



The Guide to Anti-Money Laundering - Third Edition

**Switzerland: complying with
anti-money laundering laws amid
threat of sanctions**

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The Guide to Anti-Money Laundering is one of the first publications to simultaneously tackle both sides of the money laundering conundrum. Edited by Sharon Cohen Levin of Sullivan & Cromwell, the third edition covers global enforcement and compliance trends – with specific practical advice for corporations and their counsel throughout. It also features a new Spotlight section, which takes a deep dive into the anti-money laundering regimes of key jurisdictions around the world.

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Switzerland: complying with anti-money laundering laws amid threat of sanctions

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Summary

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MONEY LAUNDERING

WHAT LAWS IN YOUR JURISDICTION PROHIBIT MONEY LAUNDERING?

The offence of money laundering is punishable under Article 305 *bis* of the Swiss Criminal Code (SCC).

WHAT MUST THE GOVERNMENT PROVE TO ESTABLISH A CRIMINAL VIOLATION OF THE MONEY LAUNDERING LAWS?

An offence of money laundering is committed if the following cumulative objective and subjective requirements are evidenced:

- An asset exists (i.e., any benefit that has a realisable economic value and is therefore capable of being capitalised in an accounting system). It may be a chattel or real estate, a claim or other right, in particular cash or funds in a bank account.
- A predicate offence has been committed that meets the definition of a felony (i.e., an offence punishable by a custodial sentence of more than three years)^[1] or an aggravated tax misdemeanour.^[2]
- The asset is linked with the predicate offence. It can be the direct proceeds of the offence or the replacement values of these direct proceeds as long as the paper trail can be established.
- An act aimed at frustrating the forfeiture of assets was committed. Money laundering can be achieved by any act aimed at frustrating the establishment of a link between the predicate offence and the assets originating from it or frustrating the authorities' control over these assets. It is irrelevant whether this result has actually been achieved. It includes cash withdrawals, the exchange of money or the transfer of money from one account to another when it implies the use of numbered accounts or changes in the holder or beneficial owner of the accounts, among other things.

In addition to the above objective requirements, the competent authorities must also prove the intention (i.e., knowledge and will) of the offender in relation to all the above-mentioned requirements. *Dolus eventualis* is covered, meaning that the offender will also be considered to have acted intentionally if they regard the realisation of the act as being possible and accepts this.

In relation to the requirement of the predicate offence, it is sufficient that the offender is aware of circumstances that give rise to a serious suspicion of acts that legally constitute a felony and that they accommodate themselves to the possibility that these acts have taken place.

For aggravated money laundering, in addition to the above-mentioned requirements, the competent criminal authorities must also prove that the offender:

- acts as a member of a criminal or terrorist organisation;
- acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
- achieves a large turnover (i.e., at least 100,000 Swiss francs) or substantial profit (i.e., at least 10,000 francs) through commercial money laundering.

This list of aggravated cases is not comprehensive.

WHAT ARE THE PREDICATE OFFENCES TO MONEY LAUNDERING? DO THEY INCLUDE FOREIGN CRIMES AND TAX OFFENCES?

The assets must originate from a felony or aggravated tax misdemeanour.^[3]

A felony is described in the SCC as an offence punishable by a custodial sentence of more than three years.^[4] The following economic offences are examples of felonies: misappropriation, theft, fraud, aggravated criminal mismanagement, bankruptcy and debt collection felonies, participation or support to a criminal or terrorist organisation, and active and passive bribery of Swiss or foreign public officials.

Active and passive bribery of private individuals is not a felony under Swiss law.

Since 1 January 2016, Article 305 *bis* of the SCC includes aggravated tax misdemeanours as predicate offences for money laundering. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act on Direct Federal Taxation and Article 59(1)(1) of the Federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300,000 Swiss francs. This implies that the taxpayer must have abused the tax authority by using forgery in the documents.

The predicate felony or aggravated tax misdemeanour may have been committed abroad, provided that the act is punishable under the law of the place the act was committed and would be a felony or aggravated tax misdemeanour under Swiss law had it taken place in Switzerland (double criminality requirement).^[5] It is not necessary for the competent criminal authority at the place of commission of the predicate offence to have prosecuted or convicted the offender.

IS THERE EXTRATERRITORIAL JURISDICTION FOR VIOLATIONS OF YOUR JURISDICTION'S MONEY LAUNDERING LAWS?

Switzerland has jurisdiction to prosecute money laundering acts committed on Swiss soil involving assets stemming from an offence committed abroad. For instance, Swiss law applies if the offender has had recourse from abroad to a financial intermediary active on Swiss soil to launder assets. Swiss law also applies to offenders who carry out money laundering operations from Swiss soil, even if the laundered assets are located abroad.

Switzerland does not have general extraterritorial jurisdiction to prosecute acts of money laundering committed abroad. Swiss criminal jurisdiction can extend to Swiss offenders or offences committed against a Swiss person under restrictive conditions mentioned under Article 7 of the SCC.

IS THERE CORPORATE CRIMINAL LIABILITY FOR MONEY LAUNDERING OFFENCES, OR IS LIABILITY LIMITED TO INDIVIDUALS?

The provisions regarding money laundering offences also apply to entities within the meaning of Article 102(4) of the SCC (i.e., any legal entity under private law or under public law except local authorities, companies, sole proprietorships and 'undertakings').

Such an entity will be penalised for money laundering committed within itself in the exercise of commercial activities in accordance with the objects of the undertaking if it failed to take all reasonable organisational measures required to prevent the offence.

WHICH GOVERNMENT AUTHORITIES ARE RESPONSIBLE FOR INVESTIGATING AND PROSECUTING VIOLATIONS OF THE MONEY LAUNDERING LAWS?

The federal and cantonal prosecuting authorities are responsible for investigating and prosecuting money laundering offences in Switzerland.

In the context of financial crime, the Office of the Attorney General of Switzerland has primary jurisdiction to investigate and prosecute offences of money laundering and failure to identify the beneficial owner of a financial relationship, provided that these offences have, to a substantial extent, been committed abroad or have been committed in two or more cantons with no single canton being the clear focus of the criminal activity.

The various cantonal prosecution offices have jurisdiction to investigate and prosecute offences of money laundering committed in their respective cantons, which are not subject to federal jurisdiction. In practice, cantonal prosecution offices also investigate and prosecute very significant money laundering cases with transnational backgrounds (especially Zurich or Geneva prosecution offices).

WHAT IS THE STATUTE OF LIMITATIONS FOR MONEY LAUNDERING OFFENCES?

Simple money laundering acts committed since 1 January 2014 are subject to a 10-year statute of limitations, and those committed between 1 October 2002 and 31 December 2013 are subject to a seven-year statute of limitations.

Aggravated money laundering acts are subject to a 15-year statute of limitations.

The limitation period begins, in principle, on the day on which the offender committed the offence.

To date, there is no leading judgment resolving questions regarding the conditions under which the limitation period commences. If various acts of money laundering are committed by the same offender at different times, the limitation period of all those acts could be deemed as beginning on the day on which the final money laundering act was carried out.

Regarding the end of the limitation period, the time limit no longer applies if a judgment is issued by a court of first instance before the expiry of the limitation period.

WHAT ARE THE PENALTIES FOR A CRIMINAL VIOLATION OF THE MONEY LAUNDERING LAWS?

The simple offence of money laundering is punishable by a custodial sentence not exceeding three years or a monetary penalty. The monetary penalty may amount to a maximum of 180 daily penalty units. Depending on the personal and financial circumstances of the offender, the penalty unit could range from 30 Swiss francs to 3,000 Swiss francs, resulting in a maximum potential penalty of 540,000 Swiss francs.

Concerning the aggravated offence of money laundering, the penalty is a custodial sentence not exceeding five years or a monetary penalty.

Companies convicted of money laundering may receive a fine not exceeding 5 million Swiss francs.^[6] The court assesses the fine in accordance with the seriousness of the offence, the organisational inadequacies, the loss or damage caused and the economic capacity of the entity.

ARE THERE CIVIL PENALTIES FOR VIOLATIONS OF THE MONEY LAUNDERING LAWS? WHAT ARE THEY?

Swiss law does not recognise the concept of civil penalties to compensate the state for damage done to it.

Swiss competent jurisdictions can confiscate from the offender or, under certain conditions, from a third party the direct proceeds of a money laundering offence, as well as their replacement values if the paper trail can be established. If a confiscation is not possible, they can order the offender or third party to a compensation claim of the same amount.

The offender can also be ordered to pay the procedural costs and the plaintiff's costs incurred in relation to the criminal proceeding.

The Swiss Supreme Court (SSC) admitted that the victim of a predicate offence could claim civil damages against an offender convicted of laundering assets stemming from the predicate offence, even if the offender is not the perpetrator of the predicate offence. The civil damages can be claimed within the criminal proceeding conducted against the offender or in a separate civil proceeding. If a competent jurisdiction – whether criminal or civil, and whether foreign or Swiss – awards civil damages, the victim can request from the competent Swiss criminal jurisdiction the allocation of the confiscated assets or of the compensation claim.

IS ASSET FORFEITURE POSSIBLE UNDER THE MONEY LAUNDERING LAWS? IS IT PART OF THE CRIMINAL PROSECUTION? WHAT PROPERTY IS SUBJECT TO FORFEITURE?

Direct proceeds of a money laundering offence, and their replacement values if a paper trail can be established, can be confiscated from the offender or, under certain conditions, from a third party who benefited from them.

If the direct proceeds of the money laundering offence or their replacement value cannot be confiscated, a compensation claim of the same amount can be pronounced against the offender or, in certain conditions, against a third party.

The competent criminal authorities can freeze assets owned by the offender or by a third party involved in the offence at the beginning or during the investigative phase when there are sufficient charges against the offender, and confiscation of the assets or a compensation claim can be envisaged at the end of the proceeding.

Assets owned by the offender can be frozen by the same authorities at the beginning or during the investigative phase to serve as security for future orders to pay procedural costs, criminal monetary penalties, fines or plaintiff's costs.

Freezing orders and final measures such as confiscation or compensation claims and orders to pay criminal monetary penalties, fines or plaintiff's costs can only target the assets to which the accused or an involved third party have ownership rights, including limited ownership rights such as pledges or mortgages.

IS CIVIL OR NON-CONVICTION-BASED ASSET FORFEITURE PERMITTED UNDER THE MONEY LAUNDERING LAWS? WHAT PROPERTY IS SUBJECT TO FORFEITURE?

Swiss law does not have, as such, the procedures of civil asset forfeiture as envisaged under US law, or worldwide freezing orders or unexplained wealth orders as envisaged under UK law; however, a victim of a predicate offence can claim civil damages, notably in a criminal or civil proceeding against the money laundering offender.

In criminal proceedings, a victim who participates as the plaintiff can obtain the allocation of the confiscated assets or the compensation claim pronounced against the offender or, under certain conditions, a third party who benefited from the proceeds of the money laundering offence. To protect the assets, the victim can request from the competent criminal authority a freezing order on any assets of the offender or the involved third party. The confiscation and compensation claim, as well as the interim freezing of assets, are *in rem* measures that can be pronounced during a criminal proceeding independently of the prosecution of an offender.

If the victim decides to initiate a civil proceeding against the offender, it can obtain before, in parallel or after a final and enforceable civil judgment, the civil attachment of any assets of the civil defendant under the conditions provided in the Federal Debt Enforcement and Bankruptcy Act or the Swiss Civil Procedural Code.

Freezing orders (civil attachment) can only target the assets on which the offender or an involved third party (the civil defendant) has ownership rights, including limited ownership rights such as pledges or mortgages.

ANTI-MONEY LAUNDERING

WHICH LAWS OR REGULATIONS IN YOUR JURISDICTION IMPOSE AML COMPLIANCE REQUIREMENTS ON FINANCIAL INSTITUTIONS AND OTHER BUSINESSES?

The key anti-money laundering (AML) regulations are the Anti-Money Laundering Act (AMLA) and its implementing ordinance (the Anti-Money Laundering Ordinance (AMLO)), the Anti-Money Laundering Ordinance of the Swiss Financial Market Supervisory Authority (AMLO-FINMA) and the Swiss Financial Market Supervisory Authority (FINMA) circulars, which are intended to establish legal standards with a wide scope.

In addition, AML principles are supplemented by private standards, in particular the Due Diligence Agreement of the Swiss Banking Association (SBA),^[7] which applies to banks, as well as the internal regulations of the self-regulatory organisations with which most financial intermediaries not supervised by FINMA are obliged to affiliate.

For historical reasons, criminal law also plays a role in the AML system: on one hand, the SCC criminalises the failure to identify the beneficial owner of a relationship or of a transaction; on the other hand, the AMLA and the Financial Market Supervision Act provide for administrative criminal law sanctions to penalise violations of the duty to report well-founded suspicions and obligations to obtain an authorisation from FINMA or the competent supervising body.

WHAT TYPES OF INSTITUTIONS ARE SUBJECT TO THE AML RULES?

The AMLA applies to all financial intermediaries described under its Article 2. In addition to the financial institutions listed in Article 2(2) of the AMLA (e.g., banks, portfolio managers and trustees, fund management companies, investment companies with variable capital, limited partnerships for collective investment and investment companies with fixed capital, insurance institutions, securities firms and casinos), the AMLA also generally applies to persons who on a professional basis accept or hold deposit assets belonging to others or who assist in the investment or transfer of such assets.^[8] Article 2(3) of the AMLA lists some of the relevant activities, which include credit and payment transactions.

The AMLA mainly covers activities in the financial sector; however, its regulations can also apply to individuals and entities that primarily provide services in other sectors, if they also perform activities as financial intermediaries. For example, an attorney who provides

financial services to clients or advises outside their typical activity is considered a financial intermediary under Article 2(3).

Since 2014, traders (i.e., individuals or legal entities who professionally trade in goods and receive cash (banknotes or coins) in payment) are also subject to the AML regulations^[9] and to AML duties when certain thresholds or conditions are met.^[10]

A draft bill of August 2023 foresees the extension the AMLA's application to advisers (i.e., professionals performing consultancy as well as activities in the financial industry) who provide legal or accounting advice relating to the sale or purchase of real estate.^[11] This extended scope will cover lawyers' advice in those areas, unless the advice is provided in connection with a proceeding.

MUST PAYMENT SERVICES AND MONEY TRANSMITTERS BE LICENSED IN YOUR JURISDICTION? ARE PAYMENT SERVICES AND MONEY TRANSMITTERS SUBJECT TO THE AML RULES AND COMPLIANCE REQUIREMENTS?

A distinction must be made between payment systems (i.e., an entity that clears and settles payment obligations based on uniform rules and procedures) and services in the field of payment traffic.

Regarding payment systems, the AMLA applies if the entity requires a licence from FINMA under Article 4 (2) of the Financial Market Infrastructure Act (FinMIA). This is the case only if it is necessary for the proper functioning of the financial market or the protection of financial market participants and if the payment system is not operated by a bank.^[12]

Regarding payment traffic services, persons who provide services relating to payment transactions, in particular by carrying out electronic transfers on behalf of other persons, or who issue or manage means of payment such as credit cards and travellers' cheques, are subject to the AML regulations.^[13]

Article 4(2) of AMLO lists four types of services in the payment traffic area:

- the execution of payment orders;
- the support of the transfer of virtual currencies;
- the issuance or management of means of payment; and
- the transmission of funds or securities.

This list is not comprehensive.

In a decision from 2020,^[14] the SSC clarified the scope of persons subject to Article (3)(b) of the AMLA by stressing that 'payment traffic' should be understood as all payment transactions by which means of payment are transmitted from sender to recipient. In this case, the possibility offered by a telephone company to its customers to pay for public transport tickets by sending an SMS – the customer then receiving the bill for these charges and for the communication costs – was considered a payment traffic service.

ARE DIGITAL ASSETS SUBJECT TO THE AML RULES AND COMPLIANCE REQUIREMENTS?

The Swiss laws regulating AML are based on the concept of 'assets',^[15] which is a broad concept, covering all assets and pecuniary benefits that have an economic value. The concept includes money – physical, scriptural or electronic – chattel and real estate,

receivables, securities, precious stones and metals, and other pecuniary advantages that can be estimated or quantified.

It is commonly accepted that AML regulations apply to digital assets, although no Federal Court decision has yet been made in this regard. According to the Federal Department of Finance, the AMLA applies to the activity of financial intermediaries in connection with cryptoassets. Financial intermediaries that hold cryptocurrencies for others or assist in the transfer of cryptocurrencies are therefore subject to the same obligations as if the currency used was a fiat currency, such as the Swiss franc. In August 2019, FINMA issued a communication in this regard concerning payment transactions on the blockchain.

WHAT ARE THE SPECIFIC AML COMPLIANCE REQUIREMENTS FOR COVERED INSTITUTIONS?

Financial intermediaries that are subject to AML regulations must:

- verify the identity of the customer based on a document of evidentiary value;
- identify and verify the identity of the beneficial owner;
- renew the verification of identity or the identification of the customer and the beneficial owner when, during the course of the business relationship, doubts arise regarding the identity of the contracting party or the beneficial owner;
- identify the object and purpose of the business relationship desired by the contracting party and, if doubts arise (in particular regarding the possible criminal origin of the assets) clarify the economic background of the transaction;
- draw up and keep appropriate records to document the verifications carried out; and
- periodically check that the required documents are up to date and update them if necessary.^[16]

In addition to these obligations, financial intermediaries must also report well-founded suspicions of money laundering to the Money Laundering Reporting Office Switzerland (MROS).

Finally, the AMLA imposes a series of organisational obligations (training and personnel control) on financial intermediaries that must be affiliated with a self-regulatory organisation.

ARE THERE DIFFERENT AML COMPLIANCE REQUIREMENTS FOR DIFFERENT TYPES OF INSTITUTIONS?

No, the AML compliance requirements (e.g., identification of the contracting party and the beneficial owner, special due diligence obligations in the case of increased risks, reporting obligations and internal organisation) generally apply to all financial intermediaries subject to the law regardless of their type. Under Swiss law, and in contrast to other legal systems, it can be assumed that compliance requirements do not differ depending on the type of financial intermediary, but rather depending on the risks associated with the financial transaction or the business relationship at hand.

The thresholds for triggering certain obligations imposed by the AMLA may vary when dealing with a commodity trader.^[17] The obligations regarding the identity of the customer, the identity of the beneficial owner and the duty to keep records^[18] only have to be followed if the dealer receives more than 100,000 Swiss francs in cash as payment.^[19] Further, traders only need to clarify the background and purpose of a transaction if the transaction appears

unusual, unless the legality of the transaction is clear, or if there are indications that assets have been derived from a crime or a qualified tax offence as defined in Article 305 *bis*(1 *bis*) of the SCC.^[20] The duties of securities dealers are set out in Articles 17 to 21 of AMLA.

WHICH GOVERNMENT AUTHORITIES ARE RESPONSIBLE FOR THE EXAMINATION AND ENFORCEMENT OF COMPLIANCE WITH THE AML RULES?

In Switzerland, the compliance of financial intermediaries with AML legislation is monitored by FINMA, the Swiss Federal Gaming Commission (FGC), supervisory organisations (SOs) and self-regulatory organisations (SROs), depending on the type of financial intermediary.

FINMA monitors compliance with AML regulations by financial service providers, which are submitted to its direct supervision, namely banks, securities firms, insurers and institutions under the Collective Investment Schemes Act. It also indirectly monitors the financial intermediaries subject to supervision by SROs and SOs; only FINMA can take enforcement measures against them.

The FGC is responsible for ensuring that gambling houses comply with their money laundering obligations. Enforcement measures can range from intervention in the operation to the withdrawal of concessions, including, if necessary, the dissolution of the company.

Since 1 January 2020, independent portfolio managers and trustees must be supervised by an SO authorised by FINMA. FINMA has the authority in connection with the indirect supervision of these financial institutions to enact measures and sanctions to restore compliance. FINMA supervises the licensed SOs on an ongoing basis.

Other financial intermediaries, such as individuals and companies in the para-banking sector (e.g., credit card companies, payment service providers and leasing companies) must be affiliated to an SRO authorised and supervised by FINMA. SROs define the due diligence requirements under the AMLA in the form of regulations and monitor whether affiliated financial intermediaries comply with them. SRO regulations also define how SROs monitor compliance with these requirements and how breaches are penalised (reprimand, contractual penalty or exclusion).

ARE THERE REQUIREMENTS TO MONITOR AND REPORT SUSPICIOUS ACTIVITY? WHAT ARE THE FACTORS THAT TRIGGER THE REQUIREMENT TO REPORT SUSPICIOUS ACTIVITY? WHAT IS THE PROCESS FOR REPORTING SUSPICIOUS ACTIVITY?

Financial intermediaries must clarify the economic background and the purpose of a transaction or of a business relationship, particularly if (1) the transaction or business relationship appears unusual, unless its legality is clear, or if (2) there are indications that the assets are the proceeds of a felony or an aggravated tax misdemeanour.^[21]

Financial intermediaries have an obligation to report, as soon as they know or presume, based on well-founded suspicions (i.e., on reasonable grounds), that the assets involved in the business relationship (1) are connected with the offences of participation in or support of a criminal or terrorist organisation or money laundering, (2) originate from a crime or a qualified tax offence or (3) are subject to the power of disposition of a criminal or terrorist organisation or serve the financing of terrorism.^[22]

A suspicion is well-founded when the financial intermediary has specific evidence or several indications that one of the above provisions may be met for the assets involved in the business relationship, and this suspicion cannot be dispelled on the basis of additional clarifications under Article 6 of AMLA.

Financial intermediaries must report well-founded suspicions to the MROS. The report must not be disclosed to the client or to third parties. Further, a blocking duty arises only when the MROS notifies the financial intermediary that it has passed on the information to the competent criminal authority. If this is the case, the block is maintained until the receipt of a decision from the criminal prosecution authority up to a maximum of five working days, after which extensions of blocking and confidentiality measures can be ordered by the prosecution authority.

Under certain conditions, financial intermediaries have the right to terminate a reported business relationship if the MROS does not notify them within 40 working days of a report having been made that the reported information will be forwarded to a prosecution authority.

ARE THERE CONFIDENTIALITY REQUIREMENTS ASSOCIATED WITH THE REPORTING OF SUSPICIOUS ACTIVITY? WHAT ARE THE REQUIREMENTS? WHO DO THE CONFIDENTIALITY REQUIREMENTS APPLY TO? ARE THERE PENALTIES FOR VIOLATIONS OF THE CONFIDENTIALITY REQUIREMENTS?

Financial intermediaries are prohibited from informing the persons concerned or third parties that it has filed a report of well-founded suspicions.^[23]

The sharing of information between financial intermediaries is permitted in certain cases, as such sharing may be necessary to coordinate communication and ensure the effectiveness of asset freezes.

There is no specific criminal penalty for violating the prohibition to inform; however, if the violation allows the client to arrange and action the transfer of the assets elsewhere, an offence of money laundering may come into consideration.

The competent criminal authority may also impose a ban on informing to a financial intermediary under the threat of a criminal sanction. This constitutes a contravention for insubordination to an authority decision that is punishable with a fine of up to 10,000 Swiss francs.

ARE THERE REQUIREMENTS FOR REPORTING LARGE CURRENCY TRANSACTIONS? WHO MUST FILE THE REPORTS, AND WHAT IS THE THRESHOLD?

There is no specific requirement for reporting large currency transactions; however, in the case of business relationships or transactions involving increased risks, financial intermediaries must undertake additional clarifications to a degree proportionate to the circumstances.

In this respect, financial intermediaries set criteria for the detection of transactions with increased risks. The AMLO-FINMA provides, by way of example, several situations that indicate the existence of an increased risk in the relationship with a client or in the transactions carried out. The situations include significant foreign exchange transactions that are not booked to a client's account.

Furthermore, financial intermediaries must verify the identity of the contracting party when one or more currency transactions that appear to be linked to one another reach or exceed 5,000 Swiss francs.^[24]

Similarly, as of 1 January 2021, financial intermediaries must verify the identity of the contracting party when a virtual currency transaction or several virtual currency transactions that appear to be linked to each other reach or exceed the sum of 1,000 Swiss francs,

provided that these transactions do not constitute a transfer of funds or assets and that no lasting business relationship is linked to these transactions. This new obligation mainly concerns the exchange of money at virtual currency ATMs.

ARE THERE REPORTING REQUIREMENTS FOR CROSS-BORDER TRANSACTIONS? WHO IS SUBJECT TO THE REQUIREMENTS AND WHAT MUST BE REPORTED?

There is no specific requirement for reporting cross-border transactions; however, in the case of business relationships or transactions involving increased risks, financial intermediaries must undertake additional clarifications to a degree proportionate to the circumstances.

In this respect, financial intermediaries set criteria for the detection of transactions with increased risks. The AMLO-FINMA provides, for example, several situations that indicate the existence of an increased risk in the relationship with a client or in the transactions carried out. The situations include the nature and location of the activity of the contracting party or the beneficial owner of the assets, in particular if an activity is carried out in a country that the Financial Action Task Force (FATF) considers to be high-risk or non-cooperative, as well as the country of origin or destination of frequent payments, in particular for payments made to or from a country that the FATF considers to be high-risk or non-cooperative. Furthermore, repeated transfers of large amounts abroad with instructions to pay the beneficiary in cash are indicative of money laundering and require increased vigilance by the financial intermediary.

IS THERE A FINANCIAL INTELLIGENCE UNIT OR OTHER GOVERNMENT AGENCY RESPONSIBLE FOR ANALYSING THE INFORMATION REPORTED UNDER THE AML RULES?

The MROS is the Swiss financial intelligence unit (i.e., the government agency responsible for analysing information reported under AML regulations). Among its various functions, it receives and analyses suspicious activity reports and, where it considers there to be well-founded suspicions, forwards them to the competent criminal authorities for follow-up action. It also cooperates with foreign financial intelligence units under certain conditions.

WHAT ARE THE PENALTIES FOR FAILING TO COMPLY WITH YOUR JURISDICTION'S AML RULES, AND ARE THEY CIVIL OR CRIMINAL?

CRIMINAL SANCTIONS

The failure to ascertain the identity of the beneficial owner is a criminal offence under the SCC. A custodial sentence of up to one year or a monetary penalty may be imposed on an individual within a financial intermediary. Corporate entities acting as financial intermediaries can only be sanctioned for such behaviour if it is not possible to attribute the failure to ascertain the identity of the beneficial owner to any specific natural person within the corporate entity owing to inadequate organisation.

Violations of the duty to report suspicious activity or of the obligation to obtain authorisation from FINMA or the competent supervising body are criminal administrative law offences. Individuals within a financial intermediary that fails to comply with the duty to report suspicious activity may be fined up to 500,000 Swiss francs if they have acted wilfully, and up to 150,000 Swiss francs if they have acted negligently. Individuals within a financial intermediary who intentionally allow the latter to carry out an activity without authorisation from FINMA or the competent supervising body are liable for a custodial sentence of up to three years or a monetary penalty of up to 250,000 Swiss francs if they acted negligently.

As of 1 January 2023, traders, as defined in Article 2(1)(b) of the AMLA (i.e., individuals or legal entities who professionally trade in goods and receive cash in payment), who wilfully violate the duty under Article 15 of the AMLA to appoint an audit firm are liable to a fine of up to 100,000 Swiss francs and up to 10,000 Swiss francs if they acted negligently. Corporate entities acting as financial intermediaries can be found to have violated these criminal administrative provisions, instead of individuals, if the investigation would make it necessary to take measures that are disproportionate to the penalty incurred and the relevant fine does not exceed 5,000 Swiss francs.

In principle, criminal and criminal administrative offences applicable to financial intermediaries can also be applied to the individuals within the financial intermediaries who are responsible for the obligation of which the breach constituted the offence. This could include relationship managers and members of upper management, including the compliance or legal personnel involved in the AML controls.

ADMINISTRATIVE SANCTIONS

Individuals who exercise a management function, as well as entities, that are financial intermediaries themselves may face restrictions in the carrying out of their regular business activities if they are found to be in violation of AML regulations. Serious offences may result in the individuals being disqualified from holding a management position for up to five years.

Such violations may also result in various measures being taken by FINMA against financial intermediaries, including the revocation of their licence to carry out their activities, the publication of decisions (naming and shaming) and the forfeiture of the illegal profits made.^[25]

PRIVATE LAW SANCTIONS

Private law sanctions are also considered for violations of the SRO AML regulations.

In the event of a breach of the SBA Due Diligence Agreement, the signatory banks can be ordered to pay the SBA a contractual fine of up to 10 million Swiss francs.^[26]

Similarly, SROs can impose sanctions on their members (e.g., reprimand, contractual penalty and exclusion). The exclusion of a member will have the effect of it no longer being able to exercise its activity as a financial intermediary until it is again affiliated with an SRO.

A draft bill of August 2023 foresees the inclusion in the AMLA of sanctions taken by SROs on their respective members, notably a monetary penalty. The sanctions would then be public in nature.

From a civil point of view, a violation of the offence criminalising the failure to ascertain the identity of the beneficial owner or of the AMLA provisions are not grounds for civil (tort) liability of the offender, as these provisions only protect collective interests.

Finally, individuals who committed violations of AML regulations or SRO AML regulations might be sanctioned by their employer, which may include immediate termination of employment for serious violations.

WHAT IS THE STATUTE OF LIMITATIONS FOR VIOLATIONS OF THE AML RULES?

Regarding the criminal offence of failure to ascertain the identity of the beneficial owner, the statute of limitations is seven years. As the offence is a continuing offence, the statute of limitations runs from the end of the business relationship or from the time when the financial

intermediary remediates the unlawful situation by correctly identifying the beneficial owner. The expiry date of the limitation period no longer applies if a judgment is issued by a court of first instance before the expiry of the limitation period.

Regarding violation of the duty to report suspicious activities, the statute of limitations is seven years. As the offence is a continuing offence, the statute of limitations runs from the time when the financial intermediary remediates the unlawful situation by duly reporting the suspicious activity to the MROS. The expiry date of the limitation period no longer applies if a judgment is issued by a court of first instance before the expiry of the limitation period.

Regarding the exercise of an activity without authorisation or affiliation, the statute of limitations is seven years. If the offender carries out the criminal activity at different times, the limitation period begins to run on the day on which they carried out the last activity. Alternatively, unauthorised activity may also be considered a continuing offence, in which case the statute of limitations begins on the day on which the criminal conduct ceases.

Regarding the violation for failure by a trader to appoint an audit firm, the statute of limitation is seven years. As the offence may be considered a continuing offence, the statute of limitations runs from the time when the trader remediates the unlawful situation by appointing an audit firm.

Regarding corporate entities acting as financial intermediaries, where the conditions for the application of provisions to corporate entities are met, the same statute of limitations indicated above for individuals applies.

DOES YOUR JURISDICTION HAVE A BENEFICIAL OWNERSHIP REGISTRY OR AN ENTITY OR OFFICE THAT COLLECTS INFORMATION ON THE BENEFICIAL OWNERSHIP OF LEGAL ENTITIES?

There is no central register of beneficial owners of legal entities in Switzerland. Its introduction was discussed as part of the revision of the Code of Obligations (CO) but abandoned as excessive and too expensive; however, two things should be noted:

- Financial intermediaries subject to the AMLA must, 'with the due diligence required in the circumstances',^[27] identify the beneficial owner and keep a record of it. Financial intermediaries must keep records of transactions carried out and of clarifications required under the AMLA that are detailed enough to allow other specially qualified persons to make a reliable assessment of the transactions and business relationships and of compliance with the AMLA provisions. The AMLA further states that financial intermediaries must retain the records in such a manner as to be able to respond within a reasonable time to any requests made by the prosecution authorities for information or for the seizure of assets.^[28]
- The CO obliges shareholders of unlisted companies, whose shareholding reaches or exceeds the threshold of 25 per cent of the capital or votes, to disclose the identity of the beneficial owners.^[29] This provision is part of a broader transparency system, which also includes the rules on the disclosure of listed companies in the FinMIA, well as those on the identification of beneficial owners in AMLA. This duty of disclosure on the part of shareholders is coupled with an obligation on the part of the board of directors to enter the name and address of the person concerned in a private list of beneficial owners.

Although these obligations to announce and keep a list of beneficial owners are included in private law codifications, they pursue a public law objective: to prevent the use of legal entities for money laundering or terrorist financing purposes. These provisions must make it possible to obtain satisfactory, accurate and up-to-date information on the beneficial owners and control of legal entities.

According to the draft bill of May 2024, subject to certain exceptions, legal entities under Swiss private law and certain foreign entities with a special link to Switzerland would be obliged to identify the natural persons who are to be considered their beneficial owners.^[30] A 'register of transparency' would be created and managed by the Federal Office of Justice.

The draft bill defines the beneficial owner as any natural person who ultimately controls the company by holding, directly or indirectly, alone or in concert with third parties, at least 25 per cent of the capital or voting rights or who otherwise exercises control over it. The above-mentioned entities would be obliged to announce their identified beneficial owners in the register of transparency. The information would be recorded electronically in the register and would be accessible by the authorities and, for the purposes of combating money laundering, by financial intermediaries, advisers and lawyers subject to AMLA obligations. Persons who fall within the scope of relevant entities who fail to comply with these obligations of identification and announcement may be fined up to 500,000 Swiss francs.

ENDNOTES

^[1] [Swiss Criminal Code](#) (SCC), Article 10(2).

^[2] Id., Article 305 *bis*(1 *bis*).

^[3] Id.

^[4] Id., Article 10(2).

^[5] Id., Article 305 *bis*(3).

^[6] Id., Article 102.

^[7] [Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence](#) (CDB 20)

^[8] [Anti-Money Laundering Act](#) (AMLA), Article 2(3).

^[9] Id., Article 2(1)(b).

^[10] Id., Article 8a.

^[11] Press release, '[Federal Council initiates consultation on strengthening the anti-money laundering framework](#)', Federal Council (30 Aug 2023).

^[12] [Financial Market Infrastructure Act](#), Article 4(2).

^[13] AMLA, Article 2(3)(b); [Anti-Money Laundering Ordinance](#), Article 4(1), Paragraphs a and b.

^[14] Swiss Supreme Court, Decision No. 2C_448/2018 (6 June 2018).

^[15] AMLA, Article 2(3).

- [16] The frequency, extent and method of verification and updating depend on the risk represented by the co-contractor.
- [17] AMLA, Article 2(1)(b).
- [18] Id., Article 7.
- [19] Id., Article 8a(1).
- [20] Id., Article 8a(2).
- [21] Id., Article 6(2).
- [22] Id., Article 9.
- [23] Id., Article 10a.
- [24] [Anti-Money Laundering Ordinance of the Swiss Financial Market Supervisory Authority](#), Article 5(1)(a).
- [25] [Financial Market Supervision Act](#), Article 29 et seq.
- [26] CDB 20, Article 64.
- [27] AMLA, Article 4.
- [28] Id., Article 7(2).
- [29] [Code of Obligations](#), Article 697j.
- [30] Press release, '[Federal Council adopts dispatch on strengthening anti-money laundering framework](#)', Federal Council (22 May 2024).



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