuite des relations d'affaires glo-balement les plus significatives du point de vue des risques, des transactions globalement les plus significatives du point de vue des risques ainsi que~~ d'autres modifications importantes des risques juridiques et de réputation ~~et ce en particulier si~~

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~~*d'importantes valeurs patrimoniales ou des personnes politiquement exposées sont concernées*~~*;*

Art. 9b and Art. 13 Par. 2 lit. h Domiciliary companies

We are conscious about the public sensitivity of domiciliary companies. We presume that the issue has been – and will be – very much in the focus of FATF-GAFI country reviews. Nevertheless, the special treatment given to such companies by Art. 9b seems unwarranted. The AML risks associated with domiciliary companies are not different from those associated with trusts and fiduciary companies. **Therefore, we suggest that Art. 9b states a duty to clarify the background of a stated goal and a chosen structure of a business relation in general. Art. 9b is then a specification of Art. 6 Par. 1 AML Act.**

Art. 9b must be read together with Art. 13 Par. 2 lit. h. The literal is not only very detailed – too detailed for an Ordinance and too detailed in comparison to the other criteria which are mentioned in Art. 13 Par. 2 - but it has conceptual drawbacks. Pts 1-4 refer to the set-up of the domiciliary structure itself, i.e. to objective conditions. Lit. h pt 5 and pt 6 relate to subjective decisions.

The reasons why such companies are used – the subjective reasons of pt 5 and pt 6 - do not allow to infer on the complexity of the company's structure, which is the very subject of lit. h. For legal certainty's sake, we strongly suggest that lit h deals exclusively with complexity issues. FINMA's own explanatory report translates "complex structures" into customer relationships which are "intransparent" (e.g. p. 26). Such inferences give much too broad a scope for interpretation, and, thus, increase legal uncertainty. The concern of the FATF-GAFI lies, in our understanding, on the missing typology. Typologies should be based on objective criteria which allow a proper assessment whether an account relationship has to be deemed higher-risk or not. But this is not assured by the proposed wording of Art. 13 Par. 2 lit. h; hence the catalogue of criteria is not stringent.

Given our belief that Art. 13 Par. 2 lit h should focus exclusively on matter of complexity, pt 3 to pt 6 should be deleted. They are not related to complexity. Given the tightened requirements on the due diligence on beneficial owners – both identification and verification – pt 3 and pt 4 are included in Art. 9a and Art. 9c. Pt 5 and pt 6 are included in (a reformulated) Art. 9b.

Following this reasoning we believe it to be both sufficient and more stringent to redraft Art. 9b and Art. 13 Par 2 lit. h as follows:

« Art. 9b: Clarifications de l'arrière-plan de la relation d'affaires

Dans le cas d'une entrée en relation d'affaires, l'intermédiaire financier clarifie le but et la structure de la relation, notamment en cas de recours à des sociétés de domicile ou autres constructions juridiques. »

" h. la complexité des structures, notamment en cas d'utilisation ~~*de sociétés d'une société de domicile*~~

1. *de plusieurs sociétés de domicile et/ou constructions juridiques* ~~*en relation avec une autre société de domicile*~~*,*

2. *de sociétés de domicile et/ou constructions juridiques* ~~*en relation*~~ *en relation avec une société exerçant une activité opérationnelle* ~~*entreprise*~~*,*

~~*3. avec des actionnaires fiduciaires,*~~

~~*4. dans une juridiction non transparente,*~~

~~*5 sans raison manifestement compréhensible, ou*~~

~~*6. en vue d'un placement de valeurs patrimoniales à court terme;"*~~

High risk and non-cooperative countries according to the FATF-GAFI lists (Art. 13 and 14)

The Ordinance refers to business relations with persons, domiciled in a country which is considered "High risk" or "non-cooperative" by the FATF-GAFI. Undoubtedly, such countries are high-risk countries. However, the direct reference to FATF-GAFI lists and terminology entails a revision of the FINMA AML-Ordinance if FATF-GAFI terminology changes. Moreover – and probably more important – the reference to FATF-GAFI-lists implies that only FATF-GAFI considerations matter. But SECO sanction lists are as important, and should, therefore, be listed as well. On the other hand, we do not believe that banks should be obliged to take into account lists of private organisations, as suggested by the explanatory report, which refers to Transparency International ratings.

Either FINMA is establishing a system of alerts, includes, if she wishes, information from non-official sources, and refers in the Ordinance directly to her own classification, or the reference in the current text to FATF-GAFI is replaced by a general reference to «official national and international organisations », and the term "country" is replaced by "jurisdiction".

Art. 13 Par. 2 lit. a can therefore be reformulated as follows :

"le siège ou le domicile du cocontractant, du détenteur du contrôle ou de l'ayant droit économique des valeurs patrimoniales, notamment s'il est établi dans une juridiction à propos de laquelle la FINMA / des institutions nationales ou internationales officielles a émis une mise en garde ~~un pays que le Groupe d'Action Financière (GAFI) considère à haut risque ou non coopératif~~, ainsi que la nationalité du cocontractant ou de l'ayant droit économique des valeurs patrimoniales;"

Art. 13 Par. 2 lit. c^{bis} Absence of contact

The absence of any contact with a client does constitute undoubtedly a higher risk. Such absence can be the result of account opening via internet or correspondence, but also by the delegation to a service provider which is herself not subject to FINMA approval and supervision (or an equivalent foreign regulatory one).

As the revision tightens the rules on the verification of the beneficial ownership of the assets deposited in the account, it seems unnecessary to deem account relationships, which are the result of a referral activity, as per se higher-risk accounts. The financial intermediary will find out when she is performing the newly required due diligence (Art. 9a and Art 13, as per Art 15 AMLO-FINMA) whether they are so or not. This is particularly appropriate in view of the new Financial Institute Act which strengthens the current regulatory set-up for third-party financial service providers.

Art 13 Par 2 lit c can be reformulated along the following lines:

"c. l'absence de contact direct ~~rencontre~~ avec le cocontractant et l'ayant droit économique, en particulier en cas de relation d'affaires par correspondance ou Internet ou par l'intermédiation par d'autres prestataires qui ne seraient pas assujettis à une surveillance prudentielle et à une réglementation en matière de lutte contre le blanchiment d'argent et le financement du terrorisme adéquates;.

The proposed lit. c^{bis} is omitted.

Alternatively, lit.c remains unaltered and lit. c^{bis} is reformulated as follows:

« c^{bis} ~~le courtage ou le suivi de la relation d'affaires~~ l'intermédiation par d'autres prestataires qui ne seraient pas assujettis à une surveillance prudentielle et à une réglementation en matière de lutte contre le blanchiment d'argent et le financement du terrorisme adéquates;

Art. 25a Decision responsibility in case of reporting

The current Art. 24 specifies that responsibility remains with management, and cannot be delegated to a money laundering unit.

Draft Art. 25a, however, stipulates that management can delegate the reporting responsibility to a member of management who is not responsible for the business relation in question, the money laundering or an independent unit.

Taken together, the two articles delegate the responsibility to report without the decision right to do so to a unit which is not part of the management.

To avoid this asymmetry, we propose to restrict the delegation to a member of management who has no direct responsibility for the business transaction.

We propose the following text:

"La direction à son plus haut niveau décide d'effectuer des communications selon l'art. 9 LBA et l'art. 305ter, al. 2, CP7. Elle peut déléguer cette tâche à l'un de ses membres qui n'est pas directement responsable de la relation d'affaires~~, au service spécialisé de lutte contre le blanchiment ou à un autre service indépendant~~."

Art. 31 Doubtful business relations and reporting right

We take note of the change which we believe to be a formal adjustment of the Ordinance to the FINMA practice.

However, we suggest reviewing at the next convenient occasion the relation of reporting duty (Art. 9 AML Act) and reporting right (Art. 305ter Par. 2 Criminal Code) and the notion of "founded suspicion" re-examined. This would contribute to legal certainty, which is as a result of the enhanced sanction risk following Art. 37 AML Act of particular importance to the financial intermediaries.

Art. 32 Breaking off of a business relation

The precision in Art. 32 Par. 3 is welcomed. We want to point out an issue which has been posed in practice and we also propose being taken up at a convenient occasion:

The procedure to breaking off a business relation when the report is based on Art. 9 AML Act does not raise any questions. But under the reporting right (Art. 305ter Par. 2 Criminal Cod) banks have experienced that the MROS needs more time in dealing with the case. Banks may then be obliged to keep alive an undesirable banking relation. We suggest that the possibility to fix a maximum delay – obviously longer than 20 days) after which a bank can close a relationship, which has been reported to MROS but on which MROS has not decided yet.

Further remarks

Finally, we draw your attention to some imprecisions in the French version of the draft Ordinance:

Art. 9a Verification of the beneficial owner

- The term "réellement" is redundant, as a beneficial owner is a beneficial owner or he/she is not.

The paragraph can be formulated as follows:

"L'intermédiaire financier vérifie par des mesures basées sur les risques que ~~si~~ la personne indiquée ~~comme étant l'ayant droit économique~~ est ~~réellement~~ l'ayant droit économique effectif."

« Der Finanzintermediär verifiziert anhand risikobasierter Massnahmen, dass die angegebene Person die tatsächlich wirtschaftlich berechtigte Person ist."

Art. 13 Abs. 2 lit. c[bis]

We believe the French translation to be wrong. A "courtage" corresponds to the German "Mäklervertrag" and not to "Vermittlung".

Also, Art. 13 Abs. 2 lit. i reads in German

"i. häufige Transaktionen mit erhöhten Risiken."

And should therefore be translated into

"i. des transactions fréquentes comportant ~~fréquemment~~ des risques accru

We thank you for taking note of our proposals and comments. For any questions, please do not hesitate to contact us.

Best Regards

ASSOCIATION OF FOREIGN BANKS IN SWITZERLAND

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