Homburger

# Regulatory Innovations
# Transparency of Legal Entities and Other Legal Constructs

## I. Introduction

At its meeting on May 22, 2024, the Federal Council approved the dispatch on the further development of the Swiss anti-money laundering framework to be submitted to Parliament. The aim is to strengthen the integrity and competitiveness as well as the reputation of Switzerland as a financial and business center. It is not anticipated that the proposed legislation will become effective until at least the beginning of 2026.

The key elements of the proposed legislation are:

- The introduction of a federal register in which legal entities in Switzerland will be required to enter information on their beneficial owners (**Transparency Register**). The basis for this new obligation is the draft of a new Federal Act on the Transparency of Legal Entities and the Identification of Beneficial Owners (**Legal Entities Transparency Act**).
- The application of the anti-money laundering due diligence obligations to certain advisory activities (including real estate transactions and the establishment, administration and financing of companies, foundations or trusts) that are generally held to pose a high risk of money laundering.
- Additional measures to strengthen the anti-money laundering framework, including measures to prevent the violation or evasion of sanctions under embargo laws and the revision of the due diligence obligations for cash payments in real estate, precious metals and gemstone transactions.

In light of the feedback received during the consultation process, the Federal Council has decided not to pursue the reform of the system of sanctions for self-regulatory organizations (**SROs**).

This Homburger Deep Dive provides an overview of the measures as proposed by the Federal Council in order to strengthen the existing anti-money laundering framework with a focus on the newly to be introduced transparency register.

## II. Background

In recent years, legal entities and trusts have been increasingly misused worldwide for the purpose of concealing assets in order to promote illicit activities, including but not limited to money laundering, terrorist financing, tax evasion, corruption, and the circumvention of sanctions. Being the largest wealth management center in the world, Switzerland is particularly affected by this development, and it poses a serious risk to the reputation and integrity of the Swiss financial sector, as evidenced by the U.S. Tax Dispute, the Panama Papers and the challenges encountered in implementing international sanctions in connection with the situation in Ukraine.

An effective system for combating financial crime is crucial for maintaining Switzerland's reputation as an internationally important, compliant, secure and future-oriented financial center and business location. The Swiss system for combating money laundering is rated as good by international bodies, but there are certain gaps, for example with regard to the transparency and the identification of the beneficial ownership of legal entities. The proposed legislation, in particular the introduction of the Transparency Register, is designed to facilitate that the competent authorities can obtain information about the beneficial ownership of legal entities quickly and

efficiently. This will enable the authorities to prevent money laundering and economic crime more effectively.

## III. Current Situation in Switzerland

Already in 2014, Switzerland took measures to increase transparency requirements for legal entities. Since then, beneficial owners with a participation of more than 25 percent in companies limited by shares or limited liability companies are required to disclose their identity to the company (Articles 697j and 790a of the Swiss Code of Obligations [**CO**]). In addition, these companies are required to keep a list of their beneficial owners, which must be accessible in Switzerland at all times, in particular to the competent authorities (Articles 697l and 790a CO). However, there is currently no standardized register of beneficial owners in Switzerland.

The current regulation does not explicitly require companies to actively verify the accuracy of the information on the beneficial ownership provided to them. Furthermore, due to nuanced differences in the definition of beneficial ownership, the current regime does not necessarily result in the identification of the same person as under the Anti-Money Laundering Act (**AMLA**), particularly in cases where the company is indirectly or otherwise controlled.

Accordingly, the current legal framework was found not to provide the competent criminal and administrative authorities in Switzerland with the necessary tools to identify the beneficial owners of a company in a timely and efficient manner. At present, law enforcement authorities must primarily rely on Swiss financial intermediaries. However, this does not ensure comprehensive and unrestricted access to information on beneficial owners, as it is not always possible to identify all bank accounts held by a company, and not every company has a bank account in Switzerland.

Under Swiss law, only financial intermediaries and, to a lesser extent, merchants are currently subject to the AMLA. Therefore, lawyers, notaries and other professionals in the field of business consulting are only subject to the due diligence obligations of the AMLA if they act as financial intermediaries, e.g., if they manage the assets of third parties. However, they are not subject to the due diligence requirements of the AMLA if, for example, they draw up the deed of foundation of a trust, open an escrow account for the initial capital of a company or provide general advice or assistance in setting up or managing legal structures. According to the Swiss Federal Council, this is a significant gap in the Swiss anti-money laundering framework.

## IV. International Standards

### A. General

The Financial Action Task Force (**FATF**) is addressing the risks associated with legal entities by increasing their transparency. In March 2022, the FATF agreed on tougher global beneficial ownership standards in its Recommendation 24 by requiring countries to ensure that competent authorities have access to adequate, accurate and up-to-date information on the beneficial ownership and control of legal entities. The FATF regularly updates its guidance to assist member countries in implementing the revised Recommendation 24. The FATF leaves the choice of mechanism to the member countries. The establishment of a beneficial ownership register is not required, provided that authorities have another effective means of accessing information on the beneficial ownership of legal entities.

Transparency on beneficial ownership is a matter of global concern to which the vast majority of countries, including emerging and developing countries, have committed. Currently, the information on the beneficial ownership information of legal entities is available in some form in 167 of the world's 196 countries. In only 29 countries is such information not available.

Since 2017, transparency registers have been introduced at the national level in EU/EEA member states. In 2024, the USA introduced a Beneficial Ownership Information Registry.

## B. EU/EEA Transparency Register

Under the EU and EEA rules, all domestic legal entities, partnerships and asset units, as well as – under certain conditions – foreign trusts are obliged to obtain the required information on the beneficial owners and to transmit it to the competent registration authorities. The beneficial owners, in turn, are required to provide the necessary information to the legal entities.

In general, beneficial owners are individuals who, either directly or indirectly, hold more than 25% of the capital shares or control more than 25% of the voting rights of a legal entity.

The transparency registers must be accessible to the public without the need to prove a legitimate interest. Under the German Money Laundering Act, for example all members of the public, in addition to authorities and courts, have access to the transparency register following online registration. The information available to the public includes the first and last name, month and year of birth, country of residence and nationality of the beneficial owner, as well as the nature and extent of the economic interest. A beneficial owner may request that public access be restricted in whole or in part, provided that the beneficial owner can demonstrate an overriding interest. This may include, for example, the risk of becoming a victim of a criminal offense (e.g., fraud, extortion).

In November 2022, the European Court of Justice (**ECJ**) ruled that the regulation in one EU member state (Luxembourg) regarding the public access to the transparency register was disproportionate and contrary to fundamental rights. As a consequence, the draft directive currently under discussion in the EU proposes to restrict access to those who can demonstrate a legitimate interest.

## C. U.S. Beneficial Ownership Information Registry

Under U.S. law, most privately held corporations, limited liability companies, limited partnerships, statutory trusts and other similar entities that are created in, or registered to do business in, any of the states in the United States – including the District of Columbia, Puerto Rico and other U.S. territories – are required to report the beneficial owners to U.S. Department of the Treasury's Financial Crimes Enforcement Network (**FinCEN**). There are 23 categories of exempt entities, including large operating companies, dormant entities, pooled investment vehicles, financial institutions, and tax-exempt entities.

Beneficial owners are any individuals who, directly or indirectly, either exercise substantial control over a legal entity (e.g., president, CEO, COO, CFO, general counsel and any other officer performing a similar function or any other person who has substantial influence over important decisions), or own or control 25% or more of the ownership interests of a legal entity.

Legal entities created or registered to do business in the United States before January 1, 2024 must file the reports by January 1, 2025. Legal entities created or registered to do business in the United States in 2024 have 90 calendar days to file the reports after receiving actual or public notice that their creation or registration is effective.

The reports must be filed only once, unless the legal entity needs to update or correct information. Generally, legal entities must provide the name, date of birth, address, and identification number and issuer of an official identification document for each beneficial owner.

Authorized entities, including federal, state, local, and tribal officials and certain foreign officials, may access the U.S. Beneficial Ownership Information Registry for national security, intelligence, and law enforcement purposes. Financial institutions may also have access under certain circumstances with the consent of the legal entity involved.

## V. Proposed Measures

### A. Introduction of a Transparency Register

#### 1. Scope of the Transparency Register

The basis for the introduction of the Transparency Register will be the Legal Entities Transparency Act (**LETA**). The Transparency Register will be managed electronically by the Federal Office of Justice (Article 28 LETA) to leverage the existing infrastructure and expertise of the commercial register authorities, which already cover all Swiss legal entities that are required to register in the commercial register.

To ensure the accuracy, completeness, and up-to-dateness of the Transparency Register, a Control Authority (Art. 46 LETA) attached to the Federal Department of Finance (**FDF**) will be tasked with carrying out inspections (Article 42 para. 1 LETA). The controls will be carried out on the basis of a risk-based approach or on a sample basis (Article 42 para. 2 LETA). For example, a complex structured domiciliary company is likely to have a higher risk than a locally rooted small or medium-sized enterprise and is therefore more likely to be controlled. The Control Authority will report any violations of the provisions of the new law to the FDF's Criminal Justice Service (Article 52 para. 3 LETA).

The key objective of the Transparency Register is to increase the transparency of legal entities so that authorities can more efficiently and reliably determine who is behind a legal structure in order to prevent money laundering and financial crime, as well as the evasion of international sanctions and tax laws.

The LETA will apply to the following legal entities (Article 2 LETA):

- Swiss companies limited by shares, partnerships limited by shares, limited liability companies, SICAV/SICAF, cooperatives and limited partnerships for collective investments;
- Swiss foundations and associations that are required to register in the commercial register;
- Foreign legal entities that have a registered branch in Switzerland, conduct their actual administration in Switzerland, or own real estate in Switzerland;
- Trustees who are resident or domiciled in Switzerland or who manage trusts in Switzerland, unless they are subject to the AMLA;

Accordingly, non-professional trustees will be subject to the LETA, yet not obliged to report their beneficial owners to the Transparency Register. Professional trustees are already subject to the AMLA and thus required to comply with the anti-money laundering due diligence obligations (Article 2 para. 2 lit. a$^{bis}$ AMLA and Articles 2 para. 1 lit. b and 17 para. 2 of the Federal Act on Financial Institutions).

The following legal entities are excluded from the scope of the new law (Article 3 draft LETA):

— Legal entities whose equity securities are wholly or partially listed on a stock exchange.

— Subsidiaries that are more than 75 percent directly or indirectly owned by one or more companies whose equity securities are wholly or partially listed on a stock exchange.

— Occupational pension schemes and institutions.

— Legal entities in which more than 75 percent of the participation rights are held directly or indirectly by the public sector.

Sole proprietorships as well as simple and general partnerships will not be subject to the LETA because they are not legal persons and pose a low risk of money laundering and terrorist financing.

The new law is expected to affect over 1,500,000 legal entities (485,000 companies, 18,000 foundations, 11,000 associations, 8,000 cooperatives and 3,000 branches of foreign companies).

## 2. Definition of Beneficial Owners

Within the meaning of the LETA the following individuals are deemed to be the beneficial owners:

— **Companies:** All individuals who ultimately control the company by holding, directly or indirectly, alone or in concert with third parties, at least 25 percent of the capital or voting rights of the legal entity, or who otherwise exercise control over the company (Article 4 para. 1 LETA). If no individual meets these criteria, the highest-ranking member of the executive body must be registered as the beneficial owner of the company (Article 4 para. 3 LETA). Similar rules apply to SICAV (Article 5 LETA).

— **Foundations:** The highest-ranking member of the management body of a foundation is generally considered to be the beneficial owner (Article 19 para. 3 LETA and Article 20 para. 2 LETA). This is usually the chairperson of the foundation board. The following persons may also be deemed to be beneficial owners (Article 19 para. 1 LETA):

  • The founders, if they actually or legally exercise a decisive influence on the decisions of the foundation, in particular on distributions.

  • The beneficiaries, if they are designated by name or in an identifiable manner in the foundation deed and are entitled to distributions from the foundation.

  • The beneficial owner of a legal entity that is a beneficiary of the foundation.

  • Any other individual who exercises control or significant influence over the foundation.

— **Associations:** The highest-ranking member of the management body of an association is generally considered to be the beneficial owner (Article 19 para. 3 LETA and Article 20

para. 2 LETA). This is usually the president of the association. In addition, all individuals who ultimately actually control the decisions of the association may also be deemed to be beneficial owners (Article 19 para. 2 LETA).

— **Trusts:** The settlors; the trustees, the protectors, the beneficiaries and any other natural person who ultimately exercises control over the trust, including the beneficial owners of a settlor, trustee, protector or beneficiary (Article 23 para. 2 LETA).

## 3. Obligations of the Legal Entities

Under the proposed LETA, the legal entities will have the following obligations:

— **Identification:** The legal entities must identify their beneficial owners and obtain their first and last name, date of birth, nationality, address and country of residence, as well as the nature and extent of their control over the legal entity (Article 7 para. 1 LETA).

— **Verification:** The legal entities must verify the information received with all due care required by the circumstances and obtain the relevant supporting documentation if necessary (Article 7 para. 2 LETA). The extent of the verification obligation depends on the specific circumstances. A one-person company or a small or medium-sized enterprise that knows its shareholders does not need to take any additional steps to verify the identity of the beneficial owners. However, in the case of a domiciliary company held by a trust within a complex international structure, such verification will be necessary.

— **Documentation:** The legal entities must document the information on the beneficial owners and ensure that it is accessible in Switzerland at any time (Article 8 para. 1 LETA). If, despite all efforts, the legal entity is unable to establish the identity of the beneficial owners or to verify the information received about them (e.g., because shareholders do not comply with their cooperation obligation), the legal entity must document its efforts in an appropriate manner (Article 8 para. 2 LETA). The information and supporting documentation must be retained for a period of ten years after the individual has lost their status as a beneficial owner (Article 8 para. 3 LETA).

— **Update:** The legal entities must ensure that the information on the beneficial owners is up to date (Article 8 para. 1 LETA), i.e., they must review it whenever they become aware of a significant change in the beneficial ownership. In some circumstances (e.g., frequent changes of shareholders) it may be appropriate to carry out regular reviews to ensure that the information is still up to date.

— **Reporting**: The legal entities must report to the Transparency Register the identity of their beneficial owners (first and last name, date of birth, nationality, address and country of residence) and the nature and extent of the control exercised by the beneficial owners (Article 9 para. 1 LETA). The reports must be submitted within one month of the legal entity's registration in the commercial register or, in the case of a foreign legal entity, within one month of its becoming subject to LETA owners (Article 9 para. 4 LETA). The legal entities must report any change to a fact entered in the Transparency R to the register within one month of becoming aware of it (Article 10 LETA). The reports must be submitted electronically (Article 30 LETA).

These obligations will also apply to foundations and associations (Articles 20 et seq. LETA). In contrast, the obligations of the trustees subject to the LETA will be limited. In particular, the

trustees will have no reporting obligations to the Transparency Register and they must retain the information only for five years after the termination of their function as trustee (Article 24 LETA).

The Federal Council may provide for simplified identification and verification rules or a simplified reporting procedure for certain types of legal entities that are associated with limited risks. In determining the risks associated with a legal entity, the Federal Council shall take into account its legal form, its structure and the legal provisions applicable to it (Article 27 LETA).

## 4. Obligations of the Shareholders, Partners, Beneficial Owners and Third Parties

In order for the legal entities to fulfill their obligations under the new law, the following individuals will have reporting and cooperation obligations:

- **Shareholder and Partners**: The shareholders or partners who alone or in concert with third parties hold company shares to an extent that allows ultimate control of the legal entity will be required to provide the legal entity with the identity of the beneficial owners (first and last name, date of birth, nationality, address and country of residence) and the nature and extent of the control exercised by the beneficial owners (Article 13 para. 1 LETA). The reports must be submitted within one month of the date on which the first control is exercised by the beneficial owners (Article 13 para. 3 LETA). Any change to the information provided must be reported to the legal entity within one month of becoming aware of it (Article 13 para. 5 LETA). The shareholders or partners will be required to cooperate with the legal entity and provide any information and documentation that is necessary for the legal entity to verify the identity of the beneficial owners and the nature and extent of the control exercised by the beneficial owners (Article 13 para. 4 LETA). These provisions will replace the existing Articles Articles 697j, 697jl and 790a CO.
- **Beneficial Owners of Shareholder and Partners:** The same reporting and cooperation obligations will apply to the beneficial owners of the shareholders and partners in relation to the shareholders and partners and, under certain conditions, in relation to the legal entity (Article 14 LETA).
- **Beneficial Owners of Foundations and Associations:** The same reporting and cooperation obligations will apply to the beneficial owners of foundations and associations in relation to the foundations and associations (Article 22 LETA).
- **Fiduciaries:** Members of the board of directors, managing directors, shareholders and partners acting in a fiduciary capacity will have to report the individual or entity they are acting for to the legal entity (Article 16 LETA).

## 5. Access to the Transparency Register

For privacy and data protection reasons, the Transparency Register will not be accessible to the general public. In particular, the LETA does not provide a basis for access based on the demonstration of a legitimate interest.

Access to the Transparency Register is restricted to designated authorities, including, the Control Authority, police authorities, administrative or criminal prosecution authorities, the MROS, the competent tax authorities in the area of administrative assistance in tax matters, the State

Secretariat for Economic Affairs (**SECO**) and other competent control authorities in the area of sanctions fulfill their legal obligations (Article 33 et seq. LETA).

Financial intermediaries and the financial advisors subject to the AMLA may also access the Transparency Register to fulfill their anti-money laundering due diligence obligations (Article 35 LETA).

## 6. Discrepancy Reporting

Under the new law, financial intermediaries will be required to report to the Transparency Register if they identify discrepancies between the data in their records and the information contained in the Transparency Register. This obligation arises under the following circumstances (Article 38 para. 1 LETA):

— The discrepancies cast doubt on the accuracy, completeness or up-to-dateness of the information on the beneficial owner of a legal entity. A report is not required if the financial intermediaries notice a discrepancy between their records and the Transparency Register but realize that the information in their records is incorrect, for example because it is not or is no longer up to date.

— The financial intermediaries must first contact the clients concerned and give them a reasonable period of time to clarify the situation.

Financial intermediaries must file the discrepancy report within 30 days if they cannot clarify the situation with the clients (Article 38 para. 2 LETA).

Financial intermediaries who report to the Transparency Register in good faith are not subject to any civil or contractual liability. This measure ensures the effectiveness of the reporting system (Article 38 para. 3 LETA).

The intentional or negligent violation of the discrepancy reporting obligation is not subject to any criminal sanctions.

The obligation to report discrepancies will not replace the due diligence obligations of the financial intermediaries under the AMLA, in particular the obligation to report to the Money Laundering Reporting Office (**MROS**).

## 7. Penalties

The intentional violation of the reporting obligations under the LETA and the intentional provision of false information to the Control Authority will be punishable by a fine of up to CHF 500'000 (Article 50 LETA). Not only the failure to submit the required reports (including reports regarding changes) will be punishable but also the provision of untrue or incomplete information. Negligent breaches are not subject to penalties.

In addition, the intentional non-compliance with a final and binding order of the Control Authority will be punishable by a fine of up to CHF 500'000 (Article 51 LETA).

In principle, only individuals are subject to prosecution. However, the legal entity may be fined instead of the responsible individual if the investigative measures would be disproportionate to

the penalty, and the penalty under consideration would not exceed the amount of CHF 5,000 (Article 52 para. 1 LETA and Article 7 of the Federal Act on Administrative Criminal Law).

The competent authority for the prosecution and conviction of offenses under Articles 42 and 43 LETA will be the FDF's Criminal Justice Service (Article 52 para. 2 LETA). The statute of limitations for criminal prosecution is seven years (Article 52 para. 4 LETA). The FDF's decision can be challenged before the Federal Criminal Court (Article 52 para. 5 LETA) and subsequently before the Federal Supreme Court.

## B. Application of AMLA to Financial Advisors

Certain services provided by lawyers, notaries, and other business advisory professionals can be used for money laundering purposes by circumventing corporate transparency requirements, facilitating transactions designed to conceal assets of criminal origin, or creating complex constructions designed to disguise the true beneficial owner of a transaction.

The Federal Council proposes that the following specific activities of lawyers, notaries and other business advisory professionals (the **Financial Advisors**) be subject to anti-money laundering due diligence obligations (Article 2 para. 3$^{bis}$ and para. 3$^{ter}$ draft AMLA):

— Sale or purchase of real estate.

— Formation or establishment of a company, foundation or a trust.

— Management or administration of a company, foundation or a trust.

— Organization of the financing of a company.

— Sale or purchase of a company.

The Financial Advisors who engage in an activity related to court, criminal, administrative, or arbitration proceedings, will be explicitly exempt from the AMLA (Article 2 para. 4 draft AMLA).

Financial Advisors subject to the AMLA must fulfill the following anti-money laundering due diligence obligations:

— Identification of the client and the beneficial owner (Article 8 para. 1 lit. a and b draft AMLA).

— Identification of the object and purpose of the transaction or service requested by the client (Article 8 para. 2 draft AMLA).

— Clarification of the background and purpose of a transaction or service requested by the client, when justified by the high risks involved (Article 8 para. 3 draft AMLA). Examples of such risks include the client being a politically exposed person or the origin of funds being unclear.

— Implementation of necessary organizational measures to prevent money laundering, terrorist financing or violations of sanctions (Article 8d draft AMLA). This primarily entails the assessment of potential risks associated with transactions and services provided and internal measures, including the training of employees and the establishment of controls.

— All relevant measures taken in connection with the due diligence obligations must be properly documented (Article 8 para. 1 lit. c draft AMLA).

Finally, the Financial Advisors will be required to file suspicious activity reports with the MROS (Article 9 para. 1$^{ter\text{-}sexies}$ draft AMLA). Lawyers and notaries will only be required to file suspicious activity reports if they carry out a financial transaction in the name of or for the account of a client, and the information is not subject to attorney-client privilege (Article 9 para. 2 draft AMLA). It is not yet clear how to reconcile the inherent tension between the validity of attorney-client privilege and the reporting obligation, and this will probably lead to further discussions.

## C. Other Proposed Changes

In addition, the Federal Council proposes the following measures to strengthen the anti-money laundering framework in Switzerland:

- **Real Estate Trading**: At present, merchants are only required to fulfil certain anti-money laundering due diligence obligations (e.g., verification of the customer's identity and establishment of the beneficial owner's identity) if they accept more than CHF 100,000 in cash in the course of a commercial transaction. With regard to real estate transactions, the CHF 100,000 threshold will be eliminated (Article 8a para. 4 draft AMLA). While the use of cash in real estate transactions will remain permissible, merchants must comply with the relevant anti-money laundering due diligence obligations.
- **Precious Metals and Gemstones Trading**: The minimum cash transaction amount for precious metal and gemstone merchants to be subject to anti-money laundering due diligence obligations will be reduced from CHF 100,000 to CHF 15,000 (Article 8a para. 2$^{bis}$ draft AMLA). Precious metals are defined as gold, silver, platinum, and palladium. The term precious stones includes rubies, sapphires, emeralds, and diamonds. The proposed solution will have minimal impact on the retail trade, as finished products such as jewelry will not be subject to the measure.
- **Format of Report to MROS:** A standardized format will be introduced in which financial intermediaries will send their reports to MROS (Article 23 para. 7 draft AMLA). This measure is designed to address the increase in data volume and complexity associated with the suspicious activity reports, as well as the suboptimal quality of the electronic reports. By streamlining the reporting process, MROS can focus on its core competency of analysis, enhancing efficiency and reducing costs for both MROS and the financial intermediaries involved.
- **Prevention of Violation of Sanctions:** In light of the international context and the significance of the Swiss financial center, financial intermediaries are expected to exercise the utmost care when implementing organizational measures to identify, limit, and monitor the risks associated with sanctions. To this end, the Federal Council proposes an amendment to the AMLA to specify that the anti-money laundering due diligence obligations also aim to prevent violations of sanctions under the Embargo Act (Article 1 draft AMLA).

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