GIR KNOW HOW ANTI-MONEY LAUNDERING

Switzerland

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Money laundering

1. What laws in your jurisdiction prohibit money laundering?

The offence of money laundering is punishable under article 305-bis of the Swiss Criminal Code.

2. 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:

- The existence of an asset, that is, 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.
- The existence of a predicate offence, which must meet the definition of a felony within the meaning of article 10(2) of the Swiss Criminal Code (SCC) (ie, an offence punishable by a custodial sentence of more than three years). It may also be an aggravated tax misdemeanour as defined in article 305-bis (1-bis) SCC.
- The asset must be 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.
- The existence of an act aimed at frustrating the forfeiture of assets. 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, for example, cash withdrawals, the exchange of money or the transfer of money from one account to another when it implies the use of numbered accounts, changes in the holder or beneficial owner of the accounts, etc.

Cumulatively to the above objective requirements, the competent authorities also have to prove the intention (ie, knowledge and will) of the offender in relation to all the above-mentioned objective requirements. Dolus eventualis is also covered, meaning that the offender also acts intentionally if he regards 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 objective and subjective requirements, the competent criminal authorities must prove either 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 (ie, at least 100,000 Swiss francs) or substantial profit (ie, at least 10,000 francs) through commercial money laundering.

This list of aggravated cases is not comprehensive.

3. What are the predicate offences to money laundering? Do they include foreign crimes and tax offences?

Article 305-bis of the SCC states that the assets must originate from a felony or aggravated tax misdemeanour.

Felony is described within the meaning of article 10(2) SCC (ie, an offence punishable by a custodial sentence of more than three years). The following economic offences are examples of felonies within

the above-mentioned meaning: misappropriation, theft, fraud, aggravated criminal mismanagement, bankruptcy and debt collection felonies, participation or support to a criminal or terrorist organisation, active and passive bribery of Swiss or foreign public officials.

Noticeably, active and passive bribery of private individuals is not a felony under Swiss law.

Since 1 January 2016, article 305-bis SCC includes aggravated tax misdemeanour as a predicate offence 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 francs. This implies that the taxpayer must have abused the tax authority by using a forgery in the documents.

The predicate felony or aggravated tax misdemeanour may have been committed abroad, at the condition that (i) the act is punishable under the law of the place of commission and (ii) would be a felony or aggravated tax misdemeanour under Swiss law if it had taken place in Switzerland (double criminality requirement; article 305-bis(3) SCC). 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.

4. Is there extraterritorial jurisdiction for violations of your jurisdiction's money laundering laws?

As mentioned above, Switzerland has jurisdiction to prosecute a money-laundering act 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 the offender who carries out money laundering operations from Swiss soil, even if the laundered assets are located abroad.

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

5. Is there corporate criminal liability for money laundering offences, or is liability limited to individuals?

A money laundering offence is also applicable to entities within the meaning of article 102(4) of the SCC (any legal entity under private law or under public law with exception of local authorities, companies, sole proprietorships; together "undertakings").

Such an entity is penalised for money laundering committed within itself in the exercise of commercial activities in accordance with the objects of such undertaking, provided that it has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.

6. Which government authorities are responsible for investigating 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 notably 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 the federal jurisdiction as mentioned above. In practice, cantonal prosecution offices also investigate and prosecute very significant money laundering cases with transnational backgrounds (especially Zurich or Geneva prosecution offices).

7. Which government agencies are responsible for the prosecution of money laundering offences?

See answer to 6.

8. 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, respectively to a seven-year statute of limitation when committed between 1 October 2002 and 31 December 2013 included.

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 this day, there is no leading judgment solving the question as to whether and at which conditions, in the presence of various acts of money laundering committed by the same offender at different times, the limitation period of all these various acts of money laundering could be deemed as beginning on the day on which the final money laundering act was carried out.

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

9. 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, which range depending on the personal and financial circumstances of the offender from 30 francs to 3,000 francs and can therefore reach a maximum of 540,000 francs.

Concerning the aggravated offence of money laundering, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units (ie, maximum of 1,500,000 francs).

For companies convicted of money laundering, article 102 SCC provides for a fine not exceeding 5 million francs. The court assesses the fine in particular in accordance with the seriousness of the offence, the organisational inadequacies and the loss or damage caused, and based on the economic capacity of the entity.

10. Are there civil penalties for violations of the money laundering laws? What are they?

Swiss law does not recognise the concept of civil penalties sought in order to compensate the state for harm done to it.

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

The offender can also be condemned to pay the procedural costs and the costs of the plaintiffs incurred in relation to the criminal proceeding.

Finally, the Swiss Supreme Court (SSC) admitted that the victim of a predicate offence could claim civil damages against an offender condemned for the laundering of the assets stemming from said predicate offence, even if said offender is not the perpetrator of the predicate offence. Such civil damages can be claimed within the criminal proceeding conducted against said offender or in a separate civil proceeding. If civil damages are pronounced by a competent criminal or civil, foreign or Swiss, jurisdiction, the victim can request from the competent Swiss criminal jurisdiction the allocation of assets confiscated or of the compensation claim pronounced.

11. 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, as well as their replacement values as long as the paper trail can be established, can be confiscated in the hand of the offender or even, at certain conditions,in the hand of a third party who benefited of them (an "involved third party").

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 even, in certain conditions,an involved third party.

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

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

Freezing orders and final measures such as confiscation or compensation claim and condemnation to criminal monetary penalties, fines or costs of the plaintiffs, can only target the assets on which the accused, or the involved third party, have ownership rights (including limited ownership rights such as pledges or mortgages).

12. 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 institution of 'civil asset forfeiture' of US law or the institutions of 'worldwide freezing order' or 'unexplained wealth orders' of UK law.

However, a victim of a predicate offence can claim civil damages notably in a criminal or in a civil proceeding against the money laundering offender.

In a criminal proceeding, the victim who participates as the plaintiff can obtain the allocation of the confiscated assets or of a compensation claim pronounced against the offender, as well as, under certain conditions, a third party who benefited from the proceeds of the money laundering offence (an 'involved third party'). To protect such allocation, 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 in order to protect these sanctions, are in rem measures. They can be pronounced within a criminal proceeding independently of the prosecution, respectively of the conviction, of an offender.

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

Such freezing order, respectively civil attachment, can only target the assets on which the offender or an involved third party, respectively the civil defendant, have ownership rights (including limited ownership rights such as pledges, mortgages).

Anti-money laundering

13. Which laws or regulations in your jurisdiction impose anti-money laundering compliance requirements on financial institutions and other businesses?

The key anti-money laundering regulations are the following: the Anti-Money Laundering Act (AMLA) and its implementing ordinance (AMLO), the Anti-Money Laundering Ordinance of the Swiss Financial

Market Supervisory Authority (FINMA) and the FINMA circulars, which are intended to concretise open and undetermined legal standards.

In addition, the principles of anti-money laundering are supplemented by private standards, in particular the Swiss Bankers Association's Due Diligence Agreement, which is applicable to banks, as well as the internal regulations of the self-regulatory organisations to which most financial intermediaries not supervised by the FINMA are obliged to affiliate.

Finally, for historical reasons, criminal law also plays a role in the anti-money laundering system. On the one hand, the Swiss Criminal Code 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 notably the violation of the duty to report well-founded suspicions and the obligation to obtain an authorisation from the FINMA or the competent supervising body.

14. What types of institutions are subject to the AML rules?

AMLA applies to all financial intermediaries as described under article 2 AMLA. In addition to the financial institutions listed in article 2(2) AMLA (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, casinos), the AMLA also generally applies to persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets (article 2(3) AMLA). Article 2(3) AMLA lists some of the relevant activities, such as credit and payment transactions. This list shows that 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 providing financial services to clients or advises outside their typical activity has to be considered as a financial intermediary in the sense of article (3) AMLA.

It should also be noted, that since 2014, traders (ie, individuals or legal entities who professionally trade in goods and receive cash (banknotes or coins) in payment) are also subject to the anti-money laundering regulations (article 2(1) (b) AMLA).

15. 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 (ie, entity that clears and settles payment obligations based on uniform rules and procedures) and services in the field of payment traffic.

Regarding payment systems, AMLA is applicable if they require a license from the Swiss Financial Market Supervisory Authority according to article 4 (2) of the Financial Market Infrastructure Act (FinMIA). This is the case only if this 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 (article 4(2) FinMIA).

Regarding payment traffic services, persons who provide services related 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 travelers' cheques, are subject to the anti-money laundering regulations (article 2(3) (b) AMLA and article 4(1) (a) and (b) of the Anti-Money Laundering Ordinance [AMLO]).

Article 4(2) 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 issuing or management of means of payment; and
- the transmission of funds or securities.

However, this list is not comprehensive. In a decision from 2020 (SSC decision No. 2C_448/2018, 6 June 2018), the SSC clarified the circle of persons subject to article (3) (b) 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 as well as for the communication costs – was considered a service in the area of payment traffic as defined above.

16. Are digital assets subject to the AML rules and compliance requirements?

The Swiss laws regulating anti-money laundering are based on the concept of 'assets' (article 2(3) of AMLA). It is a broad concept, covering all assets and pecuniary benefits that have an economic value. This notion includes money – physical, scriptural or electronic – chattel and real estate, receivables, securities or even precious stones and metals. This also includes other pecuniary advantages, insofar as they can be estimated or quantified.

It is commonly accepted that anti-money laundering 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 is applicable to the activity of financial intermediaries in connection with crypto assets. Financial intermediaries who hold crypto-currencies for others or assist in the transfer of crypto-currencies are therefore subject to the same obligations as if the currency used was a fiat currency, such as the Swiss franc. In August 2019, the Swiss Financial Market Supervisory Authority has also issued a communication along these lines regarding payment transactions on the blockchain.

17. What are the specific AML compliance requirements for covered institutions?

Financial intermediaries subject to anti-money laundering regulations have the following material obligations:

- 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 as to the identity of the contracting party or the beneficial owner. As of 1 January 2023, the revised AMLA will provide for the periodic verification and updating of client data and documents of all business relationships, irrespective of events.
- Identify the object and purpose of the business relationship desired by the contracting party and, when doubts arise, in particular as to the possible criminal origin of the assets, clarify the economic background of the transaction.
- Draw up and keep the appropriate documents to establish the verifications carried out.

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

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

18. Are there different AML compliance requirements for different types of institutions?

No, the anti-money laundering compliance requirements (eg, 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 there is no different compliance depending on the type of financial intermediary, but rather on the risks associated with the financial transaction or the business relationship at hand.

It should be noted that the thresholds for triggering certain obligations imposed by the AMLA may vary when dealing with a commodity trader (article 2(1) (b) AMLA). In this case, the identity of the customer, the identity of the beneficial owner and duty to keep records (article 7 AMLA) only have to be respected if the dealer receives more than 100,000 francs in cash as payment (article 8a (1) AMLA). In addition, traders must clarify the background and purpose of a transaction only if the transaction appears unusual, unless it is clearly legal, or there are indications that assets have been derived from a crime or a qualified tax offence as defined in article 305bis 1-bis (article 8a (2) AMLA). The duties of the securities dealer are set out in articles 17 to 21 AMLA.

19. Which government authorities are responsible for the examination and enforcement of compliance with the AML rules?

In Switzerland, financial intermediaries' compliance with anti-money laundering legislation is monitored by FINMA, the Swiss Federal Gaming Commission (FGC), Supervisory organisations (SO) and Self-regulatory organisations (SRO) depending on the type of financial intermediary.

FINMA monitors compliance with anti-money laundering regulations by financial service providers, which are submitted to its direct supervision: banks, securities firms, insurers and institutions under the Collective Investment Schemes Act. It also indirectly monitors the other financial intermediaries subject to supervision by the SRO and SO; only FINMA can take enforcement measures against them.

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 have to be supervised by a 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 (eg, credit card companies, payment service providers or leasing companies) must be affiliated to an SRO authorised and supervised by FINMA. SROs define the due diligence requirements under AMLA in the form of regulations (SRO 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).

20. 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?

According to article 6 (2) of AMLA, financial intermediaries must clarify the economic background and the purpose of a transaction or of a business relationship in particular if (i) the transaction or business relationship appears unusual, unless its legality is clear or if (ii) there are indications that assets are the proceeds of a felony or an aggravated tax misdemeanour.

Article 9 AMLA provides for an obligation for financial intermediaries to report, as soon as they know or presume, based on well-founded suspicions (ie, on reasonable grounds), that the assets involved in the business relationship (i) are connected with offences of participation or support to a criminal or terrorist organisation or money laundering or (ii) originate from a crime or a qualified tax offence, or (iii) are subject to the power of disposition of a criminal or terrorist organisation or serve the financing of terrorism.

In order to be well founded, the Swiss Supreme Court held that the suspicion must not be of a certainty or of a particular probability. As soon as there is a concrete indication or several indicia that one of the above options could be met, financial intermediaries have to conduct clarifications according to article 6 AMLA. If these additional clarifications do not dispel the suspicion, financial intermediaries

have to file a report immediately. As of 1 January 2023, said interpretation will be expressly enshrined in the AMLA.

Financial intermediaries have to 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 blocking is maintained until the receipt of a decision from the criminal prosecution authority, but for a maximum of five working days, after which extensions of blocking and confidentiality measures can be ordered by the prosecution authority.

As of 1 January 2023, the AMLA will provide expressly for a right for financial intermediaries to terminate a reported business relationship if 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.

21. 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?

Pursuant to article 10a of AMLA, financial intermediaries are prohibited from informing the persons concerned or third parties that it has filed a report of well-founded suspicions.

The law permits the sharing of information between financial intermediaries in certain cases, as this may be necessary to coordinate the communication and ensure the effectiveness of the freezing of assets.

There is no specific criminal penalty for violating the prohibition to inform. However, if the indiscretion allows the client to arrange to ask and obtain the transfer of the assets elsewhere, an offence of money laundering may come into consideration.

The competent criminal authority might also impose a ban on information to a financial intermediary under the threat of a criminal sanction. This is a contravention punishing insubordination to a decision of the authority with a fine of up to 10,000 francs.

22. 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.

This being said, it should be noted that in the case of business relationships or transactions involving increased risks, financial intermediaries shall undertake additional clarifications to a degree proportionate to the circumstances.

In this respect, financial intermediaries shall set criteria for the detection of transactions with increased risks. The AMLO-FINMA provides, by way of example, a number of situations, which indicate the existence of an increased risk in the relationship with a client or in the transactions carried out. Said situations include significant foreign exchange transactions, which 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 francs (article 51(1) (a) AMLO-FINMA).

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 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.

23. 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.

This being said, it should be noted that in the case of business relationships or transactions involving increased risks, financial intermediaries shall undertake additional clarifications to a degree proportionate to the circumstances.

In this respect, financial intermediaries shall set criteria for the detection of transactions with increased risks. The AMLO-FINMA provides, by way of example, a number of situations, which indicate the existence of an increased risk in the relationship with a client or in the transactions carried out. Said situations include, among others, 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 from or to 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.

24. Is there a financial intelligence unit (FIU) or other government agency responsible for analysing the information reported under the AML rules?

The MROS is the Swiss FIU (ie, the government agency responsible for analysing information reported under anti-money laundering regulations). Among its various functions, it receives and analyses suspicious activity reports and, where it considers that there are well-founded suspicions, forwards them to the competent criminal authorities for follow-up action. It also cooperates with foreign FIUs under certain conditions.

25. 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 according to the SCC. A custodial sentence of up to one year or a monetary penalty may be imposed on an individual within a financial intermediary. Regarding corporate entities acting as financial intermediary, they 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 said corporate entities due to their inadequate organisation.

Second, the violations of the duty to report suspicious activity or of the obligation to obtain authorisation from the FINMA or of the competent supervising body are criminal administrative law offences. Individuals within a financial intermediary who fail to comply with the duty to report suspicious activity may be fined up to 500,000 francs if they have acted wilfully, respectively up to 150,000 francs if they have acted negligently. Individuals within a financial intermediary who intentionally allow the latest to carry out an activity without authorisation from the FINMA or of the competent supervising body is liable to a custodial sentence of up to three years or to a monetary penalty, respectively to a fine of up to 250,000 francs if they have acted by negligence. Corporate entities acting as a financial intermediary can be condemned for violations of these criminal administrative provisions (instead of individuals) at the following cumulative conditions: (i) the investigation would make it necessary to take measures of investigation that are out of proportion to the penalty incurred, and (ii) the relevant fine does not exceed 5,000 francs respectively 50,000 francs.

We note that, in principle, criminal and criminal administrative offences applicable to financial intermediaries can be reproached to the individuals within said financial intermediaries who are responsible for the application, respectively the control, of the obligation, the breach of which constitutes the

offence. This can be the case from a relationship manager involved to the highest management level, including the compliance and/or legal personnel involved in the AML controls.

Administrative sanctions

Violations of anti-money laundering regulations may call into question the guarantee of irreproachable activity required of persons exercising a management function and of the financial intermediaries themselves in order to be authorised to carry out their activities. 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 among others 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 (articles 29 et seq FINMASA).

Private law sanctions

Private law sanctions are also considered for violations of anti-laundering self-regulations.

In the event of a breach of the Swiss Bankers Association's Due Diligence Agreement (CDB 20), the signatory banks can be ordered to pay the Swiss Bankers Association a contractual fine of up to 10 million francs (article 64 CDB 20).

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

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 provisions of the AMLA are not grounds for civil (tort) liability of the offender, as these provisions only protect collective interests.

Finally, we note that indirectly, individuals who committed violations of anti-money laundering regulations or self-regulation might be sanctioned by their employer, up to the immediate termination of their employment contract for serious violations.

26. Are compliance personnel subject to the AML rules? Can an enforcement action be brought against an individual for violations?

See answer to 1.12.13

27. What is the statute of limitations for violations of the AML rules?

With regard to the criminal offence of failure to ascertain the identity of the beneficial owner, the statute of limitations is seven years. As such 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 regularises the unlawful situation by correctly identifying the beneficial owner. With regard to the end of the limitation period, the time limit no longer applies if a judgment is issued by a court of first instance before expiry of the limitation period.

With regard to the violation of the duty to report suspicious activities, the statute of limitations is seven years. As such offence is a continuing offence, the statute of limitations runs from the time when the financial intermediary regularises the unlawful situation by duly reporting the suspicious activity to the Money Laundering Reporting Office Switzerland. With regard to the end of the limitation period, the time limit no longer applies if a judgment is issued by a court of first instance before expiry of the limitation period.

With regard to the exercise of an activity without authorisation or affiliation, the statute of limitations is also seven years. If the offender carries out the criminal activity at different times, the limitation period begins to run on the day on which he carries out the last activity. Alternatively, unauthorised

activity may also be considered a continuing offence case in which the statute of limitations begins on the day on which the criminal conduct ceases.

With regard to corporate entities acting as financial intermediaries, where the conditions for imputation to said corporate entities are met, the same statute of limitations indicated above for individuals applies.

28. 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 Swiss Code of Obligations (CO) but abandoned as excessive and too expensive. However, two things should be noted.

On the one hand, financial intermediaries subject to AMLA must identify the beneficial owner with the due diligence required in the circumstances (article 4 AMLA) and must keep a record of it. Indeed, financial intermediaries must keep records of transactions carried out and of clarifications required under the AMLA in such a manner that other specially qualified persons are able to make a reliable assessment of the transactions and business relationships and of compliance with the provisions of the AMLA. 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.

On the other hand, 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 (article 697j CO). This provision is part of a broader transparency system, which also includes the rules on the disclosure of listed companies in the Financial Market Infrastructure Act, well as those on the identification of beneficial owners in the 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 a private law codification, 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.

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Christophe Emonet has been a partner since 2004 and heads the litigation and arbitration group in Geneva and the white-collar crime team. He specialises in complex national and international banking/commercial disputes and investigations, regulatory and white-collar crime matters (corporate/financial fraud and corruption). He also has broad experience of asset recovery and cross-border bankruptcies. Christophe Emonet represents primarily Swiss and foreign banks, corporations, foreign states and HNWIs, which request his assistance for strategic matters and complex negotiations.

Christophe Emonet's expertise has been recognised for a decade by the leading legal directories, including *Chambers, The Legal 500, Who's Who Legal, Best Lawyers* and *IFLR*. A sample of recent quotes from clients and peers distinguish him as "standing out among Swiss lawyers. He always goes the extra mile." (*The Legal 500* 2020, Banking and Finance), being a "tough but sensible lawyer, who understands the client's needs" (*The Legal 500* 2020, Insolvency and Corporate Recovery), a "top practitioner, who deeply cares about his clients" (*The Legal 500* 2019, Litigation), and praise his "deep knowledge of the law, razor-sharp advice, and the fact that he helps you to put your best interest forward" (*Chambers* 2019, WCC). Other sources emphasise: "highly strategic, very bright and relentless in defence of his clients" (*Chambers* 2018, WCC; *The Legal 500* 2016/2015, Banking and Finance), "a great negotiator" (*The Legal 500* 2018, Litigation), who is "striking in the court room as well as in negotiations" (*Chambers* 2016, WCC; *The Legal 500* 2014, Banking and Finance) and a "fierce advocate" (*Chambers* 2015, WCC). Christophe Emonet graduated from the University of Geneva in 1996 (MLaw), was admitted to the Bar in 1998 and became a partner in 2004. Prior to joining Pestalozzi in 1999, Christophe Emonet worked with barristers and solicitors in London. As part of his career, he also served for a year as foreign associate in two major law firms in Madrid and Buenos Aires.

Nicolas C. Herren

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Nicolas C Herren is a partner and a member of the litigation and arbitration group in Geneva. He specialises in national and cross-border banking/commercial disputes, in particular stemming out of contractual and regulatory issues. His activity also covers enforcement proceedings such as complex cross-border bankruptcies or recognition of foreign judgments. In addition, he has a broad experience in white-collar crime and international mutual assistance in criminal and administrative matters.

After graduating from the universities of Geneva and Bern (lic. iur. 2003), Nicolas C Herren worked at the University of Geneva as an assistant lecturer in the fields of white-collar crime and international mutual assistance in criminal matters from 2004 to 2008. He was also involved in the development of a training programme on the Swiss and cross-border anti-money laundering legislation, addressed to private banks' employees and directed by the Centre for Banking and Financial Law of the University of Geneva. After obtaining a DEA (LLM) at the University of Geneva in 2008, Nicolas C Herren joined Pestalozzi as a junior associate and, following his admission to the Geneva Bar in 2010, as an associate, before becoming partner in 2016. He is an active member of different law associations such as the International Association of Young Lawyers (AIJA) and the Geneva Association of Commercial Law (AGDA). He is president of the AIJA Commercial Fraud Commission and member of the AIJA executive committee.

Pestalozzi Attorneys at Law Ltd

Pestalozzi is one of the leading and most respected law firms in Switzerland. It has offices in Zurich and Geneva and specialists with expertise in all areas of business law, enabling it to form customised teams to meet the needs of a vast range of international and domestic clients. Over the past decade, Pestalozzi established a strong track-record in white-collar crime, financial fraud and internal investigations. The firm regularly represents governmental bodies, states, banks, financial institutions and other corporations, as well as ultra-high net worth individuals. Banks in particular draw on Pestalozzi's expertise on a regular basis to solve complex matters stemming from internal or external financial fraud or involving regulatory (Swiss Financial Market Supervisory Authority) recovery and liability issues. Pestalozzi has made a name for itself handling complex cross-border cases combining expertise in the fields of governmental investigations, financial fraud, asset recovery and liability claims.

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