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# Due Diligence and AML Obligations

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# Relevant regulations

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- Art. 305<sup>bis</sup> and 305<sup>ter</sup> Swiss Penal Code
- Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (**AMLA**)
- FINMA Anti-Money Laundering Ordinance (**AMLO-FINMA**)
- Ordinance of 18 November 2009 on the professional practice of financial intermediation (**VBF**)
- Agreement on Swiss banks' code of conduct with regard to the exercise of due diligence (**CBD 08 / CBD 15**)

# Recent developments

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- Partial revision of the Financial Action Task Force (**FATF**) recommendations in 2012
- Partial revision of the AMLA by the Swiss Parliament as of 12 December 2014 regarding the implementation of the revised FATF recommendations
- FINMA opened consultation on the draft revised version of the FINMA Anti-Money Laundering Ordinance on 11 February 2015 (**Draft AMLO-FINMA**)

# Implementation of FATF Recommendations (i)

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- Due diligence for cash payments exceeding CHF100,000
- Larger definition of political exposed persons (PEP)
- Duty to identify the beneficial owner:
  - Today generally only for domiciliary company;
  - Under new provision the financial intermediary shall apply due diligence while establishing the beneficial owner also for an operating company (except for listed companies)
  - The beneficial owner has to be established in any event (and not in the event of doubt about the matter)

# Implementation of FATF recommendations (ii)

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- New definition of the beneficial owner (art. 2 para. 2 AMLA):

*“Als wirtschaftlich berechtigte Person einer operativ tätigen juristischen Person gelten die natürlichen Personen, welche die juristische Person letztendlich dadurch kontrollieren, dass sie direkt oder indirekt, allein oder in gemeinsamer Absprache mit Dritten, mit mindestens **25 Prozent des Kapitals oder Stimmenanteils an dieser beteiligt** sind oder sie auf andere Weise kontrollieren. Können diese nicht festgestellt werden, so ist die Identität des obersten Mitglieds des leitenden Organs festzustellen.”*

# Implementation of FATF recommendations (iii)

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- Identification of the shareholder on company level:
  - Registered shares:
    - Share ledger shall be available in Switzerland
    - Documents regarding the registration shall be kept for 10 years
  - Bearer shares:
    - The acquirer of bearer shares shall notify the acquisition, first and family name and address (documented by passport extract from commercial registry) to the company within one month upon the acquisition

# Implementation of FATF recommendations (iv)

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- Identification of the shareholder on company level:
  - Any shareholder which holds alone or while acting in concert more than 25 per cent of the capital or voting rights has to notify the ultimate beneficial owner to the company
  - The beneficial owner has not to disclose itself or provide any documents to the company (difference to the disclosure rules under SESTA)
- Consequence: the beneficial owner of the company may not be identical with the beneficial owner of the assets of the company under the AML rules



# Implementation of FATF recommendations (v)

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- Serious tax crimes as predicate offence for money laundering (art. 305bis para. 1 Penal Code):

*“Wer eine Handlung vornimmt, die geeignet ist, die Ermittlung der Herkunft, die Auffindung oder die Einziehung von Vermögenswerten zu vereiteln, die, wie er weiss oder annehmen muss, aus einem Verbrechen **oder aus einem qualifizierten Steuervergehen** herrühren, wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.”*

# Implementation of FATF recommendations (vi)

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- Definition of serious tax crimes (art. 305bis para. 1bis Penal Code):

*“Als qualifiziertes Steuervergehen gelten Straftaten nach Artikel 186 des Bundesgesetzes vom 14. Dezember 1990 über die direkte Bundessteuer und nach Artikel 59 Absatz 1 erstes Lemma des Bundesgesetzes vom 14. Dezember 1990 über die Harmonisierung der direkten Steuern der Kantone und Gemeinden, wenn die hinterzogenen Steuern pro Steuerperiode mehr als 300'000 Franken betragen.”*

- Fraudulent evasion of VAT may qualify a felony (art. 305bis para. 1 and art. 14 para. 4 nVStrR)

# Implementation of FATF recommendations (vii)

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- Right to notify MROS is being extended for indications of money laundering as a result of serious tax crime (justification for the financial intermediary under art. 305ter para. 2 Penal Code)
- Circumstances to apply special due diligence have been extended to suspicion of serious tax crime
- Duty to notify MROS is being extended for suspicion of money laundering as a result of serious tax crime (duty under art. 9 para. 1 lit. a AMLA)

# Consequences for banks (i)

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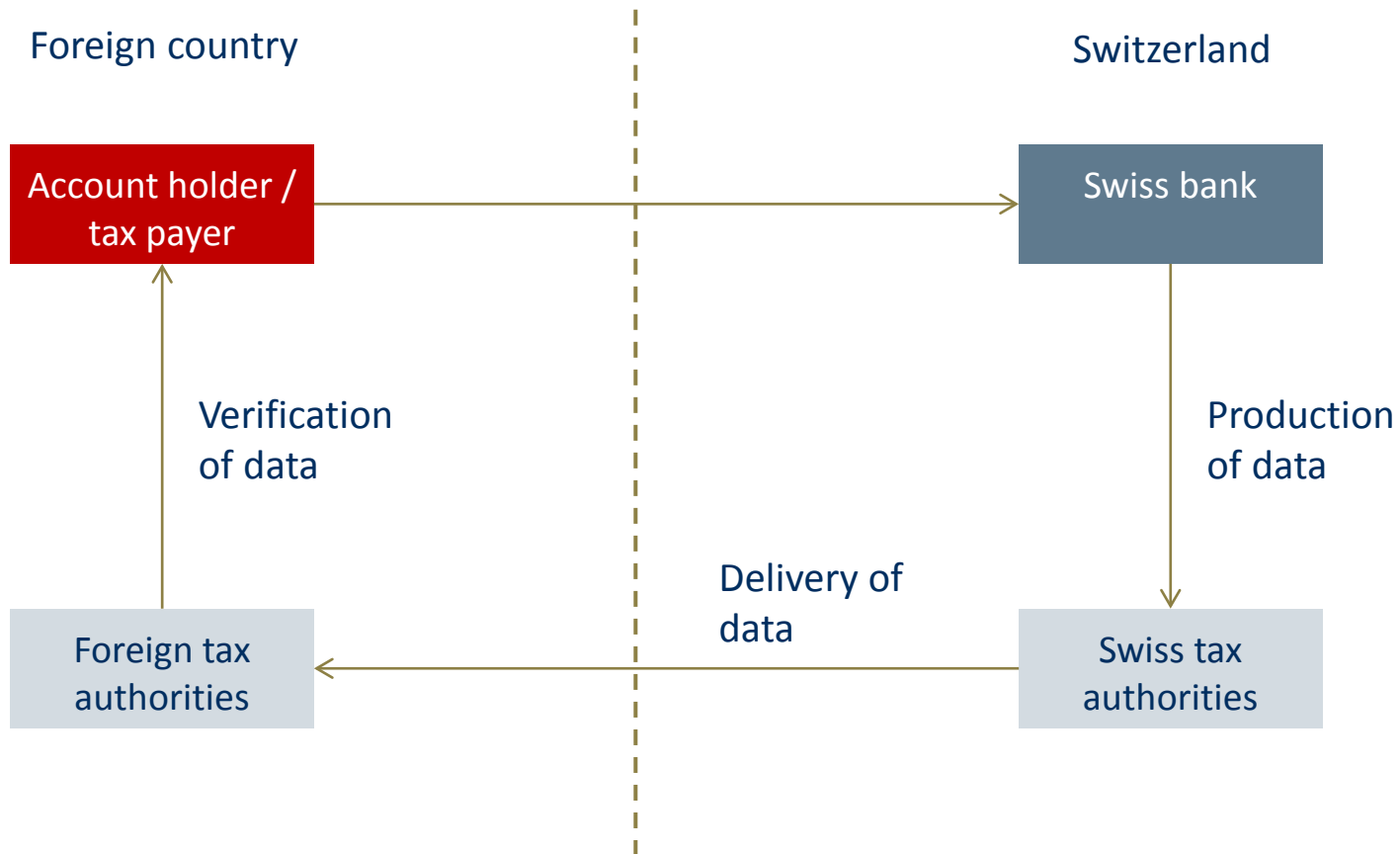
- Reminder:
  - A bank may commit money laundering by omission
  - The predicate offence to money laundering and therefore the serious tax crime may be committed outside of Switzerland
  - Forgery of documents (in relation to a serious tax crime or otherwise) qualifies as predicate offence to money laundering
  - Fraudulent evasion of VAT may qualify a felony (even below the CHF300,000 threshold)

## Consequences for banks (ii)

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- The banks have to notify MROS in the event of suspicion of money laundering as a result of serious tax crime (otherwise the bank (in the event of organizational negligence) may be liable under the Swiss penal law)
- MROS will submit a criminal complaint to the prosecutor
- The criminal proceedings may be extended to any tax evasion against the client
- The criminal proceedings may be extended against the bank (complicity in tax crime and money laundering)
- MROS may disclose the information to the respective foreign authority (administrative assistance)

# AEoI



# Common reporting standard (CRS)

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- All banks have to comply with the common reporting standard (CRS) which, inter alia, describes the due diligence procedures that must be followed by financial institutions to identify reportable accounts
- Following FATCA standard
- The banks may generally rely on the information obtained in compliance with AMLA provisions
- For new accounts a self-declaration on tax residency will be required

# Common reporting standard (CRS) Due diligence requirements

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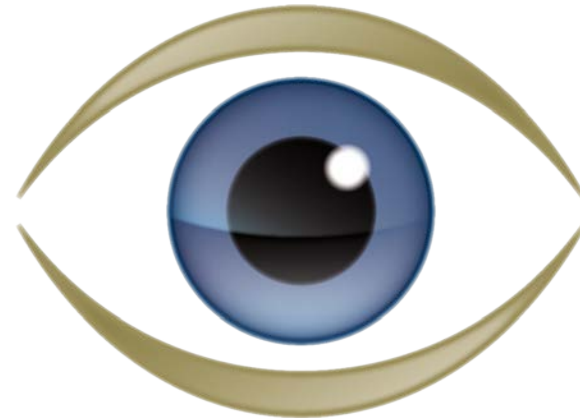
- Pre-existing individual accounts
  - Higher value accounts
  - Lower value accounts
- New Individual accounts
- Pre-existing entity accounts
  - Accounts below USD250,000 are excluded
- New entity accounts
  - Accounts below USD250,000 are not excluded



# Common reporting standard (CRS) Reporting obligations

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- Name, address, jurisdiction of residence, date of birth (of account holder / reporting person of entity), tax identification number
- Account number
- Name and identifying number of the reporting financial institution
- Account balance or value (total gross amount if custodial account/depository account)
- Custodial account: gross amount of interest, dividends, etc.
- Depository account: gross amount of interest



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# Thomas Müller

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Thomas Müller advises banks, insurance companies, asset managers, fund managers and other financial institutions in regulatory matters and represents market participants before the Swiss regulatory authorities and before civil courts. In finance, he focuses on corporate debt finance, asset based lending (including real estate finance), note issuance programs and securitisation. Other special services include international legal assistance, white collar crime and insolvency law. He regularly publishes in his areas of practice and is a lecturer at the University of Geneva.

Thomas Müller was educated at University of Bern Law School (lic. iur. 2000, Dr. iur. 2008) and holds an LL.M. degree from the New York University School of Law (2005). In 2007, he was a visiting scholar at Fordham University School of Law, New York. Prior to joining Walder Wyss, Thomas Müller was an associate with the litigation and arbitration practice of major law firms in Zurich and New York. In 2009 Thomas Müller was seconded to the Swiss Banker's Association in Basel and responsible for the revision of the Swiss deposit protection scheme.

Thomas Müller speaks German, English and French. He is registered with the Zurich Bar Registry and admitted to practice in all Switzerland.



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