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Federal Council Publishes Draft Bill for Federal Act on the Transparency of Legal Entities

On 30 August 2023, the Swiss Federal Council published a draft bill for the Federal Act on the Transparency of Legal Entities and the Identification of Beneficial Owners (*Bundesgesetz über die Transparenz juristischer Personen und die Identifikation der wirtschaftlich berechtigten Personen*) ("Transparency Act"). The Transparency Act aims at introducing a register of beneficial owners for Swiss legal entities, legal entities effectively administered in Switzerland, Swiss branches of foreign entities, and foreign entities acquiring real estate in Switzerland, which will not be public but available to law enforcement and other government agencies as well as financial intermediaries required to carry out due diligence on their clients. In parallel, it extends the scope of the anti-money laundering ("AML") due diligence obligations to a range of advisers, including lawyers, who assist clients in setting up legal entities, trusts or fiduciary relationships or are involved in mergers & acquisitions or in capital contributions. Currently, such advisers are – generally speaking – only subject to AML rules if they also act as a financial intermediary, because they have the power to dispose over assets. The change also brings along more detailed regulation than what was provided for under the current regime and the promise of more comprehensive enforcement.

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1 INTRODUCTION

On 30 August 2023, the Swiss Federal Council published the draft bill for the Federal Act on the Transparency of Legal Entities and the Identification of Beneficial Owners (*Bundesgesetz über die Transparenz juristischer Personen und die Identifikation der wirtschaftlich berechtigten Personen*) ("Transparency Act") together with a comprehensive explanatory report ("Report").

This bill aims at implementing in Swiss law the recommendations of the Financial Action Task Force (FATF) and aligning Swiss law with the requirements that already exist under EU law.

2 PURPOSE OF THE LEGISLATION

The overarching goal of the proposed new legislation is to combat financial crime, including tax fraud and the financing of terrorism. To this end, the new legislation aims to increase the transparency regarding the beneficial owners of legal entities and to facilitate their identification by authorities.

One of the core elements of the Transparency Act is the introduction of a federal register to allow authorities as well as financial intermediaries to identify beneficial owners of entities or entity structures efficiently and reliably. It expands, in this respect, the legal framework introduced in 2014, which was revised in 2019, to require shareholders holding more than 25% in non-listed entities are required to disclose to the company within one month their ultimate beneficial owner (or the absence of a beneficial owner). Under the current regime this information was recorded in a register of beneficial owners was maintained by each entity, but was not accessible at a central location. This shortcoming will be addressed with the new federal register. The new regime will be further enhanced through more stringent enforcement tool and sanctions than the civil law measures provided by the Swiss Code of Obligations and the sanctions foreseen in the Swiss penal code.

The Transparency Act further includes measures to strengthen the anti-money laundering framework, including subjecting certain advisory services, including certain legal services, to the provisions of the Federal Anti-Money Laundering Act ("AMLA").

3 REPORTING PURSUANT TO THE TRANSPARENCY ACT

3.1 Scope

The Transparency Act would significantly expand the scope of entities to whom the reporting and related obligations regarding beneficial owners. The proposed new law will apply not only to corporations and limited liability companies but also cooperatives, investment companies with a fixed capital (SICAF), investment companies with a variable capital (SICAV), associations (*Vereine*) and foundations (*Stiftungen*) (article 2 (1) Transparency Act). Moreover, the Transparency Act captures entities incorporated under foreign law (i) who have a branch in Switzerland which is registered in the commercial register, (ii) whose place of effective management is in Switzerland, or (iii) who own or have undertaken to acquire real property in Switzerland.

By contrast, listed entities as well as companies who are controlled by more than 75% by one or more listed entities, occupational benefits institutions and entities that are held by more than 75% by corporations under public law fall outside the scope of application.

3.2 Definition of Beneficial Owner and Control

Under article 4 of the Transparency Act, the beneficial owner of an entity is defined as the individual (i.e., natural person) who controls an entity through either (i) a participation in that entity of at least 25% of the capital or voting rights or (ii) other means which are to be further specified by the Federal Council in a federal ordinance. If no person fulfils these criteria, the highest member of the governing

body of the entity is deemed to be the beneficial owner. The controlling stake pursuant to (i) above can be held by a person acting alone or in concert with others. The Transparency Act uses the same terminology for acting in concert as article 120 of the Financial Market Infrastructure Act regarding the disclosure of shareholdings in listed companies; accordingly, the same principles apply under the two acts when determining whether there is a case of acting in concert.

Special rules apply under the Transparency Act for the determination of the beneficial owner in SICAV, associations, foundations, and trusts.

This approach is novel insofar as it does not follow the current approach for the reporting of the beneficial owner but does not either align with the rules applicable under the AMLA or self-regulatory instruments such as the CDB 20 or the SRO-SVV.

3.3 Reporting and Related Obligations

3.3.1 Overview

Currently, the onus of the disclosure duty is placed on shareholders holding an interest of 25% or more of the capital or voting rights to report their beneficial owner to the legal entity. By contrast, the legal entity has a purely ministerial role of recording the beneficial owners in a register of beneficial owners it maintains and the beneficial owner is not required to provide information to the shareholder. This regime will be enhanced by requiring the legal entity to verify the information they are provided before reporting this information to the register of beneficial owners.

3.3.2 Obligations of the Legal Entities

Under the Transparency Act, legal entities are required to actively identify their beneficial owners and obtain the relevant information (name, date of birth, citizenship, address and country of residence and information on the nature and extent of control).

Further, legal entities will be required to verify the information on their beneficial owners through appropriate measures and request from their shareholders, the beneficial owners and third parties the relevant documentation. The law does not specify the measures that legal entities must take to comply with their verification obligations. According to the Report, the legal entity decides on the appropriate scope of measures and can do so pursuant to risk-based approach. For example, small or medium enterprises (SME) that have known their shareholders for a long time are usually not required to undertake any measures to verify the identity of their beneficial owners. The opposite is true where a legal entity has reason to believe that the person notified to it by a controlling shareholder is not the beneficial owner. The fact that the legal entity receives instructions on a regular basis from an individual other than the notified beneficial owner or that dividends are paid to an account which is not in the name of the beneficial owner can serve as indications that the true beneficial owner is someone other than the individual notified to the entity. It is, therefore, not clear whether the verification obligations go all the way to require legal entities to carry out an enhanced due diligence on their beneficial owners and, possibly, inquire on the source of wealth and funds used to acquire the interest in the legal entity.

The legal entity must document the information received pursuant to these measures and keep them on file so that they can be accessed from Switzerland at any time.

This obligation also applies to foreign entities that have a branch in Switzerland or that own real estate or have undertaken to acquire real estate in Switzerland. Accordingly, these companies have to store the information at their Swiss branch or place of effective management or engage a third party to keep the records on their behalf.

If, despite the measures taken, a legal entity is unable to identify its beneficial owner it must

document such measures, e.g., keep copies of correspondence with which the information was requested.

The records have to be kept until ten years after the respective individual ceases to be a beneficial owner. These documentation and archiving duties are widely in line with the current regime.

Additionally, entities incorporated under foreign law whose place of effective management is in Switzerland must keep a list (share register or equivalent document) of their (direct) shareholders at their place of effective management. This obligation is not new as it is already set out today in the Federal Tax Administrative Assistance Act (from which it will be removed upon the Transparency Act entering into force). By recasting this obligation in the Transparency Act, the burden to supervise compliance and to initiate enforcement proceedings will shift from the Federal Tax Authority to the federal authority responsible for the maintenance of the register of beneficial owners and the control authority.

3.3.3 Obligations of (Direct) Shareholders

Article 10 of the Transparency Act replaces the reporting obligations currently set out (with respect to shareholders of corporations and limited liability companies only) in articles 697*j* and 790*a* of the Swiss Code of Obligations and, as noted above, expands them to other forms of legal entities.

The primary obligation remains largely similar to the current law: (direct) shareholders who, acting alone or in concert with others, hold a participation in a legal entity that allows for the control over that entity (pursuant to the definition of article 4 of the Transparency Act outlined in chapter 4.2 above) have to report their beneficial owner to the entity within one month.

The information must include the name, date of birth, citizenship, address and country of residence and information on the nature and extent of control. If the shareholder is a legal entity whose equity securities are listed on a stock exchange, it is only required to report the fact that it is listed along with its name, registered seat and the details of its listing (which the Transparency Act does not specify further; indicating the listing venue and specifying which securities are listed, e.g., by providing the ISIN, should in our view be sufficient).

In addition to the reporting obligation, the Transparency Act also obligates shareholders to provide upon request by the legal entity all information and documents required to verify the identity and characteristics of the beneficial owner. This mirrors the new verification obligations of the legal entity described above.

As under the current law, shareholders must report changes to the information provided regarding the beneficial owner. However, the Transparency Act shortens the deadline to report changes to one month compared to three months under the current legal regime. The deadlines for the (initial) reporting of the beneficial owner and for the notification of any changes are, thus, the same.

3.3.4 Obligations of Beneficial Owners

The provisions of the Swiss Code of Obligations currently in force only impose obligations on the (direct) shareholder to report the beneficial owner and the legal entity to maintain a register of beneficial owners. However, the shareholder may not itself be aware of the identity of the ultimate beneficial owner and neither the shareholder nor the legal entity have any enforceable claim under Swiss law to require the beneficial owner to identify itself and/or provide the necessary information. To close this gap and ensure that the beneficial owner is reported correctly to the legal entity also in cases where the acquiring shareholder is unaware or uncertain of the identity of the beneficial owner, the Transparency Act provides that if a person becomes the beneficial owner, it must

report so to the direct shareholder or, if control is exercised through other means or indirectly through a chain of control comprising several entities or person, directly to the legal entity. In other words, in these scenarios, the Transparency Act creates a redundant obligation of the beneficial owner to notify the legal entity, who in turn can make the filing with the register of beneficial owners.

Any changes to the relevant information must be notified within one month and the beneficial owners are also required to furnish both to the legal entity and the shareholders the required information.

3.3.5 Obligations in Case of Fiduciary Arrangements and Trusts

The Transparency Act also introduces obligations applicable to members of the board of directors, members of management and shareholders who act pursuant to a fiduciary relationship as well as trustees. Accordingly, persons who act in the capacity of board or management member or shareholder on behalf of a third party are required by the Transparency Act to report to the legal entity the name of that third party.

Financial intermediaries and advisers subject to the Federal Anti-Money Laundering Act (in its version as amended upon entry into force of the Transparency Act) as well as attorneys subject to the duty of care under the Federal Act on the Free Movement of Lawyers are exempt from the reporting obligation.

Similarly, trustees are required to record the details of the various categories of beneficial owners of a trust. In connection with trusts, the term beneficial owner does not equate to the notion of beneficiary but extends to the settlor, the trustee, the protector (if any), the beneficiary and any other individual exercising control through other means, including, where applicable, the legal entity acting in that capacity and its own beneficial owner.

3.3.6 Facilitated Rules

The Transparency Act authorizes (but doesn't require) the Federal Council to ease the rules regarding the identification and verification of beneficial owners or to introduce a simplified notification procedure for specific categories of legal entities to account for the limited transparency risks that such legal entities pose. The Report names SMEs and groups of companies as potential beneficiaries of such facilitated rules.

4 REGISTER OF BENEFICIAL OWNERS

4.1 Introduction of Federal Register

The Transparency Act introduces a federal register of beneficial owners which will replace the registers privately maintained by legal entities under the law currently in force. This represents a paradigm shift in Switzerland and is the most fundamental change proposed by the Transparency Act. The register will be maintained by the Federal Department of Justice and Police in electronic form.

4.2 Notification to the Register

The notification to the register must be made by the legal entity. The information on the entity's beneficial owners to be notified to the register corresponds to the information that shareholders must provide to the legal entity. If a legal entity is unable to determine its beneficial owner, it must notify the register thereof and provide the information available to it.

The notification has to be made within one month of the registration of the legal entity in the commercial register or, in the case of entities incorporated abroad, within one month an entity becoming subject to the provisions of the Transparency Act. Subsequent changes regarding the beneficial owner must be reported within one month of the legal entity becoming aware thereof. Notifications must be made electronically. Further details of the notification procedure are to be enacted by the Federal Council.

The Transparency Act provides for a special notification procedure in simplified circumstances where all of the beneficial owners are entered in the commercial register either as shareholders or as members of the governing body. In such cases, the notification can be made to the commercial register who in turn will forward the notification to the register of beneficial owners. Accordingly, legal entities are exempt from making separate notifications in these circumstances. Since the commercial register also performs certain verification procedure regarding filings made with it, the special procedure is expected to contribute to the quality of data in the beneficial owner register. The same procedure applies for association and foundations where, in the absence of any other beneficial owner, the governing body is deemed to be the (only) beneficial owner.

Notifications must be made by a member of management. Delegation to another person is permissible, however, the management remains responsible for the proper execution.

4.3 Access to the Register

While the register of beneficial owners is not publicly accessible, a number of authorities at federal, cantonal and municipal level are authorized to access the information of the register. This includes *inter alia* the law enforcement agencies, tax authorities (including authorities competent for administrative assistance in tax matters) and the Money Laundering Reporting Office.

Furthermore, financial intermediaries, advisers in the meaning of AMLA and lawyers shall have online access to the data in the register, insofar as it is necessary for the fulfillment of their due diligence obligations under AMLA.

5 IMPLEMENTATION, CONTROL AND SANCTIONS

5.1 Notice of discrepancy and control by the register

This centralized regime accessible by various governmental authorities, financial intermediaries and advisers brings the promise that it will be more effective.

To ensure that the records are accurate, financial intermediaries will be required to notify the register of any discrepancy between the information in the register and their own records if (i) the discrepancy raises a doubt regarding the true, complete and current nature of the information relating to a beneficial owner of an entity, (ii) the discrepancy persists although the client was informed thereof and reasonable time was allowed to remedy it, including by amending the record in the register and (iii) the financial intermediary does not file a report with the Money-Laundering Reporting Office of Switzerland pursuant to article 9 of the AMLA. Similarly, governmental authorities are required to report any doubt they have regarding the accuracy of records at the register of beneficial owners.

Furthermore, the authority maintaining the register is required to control the information it receives and verify the identity of persons who are reported. If it is not satisfied with the information provided, it will request the reporting entity to amend its report or provide supporting documents.

In the event the authority maintaining the register continues to have doubts regarding the accuracy of information in the register or receives a notice from a financial intermediary or a governmental authority, it will be required to annotate this fact in the entry in the register.

5.2 Control

The Federal Department of Finance will also act as a control authority for the federal

register of beneficial owners. As such, it will have the authority to issue guidance on the implementation of the Transparency Act, determine the categories of risks and carry out a risk analysis on the basis of the information in the register. It will also control the true, complete and current nature of the information and review annotation, either on its own initiative or based on a request of the beneficial owner recorded in the register.

In this capacity, the control authority will have the power to request information and documents from the legal entity, the shareholders, third parties involved in the chain of control and the beneficial owners. Third parties who have a contractual relation with these persons will also be required to provide information to the extent necessary to identify the beneficial owner and ascertain its characterization as the beneficial owner.

5.3 Administrative Measures and Sanctions

The control authority will have the power to take measures that are useful and issue orders that are necessary to reinstate compliance with law in the event it finds that information recorded in the register is not accurate, complete or current. It may require the entity to communicate additional information to the register or order an amendment or deletion of information or annotation in the register. In the event of repeated breaches, the control authority will have the power to suspend voting or financial rights of the affected shareholder or even, in the event of serious and repeated breaches or if no activity is exercised, to order the dissolution and liquidation by way of bankruptcy proceedings of the entity.

In parallel, the Transparency Act provides for criminal law sanctions prosecuted by the Federal Department of Finance under the Federal Act on Administrative Criminal Law. In particular, it provides for fines of up to CHF 500 000 for a breach of the reporting duty, for providing false information to the register or the control authority or for failing to make a report to the register of beneficial owners. In the two first cases, offences committed by negligence will also entail a fine of up to CHF 150 000. As is generally the rule under Swiss law, the criminal law offences are primarily aimed at individuals. Legal entities will only be targeted to the extent it is disproportionate to seek to identify the punishable offenders in light of the sanction and that a fine of CHF 20 000 at most is at stake.

6 PHASING-IN PERIODS

For shareholders who have complied with the duty to report beneficial owners pursuant to articles 697*j* and 790*a* CO, the reporting obligation is deemed to be complied with if such persons reported all the information required under the new law. At the request of the entity, they must provide additional information within one month.

As regards the duty of legal entities to make the required notifications to the register, the draft bill provides for several different phasing-in periods:

- Swiss legal entities must notify the required information within one month after the next filing with the entry in the commercial register that occurs after the entry into force of the Transparency Act, but at the latest within the periods provided in the next bullets;
- Legal entities in which all beneficial owners are entered in the commercial register must notify the required information no later than two years after the entry into force of the new law;
- Other legal entities must adhere to the following deadlines:
  a) for companies limited by shares subject to an ordinary audit (*ordentliche Revision*): three months;
  b) for other companies subject to an ordinary audit (*ordentliche Revision*): four months;

c) for companies limited by shares not subject to an ordinary audit (*ordentliche Revision*): five months;
d) for other companies who do not meet the requirements for a limited audit (*eingeschränkte Revision*): six months.

7 AMENDMENTS TO THE ANTI-MONEY LAUNDERING FRAMEWORK

Another area that has long been the topic of controversy is the treatment of service providers who do not have the power to dispose over assets and are, therefore, under the current regime not deemed to be financial intermediaries subject to the AMLA, but nevertheless assist in setting up structures that can be used for money laundering.

After a previous attempt was rejected by parliament, the Transparency Act aims to introduce a legal framework to require advisers, including lawyers, to carry out KYC and due diligence on their clients if they, *inter alia*, prepare or carry out transactions for the account and on behalf of a client in connection with (i) the purchase or sale of real property, (ii) creation of a corporation, a foundation or a trust, (iii) purchase or sale of a corporation (i.e., M&A transactions), (iv) carrying out a capital contribution to a company or (v) offering domiciliation services for companies, foundations or trusts.

To overcome one of the main weaknesses of the bill introduced in 2019, which ultimately failed to obtain sufficient parliamentary support, the Transparency Act provides for a two pronged regime: lawyers will be required to carry out their duties as part of their professional duties as attorneys, while other advisers will be subject to the AMLA and required to comply with similar duties albeit under the supervision of an SRO.

The new KYC and due diligence duties imposed on advisers and lawyers will be comparable to the ones currently applicable to so-called dealers: They include the general AML duties of verifying the identity of the counterparty and identifying the beneficial owner, certain documentation obligations and the duty to take organizational measures to comply with these requirements, including appropriate training. In line with the current AML framework, the applicable due diligence duties will depend on whether a transaction or business relationship is qualified as high risk.

In order to safeguard the attorney-client privilege, lawyers acting as an adviser (without the power to dispose over assets) will, generally speaking, not be required to inform the Money Laundering Reporting Office Switzerland (MROS) if they suspect money laundering or terrorist financing. However, they will be required to refuse the business, or terminate their relationship with the client. Moreover, the enforcement of these rules will not be left to SROs but, in principle, to the cantonal authority responsible for the supervision of lawyers. Notably, these authorities will have the power to take disciplinary measures in the event of breaches including the power to levy a fine of up to CHF 100 000.

This regime will also be extended to other advisers who are not lawyers covered by professional rules in the AMLA. Accordingly, the AMLA provides for an enforcement regime that will be governed by public law but administered by SROs except for proceedings aiming at pronouncing administrative sanctions requiring the payment of an administrative fine or pronouncing a warning or a reprimand, which will all be within the realm of the Federal Department of Finance applying administrative procedure.

8 CONCLUSION

The Transparency Act is overall an ambitious piece of legislation that will enhance the legal framework against money-laundering and the financing of terrorism and bring Swiss law up to speed with the rules applicable in the EU and the recommendations of the FATF. Undoubtably, this new regime will put a more significant administrative burden on legal entities, their shareholders and beneficial owners and will possibly make it more difficult

to access the services of lawyers and advisers due to the more complex onboarding process they will be subject to.

At this stage, the Transparency Act is only at the consultation stage. It will still be reworked based on the responses received from all stakeholders in this context and then be presented to parliament before it can be passed into law. Accordingly, the project is unlikely to be implemented in the immediate future. Moreover, the future of this piece of legislation will largely depend on the political reactions it will trigger in parliament.

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