Commentary on the agreement on the Swiss bank's code of conduct with regard to the exercise of due diligence (CDB 08)
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Introduction

The agreement on the Swiss banks’ code of conduct with regard to the exercise of due diligence (CDB), which has existed since 1977, is revised on a five-year cycle (except for CDB 98 due to the enactment of the Anti-Money Laundering Act (AM LA) in that year). As a result, the CDB was last revised in 2007 and entered into force on 1 July 2008 as CDB 08.
**Background**

When the CDB was revised in 2002 the Legal Commission of the Swiss Bankers Association (SBA) decided to write a report accompanying the revised CDB for the first time. At the revision in 2007 it again decided to produce a report, this time in the form of a detailed commentary on selected provisions of CDB 08 and to expressly state in the CDB that the accompanying reports must be taken into account when interpreting the CDB (point 4 CDB). The accompanying report to CDB 03 has been incorporated in this commentary insofar as it continues to apply.

Switzerland probably has the strictest regulations in the world on the identification of contracting partners and beneficial owners. Nonetheless, the Financial Action Task Force on Money Laundering (FATF) criticised Switzerland in a number of points in its mutual evaluation report in 2005 for having insufficiently implemented the 40 recommendations and 9 special recommendations of the FATF. The revision of the CDB was intended to address these criticisms as well as the difficulties that had been encountered in implementing certain regulations of the previous CDB in practice. The revision of CDB 03 was therefore a comprehensive exercise.

A number of provisions which had proved to be too rigid, or impossible to implement in practice, or which proved to be excessive in an international comparison, were amended. The principle that the sanctions regime of the CDB applies solely to violations of the CDB was maintained. It must be strictly separated from the enforcement of the duty of due diligence set out in the Anti-Money Laundering Act (AMLA) and the Money Laundering Ordinance of the Swiss Federal Banking Commission (MLO SFBC) respectively. This is the responsibility of the SFBC. In the case of certain provisions for which there is a particularly high risk of a mixing of the duties of due diligence under the CDB and the MLO of the SFBC, internal audit is currently seeking to clarify the issue.

A number of revised provisions deliberately allow for greater flexibility and so make it possible to apply the CDB using a risk-based approach; this reflects the idea that the CDB should establish a minimum regulatory standard which leaves the signatories to the CDB free to devise stricter regulations on specific points.

The structure and approach of the CDB have not been changed in order to maintain the practical focus of the regulations. In the interests of user-friendliness the CDB now includes a table of contents. As a result, each point in the CDB has been given a title, which has also been used for the table of contents. The glossary of abbreviations used in the commentary (see final page) is also new.

Letters are now used throughout in place of lemmata to make referencing of the relevant CDB provision easier. Terminology has been harmonised (e.g. “contracting partner” instead of “client, account holder, contracting partner” etc.) and adapted to the Anti-Money Laundering Act (“checking the identity” instead of “identification”). The term “point” is used for the sections of the commentary. “Implementing provision” and “margin note”, which mean the same thing, are also sometimes used in practice.

A consultation was held on the draft of CDB 08 on 26 September 2007 among the supervisory bodies of the CDB, banks and banking groups, the committees of the SBA and other organisations (e.g. the Swiss Chamber of Certified Accountants and Tax Consultants and Forum SRO GwG). On the basis of the around 25 responses received, CDB 08 and this commentary were revised and adjusted with the SFBC.
Commentary on selected provisions of the CDB

Art. 1 Preamble

1 Geographical scope
In addition to banks, point 1 CDB now explicitly mentions securities dealers, who can also sign the CDB. Unless otherwise noted, the CDB and commentary relate to all signatory financial intermediaries (banks and securities dealers), even if only one term is used in the text for convenience.

As before, the CDB only applies within Switzerland and is therefore not applicable globally. However, banks may not use their foreign branches, subsidiaries and affiliated companies to circumvent the agreement (paragraph 2).

3 Relationship to the Swiss Anti-Money Laundering Act (AMLA) and the SFBC Money Laundering Ordinance (MLO SFBC)
Point 3 CDB states that the CDB is intended to give specific effect to certain points of due diligence governed by the Anti-Money Laundering Act, in particular verifying the identity of the contracting partner and identifying the beneficial owner. The SFBC’s Money Laundering Ordinance also gives specific effect to these due diligence principles. In particular, the MLO SFBC sets out when and how unusual business relationships or transactions need to be investigated further (see the 3rd sentence of point 3 CDB). Accordingly, the bodies responsible for the enforcement of the CDB do not need to concern themselves with the points dealt with in the ordinance which fall under the sole ambit of the SFBC.

Special regulations entered into force on 1 October 2004 regarding the verification of the identity of clients in the credit card business (see Circular 7356 of the SBA of 23 September 2004). These continue to apply with the entry into force of CDB 08.

4 Commentary on the code of conduct
The CDB explicitly establishes a new relationship between the agreement and the commentary, clarifying that the commentary on CDB 08 must be taken into account when the CDB is being interpreted by the banks, the supervisory bodies of the CDB (including the arbitration panel) and auditors. The importance of the commentary is set out transparently in the interests of greater legal certainty for the users of the CDB. Moreover, when interpreting CDB 08, due account must be given to the “leading cases” adjudicated by the supervisory board based on this version of the CDB. These are published by the SBA.

For the convenience of the reader, those provisions of the accompanying report to CDB 03 which continue to apply have been integrated in this commentary. The accompanying report to CDB 03 is therefore only important in its own right insofar as violations of CDB 03 are at issue.

The contents of the former point 4 CDB 03 are fully dealt with by Art. 9.
A Verifying the identity of the contracting partner and identifying the beneficial owner

Art. 2 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 point 15 ff. CDB applies.

It is the general practice of the supervisory board (see e.g. Activity Report 2001-2005 of the supervisory board, individual cases, cases 1.10 and 1.13) that a contracting partner who has already been identified does not need to be identified again if they carry out further transactions. This practice has been integrated in the CDB by inserting a new paragraph 3 in Art. 2. The decision not to carry out a repeat verification of the identity of a contracting partner because a business relationship already exists does not need to be specially documented. The duty to document procedures (see point 23 CDB) is met if the documentation shows that the contracting partner has already been identified (e.g. if the identification documents are held by the bank or in the bank’s system). Art. 6 is also applicable here too, i.e. the identity of the contracting partner must be verified again if doubts arise as set out in Art. 6.

The term “correctly verified” relates to the duty of due diligence which applied when the business relationship was established. The verification of identity has therefore been carried out correctly 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 period of limitation is set out in Art. 11 (5).

The reference to point 14 and 15 CDB makes clear that a repeat application of these regulations is not required if a contracting partner has already been identified. However, if a person whose identity has been verified when establishing a business relationship for a legal entity in accordance with point 14 establishes a business relationship in his or her own right, they must be identified in accordance with the regulations of point 9 ff. and 12 ff. This is explained by the fact that different regulations apply in the CDB for verifying the identity of a contracting party and verifying the identity of a person establishing a business relationship (see the commentary on point 14).

Art. 2 (3) only applies to current business relationships. If a business relationship is completely closed and reopened at a later date, the verification of identity needs to be carried out again.

Separate provisions (see Art. 3 ff.) apply to the identification of beneficial owners. The principle set out in Art. 2 (3) that a verification of identity does not need to be repeated if it has already been carried out cannot therefore be carried over to the identification of beneficial owners. Instead, an assessment needs to be made in each individual case as to whether the assumption that the contracting party and the beneficial owner are identical still holds (see particularly Art. 3 and point 25 CDB).

As regards the special regulations applying to the verification of the identity of clients in the credit card business see the commentary on point 3 CDB.

5 Bearer savings books

In its mutual evaluation report on Switzerland in 2005, the FATF criticised the fact that although the opening of new bearer savings books is prohibited in Switzerland, no action has been taken to close existing bearer savings books. Circular 7443 of the SBA of 20
December 2005 therefore recommended blocking balances on bearer savings books internally, in order to encourage the conversion of bearer savings books into savings products denominated in the name of the contracting party and at the same time to alert bank employees to this issue. Since then a significant number of bearer savings books have been converted. To reduce the number of bearer savings books further, the revised CDB stipulates that no new bearer savings books may be opened and identification procedures have to be followed for all withdrawals (cash withdrawals, electronic transfers etc.). Deposits on bearer savings books may no longer be accepted. The banks are obliged to terminate bearer savings books the first time they are physically presented. If possible, a product denominated in the name of the contracting party must be opened or else the business relationship terminated (by paying out the balance while at the same time identifying the contracting party subject to Art. 28 M LO SFBC).

7 Cash transactions
The changing of banknote denominations in the same currency also falls under the definition of cash transactions.

8 Duty of identification irrespective of minimum thresholds
For trading and cash transactions the contracting party only needs to be identified if the threshold of CHF 25,000 is exceeded. This exception does not apply if the assets are suspected to be of criminal origin. This means that there must be a suspicion that assets derive from the sources set out in Art. 9 (1) AMLA, i.e. that they are connected with a criminal action as defined by Art. 305bis of the Swiss Penal Code, derive from a crime as defined by Art. 10 (2) of the Swiss Penal Code or are under the control of a criminal organisation as defined by Art. 260ter of the Swiss Penal Code.

In accordance with FATF recommendation 13 (together with recommendation 5), the former Art. 24 of the M LO SFBC1 obliges banks to notify the Money Laundering Reporting Office if they break off discussions on the establishment of a business relationship due to having serious grounds for suspecting money laundering or links to a terrorist or other criminal organisation. This duty will be explicitly inserted in the revision of the AM LA (see Art. 9 (1) (b) draft AM LA). In the light of the above, point 8 CDB has been harmonised with these provisions by deleting the former final sentence of paragraph 2.

The approach of the CDB is that the obligation to prepare a full identification file relates to contracting partners with whom an effective business relationship is established (see Art. 2 CDB). The duty to document procedures (see Art. 7 AM LA and points 23 and 26 CDB) leads to an obligation for banks who turn down a business relationship to keep any already existing documentation. On the other hand, there is no obligation to obtain further documents in relation to the notification of suspected money laundering if a business relationship is turned down (see p. 17 of the Report).

1. Individuals
   a) General: Permissible identification documents

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1 Art. 24 M LO SFBC will be abolished in the revised M LO SFBC which enters into force on 1 July 2008, as a new provision imposing a duty of notification in the event of the termination of negotiations to establish a business relationship is to be added to the AM LA (see Art 9 (1) (b) draft M LA).
The documents permitted for identification continue to be described in general terms, i.e. an exhaustive list of acceptable documents is not provided. 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.

b) Expired identification documents

The identification document used must be up-to-date (particularly the photograph), but the CDB does not specify definitively how institutions should deal with expired identification documents belonging to private individuals. The decision on this is to remain within the authority and discretion of the individual banks.

c) Term “identification”

Points 9 and 10 CDB now use the term “identification” to describe the process of verifying identity. Firstly, this harmonises the terminology with that used in the AMLA. Secondly, it indicates that identification of the contracting partner is not the same as the verification of the identity of persons establishing business relationships, but that separate regulations exist for the two procedures (see the commentary on point 14 CDB).

9 Identification during a face-to-face meeting

The term “face-to-face meeting” used in point 9 of the CDB means that there was personal contact between the client and the bank representative at the time the account was opened. This personal contact can take place at the bank’s offices or elsewhere.

10 Identification when a business relationship is established by correspondence

If an account is opened via the Internet, the identity of the client must be verified in the same way as if the account was opened via correspondence.

If an account is opened by correspondence, the residential address provided must be verified by sending mail to the address or by an equivalent method. This is due to the fact that passports and identity cards and in some cases driving licenses do not include an address. A normal postal delivery (by A or B post) is sufficient to confirm the residential address for the purposes of this clause; 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. In accordance with the practice of the supervisory board, verification of identity by a delegate is only possible in the presence of others (see commentary on point 23 CDB). However, verification of identity by correspondence and the required submission of an authentication does not constitute a delegation of identification, which is why a written agreement between the bank and the person providing the authentication is not required.
11 Bodies authorised to provide authentication

When opening an account 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. Verification of the signature is not required.

Authentications can be provided by branches, representative offices and subsidiaries of the bank, correspondent banks, other financial intermediaries recognised by the account-opening bank as well as notaries and public authorities who customarily issue such confirmations of authenticity. The term “financial intermediary” used in sub-section (b) is defined by Art. 2 (2) and (3) AMLA. The term therefore refers to a financial intermediary who is subject to a certain degree of supervision with respect to the combating of money laundering.

Lawyers in Switzerland who are affiliated to a self-regulatory organisation (SRO) authorised by FINMA are deemed “other financial intermediaries” in accordance with sub-section (b). Otherwise, lawyers in Switzerland cannot issue confirmations of authenticity.

In point 11 (1) (b) CDB the phrase “specially appointed” is replaced with “recognised”. This is to indicate that a written agreement (whether concluded before or after the issue of the authentication) is not required for a correspondent bank or other financial intermediary to authenticate the copy of the identification document. The word “recognised” is used purely to ensure that a bank may reject an authentication provided by a particular correspondent bank or a particular financial intermediary (e.g. if it lacks credibility). For this reason a more restrictive definition of financial intermediaries who may authenticate a copy of an identification document has deliberately been chosen than in Art. 10 of the Money Laundering Ordinance of the Money Laundering Control Authority (MLO MLCA).

In accordance with point 11 (1) (c) CDB, these confirmations of authenticity can be issued by public bodies who normally provide such authentications. An example of “another public authority” are, for example, the post offices of the Swiss Postal Service, who can verify the identity of private individuals since 1 July 2003 and issue certified copies of identity documents (this is known as “yellow identification”).

In accordance with point 11 (2) CDB, identification in connection with the delivery or collection of post continues to be valid if the contracting partner is identified by means of an official identification document and such identification guarantees that the post is delivered solely to the addressee. Point 11 (2) CDB relates, for example, to the PostIdent procedure of the German Postal Service. The Swiss Postal Service does not currently offer a delivery identification service as described in point 11 (2) CDB. Although a copy of an identity document is not produced with the PostIdent procedure, the contracting partner is identified by means of an official identity document. The bank must also be able to demonstrate that the contracting partner was identified via the PostIdent procedure.

2. Legal entities and partnerships

CDB 08 introduces uniform terminology for all contracting partners who are not private individuals. The terms “legal entities” and “partnerships” are used for the first time (in keeping with the terms used in Swiss civil law, see in particular Art. 52ff. Civil Code and Art. 552 ff. Code of Obligations). For ordinary partnerships the special regulations set out in point 15 CDB apply. Sole proprietorships registered in the Commercial Register...
may be identified either on the basis of the regulations applicable to private individuals (see point 9) or alternatively on the basis of the regulations applicable to legal entities and partnerships (see point 12). The only distinction that is now made when identifying legal entities and partnerships is whether they are registered in the Commercial Register or not. The former distinction on the basis of whether their registered office was in Switzerland or abroad has been abolished.

The provisions on the identification of legal entities and partnerships apply to contracting partners domiciled in Switzerland and analogously to contracting partners domiciled abroad. This principle is expressed in the CDB in the wording of the title “entry in the Swiss Commercial Register or an equivalent foreign register”. The provisions also apply analogously to contracting partners constituted under public law (e.g. public corporations etc.).

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 entity as defined by point 12 CDB are those of Teledata, Creditreform, Intrum Justitia, Dun & Bradstreet, Deltavista, the Register 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 the Swiss Federal Banking Commission, the German Federal Financial Supervisory Authority and the UK Financial Services Authority.

13 Identification without an entry in the Swiss Commercial Register or an equivalent foreign register

Legal entities and partnerships not registered in the Commercial Register (e.g. some clubs and associations) can usually be identified on the basis of their act of foundation or founding statutes, an audit certificate, a certificate of incumbency, a certificate of good standing, a certificate of incorporation or an official authorisation to exercise a profession. If the contracting partner is listed in a database maintained by the supervisory body or a trustworthy private entity, they can alternatively be identified by means of a written extract from this database. Examples of databases managed by a supervisory body or a trustworthy private entity are listed above in the commentary on point 12 CDB.

Special cases:

a) Condominium associations Condominium associations must be identified on the basis of an excerpt from the Land Register. Alternatively, they can be verified by means of a simple copy of the articles of association of the condominium association together with an excerpt from the minutes stating that the administrator is authorised to manage the bank accounts on behalf of the association. An excerpt from the minutes is not necessary if an excerpt from the Land Register is used for identification. Points 9 ff. and 14 CDB do not apply as condominium associations are covered by the specific identification procedures set out above.

On the identification of beneficial owners, see the commentary on Art. 4.

b) Co-ownership associations registered in the Land Register
Co-ownership associations registered in the Land Register must be identified in the same way as for condominium associations (see discussion under sub-section a above).

On the identification of beneficial owners, see the commentary on Art. 4.

c) 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) who has to be identified.

14 Checking the identity of persons establishing business relationships and taking note of power of attorney arrangements

In order to implement international legal standards (particularly the recommendations of the FATF and Art. 3 (1) of the draft AM LA), an obligation has been introduced to check the identity of those establishing business relationships for legal entities and partnerships, unless the exceptions set out in point 17 ff. CDB apply. The terminology of the draft law has been deliberately adopted (checking the identity of persons establishing business relationships). This ensures that the same terminology is used in the Anti-Money Laundering Act and the CDB. On the other hand, different terminology is used than for the process of identifying the contracting partner (“checking the identity” instead of “identification”). Different regulations apply in the CDB to the two processes of verifying the identity of the contracting partner and checking the identity of persons establishing business relationships.

The persons establishing the business relationship are defined as those persons who represent the legal entity 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 private individuals acting for the legal entity establishing the relationship must be verified. The person whose identity needs to be verified is always the person taking the effective action at the point at which the business relationship is opened.

The bank may verify the identity of the persons establishing the business relationship by inspecting and copying an identification document in accordance with point 9 CDB. If a business relationship is established by correspondence, the identity of those establishing the relationship is verified by means of an authenticated copy of an identification document in accordance with point 10 CDB.

Alternatively, the identity of this person or these persons can be verified by means of an authentication of the signature, which may be issued by the persons or institutions listed in Point 11 CDB. The duty to document procedures (see point 23 CDB) requires that the verification of the identity of the persons establishing the business relationship is documented (i.e. the identification documents must be stored in the client file or the bank’s system).

The residential address of the person establishing the relationship does not have to be verified (neither if the account is opened in person nor if it is opened by correspondence). This is because the CDB contains specific regulations on the verification of the identity of persons establishing business relationships (separate point). As a result, a person establishing a business relationship does not become a contracting partner. If they establish a business relationship in their own name, they have to be identified in accordance with the regulations set out in point 9 ff. CDB, provided that their identity...
was not already verified when establishing an earlier business relationship (see Art. 2 (3) CDB).

Private individuals who establish a business relationship on behalf of a legal entity or partnership (so called “persons establishing a business relationship”, see above) do not have to be registered in the register of authorised representatives as a result of this function. However, they should be registered as authorised representatives if they also have signature authority for the business relationship.

In order to implement the revised FATF recommendations, the CDB introduces an obligation to take note of its power of attorney arrangements when establishing a business relationship with a legal entity. In accordance with Art. 3 (1) draft AMLA, this obligation applies solely to legal entities (e.g. limited companies, limited liability companies, etc.) but not to contracting partners with different legal structures (e.g. partnerships, trusts etc.).

The term “power of attorney arrangements” is that used in the legislation (see Art. 3 (1) draft AMLA). Holders of power of attorney or authorised representatives in this context are defined as persons who can act on behalf of the legal entity and who establish the business relationship with the bank (with individual or collective power of attorney), i.e. its executive bodies, its authorised signatories or authorised third parties.

The power of attorney arrangements can, for example, be noted by taking an excerpt from the Commercial Register. Alternatively, other documents which provide information on powers of attorney can be used (e.g. powers of attorney issued by executive bodies of the company to other persons, excerpt from internal regulations, signature books etc.). The requirements of point 14 (3) CDB can also be met by filing a simple copy of the relevant legal documents of the organisation (e.g. statutes and articles of association, AGM and Board minutes and annual authorisations containing details on signature authorities, rights to nominate authorised signatories and powers of attorney granted by executive bodies of the organisation to third parties etc.).

The duty to document procedures (see point 23 CDB) means that a copy of the document setting out the contracting partner’s power of attorney arrangements must be placed on file. The power of attorney arrangements must be contained in the filed documents themselves or in the information available in the bank system. This is the case, for example, if the bank has access to a signature book of the contracting partner or it is sent a list of the signature authorities. There are no special requirements as to the form that the documentation of the contracting partner’s power of attorney arrangements must take.

Point 14 (4) CDB 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 by point 34 CDB. The reason for this is that different standards generally apply in interbank transactions. Signature books are often exchanged without persons necessarily having established a business relationship as defined by paragraphs 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 paragraphs 1 and 2. Art. 14 (4) therefore clarifies that, for transactions with financial intermediaries subject to specific legal supervision as defined by point 34 CDB, signature books, electronic keys or other means customarily used in the industry may be exchanged instead of the procedure set out in point 14 (1-3).
The principle now explicitly set out in Art. 2 (3) CDB that contracting partners whose identity has already been verified do not need to be re-identified if they engage in other business also applies when verifying the identity of a person establishing an account (see the corresponding reference in Art. 2 (3) to section 14 CDB). If the identity of a private individual establishing a business relationship has already been verified by the bank in another context (e.g. when establishing another business relationship), the identity of this person does not need to be verified again if they open a business relationship for another legal entity or partnership.

Point 14 CDB will enter into force on 1 July 2009 (see Art. 15 (4) CDB). This transitional period reflects the fact that the legal basis for this provision will enter into force with the revised AMLA (see Art. 3 (1) draft AMLA). It also gives the banks sufficient time to update their systems. Point 14 CDB does not need to be applied retroactively (see Art. 15 (2)).

15 Identification of ordinary partnerships, companies in the process of foundation and trustees

Very different forms of ordinary partnership exist in practice. A (non-exhaustive) list of ordinary partnerships might include: Jass, Guggenmusik and school clubs; building consortia; and firms of lawyers. Ordinary partnerships do not have legal capacity in their own right and are not registered in the Commercial Register. In practice the bank has contact with those persons who have signature authority vis-à-vis the bank for the account relationship in question. It is sufficient to identify the persons with signature authority vis-à-vis the bank when an account is being opened in the name of an ordinary partnership or rubric. The duty of identification also applies to persons with signature authority who come into contact with the bank at a later date after the business relationship has been established. If a legal entity or partnership has signature authority over an account opened in the name of an ordinary partnership, the legal entity or partnership must be identified (and not the representatives acting for them). Point 14 CDB (Checking the identity of persons establishing business relationships and taking note of power of attorney arrangements) is not applicable, as a business relationship is being established with an ordinary partnership and the special regulations of point 15 CDB apply.

The identity of the authorised signatories must be verified in accordance with the provisions of points 9 – 10 CDB (private individuals) or 12 – 13 CDB (legal entities and partnerships).

Communities of heirs in civil law are classified as ordinary partnerships. 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 ordinary partnerships (verifying the identity of the authorised signatories) only apply if a new business relationship is established with a community of heirs.

Funds with assets held for a specific purpose without a separate organisation (e.g. donations to disaster appeals etc.) should be treated in the same way as ordinary partnerships. The identity of the persons with signature authority must be verified. On the identification of condominium associations and co-ownership associations registered in the Land Register, see the commentary on point 13 CDB.

Previously when an account was opened to pay in capital contributions when founding or carrying out a capital increase for a limited company or a limited liability company...
or, the special regulations set out in point 18 (c) CDB 03 applied. The FATF criticised these arrangements in its mutual evaluation report of Switzerland in 2005. Subsection (c) of point 18 CDB was consequently deleted and a new provision added in point 15 (2) CDB that, in the case of companies in the process of foundation, the persons establishing the business relationship must be identified. This provision is based on the idea that such companies are treated as ordinary partnerships in civil law. However, there are no authorised signatories for such capital contribution accounts as the accounts have to be blocked so that the confirmation mandated by law that capital contributions have been paid in can be provided to the founders’ meeting of the company. The capital is only unblocked after the executive bodies of the new company have been appointed and this has been documented. The identification procedure set out in the CDB for ordinary partnerships (see point 15 (1) CDB) is not applicable in this case. Instead, the persons who open these accounts must be identified. The definition of the term “person establishing a business relationship” is contained in the commentary on point 14 CDB. Here again the rule is that the private individual who is actually acting needs to be identified (even if he or she is acting as the representative of a legal entity, see the commentary on point 14 CDB). If this person has already been identified (e.g. when they opened an account for another entity in the process of foundation), the identification procedure does not need to be repeated in accordance with Art. 2 (3) CDB. Art. 15 (2) CDB will only enter into force on 1 July 2009 (see Art. 15 (4) CDB).

Once it has been founded the company itself must be identified (with one of the documents set out in points 12 – 13 CDB). In the case of a capital increase, the contracting partner already has legal capacity. Point 15 (2) CDB therefore no longer applies. Identification must be carried out in accordance with points 12 – 13 CDB.

For business relationships with a trust the trustee is the bank’s contracting partner and must be identified accordingly (as a private individual or legal entity or partnership, see point 9 ff. CDB). The trust itself cannot be a contracting partner. The trustee must confirm to the bank in writing his or her authority to open an account on behalf of the trust at the bank (e.g. in 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. Further evidence of this authority is not required. In order to ensure that the bank does not incur the risk of being treated as a constructive trustee (with a corresponding effect in terms of its liability), it should not take receipt of any trust statutes (for the procedure for determining beneficial ownership see commentary on points 43-44 CDB). In contrast to the 2003 version, CDB 08 stipulates how a trustee is to declare that he or she is authorised to establish a business relationship with the bank on behalf of the trust. The previous decisions of the supervisory board on this issue therefore no longer need to be regarded as leading cases.

In practice domiciliary companies maintained by trusts and foundations also open 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 these cases the underlying company is identified as the contracting partner (see points 43 – 44 CDB on the procedure for determining beneficial ownership). There is no business relationship with the trust itself in these cases. Point 15 (3) CDB (confirmation of the trustee that he or she is authorised to open a business relationship with the bank for the trust) therefore does not apply.
16 **Validity period of commercial register extracts and equivalent documents**

CDB 08 redefines what identification documents are acceptable (see point 12 ff. CDB). If one of these documents is available but is more than 12 months old (e.g. excerpt from the Commercial Register, certificate of incumbency, certificate of incorporation or certificate of good standing), it can be used along with an auditor’s certificate which is less than 12 months old to identify the contracting partner. The CDB does not stipulate what the auditors’ certificate must contain. This will be determined by the legislation, regulations and practice applying in the country concerned.

The equivalent provision in CDB 03 (point 15 – now point 16 CDB 08) also stipulated the “certificate of good standing” in addition to the auditor’s certificate. The certificate of good standing is no longer mentioned in CDB 08, as identification is now possible solely with one of these certificates (see commentary on point 12 and 13 CDB).

In practice clubs and associations are usually not registered in the Commercial Register nor are they audited by a firm of auditors. They can therefore usually only be identified by means of their articles of association or other founding documents. As these documents normally reflect the current situation even if they are more than 12 months old, it would be unrealistic to hold to the 12-month rule when dealing with Swiss clubs, associations and societies. Swiss clubs and societies can therefore be identified by means of their articles of association, statutes, club regulations etc. irrespective of the age of the documents. However, if the club or society is registered in the Commercial Register, the 12-month rule applies.

In accordance with the practice of the supervisory board, a simple copy of the Commercial Register excerpt or an equivalent identifying document can be used to identify a legal entity or partnership (see Activity Report 1998-2001, section 1 (l), p. 12 CDB). This practice is to be maintained in future (for a differing opinion see: Brühwiler/Heim, Praxiskommentar zur VSB, note on point 15 of the implementing provisions to Art. 2 VSB 03).

17 **Publicly known legal entities**

Point 17 CDB 08 reformulates (without altering the previous content of point 17) how a publicly known legal entity is to be identified. If the identity of a legal entity is publicly known, the entity can be identified by documenting the fact that the identity is publicly known. This special regulation also applies with regard to checking the identity of persons establishing an account relationship and noting the power of attorney arrangements. For publicly known legal entities the procedure set out in points 12 – 14 CDB is replaced by a documentation of the fact that its 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 the internet page of a stock exchange printed out on which the contracting partner is listed as a quoted company.

3. **Special cases**

18 **Accountholder is a minor; rental surety accounts**

Previously when an account was opened for paying in capital contributions when establishing or carrying out a capital increase for a limited company or plc, the special regulations set out in point 18 (c) CDB 03 applied. The FATF criticised these arrangements in its mutual evaluation report of Switzerland in 2005. Sub-section (c) of
point 18 CDB was consequently deleted and the provision was added to point 15 CDB that for companies in the process of foundation it is the persons who open the account who need to be identified (see the commentary on point 15 CDB). In the case of a capital increase, the company concerned has its own legal capacity. It therefore needs to be identified in accordance with the provisions of points 12 and 13 CDB.

If a minor opens an account himself, he must be identified in accordance with point 18 (a) CDB. The provisions of points 9 – 11 CDB need to be observed. If such a contracting partner does not have any identification documents, point 20 CDB applies.

19 Identification within the group

The phrase “i.e. employing a standard of due diligence that complies with this agreement” has been added to point 19 CDB. This is intended to clarify that the phrase “in an equivalent manner” refers to the standard of due diligence in the CDB. This has also been done against the backdrop that the FATF criticised this provision in its mutual evaluation report of Switzerland in 2005.

The assessment of whether an equivalent standard of due diligence has been applied is made on the basis of the date at which the business relationship was established. If a contracting partner was identified within the banking group when an account relationship was opened on the basis of the standard of due diligence applicable under the version of the CDB valid at that time (or alternatively under CDB 08), the identification procedure does not have to be repeated if the same contracting partner establishes a business relationship with another group company. Here too Art. 6 applies. If doubts as to the identity arise as defined by Art. 6, the contracting partner has to be identified once more.

Banking groups (e.g. Raiffeisen Switzerland) organised as co-operatives etc. also fall under the definition of a group. Registered offices, branches, agencies, representative offices and subsidiaries should therefore be treated as part of the group for the purposes of this article. For example, point 19 CDB is applicable 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 is held on a group-wide basis.

The proviso in the last sentence of point 19 CDB relates to current practice with respect to data protection and banking secrecy in the country concerned. The consent of the contracting partner is required before a copy of the identification documents can be sent to another group entity. If this consent is not provided, the contracting partner must be identified once more.

20 Verification of identity in another expedient manner

This provision deals with exceptional cases where a contracting partner cannot be identified in the prescribed manner because the required documents are not available. In such situations the bank can procure other documents which are suitable for identification purposes and file these. In order for this provision to fulfil its purpose and uphold the principle of proportionality, a bank must be granted appropriate scope for discretion in applying this clause. The bank must place a memorandum on file explaining the reasons for the exception.
4. General regulations on identity verification and supervision

21 Delegation of identification

Paragraphs 1 and 2 of point 21 CDB require the following:

- a written agreement on the delegation
- the delegating bank must be able to monitor the proper execution of the verification of identity. In practice this monitoring is carried out on the receipt of the documents produced by the delegate; on-site monitoring is not absolutely necessary.

The new paragraph 4 of point 21 CDB stipulates that, within a group, responsibility for identification may be transferred without a delegation agreement. Firstly, this is appropriate against the backdrop that the entire group is monitored by the regulator on a consolidated basis and that identical standards of due diligence should apply within the group. Secondly, a delegation agreement is not required for non-banks delegating to a financial intermediary (see e.g. Art. 31 MLO MLCA). It would be contradictory to require such a delegation agreement for delegation within a banking group.

In accordance with the practice of the supervisory board, it is essential that the delegate performs the identification of private individuals in person. The delegate may not carry out the identification of private individuals by correspondence. This does not apply for legal entities or partnerships.

A delegation as defined by point 21 CDB only exists if a third person acts as the authorised representative of the contracting partner on the basis of a contract. However, if the authorised representative is acting in the function of an executive body or authorised signatory of the contracting partner, this does not constitute delegation as defined by point 21 CDB, so that no delegation agreement is necessary.

A bank may also delegate as defined by point 21 CDB to a private individual, partnership or legal entity domiciled or resident abroad.

22 Duty to keep documentary records

In some countries dates of birth and addresses are not customarily used, so that the bank cannot obtain and store this data. To clarify that the CDB has not been violated, the CDB releases banks from the obligation to record this data in such cases.

Once a photocopy of the official identification document has been retained for private individuals, the photocopy itself is the means of identification and does not need to be recorded additionally.

23 Duty to document procedures

The SFBC published a circular entitled “Supervision and internal control” on 27 September 2006 (SFBC-RS 06/6 Supervision and internal control). The terminology used in Art. 23 (1) CDB has been harmonised with the terminology used in this circular.

In accordance with the practice of the supervisory board, the duty to document procedures set out in point 23 CDB 03 means that it must be evident from the documentation when the bank received a particular identification document (Georg Friedli, Tätigkeitsbericht der Aufsichtskommission zur Sorgfaltpflicht der Banken (Activity Report of the Supervisory board on the Banks' Duty of Due Diligence) 2001-2005, SZW, 2005, p. 246, Art. 1.6). The supervisory board left open the question of the form in which receipt of the identification documents must be recorded. CDB 08 has
now provided additional clarity on this point by adding a second paragraph to point 23 CDB and to the parallel point 36 CDB. The duty to document procedures is met, for example, if the availability of the identification 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.

The CDB does not specify the form in which documents need to be stored. The relevant provisions of the Code of Obligations therefore apply. In accordance with Art. 957 of the Code of Obligations, it is possible to store the documents solely in electronic form, provided the conditions stipulated there are met.

24 Deadline for complying with the duty to keep documentary records

The previous point 24 CDB 03 proved to be unclear and too inflexible in practice. In particular the existence of 2 different deadlines led to confusion. The deadline of 30 days to obtain all of the required documents proved to be too short, particularly for international business, and the obligation to close down an account relationship after 90 days if identification documents have not been presented is too restrictive. For this reason the deadline in point 24 CDB has been set at 90 days, with the account being blocked at the latest after the expiry of this deadline. This is more appropriate in the light of the fact that point 24 CDB is intended to ensure compliance with the formalities. Firstly, the mandatory blocking of the account for all deposits and withdrawals after 90 days creates a major incentive to obtain all the required documents promptly. Secondly, together with the other measures incumbent on the banks (e.g. the monitoring obligations laid down in MLO SFBC), this procedure is sufficient to uncover any indications of money laundering quickly so that the appropriate steps can be taken in good time.

The word “exceptionally” makes clear that an account can normally only be used when the documentation required by the CDB is complete. Many banks employ a specialised central unit to check whether this documentation is correct. It can therefore occur that only after an account has already been opened the documentation is discovered to be incomplete. To demand that an account which has been opened is blocked and may not be used until the central unit has verified that the documentation is complete would be impractical and disproportionate. Point 24 therefore permits an account to be used in exceptional cases if the documentation is incomplete. The prerequisite, however, is that the bank knows the surname and first name of the contracting partner and the beneficial owner. If the documentation turns out to be incomplete, the missing information must be obtained as quickly as possible. Although not stated in point 24, entire documents can also be missing as well as individual items of information (see point 24). This is an editorial mistake.

If the assets on an account are frozen because the identification documents were not provided in full by the deadline, the bank remains obliged to manage these assets properly (similar procedure as for the freezing of assets due to the notification of suspected money laundering as per Art. 9 AM LA).

In the case of asset management mandates with third parties, however, Art. 2 (2) (e) stipulates that rather than the account being blocked after 90 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 shall notify the client of this possibility in good time.
Art. 3 Establishing the identity of the beneficial owner

Art. 3 CDB has been reworded without altering the contents. Firstly, paragraph 1 of point 25 CDB has been moved to the first sentence of Art. 3 itself. Secondly, the second sentence of Art. 3 (previously the first sentence) has been harmonised with the wording of the Anti-Money Laundering Act (see Art. 4 (1) (a) AMLA). In Art. 3 (3) the phrase “in an appropriate manner” has been replaced with “written record”. This is in line with previous practice, whereby the declaration of beneficial ownership must be documented for cash transactions, even if Form A does not have to be used.

A new paragraph 4 has been added to Art. 3. This stipulates that a declaration of identity of the beneficial owner need not be obtained if the beneficial owner of an account is an ordinary partnership or association that is not entered in the Commercial Register and the funds booked on this account do not exceed CHF 25,000. This provision imitates Art. 7a of the draft AMLA. In accordance with this provision, the money laundering-specific due diligence standards do not apply if a business relationship only covers low-value assets. This is in keeping with the risk-based approach. This special regulation is also in line with the needs of day-to-day practice. Constantly having to obtain updated lists of beneficial ownership would be disproportionate, particularly in dealings with Jass, school and Guggenmusik clubs and the like, provided that they do not have significant assets. These groups, which qualify as ordinary partnerships, often have a large and frequently changing number of partners who are beneficial owners of the assets held in these account relationships.

25 Doubts as to whether the contracting partner and the beneficial owner are the same

In point 25 CDB the first paragraph has been deleted and put at the start of Art. 3 CDB (see commentary on Art. 3 CDB) and the former paragraph 2 (the new paragraph 1) has been worded more clearly, without changing the contents of the provision.

The practice of the supervisory board has been to interpret point 25 paragraph 2 1st point CDB 03 (now paragraph 2 (a)) in such a way that doubts exist if there is no recognisable link between an individual or entity to whom a power of attorney has been granted and the contracting partner. The wording of this point has been amended in accordance with this practice. In addition, it has been clarified that a power of attorney which only allows transactions within a business relationship but does not permit withdrawals of funds does not constitute unusual circumstances within the meaning of point 25 CDB; aside from the fact that the issue of such a power of attorney to a third party is nothing unusual, only the contracting partner has access to the assets in these cases.

A definitive list of examples of when unusual circumstances exist as per point 25 (2) c CDB has deliberately not been provided. 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 unusual circumstances as defined by point 25 CDB exist. This approach was confirmed by an arbitration panel decision on point 25 CDB on 22 October 2004. This found that large cash transactions do not in and of themselves constitute unusual circumstances as defined by point 25 (2) (c) CDB. Instead, an assessment needs to be made in each individual case based on the specific circumstances (particularly the situation of the contracting partner) whether a cash transaction is unusual.
27 Information to be documented

The CDB requires the date of birth – where available – and the nationality of the beneficial owner to be recorded in Form A. This is intended to identify people unequivocally, particularly in the case of common names. Experience in the context of anti-terrorism ("Bush lists") has shown that contracting partners or beneficial owners can only be identified unequivocally if the bank also has information on the date of birth and nationality. This data is often not available for persons from countries where dates of birth and addresses are not customarily used (see point 22 CDB).

In practice additional documents to Form A are often provided which contain information that should actually be listed in Form A. If these are important documents such as copies of passports, it would be excessively formalistic to insist that this data be transferred to Form A. In light of this, a new paragraph 2 has been added to point 27 CDB. This stipulates that Form A can be regarded as complete if information on the beneficial owner is documented by means of simple copies of identification documents or other official documents as defined by point 9 CDB and the signed Form A contains the surname and first name or company name at a minimum, so that the form is clearly identifiable. The bank therefore does not need to complete Form A with the remaining information.

In addition, the reworded point 27 (3) CDB clarifies that a bank may insert the account number on Form A after it has already been signed. This clarification takes account of the fact that when opening an account relationship in practice (and signing Form A at the same time), the 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 the client themselves.

A bank employee or a third person 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 partner themselves. As the contracting partner has to confirm that the information contained on the form is correct by signing it, this procedure is fully compatible with the objectives of the CDB.

In practice other terms are used in addition to the account or securities account number (e.g. business no., client no., partner no. etc.). To avoid confusion these alternative terms were not included in the form. However, the banks are free to use their own terms on Form A in accordance with their own particular needs.

28 Signing Form A

Technical systems already exist which enable a physical signature to be appended to an electronic document (e.g. Signotec Pen-Pad). This procedure differs significantly from the mechanical reproduction of a signature (e.g. by scanning a signature or using a facsimile stamp), as the person has to sign each time a signature is required, which rules out improper use. In addition, this electronically converted signature is stored in encrypted form in the document together with the contracting partner's biometric information, which means that the signature cannot be removed from the document and the document is reliably protected against manipulation. This electronic conversion of a signature which is performed physically therefore has the same quality as the conventional handwritten signature of a document, so that a Form A, R or T can be readily signed in this way and can be regarded as of equal value to an original signature. This has been established by official expert opinion in Germany.
Form A can be signed by the contracting partner or by a person authorised by them. The authorised person may be different from the person establishing the business relationship as per point 14 CDB.

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 point 14 CDB.

30 Model Form A

The model form has been simplified to make it more user-friendly, avoid misunderstandings and minimise errors. The previous two rubrics (whether the contracting partner is the sole beneficial owner of the assets or, alternatively, that the persons listed below are beneficial owners of the assets) have been combined into one. The contracting partner now has to declare that the individual(s) or partnership(s) listed below is/are the beneficial owner(s) of the assets deposited under this business relationship. If the contracting partner is the beneficial owner of the assets, this must now be recorded by entering his or her data in Form A; previously the box in Form A only needed to be ticked if this was the case. 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 puts terms such as "myself" or "account holder" on the signed Form A. This clearly records the beneficial ownership (contracting partner is the beneficial owner). 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 reference to the criminal penalties of Art. 251 of the Penal Code has been brought into line with the wording of this article. The place of signature information has been deleted on Model Form A. This change is based on the practical experience that the place of signature provides little information as to whether the business relationship was opened by correspondence or in person. For example, if the contracting partner's address is in the same town as the bank's office, the place of signature does not indicate whether the account was opened in person or by correspondence. Or if the contracting partner opened the account during a face-to-face meeting at a hotel rather than at the bank's offices or if Form A was only signed after the account relationship had already been opened, the inference from the place of signature that the account relationship was opened by correspondence, is wrong. Point 27 CDB permits banks to provide other documentary information in their possession in place of missing information on Form A (see the commentary on section 27 CDB). The bank does not need to complete Form A by adding this information.

The date on Form A is intended to make it possible to verify whether Form A was received by the bank on time (before the use of the account or the expiry of the deadlines laid down in point 24 CDB). This duty to document procedures is set out specifically in point 23 (2) and section 36 CDB. The bank's received stamp can therefore take the place of entering the date in Form A. In application of point 36 (2) CDB, an undated Form A can be regarded as correctly completed if internal audit and the external auditors can verify the date from which it was available in the bank's system.

An electronic version of Form A is available on the website http://www.swissbanking.org in the languages into which the CDB has been translated (German, French, Italian, English). For this reason the second sentence in section 30 VSB (that the form can be
obtained in English, French, German, Italian and Spanish from the Swiss Bankers' Association) has been deleted. The forms are no longer provided in hard copy.

The bank may add the account or securities account number to Form A after it has been signed (see the above discussion on section 27 CDB). For certain business types (e.g. cash transactions) no account number can be provided at the time that Form A is completed. In these situations Form A can therefore be regarded as having been correctly completed without an account or securities account number. Other terms apart from account or securities account number are sometimes used in practice (e.g. business no., client no., partner no. etc.). To avoid confusion these alternative terms were not included in the form. However, the banks are free to use their own terms on Form A in accordance with their own particular needs.

Old Form A’s can continue to be used (see Art. 15 CDB, transitional arrangements).

31 Own Form A

The revised second sentence of point 31 CDB makes clear that every bank is free to devise its own forms tailored to its own particular needs for recording the beneficial owner.

Forms designed by a bank itself can contain different wording from the model form, provided that the content is equivalent to the model form of the SBA. The equivalent content condition would be considered to be met, for example, if a model form for CDB 03 is used or other terms are used for the account or securities account number (see commentary on point 30 CDB).

32 Collective accounts and collective safekeeping accounts

According to the new point 32 (2) CDB, banks do not have to record the beneficial owner for collective accounts and collective safekeeping accounts if the contracting partner is an operating company. This provision applies, for example, to business relationships with doctors’ collection agencies, property management companies and auction houses. The application of point 32 (2) CDB must be recorded on file. There are no particular requirements for the format of this record. This duty of documentation is met, for example, if the Commercial Register excerpt in the client’s file or other documents (e.g. printout from the website of the contracting partner) show that the contracting partner is involved in collection, property management, factoring etc. Each bank must decide in each individual case based on a risk assessment whether this rule is applied or not. At the same time it should be noted that the list in point 32 (2) only provides examples and is not definitive. It is also possible to apply this provision to other cases if a large number of beneficial owners benefit from a service, the assets are held on a fiduciary basis when performing this service and there is no relevant danger of abuse from the perspective of the prevention of money laundering (e.g. management of employee share plans etc.).

Guggenmusik clubs and school funds etc. with no particular legal form should be treated as ordinary partnerships. When verifying identity point 15 CDB therefore applies. The accounts opened by such organisations should not be treated as collective accounts or collective safekeeping accounts as far as the determination of beneficial ownership is concerned (see the commentary on Art. 3 (4) CDB).
33 Collective investments and investment companies

Special Purpose Vehicles (SPVs) used to issue securities fall under section 33 CDB. If the securities issued by a SPV are listed on a stock exchange, the investors do not have to be disclosed.

The provision in point 33 CDB 03, whereby beneficial ownership was to be recorded for investors holding at least 5% of the assets of a collective investment or investment company, proved impossible to implement in practice. Such disclosure was often not obtainable from foreign investors under the regulations applicable to them. For this reason this threshold criterion was deleted in point 33 CDB 08. At the same time, the second sentence of the former point 33 (new 33 (1)) has been reworded without changing its content. For collective investments and investment companies, a declaration of beneficial ownership is only required if there are 20 investors or less. If there are more than 20 investors, a broad investor base can be assumed and beneficial ownership does not have to be recorded.

The previous final sentence of section 33 CDB has been integrated in the new paragraph 2 of this section and expanded. Firstly, it stipulates that collective investments and investment companies listed on a stock exchange do not need to make a declaration of beneficial ownership, as a stock exchange listing automatically entails disclosure requirements. Secondly, this paragraph makes clear (in application of point 34 CDB) that a declaration of beneficial ownership is not required, irrespective of the number of investors, if a financial intermediary as defined by point 34 CDB acts as the promoter or sponsor of a collective investment or investment company and can demonstrate the application of appropriate rules in relation to the combating of money laundering and the financing of terrorism. If a financial intermediary as defined by point 34 CDB invests in a collective investment or investment company itself, the beneficial owners standing behind this financial intermediary also do not have to be disclosed.

34 Banks, other financial intermediaries and Swiss public authorities as contracting partners

As securities dealers are subject to the same supervision as the banks, they have now been added to point 34 (1) CDB (as in point 1 CDB).

Banks and securities dealers from Switzerland and abroad normally do not have to provide a declaration of beneficial ownership. The CDB contains one exception to this principle: foreign banks and securities dealers who are not subject to appropriate regulation and supervision in relation to combating money laundering (prudential supervision is not of interest in this context) and who open sub-accounts for unnamed clients must disclose the beneficial owners of these accounts (paragraph 1). Countries which are assumed to have appropriate supervision and regulation in relation to money laundering are the member states of FATF as well as the Principality of Liechtenstein.

As per point 34 (2) and (3) CDB, a bank may also recognise banks, securities dealers and financial intermediaries from countries other than the above as being “subject to appropriate supervision and regulation in respect of combating money laundering and terrorist financing”, provided that the bank makes this assessment on the basis of its own information and research and documents this accordingly.

The revised point 34 (2) CDB clarifies that the existence of appropriate supervision and regulation in respect of the combating of money laundering may also be assumed if a foreign financial intermediary is part of a group subject to consolidated supervision where the parent company is domiciled in a country that exercises appropriate
supervision and regulation for combating money laundering and terrorist financing, even if the regulation and supervision in the country of domicile of the financial intermediary itself does not meet this criterion.

The precondition for the application of point 34 (2) VSB to foreign financial intermediaries is the existence of appropriate regulations in respect of combating money laundering and terrorist financing. The CDB deliberately does not lay down specific requirements for implementing and monitoring these obligations, as this is the responsibility of the regulators at the domicile of the contracting partner.

Point 34 (3) CDB defines “other financial intermediaries” as set out in point 34 (2) CDB. They traditionally include life insurance companies and financial intermediaries subject to specific legal supervision. They used to be listed in full (see wording in point 34 (3) CDB 03) but in CDB 08 they are defined more generally with reference to the definition in Art. 2 (2) of the AMLA (which is similar to Art. 21 MLO MLCA).

The definition of other foreign intermediaries now not only includes funds and fund managers, life insurance companies and tax-exempt occupational pension schemes (securities dealers are now dealt with in paragraph 1), but also all other comparable foreign financial intermediaries as defined by the specific laws of their country of domicile who are subject to prudential supervision in relation to the combating of money laundering.

The provisions of point 34 CDB also apply in relation to contracting partners which are only open to financial intermediaries (e.g. SEGA Intersettle, Euroclear, Clearstream, Fastnet etc.).

The new paragraph 5 of point 34 CDB clarifies that a declaration of beneficial ownership is not required for business relationships with Swiss public authorities (federal, cantonal and local).

35 Delegating the duty to identify the beneficial owner and deadline for compliance with the documentation requirement

Point 35 (1) CDB permits the identification of beneficial owners to be delegated in the same way as the identification of contracting partners. The provisions of point 21 CDB apply analogously (see the commentary on point 21 CDB).

An account may be used on an exceptional basis before Form A is available or has been fully completed and signed. Point 24 CDB applies analogously. Here too the provisions on the identification of the contracting partner can be transferred to the identification of the beneficial owner (see the commentary on point 24 CDB).

36 Duty to document procedures

See commentary on point 23 CDB, which also applies to point 36 CDB.

Art. 4 Procedure for domiciliary companies

Art. 4 (1) CDB has been reworded to make it clearer, without changing the content. The exception for contracting partners whose purpose is to safeguard the interests of their members or beneficiaries by way of mutual self-help, or which pursue political, religious, scientific, artistic, charitable, social or similar objectives, which was previously contained in point 39 CDB, has been inserted in Art. 4 (2) CDB instead. The phrase “or
beneficiaries” has been added. This expresses the fact that this exception can also apply to trusts and foundations as well as to clubs and societies etc. The same regulations apply to family foundations as to other foundations.

Condominium associations and co-ownership associations registered in the Land Register should also be treated as societies which safeguard the interests of their members by way of mutual self-help as defined by Art. 4 (2) CDB. They are therefore not defined as domiciliary companies. As regards their identification see the commentary on point 13 CDB.

Art. 4 (3) (b) CDB clarifies with reference to point 31 CDB that in business relationships with domiciliary companies the banks may also identify the beneficial owner with documents they have devised themselves.

Point 33 (2) CDB also applies to domiciliary companies (see the commentary on point 33 (2) CDB).

38 Concept of a domiciliary company

The definition of the concept of a domiciliary company in point 38 CDB 03 has often proved to be too narrow in practice and contrary to the purpose of Art. 4 CDB. The definition of domiciliary companies led to operational companies also being subsumed under this definition. For this reason the revised point 38 CDB 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 example, if the contracting partner has its own offices in spite of a c/o address, it no longer necessarily has to be classified as a domiciliary company. The decision of the supervisory board regarding the indications of domiciliary status (see Activity Report 2005, pp. 36-7) was made on the basis of the previous (more restrictive) wording and should therefore no longer be regarded as a leading case when applying CDB 08.

In point 38 (b) CDB the passage “they do not have their own staff working exclusively for them” has been deleted against the backdrop that in practice contracting partners often have their own personnel, but they may also work for other group companies at the same time. In addition, in many small and medium-sized partnerships the personnel is only employed part-time and they may also have other jobs.

If the indications of domiciliary status set out in point 38 CDB apply even though a bank might conclude 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 operational group), the reasons for this conclusion must be recorded and put on file (see point 38 (2) CDB). There are no regulations as to the format that this record must take. For example, a memorandum could be written or copies of documents indicating the operational activities can be placed on file.

39 Holding companies, real estate companies etc.

An important case where point 38 (2) CDB applies and a contracting partner is not classified as a domiciliary company, even though the indications of point 38 (1) CDB are met, is set out explicitly in point 39 CDB in relation to holding companies. 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 carry out any commercial operations as per Art. 4 CDB. Identifying the beneficial owner of these companies (as a consequence of their classification as a domiciliary company) makes no sense and may also be difficult to implement in practice depending on the structure of the group. It is therefore appropriate to treat such holding companies in the same way as commercial companies engaging in a commercial or manufacturing business or any other form of commercial operation. 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 in applying points 39 and 40 CDB. The result of this assessment must be documented. There are no specific regulations as to the form that this must take. For example, a memorandum or copies of documents which demonstrate that the contracting partner is part of a commercially operational group can be put on file.

These holding companies should be differentiated from holding companies which are established for the benefit of a small number of people (e.g. family members) to pool their diverse assets (e.g. securities, property and commercial interests) or to enable the payment of dividends to shareholders. These companies should usually be treated as domiciliary companies.

These provisions on holding companies can also be applied, mutatis mutandis, to companies that hold and manage real estate (property companies). Such companies usually have the same characteristics as holding companies (in particular no offices and personnel of their own). These must be differentiated from property companies which are established for the personal use of a small number of people (e.g. family members) to manage their various properties. Such companies should usually be treated as domiciliary companies (see the same discussion with respect to holding companies).

Point 42 CDB applies to listed holding and property companies.

43 Assets without any specific beneficial owner

Point 43 states what a bank should do in cases where there is no specific beneficial owner. A new model form (Form T) has been created for the declaration as per point 43 CDB that certain assets have no specific beneficial owner. Each bank can create forms tailored to its own particular requirements. The content of these forms must be equivalent to the model form. The equivalent content condition would be considered to be met, for example, if other terms are used for the account or securities account number (see commentary on point 30 CDB).

The commentary on point 28 CDB also applies mutatis mutandis with respect to the signing of Form T. The authorised representatives of the Board of Trustees or Board of Directors of an underlying company, trust, foundation, etc. can also sign Form T.

Certain trusts and foundations under common law legal systems have beneficiaries but not beneficial owners. They can be treated as trusts and foundations with no specific beneficial owner. This situation can be recorded by means of Form T.

If an underlying company declares that a trust is the beneficial owner, the underlying company must be identified as the contracting partner (see the commentary on point 14

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Footnote 2: These are companies whose shares are held in a trust/foundation and which open an account relationship for the trust or foundation at a bank.
In this case beneficial ownership must be recorded by means of Form A and/or T or on one of the bank’s own forms (see discussion in paragraph 1 of this section above). This form must be signed by the executive bodies of the underlying company (as the contracting partner). In the case of a mixed trust (combination of a non-discretionary and a discretionary trust), all beneficial owners must be recorded, identified persons by name and merely identifiable persons through indication of the criteria for identification (e.g. descendants of family X).

The contracting partner only needs to disclose information on the protector(s), trustee(s) and/or third parties if these determine beneficiaries or make decisions on the use of assets and the representatives (trustees, members of the Foundation Board, etc.) have links to them. Persons such as asset managers, advisors, etc. do not therefore have to be recorded.

44 Procedure for revocable vehicles

In practice, founders may have the right to revoke certain constructions, e.g. a trust. Other revocable structures are also possible. As a result, point 44 CDB has been amended so that for revocable trusts and similar structures the persons who hold the right of revocation must be recorded as the beneficial owners. Form A or alternatively another form the bank has designed itself should be used to document this.

45 Change in signing authority

The phrase “if doubts as defined by Art. 6 (1) CDB arise” has been added to point 45 CDB. This change makes clear that the beneficial owner does not automatically have to be identified again every time that the signature authorities for a domiciliary company change. It is only necessary to repeat this procedure if there are doubts as defined by Art. 6 (1) CDB (e.g. as to whether the declaration of beneficial ownership is still correct).

Art. 5 Individuals and entities that are bound by professional confidentiality

Due to the protection of professional confidentiality (Art. 321 Swiss Penal Code) the bank is unable to verify if the declarations made in Art. 5 are accurate. The bank is therefore not bound by any monitoring obligation. This is the responsibility of the relevant authorities.

46 Model Form R

Art. 5 and Model Form R have been tightened up in accordance with the needs of day-to-day practice so that the contracting partner now has to confirm that they are subject to professional confidentiality in accordance with Art. 321 Swiss Penal Code and that the account or securities account is used exclusively in conjunction with their activities as lawyers or notaries. It is 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 was unverifiable. The transitional provisions (see Art. 15 CDB) stipulate that a Form R which has already been completed can now be used for all the activities of a lawyer or notary subject to professional confidentiality. It is therefore not necessary to replace existing Form R’s with new ones.

Model Form R has been expanded in accordance with developments in practice so that it can also be used if the contracting partner is organised on a partnership basis (e.g. firms of lawyers). In accordance with the scope of application of Art. 321 Swiss Penal Code,
Form R must be signed by a lawyer or notary as the person responsible for professional confidentiality. If the firm of lawyers is organised as a corporation (e.g. as limited company or ordinary partnership), Form R must be signed by at least one person subject to professional confidentiality who can represent the company.

The changes to Form R relate solely to its format; its area of application has remained unchanged. Form R can continue to be used for all the activities of a lawyer or notary subject to professional confidentiality (in particular for escrow services, see the wording in the old Model Form R). The term “Swiss” (Swiss lawyer/notary, Swiss firm of lawyers/notaries) relates to the supervision of the contracting partner (i.e. to whether or not they are subject to the relevant cantonal and federal legislation).

Electronic versions of the Model Form R’s are now available on the website http://www.swissbanking.org in the languages into which the CDB has been translated (German, French, Italian, English). As a result the statement that the model forms can be obtained from the local office of the Swiss Bankers’ Association has been deleted. The model forms are no longer provided in hard copy.

The revised point 46 CDB clarifies that the banks are free to use forms tailored to their own particular requirements for this declaration in accordance with Art. 5 CDB. In particular, these forms can use different wording from the model form, provided the form has equivalent content to the model form. The equivalent content condition would be considered to be met, for example, if a model form for CDB 03 is used or other terms are used for the account or securities account number (see commentary on point 30 CDB).

With respect to the signing of the form see the commentary of point 28 CDB.

Art. 6  Repeating the verification of the contracting partner’s identity or identification of the beneficial owner (Art. 2 - 5)

Art. 6 CDB is intended to ensure that the contracting partner and the beneficial owner are correctly identified. A clear distinction must be made with the MLO SFBC, which stipulates other duties (e.g. monitoring duties or duties to clarify unusual transactions). If the MLO SFBC has been violated, it does not necessarily follow that the CDB has also been violated. The revised Art. 6 CDB differentiates clearly between the different areas of regulation of the CDB and the MLO SFBC and between the responsibilities of investigators and the supervisory board on the one hand and the SFBC on the other. Duties to investigate unusual circumstances and special risks are set out in the MLO SFBC, and only the SFBC and any auditors authorised by it are empowered to investigate compliance with these duties. In the revision the title of Art. 6 CDB has firstly been reformulated in accordance with the Anti-Money Laundering Act (see Art. 5 AMLA). Secondly, the final sentence of Art. 6 (1) CDB (“if there are signs of any unreported changes”) has been deleted and replaced with the phrase “and these doubts cannot be eradicated through normal enquiries”. This makes clear that if doubts arise as set out in Art. 6 CDB a new Form A does not automatically need to be obtained. If such doubts are eradicated after investigations by the bank as to whether the information on the contracting partner and beneficial owner is accurate, a new Form A does not need to be obtained. The term “possible 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. Alternatively, the banks are free to repeat the procedure laid down in points 9 - 24 and 25 - 45. In addition, Art. 12 CDB makes clear that an
investigating board is not responsible for establishing on a preliminary basis whether the provisions of the Money Laundering Ordinance have been violated. These investigations are the responsibility of the SFBC or the auditors authorised by them.

Investigators and the 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 Money Laundering Act. This is the object of the MLO SFBC (see point 3), and the SFBC is responsible for its enforcement. An investigation as to whether Art. 6 has been violated only needs to be carried out if there are specific indications that the person listed as the 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 in Form A, are not permitted.

47 Termination of an existing business relationship

In accordance with the practice of the supervisory board, Art. 6 CDB (and point 47 CDB) require all business relationships (and not only those relating to the suspected case) to be terminated (Activity Report 2001 – 2005, 4.13).
B Prohibition of active assistance in the flight of capital

Art. 7 Flight of capital

Art. 7 and points 48 – 52 CDB remain unchanged.
C Prohibition on active assistance in tax evasion and similar acts

Art. 8 Tax evasion and similar acts

Art. 8 and points 53 – 56 CDB remain unchanged.
D Other provisions

Art. 9 Numbered accounts

Art. 9 and point 57 CDB remain unchanged.

Art. 10 Auditing

At the request of the Swiss Chamber of Certified Accountants and Tax Consultants, Art. 10 CDB clarifies how auditors are to monitor compliance with the CDB. Firstly, it refers directly to the relevant SFBC circular (SFBC-RS 05/1 “Audit”). Secondly, the CDB explicitly states that a risk-based approach must be adopted in determining the scope of the random sample and in the audit itself. Examples of criteria which must be applied in the application of the risk-based approach (nature of the business activity and the number and scale of the new business relationships established since the last audit) are listed. The upper limit of a maximum of 75 random samples as established by the Swiss Chamber of Certified Accountants and Tax Consultants remains in force. Due to its special structure this upper limit applies to the entire Raiffeisen Group (and not to each individual Raiffeisen bank).

The deadlines within which violations are to be notified are now regulated in the CDB itself. For minor violations the auditors can now set the bank a deadline for rectifying the problem they have identified (analogously to Art. 21 (3) of the Banking Act, which provides for an auditor to set a deadline for a bank to restore compliance if they discover a violation of the law or other shortcomings).

Art. 11 Violations of the agreement, sanctions

In accordance with Art. 11 (1), due account must be taken of the degree of culpability when assessing the level of a fine for violations. The nature of the affected business relationship must also be taken into account. If, for example, it is a private banking relationship with a high level of assets involved, a correspondingly high degree of care can be expected. In other business areas (e.g. in retail banking) the processes are largely automated, mainly for cost reasons. For CDB violations in connection with such business relationships, a correspondingly lower level of culpability may therefore be assumed.

Art. 11 (1) obliges the supervisory board to take account of measures imposed by other authorities with respect to the same issue when determining its sanctions. The final sentence of paragraph 1 stipulates that the fines will be used to cover any negative cost balance incurred in relation to the CDB.

Art. 11 CDB now defines minor cases in a more general way. These exist if the money laundering-related objectives of the CDB, namely the identification of the contracting partner and the beneficial owner, have been met, even if other duties set out in the CDB have not been met in full. Art. 11 lists a number of examples of minor violations. The list is not exhaustive.

Under the revised Art. 11 (3) CDB, violations of Arts. 6 to 8 are only sanctioned if the violation was deliberate; this is due to the fact that the content of Arts. 6 to 8 would only
seem to justify sanctions in the event of intentional transgressions. Moreover, it is extremely difficult in practice to distinguish in such cases between gross negligence on the one hand and medium and minor negligence on the other.

A new paragraph 5 has been added to Art. 11 CDB. The regulation previously contained in the declaration of accession to the CDB regarding how to handle violations of earlier versions of the CDB has been included in the CDB itself.

Art. 12 Supervisory board, investigators

Developments in the financial industry are happening at an ever-faster pace (e.g. in the area of bank IT systems). To ensure that the supervisory board has access to up-to-date knowledge and experience within its ranks, the CDB now provides for representatives who are active in the banking sector to be elected to the commission. As a result, only a majority, and no longer all, of the members of the supervisory board now need to be independent in accordance with Art. 12 (1) CDB. A person is not independent in this context if they are an employee or authorised representative of a Swiss bank or securities dealer or they are on one of their executive bodies. A member of the supervisory board who does not meet this independence requirement must step down temporarily if the commission is dealing with a case affecting the financial institution with which this member is connected. Further details are set out in the statutes of the supervisory board. In order to ensure that younger members are recruited to the supervisory bodies periodically, Art. 12 (12) CDB introduces an upper age limit for election to the commission for the first time.

Art. 12 (2) ff. CDB now regulates the investigation procedure in greater detail. For example, for the first time the CDB itself clarifies when an investigator can close an investigation on his own initiative. The relevant provision is contained in Art. 6 of the investigation code, which entered into force with respect to Art. 12 CDB on 1 July 2003. In addition, the CDB makes clear that an investigating board is not responsible for establishing on a preliminary basis whether the provisions of the Money Laundering Ordinance have been violated. Violations of the Money Laundering Ordinance are investigated by the SFBC or by auditors authorised by them. This separation between the areas regulated by the CDB and the MLO SFBC is of central importance, particularly with respect to the application of Art. 6 CDB (see the commentary on Art. 6).

59 Interpretations of the code of conduct

Point 59 CDB remains unchanged. This point permits the supervisory board to provide authoritative interpretations of the CDB by agreement with the Board of Directors of the SBA. The intention here is not one of providing interpretations to banks who request an interpretation on applying the CDB in a particular case, comparable to a “no-action letter” from the US authorities; instead, the aim is to interpret the CDB, e.g. in relation to its application to issues which did not yet exist when the code entered into force. The final sentence makes clear that applications for interpretations must be submitted to the SBA and not the supervisory board.
**Art. 13 Arbitration procedure**

Point 13 CDB remains unchanged.

**Art. 14 Entry into force**

The revised CDB 08 entered into effect on 1 July 2008 and will remain in force for the usual five-year period, i.e. until 30 June 2013.

The content of paragraphs 1 and 2 is unchanged. The current paragraph 3 is a compromise between the right of the SFBC to issue additional regulations as the regulator (Art. 16 AMLA) and the interest of the banks in having an unchanged CDB for five years and not having to make any changes. Although the regulatory powers of the SFBC are generally undisputed, it does not have the power to apply the sanctions regime of the CDB to new regulations.

**Art. 15 Transitional provisions**

Art. 15 (1) CDB makes clear that existing Form A’s can continue to be used. At the same time, the banks are free to replace these with a new Form A or else a Form T (see Art. 15 and point 43 CDB 08). Moreover, it is also possible to use the model forms from CDB 03 for newly established business relationships (see the commentary on point 31 CDB).

Art. 15 (2) CDB remains unchanged. It retains the established principle that the revised provisions of CDB 08 are not retroactive. They are only applicable to business relationships opened after 30 June 2008 and to relationships for which the contracting partner or beneficial owner have to be identified again in accordance with Art. 6 after this date. If a new regulation is more beneficial than the old one, it may also be applied to business relationships which were established before 30 June 2008. An example of this from the practice of the CDB supervisory board of 19 August 2003:

“The bank cannot be reproached for allowing the declaration in Form A to be signed by a person who only held a power of attorney in relation to legal transactions rather than a position on one of the executive bodies of the contracting partner. Point 28 of the implementing provisions on Art. 3 CDB 03 explicitly stipulates that persons holding a power of attorney may also sign the declaration in Form A. This norm is also applicable to this case as the more beneficial provision (point 15 (2) CDB 03).”

Art. 15 (3) CDB applies the provision of Art. 15 (1) analogously and makes clear that the existing Model Form R’s can continue to be used. At the same time, the banks are free to replace this with a new Form R. Moreover, it is also possible to use the model form from CDB 03 for newly established business relationships (see the commentary on point 46 CDB).

In accordance with Art. 15 (4) CDB point 14, CDB will enter into force on 1 July 2009. On the one hand, this transitional period reflects the fact that the legal basis for this provision will only enter into force with the revised AMLA (see Art. 3 (1) draft AMLA). On the other hand, it will also give the banks adequate time to adapt their systems. The new provision of point 15 (2) CDB (procedure for the opening of capital contribution accounts) will also enter into force on 1 July 2009.
In order to ensure that younger members are recruited to the supervisory bodies periodically, Art. 12 (12) CDB introduces an upper age limit for election to the commission for the first time. To ensure the transfer of expertise, Art. 15 (5) CDB also makes clear that the new provisions governing eligibility for election will not apply to currently serving members of the board during the next term of office.

**Form A**

See commentary on point 27 ff. CDB.

**Form R**

See commentary on points 28 and 46 CDB.
## Glossary of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Banking Act</td>
<td>Federal Act of 8 November 1934 on Banks and Savings Banks (Bankengesetz/BankG), SR 952.0</td>
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<tr>
<td>Draft AM LA</td>
<td>Draft of 16 June 2007 of the Federal Act on the implementation of the revised recommendations of the Financial Action Task Force (FATF)</td>
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<tr>
<td>AM LA</td>
<td>Federal Act of 10 October 1997 on the Prevention of Money Laundering in the Financial Sector (Geldwäschereigesetz/GwG), SR 955.0</td>
</tr>
<tr>
<td>M LO SFBC</td>
<td>Ordinance of the Swiss Federal Banking Commission on the Prevention of Money Laundering (GwV EBK), SR 955.022</td>
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<tr>
<td>M LO M LCA</td>
<td>Ordinance of the Money Laundering Control Authority on the obligations of financial intermediaries under its direct supervision (GwV Kst) SR 955.16</td>
</tr>
<tr>
<td>KAG</td>
<td>Federal Act of 23 June 2006 on Collective Investments (Kollektivanlagengesetz/KAG), SR 951.31</td>
</tr>
<tr>
<td>OR</td>
<td>Federal Law on the supplement to the Swiss Civil Code (Part Five: Code of Obligations, SR 220)</td>
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<tr>
<td>SBA</td>
<td>Swiss Bankers Association</td>
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<tr>
<td>SR</td>
<td>Systematic collection of Swiss federal law (Internet address: <a href="http://www.admin.ch/ch/d/sr/sr.html">http://www.admin.ch/ch/d/sr/sr.html</a>)</td>
</tr>
<tr>
<td>ZGB</td>
<td>Swiss Civil Code, SR 210</td>
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