

**LSI / via E-Mail**

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Sehr geehrter Herr Staatssekretär

Wir beziehen uns auf Ihre Einladung zur Stellungnahme vom 8. März 2019 und unterbreiten Ihnen fristgerecht – und sinnvollerweise in Englisch – unser

**Statement regarding the drafts of FATF's „FATF-RBA Guidance for Legal Professionsals“, „FATF-RBA Guidance for Accountants“ and „FATF-RBA Guidance for Trusts and Company Service Providers“**

Reference is made to the aforementioned drafts of the FATF-RBA Guidances and FATF's respective consultation of the private sector, whereby we as one of Switzerland's Self-Regulatory Organisation are being offered to opine on the said drafts as well.

The association "VQF Verein zur Qualitätssicherung von Finanzdienstleistungen" ("VQF") is Switzerland's biggest Self-Regulatory Organisation (SRO) in the sense of art. 24 ff. of the Swiss Anti Money Laundering Act (AMLA). Next to its function as SRO, VQF also acts as Industry Organization EAM in the sense of the Collective Investment Schemes Act (CISA) and offers professional standards which are approved by the Swiss Financial Markets Supervisory Authority ("FINMA") for asset managers. Additionally, VQF, as a holistically set-up SRO that not only offers memberships to asset managers, but to all forms and activities of financial intermediation according to AMLA, calls numerous trustees, fiduciaries and not least legal professionals as their members. VQF is authorized and supervised by FINMA.

The published FATF-RBA Guidances are thus namely to be commented under consideration of VQF's vast experience with all respectively concerned business fields and activities.

We gladly take the opportunity to take our view to the FATF-RBA Guidances on schedule:

## **Preliminaries**

To some extent, we can understand the political wish to have as many activities, industries and professions equally governed and held to adhere to a common level of duty of care with regards to AML duties. Nonetheless, it must be stated that certain tendencies visible in the said drafts unfortunately paint a rather indifferent and thus not accurate picture of each potentially concerned branch and profession. May it be the possible absence of better understanding not only of each potentially concerned activity, but also of each jurisdiction's respective legal framework and provided governing rules to avoid any case of money laundering or any financing of terrorism – the all lead to a dangerous problematic unification and standardization of various industry branches and sectors and their respective particularities. We strongly suggest to on the contrary respect and consider these differences, and thus best apply different rules and suitable laws. Furthermore, the current Swiss legal and regulatory framework (including passed, but not yet having become effective laws and regulations, as also mentioned further below), already offer a vast and logical basis for a reasonable and effective dispositive to avoid money laundering and terrorism financing activities at best.

### **1. FATF-RBA Guidance for Legal Professionals**

#### a) General remarks

The draft of the Guidance mainly describes the potential danger of Legal Professionals being involved with their advisory activity in business propositions founded (and funded) on any form of criminal activity who then, by the power vested to the Legal Professional's title and entitlements, would give such a criminal endeavour (respectively its criminal source) a legal appearance through their advice.

While the said descriptions may seem comprehensible and, to a certain extent, plausible, they do however disregard the fact that for Legal Professionals, there already exist a variety of duties of care and diligence based on various local laws and professional standards particularly to prevent any prolongation of criminal activity through the layer of legal work.

It has already been explained by VQF on various occasions in the past but can only be re-emphasized: the attempt to introduce AML rules and duties for professionals outside of the financial sector may seem attractive, but it is alien to the existing (Swiss) legal system. This particularly applies to Legal Professionals.

If a Legal Professional has any specific function that falls under the definition of financial intermediation, such activities are already governed by the Swiss

AMLA. If the activity does not qualify as financial intermediation, it is not reasonable to still put the respective burden of the respective duties on the concerned Legal Professional. While it is true that Legal Professionals may have access to information regarding finances and financial circumstances of their clients without being specifically appointed as financial intermediaries, it would be delicate to impose the same duties of diligence to such Legal Professionals as to any respectively appointed financial intermediaries. A Legal Professional still usually lacks the full scope and picture of the financial situation of the client, and the Legal Professional not only would impair the bond of trust confided by the client by investigating on the client's financial situation without mandate-related reasoning, but the Legal Professional would furthermore lack any respective legal entitlement to do so. Depending on the circumstances given, such investigations might not even be fruitful or productive, since the Legal Professional would require to receive respective information about the financial situation from various parties, not only the one being represented by the said Legal Professional. Furthermore, any of the specified activities in the FATF-RBA Guidance for Legal Professionals where there may be a potential danger of a Legal Professional advising on a criminally originated endeavour, usually includes at least one professional financial institution that has to fully document and control all the flows of assets, moneys and funds involved.

#### b) Existing regulations for Legal Professionals in Switzerland

Legal Professionals in particular have to adhere to a variety of laws and rules based on civil and penal codes as well as public law stipulations. They are bound to the explicit penal stipulation of the Swiss penal code concerning money laundering to which the Swiss AMLA makes reference. Needless to add, any Legal Professional being asked for its advice regarding any potential criminal scheme would make itself prosecutable if the Legal Professional did not abstain itself from any advice in any such matter – apart from any instruction to reveal and disclose any crime and make said procedure legal.

Further, Legal Professionals are bound to a professional obligation of secrecy (i.e. the *professional secrecy*), founded both on respective rules in the Swiss penal code, the contractual relationship that usually precedes the engagement of a Legal Professional as well as professional standards for Legal Professionals. These rules of professional secrecy forbid any disclosure of confidential information and, as the case may be, would create an undue balance between the obligation to protect the client's privilege and the possible duty to report any suspicion of money laundering to the respective authority (especially given the fact that a *suspicion* under AMLA is cause enough for a respective reporting obligation).

c) Special legal requirements for Notaries in Switzerland

Special remarks are hereby made to the provided obligations for notaries public in Switzerland, who, by force of their position and entitlement, are bound to higher levels of duty of care. These stipulations again are being governed by another specific decree specifically applicable on notaries. This additional level of duty is rectified by the fact that a notary acts out an official function, by representing the local authorities and by providing any legalized document with a higher level of trust and reliability.

In the exemplary case of a notary advising on a purchase of a property and drafting the respective legal paperwork, it must furthermore be considered what follows: while such a transaction – from a notary’s perspective – currently does not require any specific AML duties, it still involves at least one local financial institution that has to document and thus fully control the inflow as well as the outflow of any and all assets, the source of funds and the identity of both the investor as well as of the beneficiary of such a payment.

d) Considerations for the application of the Guidance for Legal Professionals

While at first, it might appear reasonable to encumber Legal Professionals with the respective duties of care of the AML based on their potential closer view on criminal origin of assets which then are being used for what appear to be legal endeavours, it must be made very clear that Legal Professionals cannot fulfil by default the obligations that are applicable for professionals participating in the financial sector (i.e. financial intermediaries). Additionally, it has been made very clear that Legal Professionals already have to adhere to a variety of rules, laws and regulations. The main target of a Legal Professional is to advice a client how to best solve and structure a legal situation. And it cannot be expected from Legal Professionals to answer to the same level of understanding, knowledge and due diligence like from any professional in the financial sector.

## **2. FATF-RBA Guidance for TCSP**

a) General remarks

The draft allows itself a rather generic approach by subsuming all services rendered for trusts and corporations under the acronym TCSP (Trust and Company Service Providers) which, then, as defined, includes any respective activity and legal entity with the the exception of financial institutions, legal professionals, notaries, other independent legal professionals and accountants. The scope of work of such TCSP is plainly defined as a “range of services and activities that

differ vastly". While such a definition is not only problematically unspecific, it also harbours the danger of including merely any remotely related activity under this definition and thus under the obligations and duties of care of AML rules.

b) Already existing regulations for most TCSP

Service providers for trusts that could be exposed to any potential AML danger are mainly, as we can see, trustees, as trustees are the individuals/units to whom the trust assets are assigned to and who thus have full control, access and power over the trust assets (legally, they are the trustee's own assets). Given that the Swiss regulator has passed two new laws in summer 2018, the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA), both coming into force on 1 January 2020, which will regulate and govern the supervision and the institutional requirements for trustees specifically and comprehensively on federal law level (including with regards to their adherence to AML regulations), a separate regulation is no longer required. Trustees will be approved by FINMA and then supervised by a supervisory organization in Switzerland. Since Swiss law does not have its own proper definition of a (Swiss) trust, the legislator has very strictly followed the definition of a trust according to the Hague Trust Convention – to satisfy international standards and avoid any undue exceptions. Any additional regulation of trusts and trustees would thus be inconsequent.

Local managers of domicile companies (as one of the main "company services providers" that we could identify based on the very unspecific description in the guidance) are already subjected to the rules of AMLA.

Forming agents for legal persons, as Swiss law knows them, could only be notaries and, to some extent, legal professionals. We would like to refer to our respective remarks made above regarding Legal Professionals in general and Notaries in particular. In short – these professionals already are regulated, and an additional submission under AML regulation would appear to be alien to the existing legal system.

Directors and/or secretaries are vested with legal duties of care by the power of their mandate and their function. However – apart from the basic information about the shareholder structure and the beneficial ownerships, depending on the corporate structure, a director may not even have full access to the legal entities' financials. To require in addition to their existing obligations the respective duties of care is thus for the vast majority of these cases unreasonable. Should a director require the respective information and, after having had the chance to review them, should come to the conclusion that reasons for suspicions are given, it already has a legal obligation to inform the management and take all required and appropriate measures to solve any such issue in a legal manner. To impose additional duties to report would again create an undue

imbalance between the mandated obligations against the potential legal duties to report.

If at all, the stipulations of the respective FATCA-RBA Guidance could merely be applicable for company service providers and, in this particular field, for providers of registered office addresses or for anyone acting as nominee shareholder for another person.

c) Considerations regarding the application of the Guidance for registered address providers

A provider of a registered address usually offers a newly founded company in Switzerland a temporary domicile (e.g. for Start-Up Fintech companies etc.). This facilitates the process of the company incorporation and lowers the initial costs for such incorporation, as the founders not necessarily have to find and rent a whole office space in advance. Depending on how businesses develop themselves and how successful the company is, it makes sense not to enter into a rental (or even purchase) agreement for office spaces right away. Apart from the provision of a (temporary) business address, the address provider usually does not fulfil any additional tasks and obligations for the company. The provider thus rarely ever has the full scope of the company's finance, let alone about source of funds, inflows and outflows of the entities. It would furthermore be absolutely understandable if no such company using a registered address would be willing to disclose such information to the holder of the domicile.

To ask an address provider to act out AML duties would be as if all landlords would be asked to fulfil such obligations, not only for business spaces, but also in the housing space sector. It is clearly against the actual intent and scope of AML rules, and it would result in unreasonable duties for commercial activities that are clearly outside of the financial sector.

d) Considerations regarding the application of the Guidance for nominees

A nominee shareholder in the usual sense acts for and on behalf of another person. It is expected that the FATF-RBA Guidance in this particular sense refers to nominees who do not formulate their own votes, but rather represent and vote in the sense of their "agent". The Swiss law on stock companies to date still knows basically two different categories of shares, bearer shares and registered shares. While the holder of bearer shares is legally considered to be the owner of these shares and enjoys all rights and duties connected to these shares (including the right to vote and to receive any revenue connected to each share), with registered shares, the registered person for each share is considered to be the beneficial owner of said share. The registered shareholder may

nominate a nominee, but such nominee always has to identify itself with a respective proxy.

In the course of past revisions of Swiss corporate and Anti Money Laundering laws, the duties for companies issuing bearer shares have been elevated: they must either register the beneficial owners of these shares themselves through a respective shareholder register (like the one always required for bearer shares), or they can mandate a third party to register the beneficial owners of these shares. In any case, the beneficial owners of the shares for all categories of shares are now registered and known. It is thus, namely in the case of an acting nominee with bearer shares, unnecessary to have such additional duties of care implemented: while such nominee may appear to be the owner of the shares, the respective register will always and already provide all correct information.

In the case of listed shares, the company and the shareholders have to follow transparency rules by the respective stock exchange on top of these rules.

It is, under these circumstances, not understandable to what extent the addition of imposing all respective AML duties to nominees would result in a higher level of documentation and/or control.

### **3. FATF-RBA Guidance for Accountants**

#### a) General remarks

The respective draft of an FATF-RBA Guidance clearly focuses on any accounting and advisory service. The mere appearance of any connection to finances (including taxes) suffices to be concerned by this Guidance and thus, as a consequence, to be held to fulfil AML duties.

The unification of considerably different business activities and models within this Guidance for the sole purpose of imposing the respective rules on merely any financial advisory activity which is not already covered by specific regulations is both legally as well as regulatorily problematic. If the specific business case and activity is not taken into account while imposing general rules, equally applicable for all categories, this will lead to a reduction of offered services, which will not only harm the business offerors, but also the clients in need of the respective services.

Furthermore, it must be stated again that AMLA has been created to regulate activities in the financial sector. Accountants with financial intermediation activities are already subjects to the AML rules. For all other accountants (according to the definition of this Guidance), it is difficult to see the basis for the

application of AML rules on such activities. While an accountant (without actual financial intermediation) may have access to information regarding the financial situation of a client or company, the accountant in a very basic sense does not actively create, change or govern any past, current or future asset flows, and the accountant does not necessarily see the whole context of the client's asset composition.

#### b) Existing laws, rules and regulations for accountants

Accountants (as globally defined in this Guidance), if acting on a professional basis, already have to abide to a variety of legal regulations. Furthermore, it is common practice to continuously improve any accountant's knowledge by having recurring educational sessions (with respective degrees if a seminar/lesson is passed). While it might be true in most cases that accountants do have an overview over a client's finances, it is hardly conceivable that such an accountant only has visual access, without factual access to such funds. In the latter case, such accounting activity, if lead on a professional basis, falls under the definition of financial intermediation and consequently under AML regulations already. In cases where an accountant should only have informational access to the financial situation of the client, or the activity remains below the level of being commercial, by the mere limitation of the accountant's powers and entitlements such activity usually cannot result in a commercially harmful result.

Tax advisory already underlies AML regulations in the sense that tax offences exceeding the threshold of CHF 300'000.00 per tax period is being considered as a crime and thus a precondition for any AML activity.

For all advisory services enlisted, such as regulatory and compliance services, succession, structuring advice etc., these services are usually rendered by Legal Professionals or advisors within a regulated financial institution. For the said service providers, regulation already exists.

#### c) Considerations regarding the application of the Guidance for Accountants

Regarding the comprehensive list of the Guidance describing accounting services, it is indeed possible to find service providers that do not fall under a specific regulated activity. In these cases, a clear distinction has to be made whether these accountants do have in any capacity access to the funds (and thus fall under the definition of AML regulation) and if their business activity does fulfil the definition of being commercial. It is not recommendable to subject all accountants, regardless of their scope of work (including their clients' scope of activity), under the same rules and impose an unbearable additional workload on individuals and small entities which then will no longer be able to offer these services for smaller clients.

#### 4. Summary

The existing Swiss legal and regulatory framework consists of a variety of provisions namely with regard to the prevention of any money laundering or financing of terrorism activity. All of these laws, rules and regulations (with the obvious exceptions to the rule) take into consideration the respective business sector's and activity's particularities and provide the market participants, where possible and appropriate, with customized rules and instructions.

To introduce AML rules for a much further and broader circle of recipients might be politically opportune, but it is under consideration of the existing legal and regulatory framework alien and contradictory to the initial intent and goal of the said rules. AML laws and rules shall first and foremost govern the financial sector. Other activities and sectors have to abide to their respective provisions – which, if not explicit, indirectly hold all participants to act according to the law.

By forcing branch/sector activities of advisors to factually adhere their complete activity to such rules, the dynamics both in customized services and the respective costs will be changed irreversibly and, in our opinion, not for a better control and functioning of the markets.

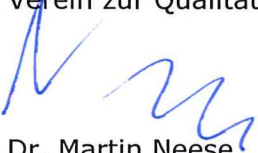
If respective rules shall be imposed, they must be appropriate and proportional. Both the rule-recipients' business activity and the exposure of their activity to the market must be taken into consideration. We do see a considerable danger in applying the said rules as they are provided in these drafts without taking into consideration each sector's particularities and provide for respective exceptions and easements. The legislator's goal must be to regulate respective activities, not the respectively labelled profession.

We thank you for offering us the opportunity to give our statement and hope that you will consider our concerns while further working on the said project. In case you should have any questions or remarks, we will gladly be at your disposal.

Sincerely

**VQF**

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