# Money Laundering Act (AMLA)

## Draft amendments following the FATF report

### Overview

In June 2019, the Federal Council adopted its message on the draft of a major amendment to the Anti-Money Laundering Act (**AMLA**),[1] which should enter into force in 2021, after consideration by the Federal Parliament Chambers. The June 2018 draft has been significantly revised. The draft essentially provides for a new category of taxable persons, which will extend to a wide range of agents, including multi-family offices, trustees and lawyers. The amendment also provides for new obligations to verify the identity of the beneficial owner and to periodically update the KYC data.

These amendments will require adaptations of internal guidelines of the reporting entities, an update and requalification of the files (whether or not subject to the AMLA) as well as training of the persons in charge of these new rules.

### The weaknesses of the current Swiss system according to the FATF

At the end of 2016, the FATF published the 4th evaluation report on Switzerland's measures to combat money laundering and terrorist financing. Rated as generally good, this system is criticized - particularly following the revelations of the Panama Papers - because of the following weaknesses: [2]

- The risk of money laundering linked to the transfer of the proceeds of offences committed abroad;
- Lack of diligence in updating the risk classification of clients;
- Lack of control and sanction of the obligation to communicate;
- Insufficient sanction policy and lack of convergence between FINMA and self-regulatory organisations;
- The limits of Swiss mutual legal assistance due to the maintenance of the confidentiality of requests addressed to FINMA or the Money Laundering Reporting Office (MROS).

### The main changes to come

The Federal Council has instructed the Federal Department of Finance (FDF), on the basis of the FATF's recommendations, to revise the AMLA. The draft submitted to Parliament **includes the following new features**:

#### a) The subjugation of advisors

At present, only financial intermediaries and traders are subject to the AMLA.

The draft provides for the introduction of a third category, the "advisors" (Art. 2 para. 1 letter c *new*). These are any persons or entities which, without being financial intermediaries or traders, constitute, manage and/or administer in a professional capacity (i) foreign companies, (ii) Swiss domiciliary companies or (iii) trusts, as well as those which organise contributions, purchase or sell or make available premises or an address of such structures, or which act on behalf of another person.

These professional advisors will be subject to the following reduced due diligence obligations:

- Verification of the identity of the contracting partner (Art. 3 para. 1 AMLA);
- Identification of the beneficial owner (Art. 4 (1) and (2) (a) and (b) AMLA);
- Preparation and storage of documents (Art. 7 AMLA).

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1 Message of 26 June 2019 of the Federal Council on the amendment of the Money Laundering, Swiss Federal Gazette 2019 p. 5239 ff

2 FATF (2016), *Measures to Combat Money Laundering and Terrorist Financing - Switzerland*, Report of the 4th Round of Mutual Evaluations, FATF, Paris 2016, www.fatf-gafi.org/fr/publications/evaluationsmutuelles/documents/mer-suisse-2016.html (last review on 09/17/2019), p. 3 ff

- Clarification of the economic background and purpose of the activity desired by the third party.

For example, an accounting firm drafting a **deed of trust** for a client will thus be subject to and must fulfil the obligations set out above, to which will also be added, as for any advisor under the meaning of Art. 2 para. 1 letter c new AMLA;

- The implementation and proof of sufficient internal organisation measures (new Art. 8d) to comply with the new law;
- The obligation to mandate an audit firm to verify the aforementioned obligations (*new* Art. 15);
- The obligation to report to MROS *well-founded suspicions* (Art. 9 para. 1$^{ter}$ AMLA) of a link between the proposed transaction and (i) a criminal organisation (Art. 260$^{ter}$ ch. 1 Swiss Criminal Code), (ii) money laundering (Art. 305$^{bis}$ SCC), (iii) a qualified tax offence (Art. 305$^{bis}$ ch. 1$^{bis}$ SCC), (iv) a power of disposal of a criminal organisation over the assets concerned or (v) terrorist financing (Art. 260$^{quies}$ para. 1 SCC).

As a reminder, and in the opinion of the Money Laundering Reporting Office-Switzerland (MROS) and of the federal courts, suspicions are "well-founded" within the meaning of Art. 9 AMLA when the specific clarifications resulting from a simple doubt do not make it possible to rule out the suspicion that the assets are linked to an offence.[3]

As examples justifying well-founded suspicions, the Federal Criminal Court recently referred to the urgency of a financial transaction, the impossibility of contacting the client, the latter's refusal to provide the information necessary to clarify the economic background of the transaction or business relationship, or the media's reference to the opening of criminal proceedings concerning a crime against the client or the beneficial owner of the assets involved in the business relationship.[4]

Proof of the fulfilment of the advisor's obligations must be included in the AMLA file of each client concerned.

### b) Lowering the threshold for trade in precious metals and stones

The AMLA threshold for trade in precious metals and stones will be lowered from CHF 100,000 to CHF 15,000. Thus, professional traders who do not use a financial intermediary for a cash payment exceeding CHF 15,000 will be subject to the AMLA.

### c) Verification of the identity of the beneficial owner

Art. 4 AMLA is amended to create an explicit legal basis for a systematic material verification of the beneficial owner, rather than a simple clarification.

### d) Updating customer data

The new paragraph 1$^{bis}$ of Art. 7 AMLA will oblige financial intermediaries to ensure that the documents relating to the client are current and to update them. In addition, there will be no limitation on the verification of the identity of the contracting partner or beneficial owner. The financial intermediary will therefore be entitled to review the client's profile more generally (e. g. the purpose and purpose of the business relationship).

### e) Adaptation of the communication system to MROS

In order to clarify the legal uncertainty between the right and the duty to disclose, the jurisprudential interpretation of the notion of "well-founded suspicion" will be included in the AML Ordinance. As a result, the 20-day analysis period for communications under Art. 9 AMLA will be abolished. In return, financial intermediaries will have the right to terminate a business relationship that has been reported to MROS and for which they have not received a response within 40 days (*new* article 9b).

[3] MROS Report 2016, p. 52; MROS Report 2007, p. 3; see also Federal Tribunal ("FT"), decision 4A_313/2008 of 27 November 2008, rec. 4.2.2.2.3; Federal Criminal Court ("FPC"), judgment SK.2018.32 of 23 March 2019, rec. 4.5.1

[4] FPC, judgment SK.2018.47 of 25 April 2019, rec. 5.5.1

### f) Other changes

A legal basis will allow self-regulatory bodies to **exchange information** with MROS as FINMA and criminal prosecution authorities are currently doing.

The MROS may transmit information received by a foreign counterpart, subject to the latter's authorisation, to the supervisory authorities referred to in Art. 29 para. 1 AMLA, self-regulatory organisations and supervisory bodies. Also, a new provision obliges criminal prosecution authorities to comply with the conditions for the use of information defined by MROS (which in turn are defined by the foreign authority).

Persons concerned by a suspicious communication to MROS will only be able to exercise their right of access to the suspicious communication information with MROS exclusively. Financial intermediaries and advisors will no longer be required to provide information in the context of the exercise of this right.

Financial intermediaries directly subject to FINMA ("DSFI") will have a period of one year to join a self-regulatory organisation (SRO), the status of DSFI being abolished with the entry into force of the FinIA on 1st January 2020.

In accordance with Art. 10a AMLA, a subsidiary company in Switzerland will have the possibility to inform its parent company abroad when certain conditions are met, in particular the parent company must comply with the prohibition to inform stipulated in Art. 10a para. 1 AMLA.

Finally, associations collecting or distributing funds abroad for charitable, religious, cultural, educational or social purposes will have to register in the commercial register (*new* Art. 61 para. 2 ch. 3 of the Civil Code) and will have to maintain a list of members under penalty of criminal sanctions (Art. 327 SCC).

### The end of professional secrecy?

The message of the preliminary draft amendments to the AMLA of June 2018 provided for an unrestricted disclosure obligation on advisors, including for lawyers and notaries. This would have meant that the preparation of a memorandum of incorporation of a foreign company, for example, which is part of the lawyer's typical activity, would have been an activity subject to the AMLA.

The draft now provides (*new* Art. 9 para. 2 AMLA) that lawyers and notaries are not subject to the obligation to communicate if they are bound by professional secrecy under Art. 321 SCC or if they do not carry out a financial transaction in the name and on behalf of a client in the course of their activity. However, this exception will not apply to compliance with due diligence obligations, to which advisors will be bound in the future.

Our specialist lawyers are at your disposal for any special requests you may have in relation to this Newsletter.

**Nicolas Killen, LL.M.**
Managing partner
Banking law
nicolas. killen@borel-barbey.h

**Pierre Bydzovsky, LL.M., CAS MAP**
Partner
Litigation, criminal law
pierre.bydzovsky@borel-barbey.ch

**Michèle Wassmer**
Partner
Banking law
michele.wassmer@borel-barbey.ch

Borel & Barbey
2 rue de Jargonnant
CH - 1207 Geneva

T +41 22 707 18 00
F +41 22 707 18 11
www.borel-barbey.ch