New Code of Conduct (CDB 16)

01.12.2015

- **New due diligence methods from 1 January 2016**
- **Controlling person of legal entities or partnerships**
- **Beneficial owner of assets**
- **Rules on insurance wrapper**

1. Introduction

To align Swiss anti-money laundering regulations with international standards, on 12 December 2014, the Swiss parliament adopted the Federal Act on the Implementation of the revised 2012 FATF Recommendations (FATF-Implementation Act). As a consequence, the Swiss Bankers Association replaced the existing rules (from 2008) with the "2016 Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence" (CDB 16). The CDB 16 will enter into force on 1 January 2016.

In essence, the Swiss Bankers Association matched the methods for identifying the contracting party as well as establishing the controlling persons and the beneficial owners with the revised Anti-Money Laundering Act (AMLA) and Anti-Money Laundering Ordinance of the Financial Market Supervisory Authority (FINMA-AMLO). The aforesaid regulations provide a definition of controlling person and explicitly distinguish between the beneficial owner of operational legal entities/partnerships and the beneficial owner of assets. On the basis of these terms, the CDB16-provisions specify the duty to exercise due diligence regarding the identification of the contracting parties and/or the establishment of the controlling persons and beneficial owners.

Going forward, the new rules must be applied to any new business relationship entered into after 31 December 2015. Importantly, the CDB 16 will apply to banks and securities dealers licensed in Switzerland, including their branbch offices domiciled in Switzerland. Foreign (i.e., non-Swiss) branches, representations, and subsidiaries of Swiss banks and securities dealers

are excluded from its scope. The revised FINMA-AMLO states that the CDB 16 shall also apply to Swiss fund management companies and asset managers regarding the methods for identifying the contracting party and for establishing the controlling persons as well as the beneficial owners of the relevant assets. In any case, financial intermediaries falling under the CDB 16's scope must have a thorough understanding of the amendments concerning the duty to exercise due diligence by no later than 1 January 2016, as outlined below.

2. Overview on Rules related to the Identification of Contracting Parties

Upon establishing business relationships with individuals, legal entities or (simple) partnerships and public authorities, banks and securities dealers must newly verify the identity of the contracting party.

a. Individuals

With respect to business relationships with individuals, the CDB 16 states that the copy of an identification document may also be authenticated by an attorney admitted in Switzerland. Thus, a bank or securities dealer establishing business relationships with individuals (natural persons) may mandate a Swiss attorney for this purpose. Further, a copy of an identification document in combination with an electronic authentication of the client will be a valid authentication if the copy of the identification document is provided from a data base, respectively a provider that fulfills the requirements of the Federal Law on the Certification of Electronic Signatures. Since banks and securities dealers must also review the identity of individuals (natural persons) who establish the business relationship on behalf of a legal entity or partnership, an attorney may also authenticate (as specified above) the respective identification document of the individual representing the legal entity or partnership.

b. Legal entities and partnerships entered in the Swiss Commercial Register

When a business relationship is established with a legal entity or partnership, which is entered in the Swiss Commercial Register, banks must verify the identity of the contracting partner either by means of a register extract issued by the registrar or by means of a written extract from a database maintained by the registry, a supervisory body or a trustworthy private individual.

c. Simple partnerships

Concerning the identification of simple partnerships, the CDB 16 specifically sets out that all partners or at least one partner as well as the authorized signatories acting towards the bank must be identified. If the simple partnership's purpose aims to protect the interests of its members or beneficiaries by means of mutual assistance, or to pursue political, religious, scientific, charitable or social objectives, the identification of the authorized signatories acting towards the bank will suffice.

d. Public authorities

When establishing business relationships with public authorities, these entities must be identified by an appropriate statute, decree, or other equivalent document or source. If the

identity of a public authority as contracting party is publicly known, banks and securities dealers are only obliged to document this fact, without further enquiries, i.e., without the need to carry out the entire identification procedure.

e. Existing business relationships

Furthermore, for existing business relationships, the CDB 16 explicitly sets forth that if the identity of the persons who established the business relationship had already been verified, or if the arrangements related to the contracting party's power of attorney had already been noticed by the bank or securities dealer, such a financial intermediary need not repeat the identification procedure.The aforesaid also applies to the identification within the financial intermediary's group if the contracting party had already been identified equivalently by another group company (subject to specific statutory exceptions that prohibit such data transfers).

3. Overview on Rules regarding the Establishment of Controlling Persons/Beneficial Owners

Banks and securities dealers must establish the identity of the controlling person of operating legal entities and partnerships as well as the identity of the beneficial owner of assets.

a. Controlling person of operating legal entities and partnerships

First, persons who have voting rights or capital shares of 25% or more in an operating legal entity or partnership are referred to as controlling persons. A controlling person must be a natural person of which the contracting party must confirm the first and last name and the current address in writing or by using Form K. According to the "waterfall" in the CDB 16, in case there is no controlling person identifiable, banks and securities dealers must establish the identity of natural persons who exercise control by other discernible means. In the absence of controlling persons and persons who exercise control by other discernible means, banks and securities dealers must, as an alternative, establish the identity of the managing person.

Subject to some exceptions set forth in the CDB 16, the methodology to establish the controlling person of legal entities and partnerships is, inter alia, applicable to opening accounts and securities accounts, entering into fiduciary transactions or into management agreements for assets deposited with third parties, or transferring cash in excess of CHF 25'000.

b. Benefical ownership of assets

Second, banks and securities dealers must obtain (e.g., by using Form A) a statement concerning the beneficial ownership of assets, which must in principle be with a natural person. As opposed to the current CDB 08, the CDB 16 does not presume that the contracting party is identical with the beneficial owner of assets (which has been favorable for banks and securities dealers). Hence, a bank or securities dealer may only refrain from establishing the beneficial owner if it has no doubts that the contracting party is identical with the beneficial owner (going forward). It must, however, document its decision, by making an appropriate note of this circumstance.

A less strict approach applies to banks and securities dealers regarding operating legal entities and partnerships not quoted on the stock exchange: they only have to obtain a statement concerning the beneficial ownership of assets from these entities when they declare that they hold assets in their possession for a particular third party.

4. New Rule for Insurance Wrapper

The CDB 16 lays down four cases in which the contracting party must declare, e.g., by using Form I, the insured person or the actual premium payer if the insured person is not identical with the premium payer:

- Case A: the assets contributed to the insurance scheme originate from a pre-existing contract between the particular bank and the insured person, respectively the actual premium payer, or from a contracting relationship in which the premium payer was the beneficial owner.
- Case B: the insured person, or the actual premium payer, has a power of attorney or an information right concerning the investment deposit account.
- Case C: the assets brought into the insurance scheme are administered according to an investment strategy agreed upon by the particular bank and the insured person, respectively the actual premium payer.
- Case D: the insurance company does not confirm that the insurance product is in line with the requirements for life insurance, including the regulations concerning biometric risks, applicable to the insured entity’s domicile or where the tax is paid.

During the business relationship, the bank must identify the insured person or actual premium payer if it notices that the the insured person or actual premium payer can directly or indirectly influence individual investment decisions.

5. Key Takeaway for Financial Intermediaries

Financial intermediaries should be aware of the complexity of implementing the duty to establish the controlling person of legal entities (e.g., the (ultimate) natural person of the legal entity's mother company) and beneficial owners of assets domiciled abroad. A specific challenge will be assessing these persons outside of a jurisdiction that has implemented the 2012 FATF Recommendations due to the lack of consistency/transparency regarding methods to obtain the relevant information. Nonetheless, the respective addressees of the CDB16-provisions will be responsible for complying with the new obligations and will need to assure the timely setup of relevant (and efficient) internal procedures.

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