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Circular 2011/1 Activities as a Financial Intermediary as per AMLA

Explanations on the Anti-Money Laundering Ordinance (AMLO)

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FINANCIAL SERVICES

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Addressees

BA			ISA			SESTA	FMIA							CISA								AMLA			OTHERS	
Banks	Financial groups and congl.	Other intermediaries	Insurance companies	Ins. groups and congl.	Distributors	Securities dealers	Trading Venues	Central Counterparties	Central depositories	Trade repositories	Payment systems	Participants	Fund management companies	SICAV	Limited partnerships for CIS	SICAF	Custodian banks	Managers domestic CIS	Distributors	Representatives of foreign CISs	Other intermediaries	SROs	DSFIs	SRO Supervised	Audit firms	Rating Agencies
																						X	X	X		

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I. Object and Legal Basis

Article 2 of the Anti-Money Laundering Act (AMLA; SR. 955.0) shall establish the scope of applicability of the AMLA. Along with the financial institutions subject to special law supervision as mentioned in Article 2(2) AMLA, the AMLA (Article 2(3) AMLA) shall also cover financial intermediaries not subject to special law supervision. On the basis of Article 41(1) AMLA, the Swiss Federal Council has refined the scope of applicability of Article 2(3) AMLA with the help of Anti-Money Laundering Ordinance (AMLO; SR 955.01). 1*

The present Circular shall represent the FINMA practices with regard to the activities subject to the Anti-Money Laundering Act and indicate how the FINMA interprets both the AMLA and AMLO and what constitutes activities as a professional financial intermediary. Explanatory examples are in italics. The Circular shall follow the structure of the AMLO, but, as a rule, the AMLO provisions will not be reiterated. 2

II. General Information on the Scope of Article 2(3) AMLA

A. Definition of Activities as a Financial Intermediary (Article 2(1)(a) AMLO)

The Anti-Money Laundering Act shall denote companies and persons subject to it as "financial intermediaries" (Article 2(1) AMLA). According to Article 2(3) AMLA, financial intermediaries shall be persons who on a professional basis accept or safeguard deposit assets belonging to others or who assist in the investment or transfer of such assets. In (a)-(g), the provision lists several examples of activities covered by the AMLA, such as the lending business, payment transactions or asset management. The list shows that the AMLA predominately covers activities in the financial sector (BBl 1996 III 1115). However, persons and companies who provide services mainly in other sectors may also be affected by the Anti-Money Laundering Act if they pursue financial intermediary activities in addition to their other activities. 3

The individual activities included by Article 2(3) AMLA shall be explained in more detail in Sections III-VII. 4

B. Activities Not Deemed To Be Activities as a Financial Intermediary (Article 2(2) AMLO)

Article 2(2) AMLO shall explicitly list the following activities, which do not qualify as activities as a financial intermediary: 5

a) The Transport and Storage of Assets (Article 2(2)(a)(1) AMLO)

The mere physical transport, i.e. the carrying of assets from one place to another, as well as the mere physical storage of assets, except for the storage of securities (Article 6(1)(c) AMLO), shall not be relevant activities as per AMLA. Should the carrier, in connection with the transport, exercise further activities that are deemed to be activities as a financial intermediary, the carrier shall be subject to the law. 6

For example, the carrier transfers the entrusted cash to its own account before it is credited to the account of the recipient. In doing so, the carrier gains authority to dispose of the cash and renders a payment transaction service in addition to the money transport. 7

b) Debt Collection Activities (Article 2(2)(a)(2) AMLO)

Debt collectors shall collect outstanding debts on behalf of creditors. After the creditor assigns the outstanding debt to the agent in trust, the agent either shall collect the debt as direct representative for the creditor or act in its own name towards the debtor. AMLO does not include debt collection in the scope of AMLA because the debtor is not the contractual partner of the agent and his/her/its identification is therefore not possible according to the conceptualization of the AMLA. 8*

Even if the agent maintains contractual relationships with both the creditor of the liability as well as to the debtor, the activity may nevertheless be debt collection. The decisive factor shall be who orders the transfer and/or transmission, which must be proven using evidence. In general, the service shall be remunerated by the client. 9

Debt collection may also be on hand if the agent acts in a closed circle of recipients of goods or services and the debt collector cannot be viewed as an independent intermediary. The purpose of the agent shall be to ensure proper procedures as well as the simplification of the payment to the provider of goods or services. 10

A cooperative brokers business transactions between its members and suppliers of goods and handles the payment transactions for the goods delivered to its members (decision 2A.62/2007 taken by the Swiss Federal Court on 30 November 2007). 11

In addition, a franchisor also offers to process the payments for the franchisees in a central processing for goods procured from suppliers. 12

c) Transfer of Assets as an Ancillary Service To A Primary Contractual Service (Article 2(2)(a)(3) AMLO)

All of the following criteria shall qualify as the transfer of assets as an ancillary service: 13

- In principle, an ancillary service shall be integrated into a contractual relationship which is not attributable to the financial sector; 14
- The contracting party that provides the primary service shall also provide the ancillary service; 15
- This ancillary service shall be of a secondary importance in relation to the primary service; this can be assumed if the price of the ancillary service just covers its costs and no additional costs are charged for the ancillary service; 16
- The ancillary service shall be closely related in substance to the primary service; the delivery of the primary service without the provision of the financial intermediary ancillary service would result in particular difficulties for the contracting parties. 17

For example, an ancillary service exists if an elderly and nursing home, apart from the primary contractual services on the account of the client, pays for third-party goods and services from a custody account opened in advance for such purposes. 18

In general, an accountant who also handles payment orders in addition to the bookkeeping services provided shall not be deemed to be an accessory service. 19

However, if a person or company offers services that do not qualify as accessory ancillary services but which, as independent services, are indicative of an activity as financial intermediary, exercising such services professionally is subject to the Act. 20

d) The Operation of Pillar 3a Pension Funds by Bank Foundations or Insurance Companies (Article 2(2)(a)(4) AMLO)

(No further comments.) 21

e) The Rendering of Services among Group Companies (Article 2(2)(a)(5) AMLO

For AMLA purposes, companies shall form an economic unit if they directly or indirectly hold more than half of the votes or capital of the other or the others, or if they control these in another way. 22

A group company that acts as cash management unit or treasury within an industrial or business group therefore is not a financial intermediary in terms of the AMLA. 23

Article 2(2)(e)(5) AMLO shall also apply by analogy to structures that are headed by a natural person rather than a legal entity. 24

f) Involvement of Auxiliary Persons (Article 2(2)(b) AMLO)

If the criteria of Article 2(2)(b)(1)-(6) AMLO are fulfilled, auxiliary persons shall be included in the license or covered by the SRO affiliation of the financial intermediary. A financial intermediary that involves an auxiliary person retains regulatory responsibility for the compliance with due diligence duties of the AMLA. 25

For money and asset transfers, an auxiliary person may only work for a single financial intermediary (so-called "exclusivity clause"; Article 2(2)(b)(5) AMLO). 26

However, an auxiliary person may work for several financial intermediaries that possess a license or an SRO affiliation except for work involving money or asset transfers. 27

C. Geographical Scope (Article 2 AMLO)

Repealed 28*

According to Article 2(1)(a) AMLO, a financial intermediary shall be located in Switzerland or operate from Switzerland if: 28.1*

- It is domiciled or registered in the commercial register in Switzerland; and 28.2*
- It has staff in Switzerland who permanently perform or execute financial intermediary services in Switzerland or from Switzerland or who could legally oblige it to do so (factual branch office). This shall include offices of companies that have been incorporated under foreign law and which have 28.3*

their headquarters abroad but which are involved in an activity requiring a license without having a formal branch office (cf. DFSC 130 II 351 reasoning 5.1 pg. 362).

A factual branch office shall also comprise persons who constantly help the foreign financial intermediary perform substantial aspects of its activity as a financial intermediary in Switzerland or from Switzerland, for instance by accepting or handing out assets or by performing activities as a financial intermediary. 28.4*

The following matters shall be in the geographical scope of the AMLA: 28.5*

- A foreign money transmitter uses a network of agents in Switzerland which accepts and disburses funds in its name.
- A foreign company issues prepaid cards and distributes these through its points of sale in Switzerland.
- A person concludes credit agreements or accepts repayments related to a credit agreement for a foreign company with clients in Switzerland.

The following matters shall not be in geographical scope of the AMLA: 28.6*

- An asset manager active and licensed abroad is given proxy by a client to dispose of assets deposited on a Swiss bank account.
- A licensed note trader active abroad delivers bank notes to a client in Switzerland.
- A licensed financial intermediary active abroad offers financial intermediary services in Switzerland solely through the internet or other electronic channels.
- A foreign asset manager comes to Switzerland temporarily in order to attend to his clients here.

III. Lending Transactions (Article 3 AMLO)

A. Lending Transactions subject to the Act

a) Cash Lending

Any commitment to give money to a borrower against the borrower's obligation to repay the principal and pay interest on the received sum, as a rule, shall be subject to the AMLA. Mortgage loans, overdraft facilities, discount credits, loans against securities (lombard loans), long-term loans, as well as shareholder loans and subordinated loans shall also be included under the AMLA, even if they are covered by collateral or other security. Pawn brokers, which grant loans against pledged collateral, shall thus be subject to the AMLA. 29

b) Consumer Credit

The Act stipulates that consumer credits as per Consumer Credit Act (CCA; SR 221.214.1) shall also be subject to the AMLA. The provisions on granting ancillary loans (margin no. 44 et seqq.) shall remain applicable. 30

c) Trade Financing

Because the advance financing of a contracting party within the framework of a commercial transaction may also be viewed as lending, trade financing shall also as a rule be subject to the AMLA. Discount loans, collateral assignment loans and financial leasing, but also commercial loans or sales financing shall also be included in this definition. 31

Apart from mentioning the manufacturer – or delivery service or agent – and the lessee, a finance lease shall also show the leasing company and the lessor as third parties. This third party shall act as the lender. The lessor shall cede the object to the lessee for an uncallable contract period that corresponds approximately to the economic lifetime of the leasing object. The sum of the leasing payments shall equal the approximate acquisition value of the object, including the financing costs. The lessee shall take on all charges and risks connected with the object, such as maintenance, insurance, taxes or forces majeures. Finance leasing shall be subject to the AMLA, whereby it is the lessor as pre-financing party that is subject to the AMLA. 32

On the contrary, neither operating leases (margin no. 53) nor, as a rule, direct leases (margin no. 52) are subject to the AMLA. 33

Trade financing is not subject to the AMLA if ancillary lending as per Article 3(f) AMLO is considered evident (margin no. 44 et seqq.) or if the interest and amortization payments are not paid by the contracting party (margin nos. 55 et seqq.). 34

B. Activities Not Deemed To Be Lending Transactions (Article 3 AMLO)

a) Borrowing (Article 3(a) AMLO)

As a rule, borrowers are not subject to the AMLA. 35

Corporations and institutions under public law that are allowed to accept deposits from the public based on Article 3 of the Banking Ordinance (BO; SR 952.02) as well as compensation funds for which they are fully liable are also not subject to the AMLA. Associations and cooperatives shall be excluded from the provisions of the AMLA, provided they adhere to Article 5(2)(f) BO. The same shall apply to deposits of employees as well as retired employees with their employer (Article 5(2)(e) BO). However, once other financial intermediary services as per AMLA (e.g. lending activities of bank, asset management, payment services, etc.) are rendered in connection with the acceptance of deposits, the services shall be subject to AMLA. 36

b) Granting of Loans Free of Interest and Fees (Article 3(b) AMLO)

(No further comments.) 37

c) Granting of Loans Between a Company and its Shareholders (Article 3(c) AMLO)

Loans granted by a company to a shareholder or vice-versa are not subject to the AMLA if the shareholder directly or indirectly holds a minimum of 10% of the capital and/or the voting rights of the company. This shall be based on to the company's capital (share capital including participation capital, nominal capital stock). This practice shall apply to loans with all legal entities where a capital or voting participation is possible (public limited company, limited corporation, limited liability company, loans between limited partner and limited partnership). 38

Loans granted by general partners to the general partnership or vice-versa, or general partners and the limited partnerships are not subject to the AMLA. 39

Loans granted by cooperatives to its members and vice-versa as well as between associations and its members are not subject to the AMLA if the loan granted remains within the designated purpose of the cooperative or association. 40

A foundation granting loans to its beneficiaries in accordance with the foundation deed is not subject to the AMLA. Non-profit and tax-free associations and foundations granting loans to third parties in accordance with the non-profit association's or the foundation's purpose are also not subject to the AMLA. 41

d) Granting of Loans Between an Employer and Employee (Article 3(d) AMLO)

The obligation to make social security contributions for the employee as per Article 3(d) AMLO must be given during the entire duration of the loan's term. As soon as this condition ceases, the lender shall be considered to be a financial intermediary. Because executive bodies are classified as paid employees according to the settled practice of the Swiss Federal Court and the Swiss compensation funds, the criteria of the payment of social security contributions resulting from paid employment activities also applies to the executive body. 42

e) Granting of Loans Between Related Parties (Article 3(e) AMLO)

(No further comments.) 43

f) Granting Loans as an Ancillary Service (Article 3(f) AMLO)

The AMLO shall exclude the granting of loans as an ancillary service from the scope of the AMLA. This shall relate to cases where the granting of a loan is added to another legal transaction that is not attributed to the financial sector (e.g. the sale of goods). For a loan deemed to be an ancillary service, the following criteria shall count cumulatively: 44

- The purpose of the contractual relationship shall be the rendering of a payment in kind or service that is not attributed to the financial sector (production and sale of capital goods, consumer goods, etc.). 45

- The seller of goods or provider of the service ("provider of primary service") shall additionally guarantee its contracting party a loan. If, however, the contracting party is granted the loan by a group company affiliated to the provider of the primary service, then it is not deemed to be an accessory activity. Financial transactions of a group company for a third party are deemed to be an activity as financial intermediary. 46

- For example, if the producer and lessor in a leasing relationship belong to the same group, then the activity for a lessee not belonging to the group shall be subject to the AMLA. 47

- The granting of a loan shall be directly related to the primary service. 48

- In comparison to the primary activity, the granting of a loan shall have a lesser significance. The granting of a loan shall be of insignificance in relation to the primary service as indicated, for example, if the relationship between the gross revenue achieved through the lending activities (interest income) and the company's gross revenue (or possibly, the segment's gross revenue) is 10 % or less. 49

- The funds for granting a loan shall originate from the general funds of the provider of the primary service. However, if agreements containing the granting of an ancillary loan are refinanced through similar credit agreements with a third-party credit institution so that the provider of the primary service only takes on a formal role with regard to the granting of a loan, it shall not be deemed to be an ancillary activity (for example, back-to-back leasing). 50

Deferment of payment, extension of a payment deadline or a hire-purchase agreement may be viewed as granting of loans as an ancillary loan. 51

As a rule, the granting of a loan in the case of direct leasing where the producer or dealer itself is the lessor shall be considered as an ancillary activity. 52

g) Operating Leasing (Article 3(g) AMLO)

In contrast to finance leases, operating leases shall feature a relatively brief transfer period of objects and/or be easier to terminate. With operating leases, the lessor shall generally bear the responsibility and risks of the leased object. It shall be comparable with a rental agreement, which is why it is not viewed as lending. 53

h) Contingent Liabilities on Behalf of Third Parties (Article 3(h) AMLO)

Sureties or guarantees, for example, fall under contingent liabilities on behalf of third parties. Therefore, the contracting party who guarantees the contingent liability (the warrantor or guarantor) shall not be subject to the AMLA. 54

i) Trade Financing Where Repayment Does Not Occur Through the Contracting Party (Article 3(i) AMLO)

For the lending business, the risk of money laundering shall be assumed for the return flows of funds (interest and amortization payments). Therefore, making this type of business subject to the AMLA makes 55

sense only if the return flows of funds originates from the contracting party (DSFSC 2A.62/2007).

For example, in factoring the factor is assigned the client's claims from the latter's business operations. The factor pays the amount to its client and collects the claim at maturity from the debtor. In this case, the return flows of funds comes from the third party (debtor) and not from the pre-financed contracting party (client). 56

Also in the case of non-recourse financing, where clearly defined claims are acquired to which the ceding creditor no longer has any recourse, the return flows of funds does not come from the pre-financed contracting party but from the debtor of the purchased claim. 57

IV. Services Related to Payment Transactions (Article 4 AMLO)

A. Execution of Payment Orders (Article 4(1)(a) AMLO)

A service related to payment transactions shall in particular take place if the financial intermediary, by order of its contracting party, transfers liquid financial assets to a third party and in the process takes physical possession of these assets, has them credited to its own account or arranges the transfer of the assets on behalf and by order of the contracting party. In the process, the financial intermediary shall obtain authority to dispose over the assets belonging to others. As a rule, all transfers and forwardings carried out by order of the debtor of the service shall be subject to the AMLA, independent of whether the debtor compensates the service provider prior to or following the compensation to the third party. Persons holding a bank power-of-attorney to carry out payment orders for third parties shall also be subject to the AMLA because they dispose of assets belonging to others by order of the debtor. This also applies if the payment order is triggered by means of electronic transmission, such as in e-banking. Persons who forward book money payments for a client, in accordance with that client's instructions, to a beneficiary using a so-called transitory account shall also be subject to the AMLA. 58

If the intermediary maintains a contractual relationship only with the creditor of the claim and is trading on the order of the creditor, then, as a rule, a collection mandate is assumed that does not constitute activities as financial intermediaries (margin no. 8 et seqq.). However, if the assets thus accepted are transferred, as per instruction of the creditor, not to the creditor itself but to a third party, the subsequent transfers represent activities as financial intermediaries, whereby whoever collects the claim subsequently acts as financial intermediary between the creditor and the third party. 59

As a rule, payroll disbursements on behalf of third parties shall be an activity subject to the AMLA; however, there are exceptions. Salary payments are not subject to the AMLA if all of the following conditions are met: 60

- The payroll disbursements shall be triggered based on payroll accounting that is established by the same natural person or legal entity who is appointed to carry out the related payment transactions; 61
- The power-of-attorney granted for the purpose of carrying out the payroll disbursements shall be limited to the execution of the payment transactions relating to the payroll accounting. 62

B. Issuance of Payment Instruments and Operation of Payment Systems (Article 4(1)(b) AMLO)

a) General Aspects

Article 2(3)(b) AMLA lists credit cards and travelers checks as examples of payment instruments as per the AMLA. However, Swiss law knows no exhaustive list of the payment instruments. 63

In general, the issuing of payment instruments and the operating of payment systems that allow third parties the transfer of assets shall be subject to the AMLA.

b) Payment Instruments

The issuance of payment instruments shall be subject to the AMLA if the issuer is not identical with the user of the payment instrument (for example, buyers and sellers). If, for example, the issuer of the payment instrument is also the seller of a good for which payment is made by means of the payment instrument, then this is deemed to be a normal two-party transaction and the issuer not a financial intermediary. The term "payment instrument" should be understood as a complement to the payment system and includes all payment instruments the value of which comes into being at the moment of issuance. For instance, non-rechargeable e-money data mediums are included in this definition. 64*

c) Payment Systems

The operation of a payment system is subject to the AMLA if it is operated by an organization that is not identical with the users of the payment system (for example, buyers and sellers of a good). Systems that allow either access to available credit on the basis of stored data (rechargeable e-money data mediums, debit cards) or the recording of a debt that is later invoiced by the operator of the payment system (credit cards, department store cards in third-party relationships, etc.) shall fall under this definition. 65

d) Open Loop Systems and Closed Loop Systems

Whether the use of payment instruments or payment systems is limited to a defined user group (a so-called closed loop system) or not (a so-called open loop system) does not impact whether a payment instrument or a system is subject to the AMLA. If an issuer of payment instruments or an operator of payment systems as described is considered to be a professional practice as per AMLO it shall always be subject to the AMLA if the business model does not foresee two parties only. 66

e) Business Models with Four or More Parties

In the case of relationships with four or more parties (credit card organization, acquirer, issuer, processing company), several parties may be deemed to be financial intermediaries. Because the risk of money laundering with the use of credit cards is considered to be on the side of the card holder, the party which provides the client with access to the payment system (buyer of a good, initiator of the payment process), and therefore is in direct contact with the client, is subject to the AMLA. 67

Large credit card organizations grant licenses to national issuers and acquirers. The issuer handles the business with the credit card holder, which includes, in particular, the signing of a contract and the 68

authorization of payments. In contrast, the buyer handles the business with the contracting companies and handles payment transactions on their behalf. If credit cards are issued by a national issuer, the national issuer is subject to the AMLA.

C. Transfer of Money and Assets (Article 4(1)(c) and (2) AMLO)

(No further comments.) 69

V. Trading Activities (Article 5 AMLO)

Only the trading with financial instruments shall be subject to the AMLA, whereby both the buying and selling of financial instruments are considered to be "trading". Bank notes, coins, foreign currencies, precious metals used in banking and securities are deemed to be common financial instruments. 70

A. Trading with Bank Notes and Coins (Article 5(1)(a) and (b) AMLO)

Persons who trade with bank notes and coins for own account or for the account of third parties shall be subject to the AMLA. However, in this regard only trading activities involving legal tender in the form of circulation coins and bank notes may constitute the object of a trading activity subject to the AMLA. Circulation coins shall be coins issued for the needs of payment systems which are issued and withdrawn by the government at nominal value. Bank notes in circulation shall be deemed official means of payments and must be accepted by everyone. They shall be issued by an institution that is authorized by the government, usually the central bank, and withdrawn at nominal value through reimbursement. The following are not deemed to be bank notes and coins according to Article 2(3)(c) AMLO are: bank notes that have been withdrawn from circulation; coins that are traded with a premium of more than 5% above nominal value, especially circulation coins with numismatic properties (e.g. minted coins with defects), commemorative and bullion coins; medals, small bars that are intended for use in jewelry. 71

B. Trading with Commodities (Article 5(1)(c) and (d) AMLO)

Trading with commodities shall only be subject to the AMLA if it is settled for the account of a third party. 72

Commodities shall be raw materials derived namely from mining or farming or that can be attributed to the energy sector, such as crude oil, natural gas, metals, ores and coffee. 73

In contrast, commodity derivatives shall be securities as per the Financial Markets Infrastructure Act (FMIA, SR 958.1) and therefore fall under the exemption clause of Article 5(2) AMLO (see margin no. 83). 74

C. Trading with Precious Metals Used in Banking (Article 5(1)(a) and (e) AMLO)

Apart from trading with precious metals used in banking for the account of third parties (Article 5(1)(a) AMLO) trading for own account shall also be subject to the AMLA. Article 178 of the Ordinance on Controlling of Precious Metals Used in Banking (OCPM, SR 941.311) defines precious metals used in banking to be the following: 75*

- Bars and granules of gold with a minimal standard of 995 thousandths. 76

- Bars and granules of silver with a minimal standard of 999 thousandths. 77

- Bars and scrap of platinum and palladium with a minimal standard of 999.5 thousandths. 78

Furthermore, trading with bullion coins made of these metals is subject to the AMLA provided they are traded with a premium of less than 5% above nominal value. 79

At the same time, it does not matter whether the trade occurs through buying or selling of precious metals used in banking or through the buying of smelt that traders will process into precious metals used in banking in order to subsequently sell them. 80

For trading using precious metals accounts for used in banking, margin no. 16bis of FINMA Circular 2008/3 "Public deposits at non-banks" must be observed. 81

The trade with smelt, precious metal goods, semi-finished products, plate and replacement goods as well as the direct purchase by manufacturers or the sale of precious metals used in banking to manufacturers for the purpose of the production of such goods is not subject to the AMLA. 82

D. Trading with Securities (Article 5(2) AMLO)

Trading with securities as per Stock Exchange Act (SESTA, SR 954.1) shall be subject to AMLA in accordance with Article 2(2)(d) AMLA. Other trading with securities – particularly if it is performed below the threshold of professional trading – is not subject to Article 2(3)(c) AMLA because it is negligible from the perspective of volume. Agent traders pursuant to Article 3(5) of the Ordinance on Stock Exchanges and Securities Trading (SESTO, SR 954.11) who, in addition to their activities as securities traders, engage in asset management or who provide payment services, for instance, shall nevertheless be subject to the AMLA in accordance with the relevant provisions (Articles 4 and 6 AMLO). 83

E. Foreign Currencies Exchange (Article 5(1)(a) and (3) AMLO)

Currency exchange shall be defined as the direct exchange of an amount in one currency to the equivalent amount in another currency. This activity shall be subject to the AMLA. In contrast, the payment of goods or services in one currency with change provided in another currency is generally not subject to AMLA. Such a trade is not qualified as currency exchange if the focus lies on the purchase of goods or services. However, if the purchase of goods or services is not the primary goal of the trade but the exchange of money into another currency, this shall be deemed as currency exchange and therefore subject to the AMLA. Indications for such loophole transactions shall exist if there is an obvious misbalance between the amount of cash given for payment and the actual price of the goods or services. 84

If a company operates in currency exchange as an ancillary activity to its main operation, this does not constitute a trading activity and is therefore not subject to the AMLA. Currency exchange is not deemed to be an ancillary activity if: 85

- the financial intermediary performs or is ready to perform single or multiple interlinked currency exchange trades in the amount of more than CHF 5,000 or 86

- the gross profit from currency exchange amounts to more than 10% of the company's earnings per calendar year. 87

F. Foreign Exchange Trading (Article 5(1)(a) AMLO)

The purchase and disposal of foreign currencies for a third party shall be subject to the AMLA. Foreign currency dealers who manage accounts for investments in foreign currencies for their clients on a professional basis are required to have a banking license (Article 5 Banking Ordinance (BO; SR 952.02) and FINMA Circular 2008/3 "Public deposits at non-banks"). 88*

G. Further Types of Trading

Further types of trading, such as real estate trading or art dealing, are in principle not deemed to be financial intermediary activities as long as no third-party assets such as cash are accepted. However, if third party assets are accepted, it may be deemed to be a financial intermediary activity subject to the AMLA. If, on the other hand, the activity may be described as debt collection (margin no. 8 et seqq.) or as the transfer of assets as an accessory ancillary service to the primary contractual service (margin no. 13 et seqq.), these activities are not subject to the AMLA. 89

VI. Other Activities

A. Asset Management (Article 6(1)(a) AMLO)

a) General Aspects

The AMLO shall cover the management of securities and financial instruments for a contractual party, which is generally referred to as asset management. An asset manager shall be given a power-of-attorney by its client to manage the client's assets through investments or investing them in financial instruments. 90

The mere forwarding of clients' purchasing instructions – e.g. by forwarding a closed envelope, fax or e-mail (client order attached as a PDF document) from the client – is not deemed to be asset management. No power-of-attorney can be assumed in such a case. 91

Typical financial instruments shall be domestic and foreign bank notes and coins, foreign currencies, precious metals, securities, negotiable instruments and book-entry securities as well as their derivatives. 92

The management and administration of assets not deemed to be financial instruments, such as stamp collections, paintings or antiques, for a third party is not subject to the AMLA.

b) Collective Investment Schemes

Investment structures not subject to Collective Investment Scheme Act (CISA, SR 951.31) according to Article 2(2) CISA are not in the scope of Article 2(3) AMLA. This shall also apply to occupational pension schemes (Article 2(2)(a) CISA and Article 2(4)(b) AMLA), social security institutions and compensation funds (Article 2 (2)(b) CISA) and public authorities and institutions (Article 2(2)(c) CISA). It shall also apply to operating entities that are engaged in business activities (Article 2(2)(d) CISA) if these are not of a 93

financial intermediary nature. Holding companies (Article 2(2)(e) CISA), associations and foundations (Article 2(2)(g) CISA) are also not subject to AMLA if they do not act as financial intermediaries and do not qualify as domiciliary companies (margin nos.102 et seqq.). Investment clubs that are not in the scope of qualification of the CISA according to Article 2(2)(f) CISA are not subject to the AMLA either because there is no management of third party funds.

c) Investment Companies

Investment companies not subject to the CISA (as per Article 2(3) CISA), shall nevertheless be subject to Article 2(3) AMLA. This shall concern investment companies holding the legal form of public limited companies if these are listed on a Swiss stock exchange or if only qualified investors (as per Article 10(3), (3bis) or (3ter) CISA) may hold their shares and the shares are registered. 94*

d) Asset Managers of Foreign Collective Investment Schemes

Asset managers of foreign collective investment schemes are subject to Article 2(3) AMLA if the foreign collective investment scheme they manage is not subject to a supervision that is equivalent to Swiss supervision as per CISA (Article 2(4)(d) AMLA). 95

B. Investment Advisory Services (Article 6(1)(b) AMLO)

According to Article 2(3)(f) AMLA, investment advisors are subject to the AMLA if they undertake investments. In contrast, mere investment advisory services do not fall in the scope of qualification of the AMLA. According to Article 6(1)(b) AMLO asset managers shall be subjected to the AMLA whenever they execute orders for the account of third parties. This applies if asset managers undertake investments for individual cases based on a corresponding power-of-attorney, for example upon the client's order to an asset manager or the custodian bank. Asset management based on a general power-of-attorney that includes the undertaking of investments shall be subject to Article 6(1)(a) AMLO. 96

C. Safekeeping of Securities (Article 6(1)(c) AMLO)

The definition of securities shall be the same as that applied in the Financial Markets Infrastructure Act. According to Article 2(b) FMIA, securities shall be standardized certificates that are suitable for mass trading, book-entry securities and derivatives and intermediated securities. Certificated and uncertificated securities, derivatives, and intermediated securities which are publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, insofar as they have not been created specifically for individual counterparties (Article 2 Financial Markets Infrastructure Ordinance, FMIO; SR 958.11) shall be deemed to be standardized securities that are suitable for mass trading. 97

The safekeeping of securities by an employer that, as part of a so-called employee participation programs, arise from treasury shares or the issuing of own shares to employees and which form part of the salary is not subject to the AMLA. 98

The mere administration of a share register without the safekeeping of the titles does not justify subordination to the AMLA. 99

D. Activities as Governing Body for Domiciliary Companies (Article 6(1)(d) AMLO)

Activities as governing body are not deemed to be an activity as financial intermediary. Members of the governing body manage and dispose of the assets of the company for which the governing body serves and thus do not do this for third-party funds. This is not the case with domiciliary companies: in this constellation, the governing body's activities shall be deemed to be and activity as financial intermediary if they are undertaken as fiduciary activities, i.e. upon the instructions of the beneficial owner. In this case, the members of the governing body manage and dispose of third-party assets, i.e. the assets of the beneficial owner. The activities are not subject to the law if the actual beneficial owner is a member of the governing body. 100*

a) Definition of Governing Body

A broad definition of governing body is assumed. Hence, persons deemed to be members of the governing body are those who actually fulfill the function of governing bodies by making decisions that are reserved for governing bodies or providing actual management and thereby significantly influencing the decision-making process of the company. This therefore shall not only include the formal (members of the board of directors) and the substantive (directors, managing directors, etc.) governing bodies, but also the factual bodies (DSFSC 114 V 213). 101

b) Definition of Domiciliary Company

Legal entities, companies, institutions, foundations, trusts, fiduciary companies and similar associations that do not operate a trading, manufacturing or other commercial business (Article 6(2) AMLO) shall be deemed to be domiciliary companies. This applies, in general, to financial vehicles that are used for managing the assets of the beneficial owner of the company or the asset structures, respectively. 102

Domiciliary companies are different from operating companies that run a trading, manufacturing or other service company or if these operate services or another trade of a commercial nature. Whether a domiciliary or an operating company is present must be clarified on a case-by-case basis. Indicators serve to determine whether the principal purpose of a company lies in the management of the assets of the beneficial owner as well as the related realization of returns or capital gains that originate from those assets, or rather whether it lies in an actual commercial operation. These indicators are to be taken, in particular, from the balance sheet and income statement. If, for example, a securities portfolio or another asset represents the dominating balance sheet item of a company, and if the main item presented in the income statement are returns or capital gains resulting from that asset, this is strong indicators that this is a domiciliary company. In cases where there are indicators for both an operating company as well as a domiciliary company, the dominating indicator or dominating indicators that determine the principal purpose of the company must be evaluated in its overall concept. 103

However, an operating company is subject to AMLA if it becomes active as a financial intermediary as per Article 2(3) AMLA. 104

As a rule, the following are deemed to be domiciliary companies:

- Companies and organized asset structures that do not pursue an operating activity and which hold the assets of their beneficial owner. 105

- Trusts: trustees who manage trusts in or from Switzerland shall be subject to the AMLA regardless of where the trust assets are located and regardless of the legal system under which the trust was incorporated. Whether a protector shall be deemed to be a financial intermediary depends on the arrangement of the powers conferred on it. The authority to change the trustee or the exercising of veto rights with respect to investment or distribution decisions of the trustee alone does not lead to a subordination to the AMLA. 106

As a rule, the following are not deemed to be domiciliary companies:

- Legal entities and companies that aim to safeguard their members' or beneficiaries' interests by means of mutual self-help or that pursue political, religious, scientific, artistic, charitable, sociable or similar aims if they only pursue the aims mentioned in their articles of association. This shall also apply to family foundations established according to Swiss law if these stay within the legal bounds defined therein (Article 335 Civil Code [CC; SR 210]) and the relevant decision of the Swiss Federal Supreme Court (DSFS 108 II 393). 107

- Companies, institutions, foundations, trusts/fiduciary companies that hold majority participations in one or several companies in order to group them together under common management by majority in voting rights or in another manner (holding companies). In doing so, the holding company must factually exercise its management and controlling influence. However, if the subsidiaries of the holding company qualify as domiciliary companies, the governing bodies of the subsidiaries shall be subject to the AMLA as financial intermediaries. 108

- Operating companies that are in liquidation. 109

E. Insurance Brokers

The term insurance intermediary shall be used as a generic term for different forms of insurance intermediation. It shall distinguish between the main categories, "independent intermediaries" (Article 43(1) Insurance Supervision Act [ISA; SR 961.01] in combination with Article 183 Insurance Supervision Ordinance [ISO; SR 961.011]) and "dependent intermediaries" (Article 43(2) ISA). 110

An activity as intermediary is not subject to the AMLA. An activity as intermediary shall be subject only to the AMLA if an activity subject to the AMLA (Article 2(3) AMLA) is performed in addition to the activity as intermediary. 111

This is, for example, the case if insurance intermediaries accept cash on behalf of clients and forward it according to their instructions. However, the activity is not subject to AMLA if it consists of collecting an overdue claim (cf. margin no. 8 et seqq.). 112

If a sales representative depends on an insurer through an employment contract or a cooperation agreement, this person shall be subject to the provisions that apply to the company. If it is subject to AMLA in 113

accordance with Article 2(2)(c) AMLA (insurance institutions pursuant to the Insurance Supervision Act that deal in direct life insurance or offer or distribute shares in collective investment schemes), its representatives and their financial intermediary activity shall also be subject to AMLA supervision. This shall apply, for example, to main and general insurance agencies.

F. Attorneys and Notaries Public

a) General Aspects

An attorney shall be subject to the AMLA if an activity that is subject to AMLA is pursued. However, attorneys and notaries public shall be exempt from reporting obligations based on Article 9(2) AMLA if they can invoke professional confidentiality in accordance with Article 321 Penal Code (PC; SR 311.0). In keeping with the practice, activities subject to professional confidentiality shall not be subject to the Act. 114

This is why (profession-specific) activities subject to professional confidentiality must be differentiated from (not profession-specific) activities not subject to professional confidentiality (DSFS 132 II 103).

An attorney's duty to maintain professional confidentiality as per Article 321 PC shall only relate to "facts that were entrusted to him/her by clients in order to allow for the performance of the mandate or that the attorney has perceived during the mandate" (DSFS 115 Ia 197). 115

This includes, for example, settlements and thereby, if common, short-term investments that relate to advances for court costs, bails, public-law fees, etc. as well as payments to or from parties of a legal process, third parties or authorities relating to a pending distribution of estate or execution of a will, in connection with pending distribution of property in the course of a divorce or separation, in civil-law or public-law matters before the ordinary courts or arbitration and foreclosure proceedings. 116

Non-profession-specific activities, which exist if the commercial element outweighs the legal activity, must be distinguished. In particular, non-profession-specific activities shall include activities that are usually only carried out by asset managers, fiduciary offices or banks. This shall include, in particular, asset management or the investment of assets. (Otherwise, an accused party could prevent profits resulting from criminal acts from being seized by prosecuting authorities by involving an attorney as a middleman.) Such activities shall also be referred to as "accessory activities" of attorneys/notaries public. 117

These rules shall only apply to attorneys and notaries public who exercise their activities as professionals and who are registered in a cantonal attorney registry, a cantonal chamber for notaries or an equivalent foreign professional association. Attorneys active in an attorney-owned public limited company or a licensed, attorney-owned limited liability company shall also be considered to be professionals. 118

b) Attorneys as Escrow Agents

An escrow agent shall be subject to the AMLA if the settlement of the escrow agreement includes a right of disposal of third-party assets. Whether an attorney acting as escrow agent is subject to the AMLA shall depend on whether the attorney's expertise is required for the execution of the escrow agreement. 119

If the activity as escrow agent is directly associated with a specific legal task, as a rule, it is to be assumed that legal expertise is required for the correct settlement of an escrow agreement and that this activity 120

shall fall under the area of the profession-specific activities. However, it shall depend on the individual case. For example, if no legal expertise is required for the settlement of simple, standard contracts, the attorney involved may well be subject to the AMLA. The attorney shall bear responsibility for the decision on whether the mandate in question requires technical knowledge and should therefore be subject to professional confidentiality.

If the execution of the escrow agreement is not directly associated with a concrete, legal mandate, it shall be assumed that no attorney expertise is required for the correct settlement of the escrow agreement and that the mandate therefore is not subject to the AMLA. In such a case, the parties are not engaging the attorney for his/her profession-specific skills, but because they prefer to rely on the services of a neutral and trustworthy person for the settlement of the agreement. 121

Again, the individual case must always be taken into consideration. If legal expertise is clearly required for the settlement of an escrow agreement, the activity could also fall under profession-specific activities.

c) Attorney's Activities in connection with the Incorporation of a Company

For company incorporations, the attorney is not subject to the AMLA if he/she limits himself/herself to providing advice, drafting contracts and procuring persons to ensure the management and execution of the incorporation, without intervening in the necessary payment transactions. If, however, bearer shares or registered shares endorsed in blank, which qualify as securities (see margin no. 97 for the definition of securities), are safeguarded during the incorporation, this shall constitute as an activity as financial intermediary. The forwarding of the founding capital by the attorney to the bank shall be deemed as a payment service that is subject to the AMLA. 122

d) Notary Public's Activities in connection with the Purchase of Real Estate

If the purchasing price in connection with a sale of property is transferred through the client cash account of the certificating notary public, this does not qualify as activity as a financial intermediary subject to the AMLA because the service is closely linked to a profession-specific activity. The same shall apply if the notary public repays mortgage debts with the purchasing price or pays fiscal dues or taxes resulting from a property transaction out of assets received from a contracting party. Likewise, the transfer of a brokerage fee to a third party is not deemed to be an activity as financial intermediary subject to the AMLA because the service is directly linked to the profession- specific activity of a notary public. Only payments to third parties that are necessary for the orderly settlement of a property transfer shall be deemed to be profession-specific. 123

G. Financial Intermediary Activities in the Real Estate Sector

a) Property Management

Property management shall include rendering services such as the collection of rents, of ancillary services such as the collection of additional costs or liability insurance from rent contracts or the acceptance of rental deposits or insurance payments. Property managers who receive cash in the name, on behalf of and for the account of the property owner as part of the usual property management are not deemed to be financial intermediaries according to the AMLA because they are carrying out a collection activity. 124

If the property manager uses the income received for the account of the owner to make payments to third parties, the activity is not subject to the AMLA if it is directly linked to usual activities related to property management. The same shall apply to payments that a property manager makes with funds received from the property owner for that purpose. 125

This is the case, for example, for interest and amortization payments on liabilities, especially mortgages; payment of current utility expenses from the contracted supply of e.g. water, electricity, etc.; payment of taxes, other fees, insurance premiums relating to the property; payment of energy purchases; payment of current property maintenance; payment of modifications and other work on the property; payment of salaries for permanent and periodical services (caretaker, gardener, etc.) including payment of social benefits to the respective institutions; repayment of possible surpluses. 126

Any acceptance and transfer of cash beyond the property management activity shall be subject to the AMLA. This practice shall also apply to the management of condominiums. 127

b) Real Estate Companies

A real estate company shall qualify as a domiciliary company if its only or primary asset is one or more properties and it does not manage those by itself, i.e. it is not involved in operations. In contrast, a real estate company that conducts property management may be subject to the AMLA itself (cf. margin nos. 124 et seqq.). 128

c) Real Estate Brokering

Being active purely as a broker is not subject to the AMLA. However, an activity as a financial intermediary may be present if the real estate broker forwards or transfers the purchasing price to the seller at the seller's instructions. If the real estate broker acts at the seller's instructions and the seller compensates this activity, this shall be deemed to be a collection activity not subject to the AMLA. 129

d) General or Sole Contractor, Architects, Engineers and Property-Related Fiduciary Services

General or sole contractors who accept payments from the builder at sales price and forward cash to subcontractors shall dispose of their own cash not that of third parties. Therefore, this cash flow does not represent an activity as financial intermediary. 130

The carrying out of payment orders and the settlement of contractor and supplier invoices of architects or engineers as part of the construction supervision shall also be regarded as an accessory activity. 131

If a builder appoints a construction advisor to perform payment transactions or pay any construction invoices, the latter shall qualify as a financial intermediary because he/she acts on the debtor's instructions. 132

VII. Government Activities

Government activities shall not be subject to the AMLA if they are undertaken in exercise of official competences, even if the operations themselves would qualify as an activity as financial intermediary. - However, if the government operates as a financial intermediary not in exercise of official authority, then the activities shall be subject to the AMLA. 133

A financial intermediary shall only be able to reasonably fulfill the duties specified in the AMLA if there is a contractual relationship. Subordinating the state to the AMLA is therefore possible only if the state, as part of its activities outside of official authority, shall enter into contracts. In doing so, it shall not matter whether the contracts have been drawn up under private or administrative law. 134

The exact organizational structure of the agency fulfilling public duties is not relevant in order to become subject to the AMLA. Private organizations may also be authorized by law, acts of public authority or an administrative-law contract to fulfill public duties. 135

Therefore, it must be reviewed on a case-by-case basis whether the activities are undertaken within the state's official authority or not. The following shall be indications of activities within the state's official authority that are not subject to the AMLA: 136

- The activity as financial intermediary is permitted or transferred to an authority or organization by means of an explicit legal basis, an act of public authority or an administrative-law contract. Adherence to the control steps and the conditions for delegation must be reviewed on a case-by-case basis. 137

- In case there is a lack of cooperation, the authority or organization that is authorized to conduct activities as a financial intermediary may issue orders. In this respect, a subordinated relationship is to be assumed between the authority and the contracting party, despite the contract. 138

- Activities as financial intermediary of an authority or organization shall serve as a means to be able to fulfill a duty in its competence or it is closely related to such a duty. 139

- The public authority or organization that provides the official action shall be subject to a financial audit competence of a superordinate public authority. 140

Debt enforcement and bankruptcy offices, the non-public liquidator (Article 241 Federal Debt Enforcement and Bankruptcy Act [DEBA; SR 281.1]) as well as debt and bankruptcy law liquidators as per DEBA (Articles 317 et seqq. DEBA) are not subject to the AMLA. Institutions such as estate liquidators (Article 516 et seqq Civil Code) or assistances (Article 393 et seqq. Civil Code) or custodial bodies (Article 360 et seqq Civil Code) are not subject to the AMLA, either. Executors of the estate (Article 554 Civil Code) and executors of a will (Article 517 et seq. Civil Code) are normally not subject to the AMLA unless they perform financial intermediation services beyond their mandates, e.g. during their involvement in the distribution of an estate. 141*

VIII. Professional Basis

A. General Criteria (Article 7 AMLO)

If any one of the following criteria are fulfilled, a financial intermediary is deemed to be a financial intermediary on professional basis, taking into consideration Article 8 et seqq. AMLO: 142

- Gross revenues per calendar year of more than CHF 50,000 (Article 7(1)(a) AMLO): Gross revenue shall consist of all revenues earned with activities that are subject to the AMLA. The gross revenue of relevance shall be the amount prior to deducting any revenue impairments. For trading companies that structure their income statements based on the gross method, gross earnings shall be relevant. If a financial intermediary provides both services that are subject to the AMLA and services that are not subject to the AMLA, then the revenues from the subjected activities must be assigned to the relevant gross revenue. This shall require a clear and proper accounting segmentation between subjected and non-subjected activities. 143

- Business relationships with more than 20 contracting parties (Article 7(1)(b) AMLO). 144

- Authority to dispose of third-party assets that exceed CHF 5 million at any time (Article 7(1)(c) AMLO). 145

- Execution of transactions where the total volume exceeds CHF 2 million per calendar year (Article 7(1)(d) AMLO). In general, every conversion or transfer of assets shall constitute a transaction. The performance of a single and isolated transaction is not yet considered to be a professional activity, even if it exceeds CHF 2 million. However, after the second transaction, the activity shall be considered to be professional if the total volume of both transactions combined exceeds CHF 2 million. In order to calculate the transaction volume according to Article 7(1)(d) AMLO, inflows of assets and portfolio reallocations within the same securities safekeeping account must not be taken into consideration. For mutually binding contracts, only the services provided by the counterparty must be taken into consideration. 146

Activities as a financial intermediary for institutions and persons listed in Article 2(4) AMLA shall not be taken into consideration for the definition of a professional activity (Article 7(3) AMLO). 147

B. Related Parties (Article 7(4) and (5) AMLO)

(No further comments.) 148

C. Lending Transactions (Article 8 AMLO)

For a leasing contract, the total volume of all installments that have to be made in the course of the contract shall be relevant. Leasing is deemed to be a professional activity if the total value of all leasing contracts exceeds CHF 5 million, whereby each leasing contract is taken into account with the total of volume of all installments to be paid and if the interest income from the leasing exceeds CHF 250,000. 149

If a person conducts the lending business as well as another activity as financial intermediary, both areas must be assessed separately to determine professional activity. If the professional activity is given in one 150

area, both areas shall be considered to be professional activities, resulting in both areas being subjected to AMLA.

D. Money or Asset Transfer Business (Article 9 AMLO)

Money or asset transfers as per Article 4(2) AMLO shall be considered to be a professional activity, i.e. independent of the amount. The absence of thresholds takes into account the fact that this activity is especially prone to money laundering. The one exception shall be the practice of such activity for related parties, where a gross revenue of more than CHF 50,000 must be earned as per Article 7(4) AMLO in order for it to be considered a professional activity. 151

E. Trading (Article 10 AMLO)

The criterion used to assess (Article 7(1)(a) AMLO) whether a trading activity as per Article 5 AMLO is performed on a professional basis shall be based on gross earnings rather than gross revenues. This is because the gross revenue from trading activities includes the value of the traded goods; for the assessment of professional activity, the difference between the purchase and sale price is of significance, in other words the gross earnings, should be the determining factor. 152

F. Withdrawal or Exclusion from an SRO (Article 12 AMLO)

(No further comments.) 153

IX. Transitional period

Repealed 154*

List of amendments

The circular has been amended as follows:

These amendments have been passed on 26 October 2016, with effect as of 1 January 2017.

Newly inserted margin nos.	28.1, 28.2, 28.3, 28.4, 28.5, 28.6
Amended margin nos.	1, 8, 64, 75, 88, 94, 100, 141
Repealed margin nos.	28, 154

Other changes: "financial intermediation" has been replaced with "activities as financial intermediary" Amended title before margin no. 75

All of the former references to the PFIO have been adjusted to reflect the Anti-Money Laundering Ordinance (AMLO; SR 955.01), effective as of 1.1.2016.

Moreover, the references to the ordinance on Stock Exchanges and Securities Trading of 1 December 1996 (SESTO; SR 954.11) have been adjusted to reflect the Financial Markets Infrastructure Act of 19.6.2015 (FMIA; SR 958.1) or the Financial Market Infrastructure Ordinance (FMIO; SR 958.11).

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