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Monthly
Newsletter
December 2023

Private Wealth

**Schellenberg
Wittmer**



Prepared for the Foundation Board? Recent Legal Changes and their Implications

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Key Take-aways

- 1.** The various supervisory authorities construe the scope of disclosure requirements differently.
- 2.** Given the anti-money laundering regulations and in case of doubt, one should clarify the origin of donations.
- 3.** Failure to comply with the new data-protection provisions may result in sanctions, including personal liability for the foundation board.

1 Introduction

The requirements for foundation board members have steadily increased over the last few years and the legal framework is constantly evolving. This newsletter provides an overview of some important legal changes and the associated obligations that every foundation board should familiarise themselves with.

2 New Reporting Obligations and Duty of Remuneration Transparency

Since 1 January 2023, the board of foundation or the auditors are obliged to notify the supervisory authority immediately in the event of the foundation's **imminent insolvency or over-indebtedness**.

Further, an obligation to **disclose the remuneration** of the board of foundation was introduced, which will have to be complied with for the first time when reporting **for the 2023 financial year**. The new disclosure obligation requires the highest foundation body, i.e. the board of foundation, to disclose the total amount of remuneration paid directly or indirectly to its members to the supervisory authority each year in accordance with Art. 734a para. 1 CO. If there is an executive board, its remuneration must be disclosed separately. The reference to company law leads to a - non-exhaustive - list of types of remuneration that must be disclosed. These include in particular

- Fees, attendance fees, salaries, bonuses and credit notes;
- Bonuses, shares in sales and other shares in the business result;
- Starting bonuses;
- All benefits for additional work.

The disclosure requirement for foundations is not entirely new.

2.1 How much Transparency is Really Necessary?

It is important to note that the new remuneration transparency **only** exists **towards the supervisory authority** and not towards the public. Family foundations are not affected by the disclosure obligation. In contrast to the provision under company law, the wording of the law only requires that the **total amount** of remuneration be disclosed. However, this provision is currently interpreted differently, even by the various supervisory authorities. For example, the Swiss Federal Supervisory Authority for Foundations (FSAF) assumes that the foundation must disclose the **amount of remuneration attributable to each member separately**. By contrast in some cantons, it is sufficient to disclose the total remuneration. It is also disputed

whether the disclosure obligation should also extend to advisory boards or other foundation bodies. **The remuneration must be disclosed either in the notes to the annual financial statements, in the profit and loss statement** itself (see e.g. Supervisory Authority in Zurich) or **in a separate report** to the competent supervisory authority.

This new disclosure obligation is likely to be of particular relevance for **charitable, tax-exempt foundations**. Some cantonal tax authorities are known to follow a strict practice and refuse tax exemption if the foundation board activities are remunerated. As the supervisory authorities must in certain cases to provide information to the domestic tax authorities or to forward the documents received as part of the reporting process, charitable foundations may be at risk of losing their tax privileges as a result.

Caution is advised when accepting donations and making grants.

2.2 Cautious All-Clear

That said, the disclosure obligation for foundations is not really new. Even before the introduction of the new transparency provisions, the supervisory authority was able to request specific evidence and more detailed information on the board's or the management's remuneration and compensation during its audit of the annual financial statements. Cantonal tax authorities have also already been able to require organisations to disclose their compensation to governing bodies as part of the periodic review of the tax exemption. The legislator therefore views the new provision as a mere clarification. The disclosure obligation will probably lead to the development of appropriate remuneration practices.

Foundation boards should take the opportunity to **review and, if necessary, adjust their remuneration practices**. If not already the case, the principles of remuneration should be set out in regulations or guidelines (flat-rate fees or attendance fees, amount of remuneration per board member or for the board as a whole, other remunerated activities). It is recommended to consult the **relevant information sheets** issued by the competent supervisory authorities and, if necessary, to contact the relevant authorities.

3 New Obligations due to the Revision of the Anti-Money Laundering Regulations?

With the revision of the Anti-Money Laundering Act (**AMLA**) and its entry into force on 1 January 2023, the question arises (again) for foundation boards as to whether and, if so, which duties they must observe when **accepting donations**. While the offence of money laundering is enshrined in the Swiss Criminal

Code (**SCC**), the **AMLA** also contains duties that are relevant for foundation boards when accepting donations.

3.1 The Foundation Board or Foundation in the Criminal Code's Sights?

Anyone who carries out an act that is aimed at frustrating the confiscation of assets which he knows or must assume originate from a crime is liable to prosecution for **money laundering under Art. 305^{bis} SCC**. Specifically, the assets must originate from a felony or a qualified tax offence, which the perpetrator knew or at least should have known. Contributions and grants to foundations can also fall under the definition of such assets, thus money laundering is already possible for small amounts. The foundation board and - in certain cases - the foundation itself can also be considered perpetrators.

However, this provision does not impose a general duty on the board of foundation to clarify and research the origin of the funds received. Nevertheless, caution is generally required when accepting gifts and making grants. In case of doubt, clarifications should be made; if the doubts cannot be dispelled, one recommends to reject the donation.

3.2 The Foundation Board or Foundation within the scope of the anti-money laundering law?

The **new AMLA** has **been in force** since 1 January 2023, introducing a number of new obligations and rights. The most important changes include the duties of financial intermediaries to verify the beneficial owner's identity and to periodically review the contracting party's details, as well as the right to terminate a reported business relationship under certain conditions.

The foundation board or foundation only has to comply with the AML duties if they fall **within the scope of the AMLA**. However, this Act only applies to professional financial intermediaries and so-called "dealers" who trade commercially in goods and accept cash. Serving as a foundation board member does **not usually qualify as financial intermediation**. Indeed, on the one hand, it does not qualify as a professional activity and, on the other, the board of foundation generally does not dispose of third-party assets but only of its own (foundation) assets.

However, if a foundation is deemed a **domiciliary company**, the activities of its board members may be subject to the AMLA. Domiciliary companies usually act as financial vehicles for asset management without operational business. The decisive factor is that their governing bodies act in accordance with the beneficial owner's instructions. According to the FINMA guidelines, charitable foundations are not deemed domiciliary companies as long as they exclusively pursue their statutory purpose. However, the situation becomes tricky if the foundation's assets cannot be clearly distinguished from those of the beneficial owner's, which is the case, for example, if the foundation board only disposes of assets as per the founder's or a beneficiary's instructions. It is therefore crucial that all transactions fall within the scope of the foundation's purpose and are based on a discretionary decision by the foundation board. Whether the activities of the foundation board are subject to the AMLA therefore depends on the specific circumstances and requires an individual assessment.

4 New Obligations due to the Revised Data Protection Act

Since 1 September 2023, foundations have been subject to the **revised Data Protection Act** and the **new Data Protection Ordinance** (see the newsletters from [October](#), [November](#) and [December](#) 2022) if they process data of individuals, which is likely to be the case. There are no specific exceptions for charitable foundations.

The most important changes are an extension of the rights of affected individuals, an active information obligation on behalf of the foundation, the duty to report data protection breaches and to maintain a data processing register (for larger foundations or those with high-risk processing). New sanction provisions apply: Fines of up to CHF 250,000.00 can be imposed, which are generally not aimed at the entity, but at the responsible individual. This may also include members of the board of foundation.

The new data protection law also applies to foundations.

4.1 Comprehensive Review of Data Processing Procedures

First, foundations should identify the areas in which they process **personal data**. Subsequently, they should check for each process whether data protection principles (in particular transparency, purpose limitation and proportionality) are complied with. In particular, they should check whether the foundation's data protection declaration fulfils the new requirements, especially the stricter duty to provide information. In order to safeguard the rights of affected individuals, one must ensure that the processes relating to data collection, analysis, storage and deletion are properly implemented and documented.

Moreover, a foundation must be able to provide an individual with **information about all processed personal data**. An appropriate process must also be developed for assessing data breaches and subsequently notifying the competent authorities as well as (if applicable) the affected individuals. Depending on the foundation's size and the data processed, additional regulations and obligations may apply.

5 Other Developments to keep an Eye on

On 1 January 2024, a number of **new legal provisions** in foundation law will come into force. The most important changes include:

- i. The possibility for the founder to include a reservation on organisational changes in the articles of association, in order to simplify future adjustments to the organisation.

- ii. The hurdle for insignificant amendments to the foundation deed is lowered.
- iii. Public notarisation is no longer required for amendments to the foundation deed.
- iv. The enactment of a legal basis for the previously-unregulated complaint to the foundation supervision.

Lastly, there is currently a discussion in Parliament about expanding the scope for family foundations and allowing maintenance foundations.



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