paragraph news

New Statutory Rules for 2016

2016 will also entail new developments in various legislative areas. In "Paragraph aktuell", Staiger, Schwald & Partner addresses and explains certain of the most important legislative changes and legislative proposals.

COMPREHENSIVE REVISION OF THE FINMA MONEY LAUNDERING ORDINANCE

The FINMA Money Laundering Ordinance, which has remained unchanged in its current form since January 1, 2011, was subjected to a comprehensive revision in connection with implementation of the revised recommendations of the Financial Action Task Force (FATF) and the associated amendments to the Money Laundering Act. The revision of the FINMA Money Laundering Ordinance takes into account both the revised FATF recommendations as well as the revised Money Laundering Act and specifies in concrete form the provisions set out therein, but over and above this it also accepts findings gained from the supervisory practice and the more recent market developments.

The comprehensive revision has resulted in various adjustments to the FINMA Money Laundering Ordinance. The revised Money Laundering Act now provides, for example, that the identity of the natural persons who are the beneficial owners of operating companies must also be established. The FINMA Money Laundering Ordinance specifies the concept introduced in this regard of "controlling person".

> The requirements in terms of the internal organization of the financial intermediary are being expanded.

The new legislative developments to the reporting system, pursuant to which financial intermediaries must execute all client instructions despite reporting them to the Money Laundering Reporting Office Switzerland (MROS), were also taken into consideration. In this respect, the revised FINMA Money Laundering Ordinance clarifies that the withdrawal of considerable assets is only permitted in a form that permits the criminal prosecution authorities to follow the trail of the transaction (paper trail).

The comprehensive revision of the FINMA Money Laundering Ordinance also involves numerous new features. For example, the information that is required in connection with cross-border payment orders has been expanded. Now, financial intermediaries must also provide information about the beneficiary, in addition to information about the originating contracting party.

The requirements in terms of the organization of the financial intermediary have also been expanded. Financial intermediaries are required to subject their business activities to an analysis of the money laundering and terrorist financing risks thereby entailed, taking into account their area of activities and their business relationships. Financial intermediaries will furthermore be required to assess in advance the money laundering and terrorist financing risks that arise from the development of new products or technologies and to appropriately take these into account within the scope of their risk management.

Finally, a new section with special provisions for fund management companies, investment companies under the Collective Investment Schemes Act dated June 23, 2006 (CISA) as well as asset managers of collective investment schemes has been included in the revised FINMA Money Laundering Ordinance. This section lays down, on the one hand, the principle of the identification of the subscribers to non-exchange-traded Swiss collective investment schemes and the establishment of the identity of the controlling persons or the persons who are beneficial owners of the assets, but also provides for relief from the above-mentioned obligations.

The comprehensively revised FINMA Money Laundering Ordinance enters into force on January 1, 2016. §

Désirée Wiesendanger

AMENDMENTS TO THE MONEY LAUNDERING ACT (MLA)

As already announced in our "*Paragraph thema*" of March 2015, Swiss legislators rapidly implemented the recommendations of the FATF (Financial Action Task Force) for combatting money laundering. Certain statutory amendments were already put into effect as per July 1, 2015, while others will come into force as from January 1, 2016. Here is a brief summary once again of the most important amendments to the Federal Act on the Combatting of Money Laundering and Terrorist Financing (MLA):

Dealers, i.e., persons who deal on a professional basis with goods and thereby accept cash, are now subject to due diligence and documentation obligations if the cash amount of the relevant transaction exceeds CHF 100,000. In other words, tradesmen, such as, for example, art galleries, car and real estate sellers and jewelers will now, depending on the circumstances, be subject to the MLA as financial intermediaries.

Dealers as well as operating companies may now be subject to the MLA.

Politically exposed persons (PEPs): Business relationships with so-called PEPs, i.e., persons that are entrusted with leading public functions, trigger special duties of due diligence on the part of the financial intermediary. PEPs will now be defined in the MLA in three categories: (i) PEPs abroad, (ii) PEPs in Switzerland, who are entrusted at the national level with leading public functions, and (iii) PEPs in intergovernmental organizations and international sports associations. Because persons who are closely affiliated with a PEP (e.g., family) may, depending on the circumstances, trigger special due diligence obligations on the part of a financial intermediary, a PEP's environment must also be carefully clarified.

Beneficial owners: In the case of operating companies, it is now necessary to verify the identity of the beneficial owners. Exceptions exist for exchange-listed companies and companies controlled by exchange-listed companies.

The **reporting duty on the part of the financial intermediary** in the event of suspected money laundering has also been amended. In addition to adjustments to the procedure and the asset freeze, there is now a reporting duty if the financial intermediary knows or has a founded suspicion that the assets involved stem from a qualified tax fraud (new predicate offence to the crime of money laundering).

Outlook
The introduction of a new Article 6a of the MLA proposed by the Swiss Federal Council would have newly obligated financial intermediaries to carry out systematic clarifications as to the tax compliance of their clients. Following the decision of the Swiss Council of States of December 2, 2015, however, to not deal with this proposal, this change is now off the table. Nonetheless, it is to be expected that implementation of the "tax compliant money" strategy will entail further regulations because an automatic exchange of information will not take place with all countries, not even in the foreseeable future. §

Gian Andri Töndury

COMPANY LAW

The legislative package adopted due on the revised FATF recommendations is being implemented on a staggered basis. In particular, the revised provisions of the Code of Obligations already entered into force on July 1, 2015. Thus, the acquirers of bearer shares must now be identified to the company within one month after acquisition by means of a document required by law and must evidence their ownership of the bearer shares. Whoever already owned bearer shares prior to July 1, 2015, must submit these reports by December 31, 2015. If the reports are not received within these deadlines, the pecuniary rights entailed by the bearer shares (in particular, claims to dividends) are forfeited as the consequence of sanctions. This forfeiture is final, i.e., in the event of a report that is made on a tardy basis, the shareholder only has a claim to the pecuniary rights arising after this report.

Based on the transition period that is about to expire, the new reporting obligations under company law must be observed in each case as from January 1, 2016.

For the period during which the report is not made, the corresponding voting rights also remain dormant. In addition to this report of the direct acquirer, anyone who acquires bearer or registered shares or GmbH-quotas, either alone or in concert with third parties, and thereby holds at least 25% of the capital or votes must report the natural persons who are beneficial owners of these holdings. Here, too, the same reporting deadlines and sanction consequences apply as in connection with the report of the direct acquirer of bearer shares. An exception from all reporting obligations applies in the case of shares of companies listed on a stock exchange.

As a counterpart to these reporting duties, companies must maintain registers of the shareholders and beneficial owners unless the company has appointed a financial intermediary as the recipient of the reporting obligations, taking into account the legal requirements for such an appointment. In any case, the details of these new rules have already had to be given proper attention since the middle of the year, but are to be paid attention to once again, including with a view to the expiration of the transition provisions as of December 31, 2015. §

Martin Kern

AGREEMENT ON THE SWISS BANKS' CODE OF CONDUCT WITH REGARD TO THE EXERCISE OF DUE DILIGENCE (CDB 16)

The Swiss financial centre has been combatting money laundering and teh financing of terrorism for decades. The Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence concluded by the Swiss Bankers Association (currently CDB 08) makes an important contribution in this regard. The international standards introduced since the last revision of the CDB, in particular the recommendations of the Financial Action Task Force (FATF), will be implemented in the revised CDB 16 and enter into effect on January 1, 2016.

The new rules and forms under the CDB 16 enter into effect on January 1, 2016.

The expanded identification obligations and the newly created forms in this regard should be mentioned as important new features. Going forward, the controlling persons of operating legal entities that are not exchange-listed and of partnerships must be identified on the Form K. In this respect, controlling persons consist of natural persons who hold 25% or more of voting rights or capital shares of a company. If no such participation exists, those natural persons who exercise control over the legal entity by other discernible means should be identified instead. If no such persons can be identified either, the contracting partner shall identify by way of substitute the person who acts as managing director.

For foundations (and similar structures), a special Form S has been introduced, and the Form T for trusts has been significantly expanded, in conformity with the Form S. Thus, on both forms, the type of trust or foundation (e.g., discretionary and revocable) must be listed, together with information on whether it has emerged out of a restructuring or a combination of existing structures. In addition to information concerning the beneficiaries and their claims, information concerning the protectors as well as persons having a right of revocation with respect to the structure must be provided.

With respect to life insurance policies for which separate accounts/safekeeping accounts are maintained, a new Form I (insurance wrapper) has been introduced.

The new rules of the CDB 16 are to be applied as from January 1, 2016, to the opening of new business relationships. If the bank has doubt as to the information provided to date, it must re-establish the identity of the beneficial owner or the controlling person. Further, it must basically terminate a business relationship as quickly as possible if it determines that it has been deceived or that it has intentionally been provided false information. §

Peter von Burg

PREDICATE OFFENCE FOR MONEY LAUNDERING

Between 2009 and 2012, the Financial Action Task Force (FATF) appointed by the OECD conducted a fundamental review of the content of its recommendations for combatting money laundering and terrorist financing.

One of the revised recommendations consists of the introduction of qualified tax fraud, which represents a predicate offence for money laundering. In Switzerland, this is being implemented by means of the revised Article 305bis clauses 1 and 1bis of the Swiss Penal Code (SPC), pursuant to which "qualified tax fraud" now constitutes a predicate offence for money laundering. Financial intermediaries will therefore have to increasingly take aspects of tax compliance into account in connection with the opening of new relationships.

A "qualified tax fraud" exists if

- falsified, forged or untruthful documents have been used in connection with the tax declaration, and

and

- the direct taxes evaded amount to at least CHF 300,000 per tax period.

A predicate offence for money laundering also exists if the "qualified tax fraud" was committed abroad and is also criminally punishable there within the meaning of the double criminality requirement (Article 305bis clause 3 of the SPC). Therefore, tax crimes against a foreign fiscal authority are punishable to the extent that the amount of taxes evaded exceeds CHF 300,000 and the tax fraud in question is one that is likewise subject to criminal punishment in Switzerland.

"Qualified tax frauds" that were committed prior to January 1, 2016, do not qualify as predicate offences for money laundering.

If someone commits mere tax evasion, because he or she did not use falsified, forged or untruthful documents, no "qualified tax fraud" leading to a predicate offence for money laundering arises from a Swiss perspective.

The provisions relating to the predicate offence for money laundering enter into force on January 1, 2016. If a financial intermediary has grounds to assume that investment assets in a business relationship are in connection with a "qualified tax fraud", it is under an obligation to immediately file a report with the Money Laundering Reporting Office of Switzerland (MROS). "Qualified tax frauds" that were committed prior to January 1, 2016, however, do not qualify as predicate offences for money laundering and do not have to be reported. §

Natalie Peter

AMENDMENTS TO THE CONSUMER CREDIT ACT AND THE SWISS CODE OF OBLIGATIONS

Prohibition of Aggressive Advertising for Consumer Loans

On January 1, 2016, the Consumer Credit Act (CCA) will be amended and, as a consequence thereof, aggressive advertising for consumer credit will be prohibited. The determination of when advertising is deemed to be "aggressive" is the responsibility of the credit industry itself (Article 36a of the CCA), which should issue in this respect a corresponding private law agreement, within the meaning of self-regulation. A draft of this agreement is already on hand. It was developed by the Association of Swiss Credit Banks and Financing Institutions in cooperation with the Leasing Association.

The Swiss Federal Council will provide for a corresponding rule only if this solution is inadequate or fails. In the event that this prohibition is infringed, a fine of up to CHF 100,000 is foreseen (Article 36b of the CCA).

Furthermore, in the course of the revision, the scope of application of the CCA in terms of subject matter has been expanded. Until now, loans that are fully repayable within no more than four installments within twelve months have been exempt from the scope of the Act. They also did not fall within the scope of application of the Unfair Competition Act (UCA). Now, only express loans that must be repaid within no more than three months are excluded from the CCA. The other types of consumer loans must then also satisfy Article 3 subparagraphs (k) – (n) of the UCA.

Finally, within the framework of the statutory revision, the quality of the credit worthiness should be improved. The lender must now, in case of doubt, demand from the borrower an excerpt from the Debt Enforcement Register, a wage statement or other documents that can provide information about the borrower's income and creditworthiness.

Right of Revocation in Connection with Telephone Transactions

Now, the right to revoke doorstep transactions has been extended to telephone sales. Pursuant to this, consumers have an opportunity to revoke agreements entered into on the phone within 14 days. This period also applies to consumer credit agreements. However, the consumers owe reasonable compensation should they abusively use leasing or installment objects during the revocation period.

As from January 1, 2016, stricter rules should apply with respect to advertising for consumer loans.

Transactions below CHF 100, insurance agreements and transactions that the consumer had expressly desired are not covered by the right of revocation.

Amendments to the Law Governing Company Names

During the course of 2016, certain amendments to the law governing company names will also enter into effect. Now, all relevant legal forms should in the future be directly recognizable based on a legal form supplement to the company name (recognizability of the legal form). In order to ensure the continuity of the company name, it should be possible to retain a company name, once chosen. If there is a change in members or a transformation in legal form, only the legal form supplement should be affected by this.

Finally, in connection with the formation of the company name, the same rules should be pertinent for all company forms: the company name should in general consist of a core, which can be freely chosen, with the corresponding legal form supplement (uniformity of the composition of the company name). Therefore, for certain specific company forms, new abbreviations will be created. §

Stephanie Volz

NEW RULES ON THE RECORDING OF WORK TIME (ARTICLES 73A AND 73B OF ORDINANCE 1 TO THE EMPLOYMENT ACT)

The Swiss Federal Council has added two new provisions to Ordinance 1 to the Employment Act (EA 01) relating to the recording of work time. The new provisions of Articles 73a and 73b of the EA 01 enter into force on January 1, 2016.

As is known, the employer is under an obligation to fully and systematically record the work time of his employees so that the competent authorities can review whether the Employment Act has been implemented. What needs to be recorded is the (daily and weekly) work time expended, including compensation and overtime as well as the location where such time was expended, the days off and substitute days off granted each week, to the extent that these do not regularly fall on a Sunday, and the location and duration of the rest breaks of 30 minutes or more (Article 73 of the EA 01).

The introduction of the two new provisions does not basically change anything in terms of the above-referenced obligation to record the work time. The work time of employees who do not dispose over a certain amount of autonomy in determining their work time is to be recorded on a systematic and complete basis. The selection of the appropriate recording instrument therefore continues to be left up to the employer.

With Articles 73a and 73b of the EA 01, two additional forms of the recording of work time have been created. The new provisions govern under which conditions and to what extent deviations are allowed from the obliga-

tion to record work time within the meaning of the above-referenced rule under Article 73 of the EA 01.

The first new provision, Article 73a of the EA 01, provides that the recording of work time can be waived in its entirety. This presupposes, however, that the waiver is agreed on in a collective bargaining agreement, that the relevant employees dispose over a large amount of autonomy and can for the most part individually determine their own work time, and that they, moreover, dispose over a gross annual income (including bonuses) of more than CHF 120,000 (proportionately reduced in part-time working relationships) and, finally, that the waiver was individually agreed upon in writing.

Basically, the work time of employees who do not dispose over a certain amount of autonomy in the determination of their work time will continue to be systematically recorded.

The second new provision of Article 73b of the EA 01 provides for a simplified recording of work time that is limited to the documentation of the total number of the work hours expended per day. A condition for this, however, is that the employees can determine a notable portion of their work time themselves. According to the explanatory report of SECO dated October 2015, this criterion should be fulfilled if the employee can freely determine at least 25% of the work time. A corresponding basis in a collective bargaining agreement is not required here. A further condition, on the other hand, is an agreement between the employer and the employee representative or, if there is no such representative, with the majority of the employees. The agreement must provide information concerning the employee category for which the simplified recording of work time applies. Because no detailed recording of work time and rest time takes place, the agreement must, in addition, explain which measures are intended to ensure that the work time and rest time provisions are adhered to. Finally, the agreement must lay down a parity procedure by means of which adherence to the agreement can be reviewed. This procedure must at the very least ensure that a periodic exchange takes place between the affected employees or their representative and the employer for purposes of implementing the agreement. Finally, in businesses that do not have 50 employees, an individual, written agreement on the simplified recording of work time is permissible. In this agreement, reference is to be made to the applicable work time and rest time provisions. In addition, a year-end discussion of the work burden must be held with each individual employee and be documented. §

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