

2020

Commentary on the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 20)

Table of contents

Foreword	6
Chapter 1: Introduction	8
Art. 1 Scope	8
Art. 2 Relationship to other rules	8
Art. 3 Commentary on this code of conduct	8
Chapter 2: Verifying the identity of the contracting partner	10
Section 1 General provisions	10
Art. 4 Verifying the identity of the contracting partner	10
Art. 6 Duty of identification irrespective of minimum thresholds	14
Art. 7 Information to be documented	15
Art. 8 Identification by other appropriate means	16
Section 2 Natural persons	16
Art. 9 Identification on a face-to-face meeting	16
Art. 10 Identification when a business relationship is established by correspondence	17
Art. 11 Bodies authorised to provide authentication	18
Section 3 Legal entities and partnerships	19
Art. 12 Identification based on an entry in the Swiss Commercial Register or an equivalent foreign register	20
Art. 13 Identification without an entry in the Swiss Commercial Register or an equivalent foreign register and identification of a public authority	20
Art. 14 Validity period of commercial register extracts and equivalent documents	21
Art. 15 Checking the identity of persons establishing business relationships and taking note of power of attorney arrangements	22
Art. 16 Identification of simple partnerships, companies in the process of foundation and trustees	24
Art. 17 Publicly known legal entities, partnerships and public authorities	26
Section 4 Special forms of identification	26
Art. 19 Identification within the group	26

Chapter 3: Establishing the identity of the beneficial owner of operating legal entities and partnerships	28
Section 1 General conditions	29
Art. 20 Establishing the identity of the controlling person	29
Art. 21 Information to be documented	33
Section 2 Exemptions concerning the duty to establish the controlling person	35
Art. 22 Companies quoted on the stock exchange	35
Art. 23 Public authorities	36
Art. 24 Banks and other financial intermediaries as contracting partners	36
Art. 25 Further exceptions concerning determination of controlling persons	38
Art. 26 Condominium owner and common ownership collectives	38
Chapter 4: Establishing the identity of the beneficial owner of assets	40
Section 1 General conditions	41
Art. 27 Establishing the identity of the beneficial owner	41
Art. 28 Information to be documented	42
Section 2 Exceptions from the obligation to identify the beneficial owner	44
Art. 29 Natural persons	44
Art. 30 Operating legal entities and partnerships not quoted on the stock exchange	45
Art. 31 Companies quoted on the stock exchange	46
Art. 32 Public authorities	46
Art. 33 Banks and other financial intermediaries as contracting partners	46
Art. 34 Simple partnerships	48
Art. 35 Condominium owner and common ownership collectives	49
Art. 36 Individuals and entities that are bound by professional confidentiality	50
Section 3 Particular duties concerning identification	50
Art. 37 Collective accounts and collective safekeeping accounts	50
Art. 38 Collective investments and investment companies	51
Art. 39 Domiciliary companies	53
Art. 40 Foundations and Art. 41 Trusts	56
Art. 42 Life insurance policy with separate account/securities account (insurance wrapper)	60

Chapter 5: Delegation and monitoring regulations	62
Section 1 Delegation	62
Art. 43 Delegation of the identification of the contracting partner, establishment of the controlling person and of the beneficial owner	62
Section 2 Duty to document	63
Art. 44 Duty to ensure	63
Art. 45 Point in time for fulfilling the duty to document	64
Section 3 Duty to repeat procedures	66
Art. 46 Duty to repeat due diligence with respect to this code of conduct in the event of doubts	66
Chapter 6: Prohibition of active assistance in the flight of capital	68
Chapter 7: Prohibition of active assistance in tax evasion and similar acts	69
Chapter 8: Audit and procedural provisions	70
Section 1 Proceedings	70
Art. 59 Auditing	70
Art. 60 Investigations	70
Art. 62 Abbreviated process	71
Section 2 Sanctioning rules	71
Art. 63 Minor cases	71
Art. 64 Violations of the rules of this code of conduct	72
Art. 65 Limitation period	72
Section 3 Organisation	73
Art. 66 Supervisory board	73
Art. 67 Investigators	73
Appendix: case studies	74
List of abbreviations	84

Foreword

The **agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB)**, which has existed **since 1977**, is normally revised in a five-year cycle.

The current version was drafted to take account of the comments made by the Financial Action Task Force on Money Laundering (FATF) in its **Mutual Evaluation Report** on Switzerland dated 7 December 2016. The revised CDB enters into force on 1 January 2020 as CDB 20.

The material changes are intended to rectify the deficiencies identified by the FATF. They relate in particular to the **thresholds for trading and cash transactions**, which have been removed , respectively lowered, (Arts. 4, 20 and 27), and the **point in time for fulfilling the duty to document** (Art. 45). Further changes made with the intention to make the text more readable and provide clarity on a number of issues arising out of practical application.

For formal reasons, the relevant sections of CDB 20 also include a reference to the current **FINMA Circular on video and online identification**.

The provisions on the prohibition of active assistance in the flight of capital, tax evasion and similar acts are retained in CDB 20.

Following the revision of the CDB text, amendments and additions have also been made to this commentary.

In the interest of readability, the text does not make any distinctions in terms of gender. All forms used should be interpreted as including the other gender.

Chapter 1: Introduction

The CDB establishes a **minimum regulatory standard**, leaving its signatories free to devise stricter regulations on specific points. Some provisions deliberately allow for certain flexibility and so make it possible to apply the CDB using a **risk-based approach**.

CDB 20 is available in English, French, German and Italian. In the event of any material discrepancy between different language versions, the German version takes precedence.

Art. 1 Scope

Unless otherwise noted, the CDB and commentary relate to all banks and securities dealers, even if only one term is used in the text for convenience.

Art. 2 Relationship to other rules

AMLO-FINMA, and not the CDB, sets out when and how the background of **business relationships and transactions involving higher risks** is to be investigated and the special investigation duties in this regard.

The reference in Art. 2 para. 3 concerning the business practice of **credit card companies** relates to the corresponding regulations in AMLO-FINMA.

Art. 3 Commentary on this code of conduct

The commentary on the CDB is published by the SBA as an **aid to interpretation** for banks, CDB bodies and audit firms, but it **does not Form part of the CDB**.

Chapter 2: Verifying the identity of the contracting partner

Section 1 General provisions

Art. 4 Verifying the identity of the contracting partner

In accordance with the practice of the supervisory board, all account holders must be identified for **joint accounts**, unless an exception applies (for example with respect to the identification of simple partnerships).

In the case of **collective accounts and collective safekeeping accounts** used to manage a company's employee share ownership schemes, only the company must be identified, provided the ownership rights are booked to a collective account or collective safekeeping account in the company's name.

The term «**securities**» is defined in Art. 2 letter b FMIA as meaning standardised certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading. The term «transactions» refers to what Art. 1 of the Stock Exchange Act (SESTA) calls «professional trading in securities». With the coming into force of CDB 20, the bank is obliged to identify the contracting partner in all trading transactions as defined in Art. 4 para. 2 letter f, regardless of the amount concerned.

Refer to Art. 2 letter b AMLO-FINMA for a definition of **cash transactions**. They include all transactions involving cash and cash equivalents, in particular currency exchange, the purchase and sale of precious metals, the sale of traveller's cheques, cash payment of bearer securities, medium-term notes and bonds and the cashing of cheques, provided these transactions are not booked to an existing client account. The threshold set out in Art. 4 para. 2 letter g has been reduced from CHF 25,000 to CHF 15,000 in response to the criticisms raised by the FATF in its 2016 Mutual Evaluation Report on Switzerland.

In accordance with the practice of the supervisory board, cash deposits and withdrawals in connection with accounts/savings books at another bank are regarded as cash transactions, even if the other bank is the parent company (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.11 p. 22). However, Art. 19 remains applicable. The supervisory board has also determined «that the decisive criterion for a financial transaction to be categorised as a cash transaction is not that there is cash settlement (in the sense of the physical receipt or handing over of an asset).» Rather, the distinctive feature of a cash transaction is that it is an ad hoc service that is not a permanent business relationship. «Accordingly, cash transactions are transactions that are not settled via an existing account of the client and do not give rise to any further relationship between the client and the bank, with the result that there is no documentation which would enable the client to be identified or the origin and subsequent movements of the assets presented to be reconstructed.» (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.15 p. 23f.).

Finally, the supervisory board states «that a cash transaction [...] is also a cash transaction when it is executed by an existing client. The fact that the client has already been identified at an earlier point in time means that the client does not need to be identified again. Nevertheless, a declaration of beneficial ownership must be obtained in every case.» (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.16 p. 24).

Exchanging cash for other denominations in the same currency also falls under the definition of cash transactions. In practice, anyone carrying out a cash transaction over the counter must be identified as a contracting partner.

Capital market transactions, specifically transactions to place securities with investors (e.g. the selling shareholder in initial public offerings) and cases in which the bank acts as paying agent and/or issuer or in a similar function, do not constitute trading transactions for the purposes of Art. 4 para. 2 letter f.

A person who has **already** been correctly identified in **connection with an existing business relationship** does not have to be identified again when extending the business relationship with the bank. In accordance with the practice of the supervisory board, this also applies if the CDB requirements for client identification have been tightened up in the meantime. However, the initial identification must have been carried out in accordance with the Agreement on due diligence in force at the time (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.10 p. 21). Persons who have been validly identified and whose business relationships are subsequently closed must be identified again when establishing a new business relationship with the bank. This rule does not apply to business relationships terminated by the bank («forced exit») which subsequently have to be reactivated, for example because the transferred assets are returned (e.g. due to insufficient or incorrect payment instructions or a cheque issued by the bank not being cashed). In such cases, the process of verifying the identity of the contracting partner and establishing the identity of the beneficial owner does not have to be repeated. However, such reactivated accounts must be blocked for all further incoming transactions.

If a person's identity has been verified in connection with an existing business relationship and a correct formal identification has already been carried out, the person need not be identified again when establishing a new business relationship. However, simply checking the identity as outlined in Art. 15 is not sufficient to obviate the need for identification for a separate business relationship.

The term «correct» relates to the duties of due diligence which applied when the business relationship was established. The person is thus deemed to have been correctly identified if the provisions of the CDB which applied when the business relationship was established, or alternatively the current provisions of the CDB, were observed (*lex mitior* principle).

The decision that the identity need not be verified again does not have to be specially documented. The duty to ensure that procedures are documented under Art. 44 is met if the documentation shows that the person has already been identified (e.g. if the identification documents are held by the bank or in the bank's system). Any duty to repeat under Art. 46 applies notwithstanding.

In the case of **credit relationships**, three types of credit can essentially be distinguished: the (bilateral) credit transaction, the syndicated loan and the sub-participation in syndicated loans.

1. **(Bilateral) credit transactions** are generally a type of financial service covered by AMLA, as they entail the risk of the proceeds of crime being used to pay interest and repay the loan. The supervisory board has confirmed that the CDB applies to credit relationships. With regard to a borrower, the bank is therefore subject to the due diligence requirements concerning identifying the contracting partner and establishing the identity of the controlling person and/or beneficial owner.
2. Since **a syndicated loan** essentially involves the same set of circumstances as with the (bilateral) credit relationships mentioned (direct contractual relationship between the individual bank and the borrower), this type of transaction is also subject to AMLA. Accordingly, the CDB applies here too. This applies both to business transactions in which the bank is leader of the consortium and to those where it is merely a participant.
3. **Subsequent participations/sub-participations** in loans or bilateral credit transactions may involve one of three different situations. They can come about:
 - a) if the subsequently joining lender accedes to the credit agreement, where this is provided for in the agreement or the borrower consents to it (giving rise to the syndicated loan situation described under point 2), or
 - b) through the conclusion of a sub-participation agreement between the lender and the acceding party, with the original lender assigning all claims under the credit agreement to the acceding party to the extent of the sub-participation by means of a separate declaration (if such assignment is not notified to the borrower during the term of the agreement, this constitutes a «tacit» assignment), or
 - c) through the conclusion of a sub-participation agreement and without partial assignment of the claim arising out of the loan. It is possible for the acceding party to participate in the credit relationship on a pro rata basis (and so to receive the interest/margins/fees flowing from the credit agreement on a pro rata basis from the lender), or for the sub-participant to participate only in the event of a loan default (and receive a portion of the margin from the lender in exchange for this «credit insurance»).

In scenarios 3.b and 3.c there is no direct contractual relationship to the borrower and thus no direct business relationship. Accordingly, no formal identification of the borrower and no clarification of the beneficial owner/controlling person are required.

Art. 6 Duty of identification irrespective of minimum thresholds

Art. 6 para. 1 specifies a **duty to identify** even below the minimum threshold under Art. 4 para. 2 letter g (CHF 15,000) if there is an attempt to avoid identification by spreading an amount across a number of transactions (so-called «smurfing»).

Art 6. para. 2 also states that the minimum threshold under Art. 4 para. 2 letter g is immaterial if there is a suspicion that assets are connected with money laundering or the financing of terrorism. This must be a suspicion that assets are derived from any of the sources set out in Art. 9 para. 1 AMLA. This is the case when assets are connected to a criminal act under Art. 305^{bis} of the Swiss Criminal Code (SCC), derived from a felony under Art. 10 para. 2 SCC or a qualified tax offence under Art. 305^{bis} point 1^{bis} SCC, controlled by a criminal organisation under Art. 260^{ter} SCC or used to finance terrorism under Art. 260^{quinquies} para. 1 SCC.

Art. 7 Information to be documented

If the contracting partner is a natural person it is to be assumed in accordance with Art. 23 of the Swiss Civil Code that the actual **domicile address** is where the contracting partner resides with the intention of settling.

If the contracting partner is a legal entity, the actual **registered office address** must be documented. The actual registered office can be determined first and foremost from the documentation (usually a Commercial Register extract) provided by the contracting partner for identification purposes. Alternatively, the bank may document the place from which the legal entity is managed as the actual registered office. In practice, a legal entity is managed from the place which is economically and practically most central to its activities or where its executive management is based. The decisive factor here is the management of ongoing activities in line with its purpose. If more than one place is identified, the main place of executive management takes precedence (see also Federal Supreme Court Decision 2C_1086/2012).

In some countries dates of birth and (domicile) addresses are not customarily used, so banks cannot obtain and document them. To clarify that the CDB has not been violated, the CDB releases banks from the obligation to document this information in such cases.

As regards documenting the actual domicile address or registered office, the bank can in principle rely on the information provided by the contracting partner. Under the risk-based approach, the bank only has to carry out more in-depth investigations if there are obvious discrepancies.

Since a photocopy of the official identification document has to be retained for natural persons, the photocopy itself acts as the means of identification and this does not need to be documented additionally. If a natural person has more than one nationality, it is sufficient to keep a copy of just one official identification document. Any other nationalities do not need to be documented in writing.

Under the CDB system, the duty to keep a complete identification file applies to contracting partners with whom a business relationship is actually established (see Art. 4).

Art. 8 Identification by other appropriate means

This provision deals with exceptional cases where a contracting partner cannot be identified in the prescribed manner because the required documents are not obtainable. In such situations, the bank has reasonable scope to exercise its own discretion in procuring other documents which are suitable for identification purposes and filing these.

Art. 8 applies *mutatis mutandis* to checking the identity of persons establishing business relationships (Art. 15).

Section 2 Natural persons

Art. 9 Identification on a face-to-face meeting

The term «**face-to-face meeting**» used in Art. 9 means that there was personal contact between the client and the bank representative and that identification was performed on this occasion. This personal contact can take place at the bank's offices or elsewhere.

The **copy of the official identification document** does not have to be made at the time the contracting partner is identified. If a copy of an identification document is made before the face-to-face meeting between the contracting partner and the bank, it must be verified with the original document at the latest during the face-to-face meeting. If the copy is not produced until after the face-to-face meeting, the provisions on identification when a business relationship is established by correspondence (Art. 10) apply. See also in this connection the commentary on the duty to document procedures under Art. 44.

A copy of an identification document does not necessarily have to be made using a photocopier. It can, for example, be photographed or scanned, with a copy added to the client file, provided the contracting partner's personal details and face are clearly visible.

Art. 9 does not provide an exhaustive list of **permitted identification documents**. The decision as to which documents to accept remains within the authority and discretion of the individual banks. This leaves the banks free to deal with specific situations as appropriate in keeping with a risk-based approach. The decision as to how to deal with identification documents that have expired also remains within the authority and discretion of the individual banks.

Only official identification documents containing a photograph of the identified person are permitted, and the identified person must in principle be recognisable in the photograph on the copy. Since it is not technically possible to produce a copy of certain identification documents on which the photograph of the holder is recognisable (for example because the document contains features designed to combat forgery that prevent the photograph from being reproduced), the rule of recognisability can be waived in exceptional cases where reasons are given.

The information outlined in Art. 7 must be documented when performing identification.

Art. 10 Identification when a business relationship is established by correspondence

In accordance with the practice of the supervisory board, a relationship is assumed to have been established **by correspondence** if there is no face-to-face meeting between the bank and the contracting partner. If a business relationship is established by correspondence, the domicile address provided must be verified by sending mail to the address or by an equivalent method. A normal postal delivery (by A or B post) is sufficient to confirm the domicile address for the purposes of this article; recorded delivery is not necessary.

Verification of identity via correspondence and the required submission of an authentication by a third party should be differentiated from verification of identity by a delegate. A delegate can only verify the contracting partner's identity in person. However, verification of identity by correspondence and the required submission of an authentication do not constitute a delegation of identification, which is why a written agreement between the bank and the person providing the authentication is not required.

The contracting partner providing official confirmation of residence in particular is considered to be equivalent to verifying the domicile address by post. The information outlined in Art. 7 must also be documented when identification is carried out by correspondence.

Art. 11 Bodies authorised to provide authentication

When a **business relationship is established by correspondence**, the bank is provided with copies of the required identification documents rather than originals, which is why their authenticity needs to be confirmed. This can be done with a signature (collective signing need not be applied). The signature of the person authenticating a document does not have to be verified. There is no prescribed form of authentication. This will be determined by the legislation, regulations and practice applying in the country concerned.

The term «financial intermediary» in Art. 11 para. 1 letter b covers financial intermediaries based in Switzerland under Art. 2 paras. 2 and 3 AMLA as well those based outside Switzerland that are subject to adequate supervision and monitoring with respect to the combating of money laundering.

Under Art. 11 para. 1 letter b, the bank can also accept **authentication** by a correspondent bank, another financial intermediary (e.g. Swiss Post or SBB) or an attorney accredited in Switzerland. Attorneys accredited in Switzerland are those who are entered in a cantonal register of attorneys. The bank may reject authentications at its own discretion (e.g. due to a lack of credibility). The definition of financial intermediaries under Art. 11 para. 1 letter b also includes subsidiaries of a correspondent bank or of a financial intermediary. A copy of an identification document may therefore be authenticated by such a company, even if that company is not a financial intermediary, e.g. in the case of a corporate trustee which offers services for setting up and managing trusts.

It is within the authority and discretion of the individual bank to accept authentications which are customarily issued by notaries in other countries (e.g. affidavits). Attorneys accredited in other countries may be regarded as public bodies under Art. 11 para. 1 letter c, provided the law in their country allows them to issue notariations. Swiss cantonal child and adult protection authorities (KESBs) are also regarded as public bodies under Art. 11 para. 1 letter c.

Under Art. 11 para. 2, identification may also be performed using other suitable means of authentication.

Section 3 **Legal entities and partnerships**

CDB 20 uses the terms «legal entities» and «partnerships» in keeping with the terms used in Swiss civil law (see in particular Art. 52ff. of the Swiss Civil Code and Art. 530ff. of the Code of Obligations).

Sole proprietorships entered in the Commercial Register may be identified in accordance with either the provisions applicable to natural persons or those applicable to legal entities and partnerships.

The provisions on the **identification of legal entities and partnerships** apply to contracting partners domiciled in Switzerland and mutatis mutandis to contracting partners domiciled abroad. The provisions also apply mutatis mutandis to contracting partners constituted under public law (e.g. public corporations and institutions).

With regard to establishing business relationships with legal entities and partnerships, the CDB does not distinguish between identification on a face-to-face meeting and identification when a business relationship is established by correspondence. The question of whether or not the persons establishing the business relationship are physically present is only relevant in terms of the way in which their identity is checked (Art. 15 paras. 1 and 2).

The required **documentation** can be provided in the Form of an original document, a copy or an electronic scan; it can either be transmitted to the bank electronically or downloaded by the bank itself from the internet. There are no formal requirements for the documents used to identify legal entities and partnerships (see also Activity Report of the CDB Supervisory Board 1998–2001, point. 1 letter I, p. 12). However, the documentation requirements set out in Art. 44 f apply in all cases.

Art. 12 Identification based on an entry in the Swiss Commercial Register or an equivalent foreign register

Examples of databases run by a supervisory authority or a trustworthy private individual under Art. 12 are those of Teledata, Creditreform, Intrum Justitia, Dun & Bradstreet, Deltavista, registers for certificates of good standing, the website of the Swiss Federal Office for the Commercial Registry (www.zefix.ch) and the registers of regulated financial intermediaries available on the websites of foreign supervisory authorities.

Art. 13 Identification without an entry in the Swiss Commercial Register or an equivalent foreign register and identification of a public authority

Legal entities and partnerships which are **not entered in the Commercial Register** can be identified, for example, by means of their founding documents, founding agreement, confirmation from their auditors, a certificate of incumbency, a certificate of good standing, a certificate of incorporation or an official operating licence. The identity of legal entities not entered in the Commercial Register can, in accordance with the practice of the supervisory board, also be established on the basis of unsigned by-laws (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.7 p. 20).

The term «public authority» is to be understood in connection with Art. 23.

Special cases:

- **Condominium owner collectives**

Condominium owner collectives must be identified on the basis of an extract from the Land Register. Alternatively, they can be identified by means of a simple copy of their articles of association, together with an excerpt from the minutes stating that the administrator is authorised to manage the bank accounts on behalf of the collective. An excerpt from the minutes is not necessary if an extract from the Land Register is used for identification. Art. 15 does not apply to condominium owner collectives.

- **Common ownership collectives registered in the Land Register**

Common ownership collectives registered in the Land Register must be identified in the same way as for condominium owner collectives (see above).

- **Restricted pension products**

For restricted pension products (e.g. pillar 3a accounts), the bank's contracting partner is the pension provider. It is therefore the pension provider (rather than the beneficiary) which has to be identified.

Art. 14 Validity period of commercial register extracts and equivalent documents

The CDB does not stipulate **what an auditors' certificate must contain**. This is determined by the legislation, regulations and practice applying in the country concerned.

In practice, there are clubs and associations that are not listed in the Commercial Register, nor are they audited by a firm of auditors. They can usually only be identified by means of their articles of association or other founding documents. Such documents can still reflect the current situation even when they are **more than 12 months old**. However, if a club or association is listed in the Commercial Register, the extract from the register must not be older than 12 months.

Art. 15 Checking the identity of persons establishing business relationships and taking note of power of attorney arrangements

The **legal entity or partnership** for which a business relationship is being established must be identified. The **persons establishing the business relationship** are defined as those persons who represent the legal entity or partnership vis-à-vis the bank when establishing the relationship and sign the account opening documents. If a legal entity establishes a business relationship on behalf of another legal entity, the identity of the natural persons acting for these legal entities must be verified. The person who must be identified is always the one playing an active role in establishing the business relationship.

The information set out in Art. 7 para. 1 does not have to be documented for persons establishing business relationships for legal entities and partnerships.

It is not necessary to acknowledge or check the domicile address of the person establishing the business relationship. This is because the CDB contains specific rules on verifying the identity of persons establishing business relationships. As a result, a person establishing a business relationship does not become a contracting partner. Persons establishing a business relationship in their own name have to be identified in accordance with the regulations set out in Art. 9ff., provided their identity was not already verified when establishing an earlier business relationship (see Art. 4 para. 3).

Holders of power of attorney under Art. 15 para. 3 are persons acting on behalf of the legal entity and establishing the business relationship with the bank on that basis, i.e. their governing bodies, authorised signatories (with individual or collective signing powers) and authorised third parties (see also Art. 3 para. 1 AMLA).

The power of attorney arrangements can, for example, be noted by taking an extract from the Commercial Register. Alternatively, other documents which provide information on powers of attorney can be used (e.g. powers of attorney issued by governing bodies of the company to other persons, excerpt from internal regulations, signature books, certificate of incumbency etc.). The requirement of Art. 15 para. 3 can also be met by filing a simple copy of the relevant corporate documents of the organisation (e.g. statutes and articles of association, AGM and Board minutes and annual programs containing details of signing authorities, rights to appoint

authorised signatories and powers of attorney granted by governing bodies of the organisation to third parties etc.). The bank is not required to make any additional effort to investigate or document the identity and legitimacy of the person signing such documents (e.g. the company secretary). The aim is to know the person representing the legal entity vis-à-vis the bank.

The duty to ensure that procedures are documented (see Art. 44) requires that efforts to verify the identity of the persons establishing the business relationship are documented (i.e. the identification documents must be stored in the client file or the bank's system). To do this, a simple copy of the document detailing the contracting partner's power of attorney arrangements is filed. There are no special requirements as to the Form that the documentation of the contracting partner's power of attorney arrangements must take.

The person establishing the business relationship does not have to be registered in the Register of Powers of Attorney unless he or she additionally has signing power for the business relationship (see Art. 39 letter c AMLO-FINMA).

Art. 15 para. 4 sets out **special regulations** for verifying the identity of persons establishing a business relationship and documenting the power of attorney arrangements when a business relationship is established with a Swiss or foreign financial intermediary as defined in Art. 24 or Art. 33. The reason for this is that different standards apply in interbank transactions in particular. Signature books are often exchanged without persons necessarily having established a business relationship as defined by Art. 15 paras. 1 and 2. Transactions are settled through electronic trading and clearing systems (e.g. SWIFT and SIC), where identity is verified by an exchange of keys, without persons establishing a business relationship in accordance with Art. 15 paras. 1 and 2. Art. 15 para. 4 therefore explicitly states that, in business transactions with financial intermediaries subject to supervision under financial market law as defined in Art. 24 and Art. 33, the procedure set out in Art. 15 paras. 1 to 3 may be substituted by an exchange of signature books, electronic codes or other means customarily used in the industry.

Art. 16 Identification of simple partnerships, companies in the process of foundation and trustees

The **special regulations** set out in Art. 16 apply to **simple partnerships**. Simple partnerships are not legal entities in their own right. They have no capacity to act and are not listed in the Commercial Register.

When establishing business relationships with simple partnerships, the bank can choose to identify either (i) all partners or (ii) the persons authorised to sign for the simple partnership vis-à-vis the bank as well as at least one partner. Art. 16 para. 1 letter c sets out a less strict procedure for simple partnerships with a non-commercial purpose whereby only those persons who are recognised as authorised signatories vis-à-vis the bank are to be identified.

This choice under Art. 16 para. 1 is intended to allow the bank to carry out identification for simple partnerships in a way that takes account of their form, purpose and number of partners (e.g. in the case of law firms).

Examples of simple partnerships with a non-commercial purpose as defined in Art. 16 para. 1 letter c include those involving groups of jazz players, carnival musicians and classmates.

The identity of the partners and/or authorised signatories must be verified in accordance with the provisions of Art. 9ff. (natural persons) or Art. 12ff. (legal entities and partnerships).

If a legal entity or partnership has signing authority in respect of a business relationship established in the name of a simple partnership, the legal entity or partnership must be identified (and not the representatives acting for it). Art. 15 does not apply because the special regulations set out in Art. 16 take precedence as *lex specialis*.

Communities of heirs are classified as simple partnerships under civil law. If there is a business relationship with the testator, the bank will have identified him or her as a contracting partner. The heirs enter into a business relationship with the bank by succession. The rules for the identification of simple partnerships only apply if a new business relationship is established with a community of heirs.

Earmarked pools of assets without their own organisation (e.g. donations to a disaster fund) can be treated *mutatis mutandis* in the same way as simple partnerships.

If an account was opened to pay in capital for **founding a company limited by shares or limited liability company**, the persons establishing it must be identified as set out in Art. 15. This is because, while such companies are to be treated as simple partnerships under civil law, there are no authorised signatories for the capital accounts involved. In fact, these accounts must be blocked so that confirmation of the capital being paid in can be presented to the founding meeting as required by law. The capital is only unblocked after the governing bodies of the new company have been appointed and this has been documented. Once the company is formed, it must itself be identified in accordance with Art. 12ff. if a business relationship is to be established with it. In the case of a capital increase, the contracting partner already has legal personality, so Art. 16 para. 2 does not apply. Identification must be performed in accordance with Art. 12ff.

For business relationships with a **trust**, the trustee is the bank's contracting partner and must be identified either as a natural person or as a legal entity or partnership. The trust itself cannot be a contracting partner. The trustee must confirm to the bank in writing or by a suitable electronic means his or her authority to establish a business relationship with the bank on behalf of the trust, for example using Form T. In lieu of written confirmation, a legal opinion also constitutes acceptable confirmation that the trustee is authorised to establish a business relationship on behalf of the trust. There are no specific regulations on the Form this confirmation must take. The legal opinion may be provided by a third party (such as a lawyer). Further evidence of this authority is not required.

In practice, domiciliary companies held by trusts and foundations also establish business relationships with banks (these are known as underlying companies, where the shares of the company are held in the trust or foundation assets). In such cases, the domiciliary company is to be identified as the contracting partner. There is no business relationship with the trust or foundation itself, so Art. 16 para. 3 does not apply.

Art. 17 Publicly known legal entities, partnerships and public authorities

Art. 17 describes how a **publicly known legal entity, partnership or public authority** is identified. These **special regulations** apply to all of the requirements set out in Arts. 12 to 15. For publicly known legal entities, the procedure set out in Art. 12ff. is replaced by a documentation of the fact that their identity is publicly known; there are no special requirements as to the Form that this documentation must take. For example, a memorandum can be put on file, or a page from a stock exchange website showing the contracting partner as a quoted company can be printed out.

Swiss public authorities include those of the Confederation, cantons and communes, together with their institutions and public corporations. Public corporations, institutions and foundations qualify as public authorities if they have a basis in law and perform tasks for the public good. Foreign public authorities are defined by the applicable national laws.

Section 4 Special forms of identification

Art. 19 Identification within the group

The assessment of whether an **equivalent standard of due diligence** has been applied is made on the basis of the date on which the business relationship was established. If a person has been correctly identified as contracting partner by one group unit of a bank in accordance with the rules applying to that group unit when establishing a business relationship, the identification procedure does not need to be repeated when that person establishes a new business relationship with another group unit. This simplified procedure applies only to existing contracting partners identified in accordance with the provisions applicable to them. Units of the same group may be in Switzerland or abroad. Banks draw up internal regulations on verifying identification documents, but the documents must in principle be made available by the group unit which identified the contracting partner. If the contracting partner ends the business relationship with a group unit, the client file may remain with the unit which identified the contracting partner.

Art. 19 also covers associations and groups of banks. Registered offices, branches, agencies, representative offices and group companies should therefore be treated as part of the group for the purposes of this article. For example, Art. 19 also applies if a contracting partner makes a cash withdrawal at a bank from an account held with another company in the same group and the client data are available to the entire group.

In accordance with current practice, the **proviso** in the last sentence of Art. 19 relates in particular to data protection and banking-client confidentiality regulations in the country concerned. The contracting partner's consent is required before a copy of the identification documents can be sent to another group unit. If this consent is not provided, the contracting partner must be identified once more.

Chapter 3: Establishing the identity of the beneficial owner of operating legal entities and partnerships

In the revised FATF Recommendations and the AMLA provisions revised in line with them in 2016, the **beneficial owners** of an operating legal entity are defined as the natural persons who ultimately control the legal entity or who are effectively in control of it by any discernible means.

This concept, which was implemented in CDB 16, aims at creating transparency with regard to the beneficial owners of operating companies which are not quoted on the stock exchange. This was also the rationale behind the 2014 revision of the corresponding provisions of the Code of Obligations (Art. 697i and Art. 697j).

In order to draw a distinction relative to the existing concept of beneficial ownership of assets, CDB 16 created a new term to describe the beneficial owner of an **operating legal entity**: the **controlling person**.

Section 1 of this chapter sets out the general duty to establish the identity of the controlling person, and Section 2 (Art. 22ff) details the **exceptions** to this duty.

This commentary and the appendix include **case studies** on multi-level participation structures (indirect participations). They are designed to clarify the concept of the controlling person. The information provided by the contracting partner takes precedence. Companies with their registered office in Switzerland will regularly provide information on the controlling person based on the register of persons with beneficial ownership of shares – in the Form of equity securities or any other Form – which they are required to keep. The information required to correctly identify the controlling person must be documented on a single form, a number of linked forms or a consolidated form, provided the content is equivalent to that of the SBA's model forms. The signatory powers must be taken into account. Irrespective of the type of documentation selected for multi-level participation structures, all forms must be signed by the contracting partner (authorised signatory or holder of a power of attorney).

Section 1 General conditions

Art. 20 Establishing the identity of the controlling person

1. Basics

The regulations in Art. 20 on **establishing the identity of the controlling persons** apply to **operating** legal entities and partnerships which are **not quoted on the stock exchange**. Companies are deemed to be operating legal entities if they operate a trading, production or service business (in contrast to domiciliary companies).

When establishing the identity of the controlling person, the financial intermediary may assume, on the basis of the revised company law and similar provisions of foreign law, that the contracting partner's representative has access to the necessary information on the controlling person. In principle, the bank can assume that this information is correct. The procedure for establishing the identity of the controlling person needs only be repeated in accordance with Art. 46 if the bank has doubts about the information provided on Form K or if there are clear indications that this information is not correct.

The duty to establish the identity of the controlling person does not apply to renting out **safe deposit boxes** or opening **rental surety accounts**.

Capital market transactions, specifically transactions to place securities with investors (e.g. the selling shareholder in initial public offerings) and cases in which the bank acts as paying agent and/or issuer or in a similar function, do not constitute **trading transactions** for the purposes of Art. 20 para. 5 letter e. When opening a capital account, no declaration regarding the controlling person need be obtained either for a company foundation or for a capital increase.

In the case of **cash transactions**, the declaration regarding the controlling person may be obtained ex post, provided efforts to do so are initiated immediately after the transaction is executed (see AMLO-FINMA Consultation Report of 3 June 2015).

2. Definition of control (cascade)

The CDB has taken the definition of and requirements for **establishing the identity of the controlling person** from the requirements set out in the FATF Recommendations.

Generally speaking, a **company is deemed to be controlled** when the natural person behind it effectively has control over, in particular, its business policies and/or the appointment of its representatives and governing bodies. The prescribed **three-stage** cascade must be applied:

- If the contracting partner is an **operating legal entity** or partnership, it must be determined in a **first stage** whether any **natural person or legal entity holds 25 %** or more of its voting rights or capital. This figure may also be reached collectively by agreement, e.g. by means of shareholder pooling agreements. Where such natural persons exist, the contracting partner must identify them on Form K. If a legal entity holds 25 % or more of the voting rights or capital the contracting partner must apply the attribution approach to identify the **natural persons** who ultimately exercise control over the intermediate company.
- If the contracting partner has **no controlling person according to the first stage**, it must name the controlling persons who exercise **control over it by other discernible means**. This might be a patriarch who does not hold 25 % or more of the voting rights or capital but nevertheless effectively controls the contracting partner. A shareholder pooling agreement may also be taken into consideration if it allows the shareholders in question to exercise control over the contracting partner by other discernible means. A lender whose loan secures a controlling influence over the contracting partner's decisions may also be deemed to have effective control over the contracting partner without holding 25 % or more of voting rights or capital. The person named should be the actual controlling person and not the holder of shares on a fiduciary basis. If the contracting partner names on Form K not only the controlling person with a share of 25 % or more of voting rights or capital, but also a controlling person exercising control over the contracting partner by other discernible means, the bank can nevertheless accept the form, provided this information appears plausible.

- If **no controlling persons are identified in the first and second stages**, the **highest managing director** must be identified as a substitute. The highest managing director is the natural person who is effectively in charge of a company's executive management. There may be more than one highest managing director, for example if the company has two joint chief executives. The highest managing director identified as a substitute does not effectively control the contracting partner but instead acts on behalf of the Board of Directors or the owner.

3. Control via a direct or indirect participation in the contracting partner

Controlling persons are the natural persons that, ultimately, exercise actual control over the company via a direct or indirect participation.

a) Direct participation

If one or more natural persons directly holds 25 % or more of the voting rights or capital of the contracting partner, they are to be identified as the direct controlling person(s).

b) Indirect participation

One or more natural persons can hold an indirect participation in the contracting partner via one or more intermediate companies. In this case, it is necessary to establish the identity of the natural persons behind such companies that exercise effective control over the last of the intermediate companies and thereby actually control the contracting partner.

Effective control of an operating intermediate company is deemed to exist when a natural person holds **more than 50 % of its voting rights or capital or controls it by other discernible means**. The shares held by the intermediate companies are attributed to the natural persons who ultimately have effective control over the intermediate companies (attribution approach). However, if a **domiciliary company holds 25 % or more of the contracting partner's** voting rights or capital, all the beneficial owners of the domiciliary company must be listed directly on Form K. If 25 % or more of an operating company not quoted on the stock exchange is held by a foundation or trust, the corresponding Forms S and T must be obtained, except in cases where Art. 40 para. 3 applies, in which event Form K must be used. Where the controlling person is a financial intermediary, collective investment or investment company, the special provisions under Arts. 33 and 38 apply, mutatis mutandis.

4. Establishing the identity of the controlling person different forms of companies

Banks must in principle request Form K from the following forms of company:

company limited by shares, limited liability company, general partnership, limited partnership, partnership limited by shares, cooperative, association and foreign forms of operating company. The **exemptions** under Art. 22ff. apply notwithstanding. Any special requirements for specific forms of company are described below.

a) Company limited by shares

An **operating company limited by shares** must confirm in writing whether a **single person holds 25 %** or more according to the register of shareholders and, if so, identify the beneficial owner of the shares (the controlling person under Art. 20 para. 1). The company must possess certain information under company law. Art. 697j para. 1 of the Code of Obligations (CO) states that any person who, alone or by agreement with third parties, acquires shares in a company whose shares are not listed on a stock exchange and thus reaches or exceeds the threshold of 25 % of the share capital or votes must within one month give notice to the company of the first name and surname and the address of the natural person for whom it is ultimately acting (the beneficial owner). Under Art. 697l para. 1 CO, the company uses this information to keep a register of the beneficial owners about which it has been notified.

b) Limited liability company

As for a company limited by shares, a **limited liability company** keeps a register of capital contributions under Art. 790 para. 1 CO which must contain details of any person who, alone or by agreement with third parties, acquires a stake and in doing so reaches or exceeds the threshold of **25 % of the capital** or votes.

c) Cooperative

In principle, the controlling person of a **cooperative** must be identified if the cooperative has links with a **high-risk country**. However, since Art. 831 CO states that a cooperative must have at least seven members, the threshold of 25 % or more of voting rights or capital will not normally be achieved. If the threshold is not achieved, the cooperative must declare whether there is a controlling person who exercises control over it by other means. Where no such person exists, the highest managing director must be identified on Form K as a substitute.

d) Association

Associations often have no controlling person in accordance with the first and second stages of the cascade, so the contracting partner normally identifies its **highest managing director** or **chairman** on Form K as a substitute.

e) Trust

Corporate trustees are **exempt** from the duty to establish the identity of controlling persons because FATF Recommendations 24 and 25 draw a clear distinction between «legal person» and «legal arrangement», and trusts qualify as legal arrangements under Recommendation 25. Recommendation 25 lists all the information that must be obtained for a trust. However, the requirement in AMLA to establish the identity of the controlling person of a legal entity is based (as expressly stated in the dispatch) on Recommendation 24, which does not apply to trusts. The relevant information for trusts is obtained using **Form T. Trustees** (i.e. corporate trustees) therefore **do not need to submit Form K**. The same applies to **insurance wrappers**, which use **Form I**.

5. Duty to repeat procedures

If the conditions set out in Art. 46 para. 1 letter b are met, the bank must repeat the procedure to establish the identity of the controlling person.

Art. 21 Information to be documented

Form K, appended to the CDB, is used to establish the identity of the controlling person. As an **alternative** to using Form K, the controlling person may be identified with a written declaration from the contracting partner. Art. 28 para. 4 applies mutatis mutandis. Forms designed by a bank itself can contain different wording from the SBA's model Form K, provided the **content is equivalent** to that of the model Form K. By analogy with the practice of the supervisory board with regard to Form A, there is no requirement to retain an original copy of Form K.

The information to be collected by banks under the CDB corresponds to the requirements of company law. When establishing the identity of the controlling person, the controlling person's actual **domicile address** must be documented. The same applies to a highest managing director identified as a substitute (i.e. the third stage of the cascade). The address provided must be the controlling person's actual domicile address. It is to be assumed that this is where the controlling person, in the words of Art. 23 of the Swiss Civil Code, resides with the intention of settling.

Financial intermediaries can rely on the information provided by the contracting partner to establish the identity of the controlling person. Further investigation is only required when doubts arise as to whether this information is correct. If the contracting partner fails to name a controlling person according to the first and second stages of the cascade or identify a highest managing director as a substitute according to the third stage, **further investigation is required under Art. 15 AMLO-FINMA** («Additional investigations in the case of increased risks»).

In the case of **multi-stage holding structures**, the procedure must be applied directly to the natural persons **behind** the intermediate company or companies, i.e. only the controlling persons of the last company in the chain must be documented (attribution approach).

In some **countries addresses are not customarily used**, so banks cannot obtain and document them. To clarify that the CDB has not been violated, the CDB releases banks from the obligation to document this information in such cases.

As regards documenting the actual domicile address, banks can in principle rely on the information provided by the contracting partner. Under the risk-based approach, banks only have to carry out more in-depth investigations if there are obvious discrepancies. The bank may add the account or securities account number later to a Form K that has already been signed. This takes account of the fact that in practice, when a business relationship is established and Form K is signed at the same time, the account or securities account number is not yet known. Moreover, the account or securities account number is a component of Form K that is decided by the bank and not by the client. In such situations, Form K can therefore be regarded as having been correctly completed without an account or securities

account number. Terms other than account number or securities account number are sometimes used in practice (e.g. business number, client number, partner number, etc.). To avoid confusion, these alternative terms have not been included in the model form. However, banks are free to use their own terms on Form K in accordance with their own particular needs.

A bank employee or a third party may prepare **Form K** or complete it on the instructions of the contracting partner, i.e. Form K does not have to be completed by the contracting partner themselves. As the contracting partner must in every case confirm that the information provided on Form K is correct by signing it, this procedure is fully compatible with the letter and spirit of the CDB.

Form K can be signed by the contracting partner or by a person authorised by them. For legal entities, Form K must be signed by authorised signatories or by an authorised representative whose power of attorney has been signed by authorised signatories. The authorised person may be different from the person establishing the business relationship under Art. 15. Banks may decide at their own discretion which powers of attorney they are willing to accept.

Section 2 Exemptions concerning the duty to establish the controlling person

Art. 22 Companies quoted on the stock exchange

Under Art. 4 para. 1 AMLA, **companies quoted on the stock exchange** include both quoted companies themselves and their majority-controlled **subsidiaries**. The identity of the persons behind a company quoted on the stock exchange does not need to be established in any case. This applies to a quoted company acting as the contracting partner as well as to a quoted company named as the controlling person or beneficial owner of another company. If a company quoted on the stock exchange is named as the contracting partner's direct or indirect controlling person on **Form K**, this is not incompatible with the principle that only natural persons can be identified as controlling persons. Form K is deemed to have been completed correctly, even if the quoted company is named on it.

Art. 23 Public authorities

The term «**public authorities**» also includes foreign public authorities. Swiss public authorities include those of the Confederation, cantons and communes, together with their institutes and public corporations. Public corporations, institutions and foundations qualify as public authorities if they have a basis in law and perform tasks for the public good. Foreign public authorities are defined by the applicable national laws.

The identity of the persons **behind** a public authority **does not need** to be established **in any case**. This applies to public authorities acting as either the contracting partner or the controlling person. If a public authority is named as the contracting partner's direct or indirect controlling person on Form K, this is not incompatible with the principle that only natural persons can be identified as controlling persons. Form K is deemed to have been completed correctly, even if the public authority is named on it.

Art. 24 Banks and other financial intermediaries as contracting partners

Casinos under Art. 2 para. 2 letter e AMLA also qualify as banks for the purposes of this article.

Banks, securities dealers and other **financial intermediaries** having their registered office or domicile **in a foreign country** are defined by the financial market legislation in their country of domicile.

Countries which are assumed to have appropriate supervision and regulation in relation to money laundering are the member states of the FATF as well as the Principality of Liechtenstein. A bank may recognise financial intermediaries from other countries as being subject to appropriate prudential supervision and regulation with respect to combating money laundering and terrorist financing if its specialist knowledge and enquiries allow it to assess this, and it documents it accordingly.

The **exemption provided for under Art. 24 para. 2 CDB** can also apply to a financial intermediary that is not subject to appropriate prudential supervision and regulation in respect of combating money laundering and terrorist financing in its country of domicile provided that, having undertaken special enquiries, the bank concludes that:

- the financial intermediary and the bank are part of the same **group subject to consolidated supervision**, provided that the latter a) monitors and mitigates legal and reputational risks globally and uniformly, in particular by applying group-wide minimum standards, b) ensures overall compliance with appropriate rules on combating money laundering and terrorist financing, and c) exercises appropriate consolidated supervision;
- the financial intermediary is part of a **group** whose parent company is domiciled in a country that has appropriate supervision and regulation in respect of combating money laundering and terrorist financing, provided that the group a) monitors and mitigates legal and reputational risks globally and uniformly, in particular by applying group-wide minimum standards, b) ensures overall compliance with appropriate rules on combating money laundering and terrorist financing, and c) exercises appropriate consolidated supervision.

The provisions of Art. 24 also apply in relation to **contracting partners which are only open to financial intermediaries** (e.g. SIX SIS AG, Euroclear, Clearstream, Fastnet etc.).

Art. 24 does **not apply to fiduciaries**, unless they qualify as securities dealers under Art. 2 para. 2 AMLA.

Art. 25 Further exceptions concerning determination of controlling persons

Art. 25 states **that no declaration concerning the controlling person is required** if the contracting partner is a company or association with a **non-commercial purpose** and no **discernible relation to any high-risk countries**. A non-commercial purpose is defined as protecting the interests of members or beneficiaries by way of mutual self-help or pursuing political, religious, scientific, artistic, charitable, social or similar aims. This is in keeping with the risk-based approach.

The corresponding FATF Recommendation is aimed primarily at combating terrorist financing. The link to a high-risk country must be determined on a case-by-case basis and in the light of the specific circumstances. Examples may include orders for payments from or to a high-risk country or where one or more members have their actual place of residence or domicile in a high-risk country, provided there are discernible indications that such member(s) exert(s) a controlling influence on the company or association.

Simple partnerships are not required to provide a statement concerning controlling persons. Examples of simple partnerships include groups of jazz players, classmates or carnival musicians and communities of heirs as well as companies in the process of foundation.

Art. 26 Condominium owner and common ownership collectives

Examples of other collectives with similar aims include those in the **agricultural sector** (e.g. forestry, arable, livestock, water source and melioration collectives).

Chapter 4: Establishing the identity of the beneficial owner of assets

There is a general duty to establish the identity of the beneficial owner; however, the basic principle is that the information on the beneficial owner need not be more extensive than if the beneficial owner were themselves the contracting partner. Under the anti-money laundering regulations, beneficial owners can in principle only be natural persons. This is subject, however, to the exceptions set out in Art. 30ff., which apply both to contracting partners and beneficial owners of the contracting partner's assets.

The first section of this chapter, «General conditions», contains the basic principle of the **duty to establish the beneficial owner's identity** and lists the information that the bank must document in this connection.

The second, «**Exceptions from the obligation to identify the beneficial owner**», lists the exceptions and rules that apply to selected types of contracting partners (e.g. companies quoted on the stock exchange, public authorities, financial intermediaries, companies with a non-commercial purpose) when establishing beneficial ownership.

Finally the third section, «**Particular duties concerning identification**» sets out the duties in respect of particular constructs. In addition to establishing the identity of the beneficial owner of trusts and foundations, these include collective accounts and collective investments/investment companies, domiciliary companies and identifying the actual premium payer for insurance wrappers.

The data necessary to **correctly establish the identity** of the beneficial owner must be documented on a single form, a number of linked forms or a consolidated form, provided the content is equivalent to that of the SBA's model forms. The signatory powers must be taken into account. Special rules apply to foundations and trusts (cf. commentary on Art. 40 and 41 CDB).

Section 1 General conditions

Art. 27 Establishing the identity of the beneficial owner

In line with the anti-money laundering legislation, Art. 27 imposes a **general duty** on banks to establish the identity of the beneficial owner for all business relationships. This is **subject to** the cases governed by the sections on «**Exceptions from the obligation to identify the beneficial owner**» and «**Particular duties concerning identification**».

Under the FATF Recommendations, those identified as beneficial owners must in **principle be natural persons**. Deviations from the principle that identity must be established are permitted under the **exceptions** set out in Art. 30ff. and also if an operating legal entity or partnership not quoted on the stock exchange is the beneficial owner; in this case, the controlling persons are identified using **Form K** and no information need be provided regarding the holding of assets by the operating legal entity or partnership on a fiduciary basis. Form K must be signed by the contracting partner. If the contracting partner declares that, in the case of an indirect holding structure, 25 % or more of the voting rights or capital are held by a foundation or trust, the contracting partner must supply the information specified in Arts. 39 to 41.

Banks are not required to establish the identity of the beneficial owner when renting out **safe deposit boxes**.

Capital market transactions, specifically transactions to place securities with investors (e.g. the selling shareholder in initial public offerings) and cases in which the bank acts as paying agent and/or issuer or in a similar function, do not constitute trading transactions for the purposes of Art. 27 para. 3 letter e.

In the case of **escrow accounts**, both the seller and the buyer are to be identified as beneficial owners.

In the case of **cash transactions** in excess of CHF 15,000, **Form A** is still required from the contracting partner, **regardless of the exceptions** set out in Section 2.

There is no duty to establish beneficial ownership of **rental surety savings accounts**.

When opening a **capital account**, no declaration regarding beneficial ownership need be obtained either for a company foundation or for a capital increase.

In the case of **loan relationships**, the practice of the CDB supervisory board requires a decision to be taken on a case-by-case basis as to whether the lender or borrower is to be regarded as the beneficial owner: «Indications that the lender is the 'true' beneficial owner of a loan include, in particular, the lender having the power to issue instructions to the borrower, the lender bearing the economic risk of the transaction, and the grant of the loan being primarily in the interest of the lender or having been initiated by the lender. Conversely, the borrower being independent of instructions from the lender with regard to how the loan is to be used, the borrower bearing the economic risk, and the grant of the loan being in the borrower's interest or having taken place at the borrower's behest would suggest that the borrower is the beneficial owner.» (see Activity Report of the CDB Supervisory Board 2005–2010, V.2.3.3 p. 31).

If an **existing business relationship is extended**, for example by opening an additional account, there is no requirement to obtain an additional Form A, unless there are doubts within the meaning of Art. 46 as to whether the beneficial ownership of the new account is the same as that previously established under the applicable provision of the CDB.

Art. 28 Information to be documented

Owing to international requirements and the resulting duties to investigate, banks require reliable information on the beneficial owners. The information to be documented is necessary to provide a good basis for more in-depth investigations.

It is to be assumed that the **actual domicile address** is where the beneficial owner, in the words of Art. 23 of the Swiss Civil Code, resides with the intention of settling.

As regards documenting the actual domicile address, banks can in principle rely on the information provided by the contracting partner. Under the risk-based approach, banks only have to carry out more in-depth investigations (as defined in Art. 46) if there are obvious discrepancies. However in **some countries dates of birth and addresses are not customarily used**, so banks cannot obtain and document them. To clarify that the CDB has not been violated, the CDB releases banks from the obligation to record this information in such cases.

Forms designed by a bank itself can contain different wording from the SBA's model Form A, provided that their content is equivalent to that of the model Form A. In particular, the content is deemed to be equivalent if the Form A corresponds to the layout of the model Form A in CDB 2003, and the use of this layout is therefore still permitted under CDB 20. There is no requirement to retain an original copy of Form A.

A bank employee or a third party may prepare Form A or complete it on the instructions of the contracting partner, i.e. Form A does not have to be completed by the contracting partners themselves. As the contracting partner must in every case confirm that the information provided on Form A is correct by signing it, this procedure is fully compatible with the letter and spirit of the CDB.

In accordance with the purpose of **Form A (identification of the beneficial owner)**, Form A can be regarded as having been correctly completed if the contracting partner adds terms such as «myself» or «account holder» when signing it. This clearly records the beneficial ownership. It would be unnecessarily formalistic to enter the contracting partner's other information on Form A, as this information already needs to be recorded as part of the identification procedure.

The bank may add the account or securities account number later to a Form A that has already been signed. This takes account of the fact that in practice, when a business relationship is established and Form A is signed at the same time, the account or securities account number is not yet known. Moreover, the account or securities account number is a component of Form A that is decided by the bank and not by the client. Terms other than account or securities account number are sometimes used in practice (e.g. business number, client number, partner number, etc.). To avoid confusion, these alternative terms have not been included in the model form. However, banks are free to use their own terms on Form A in accordance with their own particular needs.

Form A can be signed by the contracting partner or by a person authorised by them. For legal entities, Form A must be signed by authorised signatories or by an authorised representative whose power of attorney has been signed by authorised signatories. The authorised person may be different from the person establishing the business relationship as per Art. 15. Banks may decide at their own discretion which powers of attorney they are willing to accept.

The wording «If the bank has information according to paragraph 1 at its disposal» used in Art. 28 para. 3 includes not only the documents currently available but also those supplied at the time when the business relationship was established.

Section 2 Exceptions from the obligation to identify the beneficial owner

Art. 29 Natural persons

AMLA stipulates as a general **principle that the identity of the beneficial owner must be established.**

In principle, beneficial ownership must be established for every business relationship. With regard to business relationships with **natural persons**, however, Art. 29 relaxes the requirement inasmuch as the bank is **released from any duty according to Art. 27 para. 1** if it has no doubts that the contracting partner is identical to the beneficial owner and documents this fact appropriately.

The legislator has not specified how the **absence of doubt that the contracting partner and the beneficial owner are the same** is to be documented. Accordingly, each bank may decide at its discretion in what Form this is to be done. It may for example document the fact on an opening application, by means of a contractual declaration by the contracting partner, an internal memorandum or entry in the client history. It may also impose a general requirement to complete Form A, in which case no further documentation regarding the absence of doubt is required.

A deliberate decision has been made not to provide a list of examples of specific cases where doubts under Art. 29 arise. It is not possible to provide such an all-embracing list on an abstract basis. A judgement must be made on the basis of the specific circumstances of each individual case as to whether doubts for the purposes of Art. 29 exist. See also the comments on Art. 46.

Art. 30 Operating legal entities and partnerships not quoted on the stock exchange

If the contracting partner (natural person or otherwise) declares on **Form A** that an operating legal entity or partnership not quoted on the stock exchange is the beneficial owner of the assets, Form A is still deemed to have been completed correctly and can be accepted. No additional declaration by the company named in Form A to the effect that it holds the assets for itself, or by the contracting partner that the company named in Form A holds the assets for itself, is required. Where operating legal entities and partnerships are concerned, the controlling persons must be established using Form K. Companies and associations with a **non-commercial or charitable purpose** within the meaning of Art. 25 that do not provide a declaration concerning the controlling persons are also not required to establish beneficial ownership.

Art. 31 Companies quoted on the stock exchange

Under Art. 4 para. 1 AMLA, **companies quoted on the stock exchange** include both quoted companies themselves and their majority-controlled **subsidiaries**.

These are not required to provide a declaration concerning beneficial ownership, either if the quoted company acts as contracting partner or if it is designated as the beneficial owner of the contracting partner's assets.

If a company quoted on the stock exchange is named as the direct or indirect beneficial owner of the contracting partner's assets, this is not incompatible with the principle that only natural persons can be identified as beneficial owners.

Form A is deemed to have been completed correctly, even if the quoted company is named on it.

Art. 32 Public authorities

Swiss **public authorities** include those of the Confederation, cantons and communes, together with their institutions and public corporations. Public corporations, institutions and foundations qualify as public authorities if they have a basis in law and perform tasks for the public good.

Foreign public authorities are defined by the applicable national laws.

Art. 33 Banks and other financial intermediaries as contracting partners

Banks and other financial intermediaries include financial intermediaries as defined in Art. 2 para. 2 and Art. 2 para. 4 letter b AMLA as well as financial intermediaries outside Switzerland that are regulated in a similar way. Banks and securities dealers from Switzerland and abroad do not in principle have to provide a declaration of beneficial ownership. **Casinos** under Art. 2 para. 2 letter e AMLA also qualify as banks for the purposes of this article. **Collective investments** and **investment companies** that do not fall within the scope of Art. 2 para. 2 AMLA are covered by Art. 38.

Banks, securities dealers and other financial intermediaries having their registered office or domicile in a foreign country are defined by the financial market legislation in their country of domicile. The CDB deliberately refrains from laying down specific requirements for implementing and monitoring the relevant obligations, as this is the responsibility of the regulators at the domicile of the contracting partner.

Countries which are assumed a priori to have appropriate supervision and regulation in relation to money laundering are the member states of the FATF as well as the Principality of Liechtenstein. A bank may recognise financial intermediaries from other countries as being subject to appropriate prudential supervision and regulation with respect to combating money laundering and terrorist financing if its specialist knowledge and enquiries allow it to assess this, and it documents it accordingly.

The **exception provided for under Art. 33 para. 2 and 3** can also apply to a financial intermediary that is not subject to appropriate prudential supervision and regulation in respect of combating money laundering and terrorist financing in its country of domicile provided that, having undertaken special enquiries, the bank concludes that:

- the financial intermediary and the bank are part of the same **group subject to consolidated supervision**, provided that the latter a) monitors and mitigates legal and reputational risks globally and uniformly, in particular by applying group-wide minimum standards, b) ensures overall compliance with appropriate rules in respect of combating money laundering and terrorist financing, and c) exercises appropriate consolidated supervision;
- the financial intermediary is part of a group whose parent company is domiciled in a country that has appropriate supervision and regulation in respect of combating money laundering and terrorist financing, provided that the group a) monitors and mitigates legal and reputational risks globally and uniformly, in particular by applying group-wide minimum standards, b) ensures overall compliance with appropriate rules in respect of combating money laundering and terrorist financing, and c) exercises appropriate consolidated supervision.

The provisions of Art. 33 also apply in relation to **contracting partners which are only open to financial intermediaries** (e.g. SIX SIS AG, Euroclear, Clearstream, Fastnet etc.).

The definition of other **financial intermediaries having their registered office in a foreign country** includes not only fund managers, life insurance companies and tax-exempt occupational pension schemes but also all other comparable foreign financial intermediaries as defined by the specific laws of their country of domicile that are subject to appropriate prudential supervision and rules in relation to combating money laundering and terrorist financing.

Art. 33 does not apply to **fiduciaries**, unless they qualify as securities dealers.

Art. 34 Simple partnerships

Under Art. 34 para. 2, if a **simple partnership with more than four partners** that pursues a non-commercial objective and has no discernible link to any high-risk countries is the contracting partner, **no declaration** regarding beneficial ownership **need be provided**. This is, however, subject to para. 3 of this article. If a simple partnership that pursues a non-commercial or charitable purpose and has more than four partners has a discernible link to a high-risk country, the beneficial owners must be established using **Form A**. The link to a high-risk country must be determined on a case-by-case basis and in the light of the specific circumstances. Examples may include orders for payments from or to a high-risk country or where one or more members have their actual place of residence or domicile in a high-risk country, provided there are discernible indications that such member(s) exert(s) a controlling influence on the company or association.

A non-commercial purpose is defined as protecting the interests of members or beneficiaries by way of mutual self-help or pursuing political, religious, scientific, artistic, charitable, social or similar aims. This is in keeping with the risk-based approach. No threshold is specified. Constantly having to obtain updated lists of beneficial ownership is disproportionate, particularly in dealings with groups of jazz players, classmates, carnival musicians and the like. These groups, which qualify as simple partnerships, often have a large and frequently changing number of partners who are beneficial owners of the assets held in these business relationships.

Where the **contracting partner is a simple partnership that does not pursue a charitable or non-commercial purpose or has fewer than five partners**, Art. 34 para. 1 states that a statement concerning beneficial ownership of the assets needs not be obtained if the partners have been identified according to Art. 16 para. 1 letter a and the beneficial ownership of the partners is recorded in writing or by a suitable electronic means. Alternatively, the bank may require the contracting partner to submit a **Form A** confirming the beneficial ownership of the assets. This is, however, subject to para. 3 of this article. Where an identified partner is a domiciliary company, a statement of beneficial ownership must always be obtained by means of Form A. If the contracting partner, being a simple partnership, declares that it has foundations or trustees as partners, the contracting partner must supply the information set out in Arts. 39 to 41.

If an **operating legal entity or partnership** is identified as the beneficial owner of the simple partnership, the contracting partner (i.e. the simple partnership) must, subject to Art. 22ff., identify the controlling persons of the operating legal entity or partnership by means of **Form K**. This does not apply to simple partnerships which satisfy the requirement under Art. 34 para. 2.

In the case of **communities of heirs**, the provisions on the simple partnership apply.

Art. 35 Condominium owner and common ownership collectives

Examples of other collectives with similar aims include those in the **agricultural sector** (e.g. forestry, arable, livestock, water source and melioration collectives) as well as grave upkeep funds.

Art. 36 Individuals and entities that are bound by professional confidentiality

Owing to **professional confidentiality (see Art. 321 SCC)**, a lawyer or notary may in some circumstances not be permitted to provide detailed information on the beneficial ownership of the client funds held by them. Such contracting partners must therefore confirm that they are bound by professional confidentiality under Art. 321 SCC and that the account or securities account is used exclusively in conjunction with their activities as lawyers or notaries. They are no longer required to disclose which of the activities subject to professional confidentiality the account or securities account is used for, as in practice such disclosure has proven unverifiable. In accordance with the scope of application of Art. 321 SCC, **Form R** must be signed by a lawyer or notary as the person bound by professional confidentiality. If the firm of lawyers is organised as a corporation (e.g. a company limited by shares or simple partnership), Form R must be signed by at least one person bound by professional confidentiality who can represent the company. The bank is therefore **not required to carry out any monitoring** itself. This is the responsibility of the relevant authorities.

The revised Form R was published in the **SBA's Circular no. 7885 of 22 April 2016**.

Section 3 Particular duties concerning identification

Art. 37 Collective accounts and collective safekeeping accounts

Art. 37 para. 2 gives banks the option **not to identify the beneficial owner** of accounts and custody accounts if the contracting partner is an operating company and holds assets for third parties as part of its professional services. This provision may, for example, be applied to business transactions with debt collection companies, real estate management companies, factoring companies or auction houses, or for companies that execute transactions within an economic unit as part of company group activities. Likewise, accounts of regulated money transfer and cash transport companies are not regarded as collective accounts. Banks must decide on a case-by-case basis and by means of a risk assessment whether this rule is applied

in practice, and in what circumstances. It is also possible to apply this provision to **other circumstances** if a **large number of beneficial owners** benefit from a service, the assets are held for third parties when performing this service and there is no relevant danger of abuse from a money laundering prevention perspective (e.g. management of employee share ownership plans, provided the ownership rights are booked to the company's collective account or collective safekeeping account).

The application of Art. 37 para. 2 must be recorded on file. There are no special requirements as to the Form this record must take. The documentation requirement is deemed to be complied with if the operating activity is evidenced by a Commercial Register extract or other documents (e.g. printout of the contracting partner's website) contained in the client file.

Carnival musicians, groups of classmates etc. without a special legal Form are to be treated as simple partnerships with a non-commercial purpose and therefore fall within the scope of Art. 34. As regards establishing the identity of the beneficial owner, the accounts opened by such partnerships are therefore not to be treated as collective accounts or collective safekeeping accounts within the meaning of Art. 37.

Art. 38 Collective investments and investment companies

Art. 38 applies only to collective investments and investment companies that are not covered by Art. 33. **Swiss** collective investments and investment companies with **more than 20 investors** are not required to supply a declaration regarding beneficial ownership.

If the contracting partner is a **foreign** collective investment or investment company with **more than 20 investors**, the only exception to the duty to establish beneficial ownership is if either the collective investment scheme/investment company or its management company is subject to **appropriate supervision and regulation with respect to combating money laundering and terrorist financing**. However, only collective investments and investment structures that are not domiciled in a country categorised by the FATF as «high-risk» or «non-cooperative countries and territories (NCCT)» may take advantage of such an exception. To qualify, the foreign investment or investment company must therefore be domiciled in a country deemed cooperative. Countries that are involved in an «ongoing process» as part of implementation of Global AML/CFT Compliance are also covered by the exception and regarded as cooperative. This means that «high-risk» and «non-cooperative» countries are not deemed to be subject to appropriate supervision with respect to combating money laundering and terrorist financing, so that duties to establish the identity of the beneficial owners apply.

In the case of **cooperative states**, it can be assumed that the legal and regulatory requirements regarding appropriate supervision and regulation with respect to combating money laundering and terrorist financing are satisfied. Thanks to their collective membership of FATF-style regional bodies (FSRBs), which are free-standing members of the FATF, these countries play a key role in promoting the effective implementation of the FATF Recommendations. Additionally, within the individual FSRBs, evaluations of the legal and regulatory implementation of the constantly developing international efforts to combat money laundering and terrorist financing are regularly carried out. The member states of the FSRBs therefore also satisfy the requirements for appropriate regulation with respect to combating money laundering and terrorist financing.

Special Purpose Vehicles (SPVs) used to issue securities also fall under Art. 38. If the securities issued by SPVs are listed on an exchange, the investors need not be identified, as the listing automatically results in publication.

Art. 38 also applies to investment companies deemed to be domiciliary companies.

Collective investments that are organised as corporations and act as financial intermediaries fall within the scope of Art. 33. If the contracting partner is a financial intermediary within the meaning of Art. 2 para. 2 AMLA, Art. 33 applies instead of Art. 38.

In **application of Art. 38 para. 5**, a declaration of beneficial ownership is not required, irrespective of the number of investors, if a **financial intermediary acts as the promoter or sponsor** of a collective investment or investment company and provides evidence that it applies appropriate rules to combat money laundering and terrorist financing. The sponsor is responsible for setting up and structuring a fund. The sponsor reviews the selection of the directors, custodian bank, administration and fund management. The promoter of a fund is responsible for the distribution of the fund units and for compliance with the relevant local distribution rules. The promoter also supplies the investors with the offering memorandum and the corresponding fund prospectus, and ensures compliance with the distribution rules as set out in the offering memorandum.

If a **financial intermediary within the meaning of Art. 33 invests** in a collective investment or investment company itself, the beneficial owners standing behind this financial intermediary also do not have to be identified.

Art. 39 Domiciliary companies

Art. 39 para. 3 clarifies through the use of the word «**indications**» that a judgement needs to be made in each individual case as to whether a company is a domiciliary company or not. For the definition of a domiciliary company, see Art. 2 letter a AMLO-FINMA. For example, if the contracting partner has its own offices although it uses a c/o address, it does not necessarily have to be classified as a domiciliary company. In the event of doubt, it should however be assumed that it is a domiciliary company.

If, although the indications of domiciliary status set out in Art. 39 para. 3 apply, a bank concludes in a specific case that a particular company is not a domiciliary company (e.g. because the contracting partner is active operationally or is part of an operating group), the reasons for this conclusion must be recorded and put on file. There are no special requirements as to the Form that this documentation must take. For example, a memorandum could be written or copies of documents evidencing the operational activities could be placed on file.

Simple **re-invoicing companies** are not active operationally and are to be regarded as domiciliary companies.

Holding and sub-holding companies (hereinafter referred to as «holding companies») are not classified as domiciliary companies. They are companies that directly or indirectly hold a majority stake in one or more companies engaging in trading, manufacturing or other commercial operations and whose purpose is not primarily the management of third-party assets. The bank must make a record of this in its files.

Holding companies are therefore an important instance of the application of Art. 39 para. 4, under which a contracting partner is not to be classified as a domiciliary company even though the indications set out in Art. 39 para. 3 apply. These are companies which are part of a group whose member companies carry out trading or manufacturing activities or other commercial operations (whether in Switzerland or abroad). In practice, holding companies often do not have their own personnel or offices, particularly if they are domiciled within a commercially active group company whose staff also work on behalf of the holding company. At the same time, the holding company plays an important part in the management of the group. By definition, it does not itself engage in commercial activity. It is not expedient to establish the identity of the beneficial owners of a holding company, and in practice the group structure may render it virtually impossible to do so. It therefore seems appropriate to treat such holding companies **analogously to an operating company** which itself engages in trading, manufacturing or other commercial operations. For this reason, subject to Art. 22ff., a **Form K** must be obtained. This assessment must be made on the basis of the specific circumstances of each individual case, with in particular the organisation of the group, the role and function of the holding company, the importance of the holding company for the group and

the Form of consolidation being used as criteria. The result of this assessment must be documented. There are no specific requirements as to the Form that this documentation must take. For example, a memorandum or copies of documents evidencing that the contracting partner is part of an operating group can be put on file.

Holding companies that merely **combine** and/or manage the various assets (securities, real estate, commercial operations, etc.) of a **family** or **another group of specified individuals** or have the sole objective of enabling dividend distributions to be made to shareholders **are to be regarded as domiciliary companies**, and the beneficial ownership must therefore be established.

The issue of how **real estate** companies are to be treated frequently arises with regard to the definition of a domiciliary company, and in particular a holding company. They are not a homogeneous segment of companies that would permit standardised treatment as regards the formalities. A real estate company may simply hold real estate in its assets; it may manage properties itself; but it may also lease, develop, finance, buy, sell and market real estate. The spectrum ranges from the purely «**passive**» **domiciliary company for which a Form A** must be supplied to a purely **operating company for which a Form K** must be obtained. It is therefore the responsibility of the individual bank to decide on the formalities to be complied with in each individual case, having regard to the company's purpose and business activities.

A foreign company or similar foreign structure that holds assets for a large number of beneficiaries for pension purposes can also qualify as a company whose purpose is to protect the interests of its members or beneficiaries **by way of mutual self-help** as defined in Art. 39 para. 4 letter a.

In the case of **condominium owner** and **common ownership collectives** entered in the Land Register, the exception under Art. 35 applies.

Only a natural person can be the **beneficial owner** of the assets of a domiciliary company. The exceptions to the duty to establish identity are set out in Art. 30ff. If an operating company is identified as the beneficial owner, the controlling persons must additionally be identified by means of **Form K**. No declaration by the company named in Form A that it holds the assets for itself, or additional declaration by the contracting partner that the company named in **Form A** holds the assets for itself, is required. Where a domiciliary company is concerned, all the beneficial owners must be identified in every case, but the extent of each individual's beneficial ownership (e.g. percentage shares) needs not be clarified or documented.

The information on **foundations and trusts** is governed by Arts. 40 and 41.

Art. 40 Foundations and Art. 41 Trusts

The documentation of foundations and trusts is governed by Arts. 40 and 41, which are to be construed as **lex specialis to Art. 39**. They include revocable, irrevocable, discretionary and non-discretionary structures.

- **Forms S and T**

Form S is used **for foundations** and similar constructs, and **Form T for trusts**. If a structure has both revocable and irrevocable characteristics (**hybrid forms**), the dominant characteristic of the structure is decisive when stating the type of structure on Form S or T. The same applies if the structure simultaneously possesses discretionary and non-discretionary characteristics. The remarks regarding Form A in the commentary on Art. 28 apply analogously to Forms S and T, with the exception of Art. 28 para. 3.

If the contracting partner is a foundation or trust which pursues a purely **non-commercial purpose**, Art. 39 para. 4 letter a applies. For this reason, the identity of the beneficial owner does not need to be established. The bank must document the situation in an appropriate manner.

If an operating legal entity or partnership is listed on Form S or T under points 2, 3 or 5 of the model forms (e.g. settlor or founder), the identities of its controlling persons must be established unless the exceptions allowed for in Art. 22ff apply.

- **Founder/settlor**

The actual **founder** of a foundation or settlor of a trust that does not exclusively pursue a **non-commercial purpose** (as defined in Art. 39 para. 4 letter a) is the person endowing the foundation/trust with assets by transferring that person's assets (or parts thereof) to the foundation/trust.

The following – non-exhaustive – examples describe situations in which a person must be identified as the actual founder, irrespective of the time at which the assets are transferred to the foundation/trust:

- A person that contributes assets to a foundation or trust is to be identified as the actual founder.
- A person A transfers certain assets to a person B with the intention that person B should subsequently endow a foundation or trust with those assets. Person A must be identified as the actual founder.

- **Beneficiaries**

The beneficiaries include all persons with an entitlement to the foundation or trust's assets or the income from them at the time when Form S or T is signed, irrespective of whether the entitlements of the beneficiaries are fixed or whether distributions to the beneficiaries can be made solely at the discretion of the foundation board or trustee (discretionary beneficiaries). The beneficiaries also include all persons that have already received distributions and are not excluded from further distributions.

- **Discretionary beneficiaries**

All persons that are named in the by-laws, supplementary by-laws, regulations, trust deed, letter of wishes or similar documents or can already be identified individually as persons that are members of a group of beneficiaries must be identified as discretionary beneficiaries. For example if a group of beneficiaries comprising «the wife and all the direct descendants of the settlor» is mentioned, the already existing wife and any descendants already born must be listed by name, together with all the necessary information, under point 4a) of Form S or Form T. If a group of beneficiaries does not yet include any currently living persons, the group of beneficiaries that can be identified can be recorded (e.g. «descendants of the settlor»).

- **Prospective beneficiaries**

Persons that may only become entitled to the foundation or trust assets or the income from them following the occurrence of a condition precedent or when a particular date has been reached, in particular owing to the departure of a higher-ranking beneficiary, («prospective beneficiaries») need not be identified as beneficiaries **until after the condition has occurred** or the date has been reached. In the case of such prospective beneficiaries it is not relevant whether they can already be individually identified at the time when Form S/T is signed and whether the entitlement following the occurrence of the condition or the date being reached is firm or discretionary.

If, on the basis of such a condition precedent or specified date, there are no current beneficiaries at the time when Form S or T is signed, those persons or groups of persons which will become beneficiaries once the condition has been met or the date reached must be listed.

- **More than 20 beneficiaries**

If the current group of beneficiaries comprises more than 20 individually identifiable beneficiaries without a firm entitlement to distributions, it is only necessary to **state the group of beneficiaries** under point 4b). Beneficiaries with a firm entitlement to distributions must be identified by name and the exception mentioned above with regard to a category of beneficiaries comprising more than 20 individually identifiable beneficiaries does not apply. The fact that there are more than 20 individually identifiable beneficiaries without a firm entitlement can be documented via, for example, a declaration to this effect by the contracting partner on Form S/T (e.g. a note that there are «more than 20 individually identifiable beneficiaries without a firm entitlement to distributions») or in another Form within the bank (e.g. an internal memorandum or entry in the client history setting out the facts).

- **Restructuring (re-settlement)**

If the foundation or trust has arisen from the restructuring (re-settlement) of a previously existing foundation or trust or the merger of previously existing foundations or trusts, information on the original founder or settlor must be recorded in Form S or T, respectively.

- **Protectors and further persons**

In the case of foundations, the contracting partner need only provide information on other persons if they have the right to specify or appoint representatives of the foundation, provided such representatives have power of disposal over the assets or have the right to amend the allocation of assets or appointment of beneficiaries. In the case of trusts, the contracting partner need only provide information on the protectors(s) and/or further persons if they have a right of revocation in respect of the trust (in the case of revocable trusts) and/or have the right to appoint the trustee. Persons such as asset managers, advisors, etc. do not therefore have to be recorded.

- **Underlying company**

If a domiciliary company, being a contracting partner, declares that it is an underlying company holding assets for a foundation or trust, it must be identified as the contracting partner. In this case, the beneficial ownership must be established directly using Form S or T.

- **Purpose trust**

Some jurisdictions recognise a concept known as the «non-charitable purpose trust». Such trusts **do not have beneficiaries** and consequently no distributions to one or more individual persons can be made at any time. Examples of the purposes of such non-charitable purpose trusts include:

1. upkeep of a property belonging to the settlor that is made available to the settlor's parents free of charge
2. holding of shares in a company for the purpose of ensuring the long-term survival and independence of the company concerned after the company founder's death
3. upkeep of the grave of a specific deceased person (e.g. the deceased settlor)

The concept that in the case of a pure non-charitable purpose trust there are no beneficiaries is in conflict with the documentation requirements of Art. 41. For this reason, an individual assessment must be made in such cases as to whether there are natural persons and/or legal entities that derive a direct or indirect economic benefit from the provisions governing the purpose of the trust. If such persons or entities exist, they are to be regarded as beneficiaries within the meaning of Art. 41 and recorded on Form T under point 4 with all the necessary information.

In example 1 above the settlor's parents are to be regarded as beneficiaries. If the company in example 2 is an operating company with its shares held by the purpose trust, this company should be regarded as the beneficiary and documented as such on Form T. In this case, the identity of the controlling person of the company within the meaning of Art. 20ff must be established. However, if the company whose shares are held by the purpose trust is a domiciliary company, its beneficial owners are to be regarded as beneficiaries of the trust and documented directly under point 4 on Form T.

If there are no natural persons and/or legal entities that derive a benefit from the purpose trust (example 3), there is no need to name a beneficiary on Form T. This circumstance must be documented under point 4 of Form T (e.g. «This non-charitable purpose trust serves to maintain the grave of the settlor xy, who died in 1974»).

The matter of CDB-compliant documentation of structures that constitute a **hybrid Form** between a conventional «beneficiary trust» and the «non-charitable purpose trust» described here must be assessed on a case-by-case basis, having regard to the particular characteristics of the individual structure.

These comments on the purpose trust also apply, mutatis mutandis, to other legal forms (e.g. company foundations) to which the characteristics described apply.

Art. 42 Life insurance policy with separate account/securities account (insurance wrapper)

Art. 42 lists the content of **FINMA Guidance No. 18** «Handling of life insurances with separately managed accounts/portfolios».

If an operating legal entity acts as a fiduciary insured (e.g. an Italian 'fiduciaria statica'), **Form K** need not be obtained. In such cases, however, the effective (not fiduciary) premium payer must be identified. If the effective premium payer is an operating company, the controlling person of this company must be identified using Form K (i.e. both Form I and Form K are required), unless an exception under Art. 22ff applies.

Chapter 5: Delegation and monitoring regulations

The regulations in this chapter apply to both verifying the identity of the contracting partner and establishing the identity of the controlling persons and beneficial owners.

Section 1 Delegation

Art. 43 Delegation of the identification of the contracting partner, establishment of the controlling person and of the beneficial owner

The bank may delegate the **performance of duties of due diligence** to individuals or companies. This requires a written delegation agreement. The delegating bank must also be able to check whether the delegate is fulfilling its due diligence obligations correctly and in full. In practice, this monitoring is carried out on receipt of the documents produced by the delegate; on-site monitoring is not absolutely necessary. Note that although a bank can delegate the performance of duties of due diligence to a third party, the bank remains liable for any shortcomings in the performance of those duties (see practice of the CDB supervisory board on banks' duty of due diligence 2013, C. 1. p. 4).

The confirmation in accordance with Art. 43 para. 2 that the copies forwarded are identical to the originals can, in accordance with the practice of the CDB supervisory board, either be appended to the copies themselves or made by means of a separate document (see Activity Report of the CDB Supervisory Board 2005–2010, V.1.2.21 p. 27).

Within a group of companies, delegation may be arranged **without an agreement in writing**. This is appropriate, given that the entire group is monitored by the regulator on a consolidated basis and that equivalent standards of due diligence are supposed to apply within the group. Another financial intermediary may also be appointed as delegate without a written agreement, provided the intermediary is subject to equivalent supervision and regulation with respect to preventing money laundering and terrorist financing and has taken appropriate measures to fulfil the duties of due diligence in an equivalent manner.

Delegation is only deemed to exist when a third party acts for and on behalf of the bank as its contractually mandated representative. If the representative is acting in its capacity as an executive body or authorised signatory of the contracting partner, this does not constitute delegation, and no delegation agreement is necessary.

A bank may also delegate to a natural person, partnership or legal entity domiciled or resident abroad.

Section 2 **Duty to document**

Art. 44 Duty to ensure

The duty to document procedures is met, for example, if the availability of a document in the bank's system (e.g. in the physical or electronic archive) is fully documented. Full documentation is defined as the ability of internal audit or the statutory auditors to determine the date from which a relevant document was available in the bank's system.

In accordance with the practice of the CDB supervisory board, the date of receipt of an identification document must be recorded in the files, for example by using a **«received» stamp** (see Activity Report of the CDB Supervisory Board 2001–2005, C.1.8 p. 10).

The bank's stamp indicating receipt is an acceptable substitute for a date missing on a form. An undated Form is deemed to have been correctly completed if internal audit and the external auditors can establish the receipt of the document and its availability in the bank's system.

The CDB does not specify the Form in which documents need to be stored. The relevant provisions of the Code of Obligations (CO) therefore apply. In accordance with Art. 957 CO, it is possible to store the documents solely in electronic form, provided the relevant conditions are met. There is no requirement to retain original copies of Forms A, I, K, R and T.

Art. 45 Point in time for fulfilling the duty to document

An account can only be used when the documentation required by the CDB to verify the identity of the contracting partner and establish the identity of the beneficial owner and the controlling person is complete and in an appropriate form.

An account is deemed usable from the **point at which bookings can be made to it**. As long as the account remains blocked and neither deposits nor withdrawals can be booked on it, it is considered as not yet opened. The bank must be in a position to prove that it has blocked the account. It is not sufficient that the account has not actually been disposed of. If the bank is not able to do this, it is in breach of its duty to document procedures (see Activity Report of the CDB Supervisory Board 2001–2005, C.1.1 p. 8).

In response to the criticism of the previous regulation made by the FATF, the exception for business relationships where the documentation is partially incomplete has been tightened up in Art. 45 paras. 3 and 4. Accounts where the documentation is still incomplete may now only be used if all of the following conditions are met:

- Only individual information and/or documents are not available or individual documents have not been provided in the appropriate form.
- Sufficient information regarding the identity of the contracting partner and controlling person or beneficial owners must be available.
- The bank must carry out a risk-based assessment of the situation in the individual case, verifying in particular whether application of the exemption is necessary in order not to disrupt the ordinary course of business. This assessment must be documented.

The **missing documents or information** must be supplied within **30 days of the account being opened**. Otherwise the account must be blocked for deposits and withdrawals. In this case, the bank must make a further risk-based decision as to whether it will close down the business relationship without delay or attempt to secure delivery of the missing documents or information by a new deadline.

In the case of **cash transactions**, the declaration regarding the controlling person may be made ex post, provided efforts to secure the declaration are initiated immediately after the transaction is executed (FINMA report on the consultation regarding the full revision of AMLO-FINMA from 11 February to 7 April 2015, published 3 June 2015, point 3.6.3).

If the tasks of verifying the contracting partner's identity or establishing the identity of the controlling person or beneficial owner within the meaning of Art. 43 are carried out by **another group unit**, the documentation obligation under Art. 45 is deemed to have been fulfilled at the point at which the necessary documentation is available to the other group unit.

In the case of **mandates for the management of assets** held with third parties, however, rather than the account being blocked for deposits and withdrawals after 30 days, asset management activities must be suspended and/or the asset management mandate terminated if the bank has not received complete documentation by this deadline. The bank must notify the client of this possibility in good time.

The provisions regarding the duty to document procedures and the point at which the documentation requirement is complied with apply **not only** to identifying the contracting partner and establishing the identity of the controlling person and beneficial owner, but also to the duty to check the identity of the person establishing the business relationship set out in Art. 15 (see practice of the CDB supervisory board on the banks' duty of due diligence 2013, C.3.3 p. 6).

Section 3 **Duty to repeat procedures**

Art. 46 Duty to repeat due diligence with respect to this code of conduct in the event of doubts

Art. 46 is intended to ensure that the contracting partner and the controlling person/beneficial owner are correctly identified. A clear distinction must be made with AMLO-FINMA, which stipulates other duties (e.g. monitoring duties or duties to clarify unusual transactions). If AMLO-FINMA has been violated, it does not necessarily follow that the CDB has also been violated. Duties to investigate unusual occurrences and special risks are set out in AMLO-FINMA, and only FINMA and auditors mandated by it are empowered to investigate compliance with these duties.

Art. 46 requires due diligence to be repeated when there are **doubts** as to whether the contracting partner has been correctly identified or the identity of the controlling person/beneficial owner has been correctly established. As before, such doubts may arise in the course of the business relationship but also – in accordance with the broader scope of Art. 46 – at the beginning of the relationship. The latter would be the case if, for example, the clients were to supply obviously false infor-

mation when establishing a business relationship.

Such doubts may be based on unusual circumstances. These include cases where a person that does not discernibly have a sufficiently close link to the contracting partner is granted a power of attorney; powers of attorney for the management of assets that merely allow for transactions within a business relationship but withdrawals of funds are not covered by this, as granting such a power of attorney to a third party is nothing unusual and in such a case only the contracting partner can dispose of the assets. Unusual circumstances also include a situation where the assets deposited or promised are disproportionate to the financial standing of the contracting partner insofar as this is known to the bank.

Large **cash transactions** alone are not an unusual circumstance (see arbitration court decision dated 22 October 2004). Instead, an assessment as to whether a cash transaction is unusual needs to be made in each individual case based on the specific situation (particularly the circumstances of the contracting partner).

If such doubts are dispelled after appropriate enquiries by the bank as to whether the information on the contracting partner and the controlling person/beneficial owner is correct, a (new) **Form A, I, K, S or T** does not need to be obtained. The term «any enquiries» makes clear that there is no obligation in the CDB to make enquiries that do not relate to the identification of the contracting partner or the beneficial owner/controlling person. The banks are at liberty to repeat the identification procedure or the procedure for establishing the identity of the beneficial owner/contracting partner.

Ongoing business relationships are to be terminated as soon as possible without **breach of contract** and as long as the conditions for **notification** or right to notify (Art. 32 para. 3 AMLO-FINMA) do not apply. If, owing to correspondence instructions, the bank is not able to contact the contracting partner, it may delay the termination of business relations until the contracting partner's next visit or the next occasion on which correspondence is delivered. In accordance with the practice of the CDB supervisory board, Art. 46 requires all business relationships (and not only those to which the suspicions relate) to be terminated (Activity Report of the CDB Supervisory Board 2001–2005, C.4.18 p. 51).

Chapter 6: Prohibition of active assistance in the flight of capital

Chapter 6, consisting of Arts. 47 to 52 , remains unchanged.

Chapter 7: Prohibition of active assistance in tax evasion and similar acts

Chapter 7, consisting of Arts. 53 to 57, remains unchanged.

Chapter 8: Audit and procedural provisions

As part of the CDB 20 revision, the procedural provisions concerning the abbreviated process have been amended to take account of the procedural regulations.

Section 1 Proceedings

Art. 59 Auditing

Art. 59 specifies how audit firms are to review compliance with the CDB. It refers to the relevant FINMA Circular (FINMA Circ. 13/3 «Auditing»). Art. 59 explicitly states that a **risk-oriented approach** is to be adopted when determining the scope of the random sample and in the audit itself. This approach must, in particular, take account of criteria such as the nature of the business activity and the number and volume of the business relationships established since the last audit was carried out. Following the partial revision of FINMA Circular 13/3 «Auditing», the reference to the annual audit has been removed in CDB 20. The frequency/cycle of the «money laundering» audit area now depends on the institution's risk situation.

The deadlines within which **violations** are to be notified are now regulated in Art. 59. If the violation is minor, the audit firm can set a deadline for the bank to rectify any shortcomings identified.

Art. 60 Investigations

There is a separate provision governing the entire investigation procedure.

In minor cases, Art. 60 para. 4 empowers **investigators** to terminate an investigation themselves. An analogous regulation can also be found in Art. 6 of the investigation regulations.

Art. 60 para. 2 also makes clear that investigators are **not responsible** for establishing, on a preliminary basis, whether the provisions of AMLO-FINMA have been violated. Violations of AMLO-FINMA are investigated by FINMA or by auditors mandated by it.

Investigators and the CDB supervisory board are therefore **not obliged to investigate** whether a bank has checked the financial background of business relationships and transactions, as required by the Anti-Money Laundering Act. This falls within the scope of AMLO-FINMA and is therefore the responsibility of FINMA. An investigation as to whether Art. 46 has been violated only needs to be carried out if there are specific indications that the person listed as the contracting partner, controlling person or beneficial owner is not correct. «**Fishing expeditions**», i.e. a systematic analysis of account or securities account statements and transaction records to check whether this might provide any indication that an incorrect person has been stipulated as the beneficial owner or controlling person in a form, **are not permitted**.

Art. 62 Abbreviated process

Art. 62 offers the option of an abbreviated process. This consists solely of sanction proceedings, with **no investigation** being carried out by an investigator.

The bank can apply to the CDB supervisory board for an abbreviated process by means of **self-indictment**. Each application must be accompanied by the audit firm's report setting out the circumstances underlying the self-indictment.

Under Art. 62 para. 3, an abbreviated process can only be carried out if the CDB supervisory board is able to take a decision based on the facts set out in the audit report.

The CDB supervisory board merely informs the parties of its decision, but the bank may, within ten days, request written substantiation of the decision.

Section 2 Sanctioning rules

Art. 63 Minor cases

Art. 63 states that in minor cases the proceedings against the bank at fault must in all cases be closed **without any sanction**. Since CDB 16 the option of a reprimand has ceased to exist.

Art. 63 defines minor cases in general terms. A case is deemed minor if the money laundering-related objectives of the CDB, namely identification of the contracting partner and establishment of the identity of the controlling person/beneficial owner, have been met, even if other duties set out in the CDB have not been complied with in full.

If the shortcomings identified constitute **systemic failure by the bank**, this can no longer be assumed to be a minor case for the purposes of Art. 63.

Art. 63 lists a number of examples of minor violations. The list is not exhaustive.

The period of 30 days allowed for remedying subsequently identified shortcomings stipulated in Art. 63 letter e runs from the point at which the account is opened within the meaning of Art. 45 para. 2.

Art. 64 Violations of the rules of this code of conduct

In accordance with Art. 64 para. 1, due account must be taken of the degree of culpability when assessing the level of a fine for violations. The nature of the business relationship affected must also be taken into account.

Art. 64 para. 1 further obliges the CDB supervisory board to take account of measures imposed by other authorities with respect to the same issue when determining its sanctions.

Art. 64 para. 2 expressly states that only intentional failure to repeat the duties of due diligence (Art. 46) and an intentional violation of the provisions concerning the prohibition of active assistance in the flight of capital and tax evasion and similar acts (Art. 47 to 57) will lead to the imposition of a fine. This is a clarification and not a change.

Art. 65 Limitation period

In all cases, the limitation period of five years stipulated in Art. 65 begins to run at the point when the code of conduct is violated.

For example, if after the five-year limitation period has expired an error is detected in an existing business relationship which triggers a duty to repeat procedures under Art. 46, failure to rectify the error identified constitutes a renewed violation of the CDB. This in turn causes a further limitation period of five years to begin to run.

The limitation period is suspended during the process, irrespective of the nature of the process (including abbreviated processes).

Section 3 Organisation

Art. 66 Supervisory board

Art. 66 para. 1 stipulates that only a **majority** of the members of the CDB supervisory board must be independent. This means that individuals who are active in the banking sector may also be appointed as representatives to the CDB supervisory board, thus ensuring that current knowledge and experience of dealing with developments in the financial industry are represented on the board.

A person is not **independent** for the purposes of Art. 66 para. 1 if they are an employee or agent of a Swiss bank or securities dealer or they are on one of its executive bodies. A member of the CDB supervisory board must **step down temporarily** if the commission is dealing with a case affecting the financial institution with which this member is connected in this way. Further details are set out in the statutes of the CDB supervisory board.

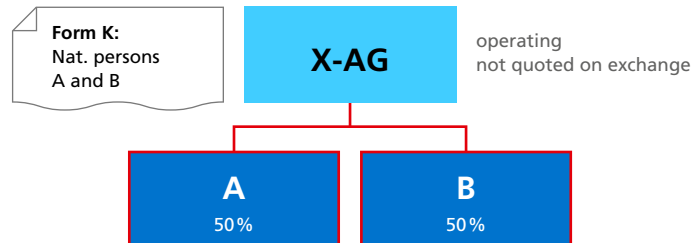
In order to ensure that younger members are recruited to the supervisory bodies periodically, the upper age limit for election to the supervisory board provided for in Art. 66 para. 3 is retained.

Art. 67 Investigators

The options for investigators to **close proceedings themselves** or to request the CDB supervisory board to terminate the proceedings have been retained in CDB 20.

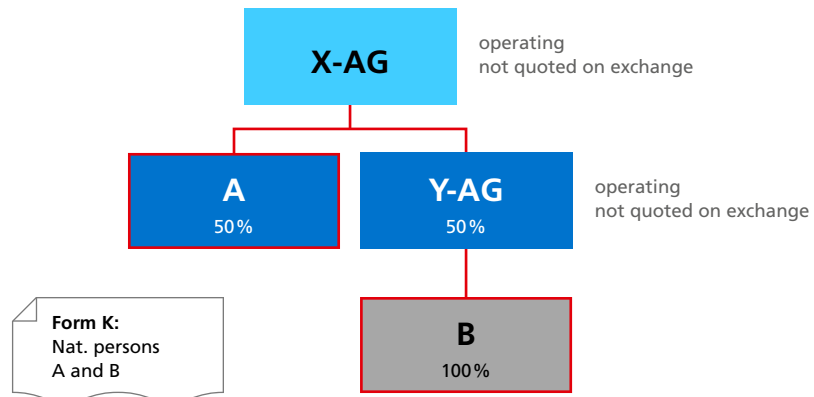
Appendix: case studies

case study 1

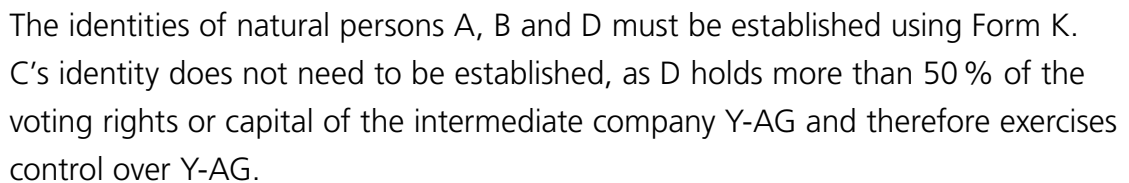


The identities of natural persons A and B must be established using Form K, as each holds 25 % or more of the voting rights or capital.

case study 2

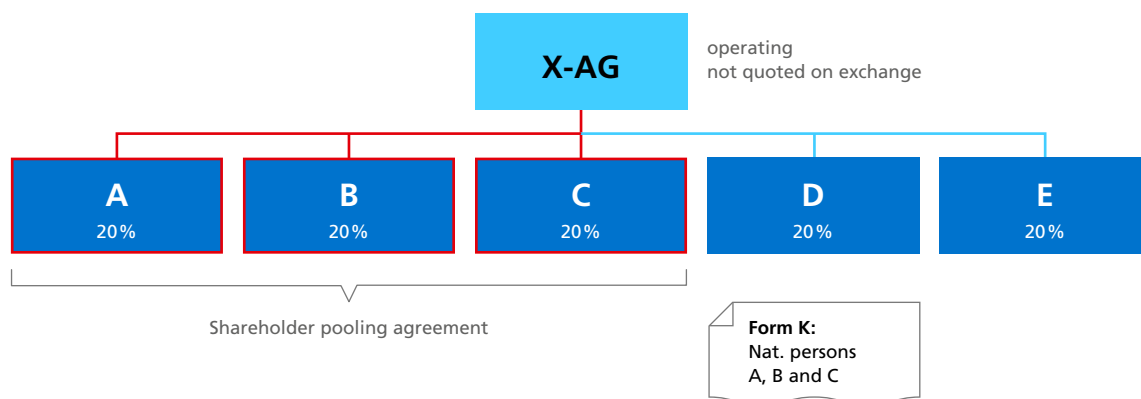


The identities of natural persons A and B must be established using Form K. A holds 25 % or more of the voting rights or capital, and B holds more than 50 % of the voting rights or capital of the intermediate company Y-AG and therefore exercises control over Y-AG.



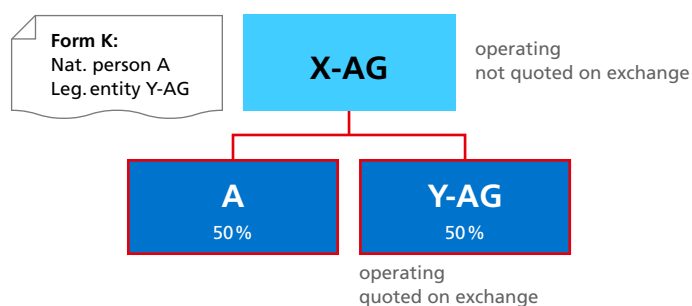
As no natural person holds 25 % or more of the capital or voting rights, no controlling persons can be identified at stage 1 of the cascading measures. If it proves impossible to establish the identity of any controlling persons that exercise control over the contracting partner «by other discernible means» in stage 2, stage 3 requires the senior managing official of the contracting partner to be identified as the controlling person.

case study 5

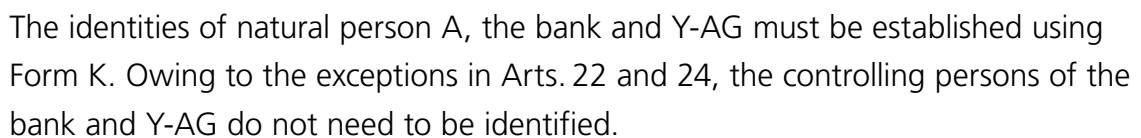


The identities of natural persons A, B and C must be established using Form K, where they exercise their voting rights jointly under the terms of a shareholder pooling agreement and so together hold 25 % or more of the voting rights or capital. The identities of natural persons D and E do not need to be established.

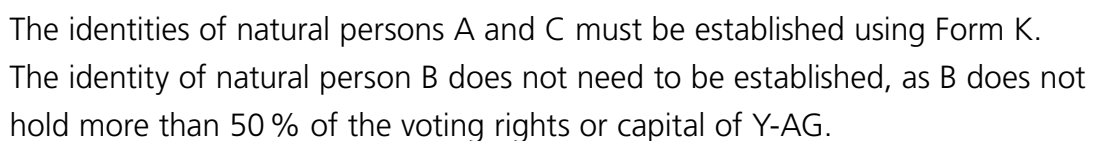
case study 6



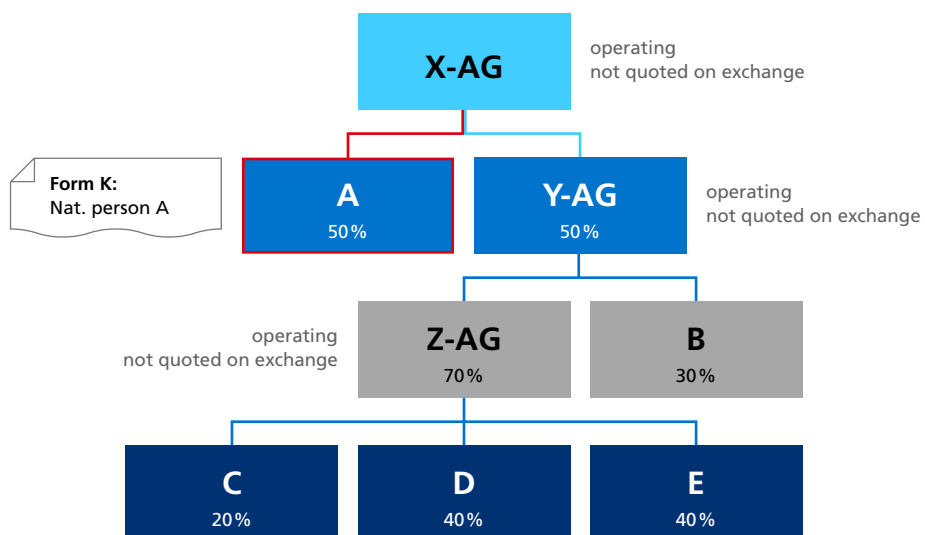
The identities of natural person A and the company Y-AG must be established using Form K. Owing to the exception in Art. 22, the controlling persons of Y-AG do not need to be identified.



case study 8



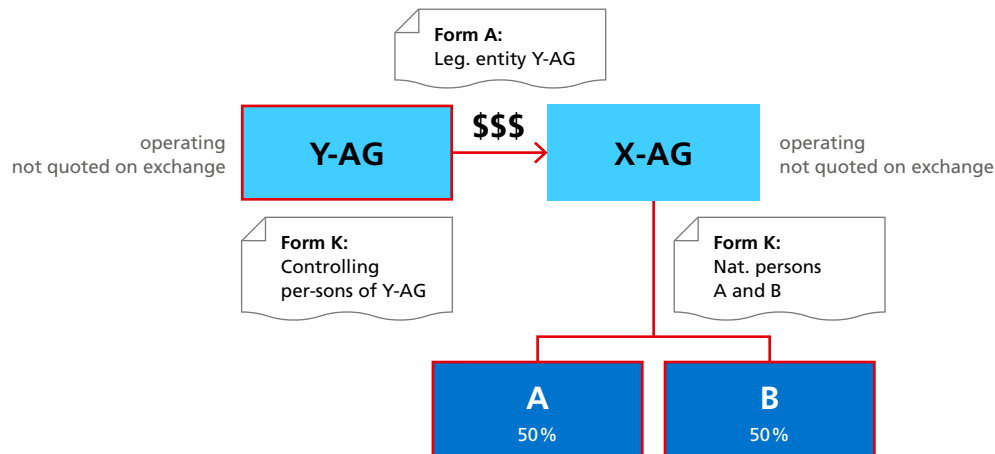
case study 9



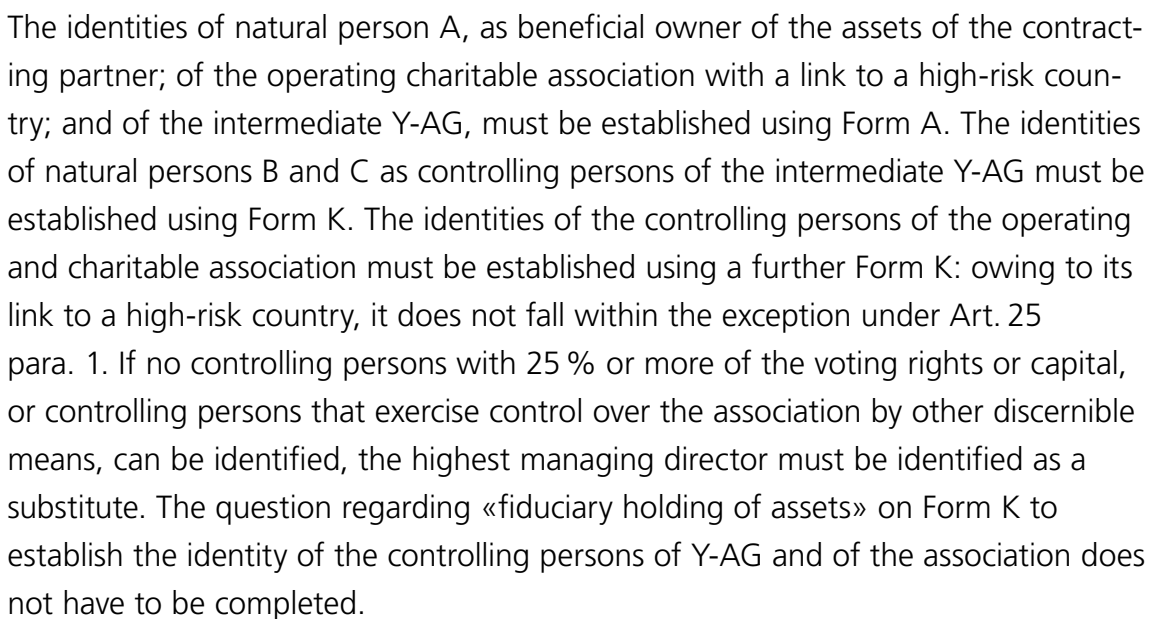
The identity of natural person A must be established using Form K.

The identity of natural person B does not need to be established, as Z-AG exercises majority control over Y-AG. Likewise, the identities of natural persons C, D and E do not need to be established, as none of them exercises majority control over Z-AG.

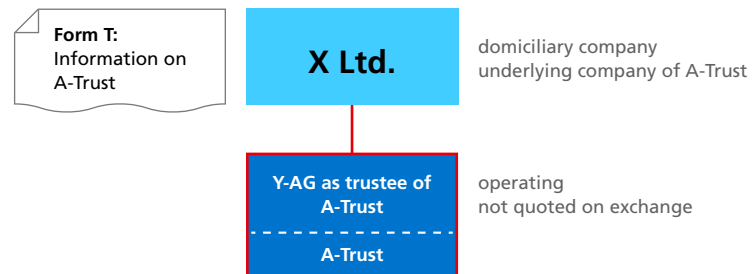
case study 12



The contracting partner X-AG holds assets of the legal entity Y-AG on a fiduciary basis. The identities of natural persons A and B must be established using Form K, as each holds 25 % or more of the voting rights or capital of X-AG. The contracting partner must also indicate on Form K that a third party is the beneficial owner of the assets deposited in the account or securities account. The contracting partner must therefore complete an additional Form A naming Y-AG as the beneficial owner of these assets. Consequently, the identities of the controlling persons of Y-AG, an operating company not quoted on the stock exchange, must be established using Form K. The question regarding «fiduciary holding of assets» on Form K to establish the identity of the controlling persons of Y-AG does not have to be completed. If X-AG manages on it's accounts both own assets and assets of the Y-AG, which it holds in trust, then both Y-AG and X-AG are to be listed on Form A.



case study 14



X Ltd., as contracting partner, must provide the information required on A-Trust using Form T.

List of abbreviations

AMLA	Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA) of 10 October 1997, SR 955.0
AMLO-FINMA	Ordinance of the Swiss Financial Market Supervisory Authority on Combating Money Laundering and Terrorist Financing in the Financial Sector (FINMA Anti-Money Laundering Ordinance, AMLO-FINMA) of 3 June 2015, SR 955.033.0
CISA	Federal Act on Collective Investment Schemes (Collective Investment Schemes Act, CISA) of 23 June 2006, SR 951.31
CO	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), SR 220
FATF	Financial Action Task Force (website: http://www.fatf-gafi.org)
FMIA	Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act, FMIA) of 19 June 2015, SR 958.1
SBA	Swiss Bankers Association
SCC	Swiss Criminal Code of 21 December 1937, SR 311.0
SR	Classified compilation of federal law (website: https://www.admin.ch/gov/en/start/federal-law/classified-compilation.html)

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