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News about Foundation Law

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With several hundred new foundations established each year, Switzerland continues to enjoy great popularity as a location for foundations. To further strengthen foundations in Switzerland and to meet the changing needs of foundations and their stakeholders, the law on foundations is undergoing change in some areas.

! The key changes to foundation law

- **New obligations are being introduced for the supreme governing bodies of foundations in connection with imminent insolvency, overindebtedness and data protection.**
- **Remuneration must now be disclosed in a remuneration report.**
- **The reform of inheritance law facilitates larger donations to foundations thanks to reduced compulsory portions.**
- **The law now defines who is authorised to file a complaint with the supervisory authority.**
- **When a foundation is established, the foundation deed may now include a reservation regarding the right to change the organisation of the foundation.**
- **The amendment of foundation deeds and by-laws is rendered easier.**

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The changes to foundation law are influenced, among other things, by the revisions to the law governing companies limited by shares, to inheritance law and to data protection legislation that have already entered into force. In addition, there will be a selective revision of foundation law effective 1 January 2024. On the one hand, the legislative changes confer new rights and impose new obligations on founders and foundation bodies, on the other, they promise flexibility and simplification.



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New obligations in the event of imminent insolvency and overindebtedness (effective 1 January 2023)

Since 1 January 2023, the supreme governing body of a foundation or its auditors are required to notify the supervisory authority immediately in the event of any imminent insolvency or overindebtedness (Art. 84a CC). This thus creates new and non-transferable duties for the supreme governing body of the foundation and the auditors. Stringent liquidity planning and continuous monitoring of the financial budget by the supreme governing body of the foundation have thus become indispensable. If the liquidity planning already indicates that insolvency is imminent, the supreme governing body of the foundation must immediately take the measures necessary. If insolvency is imminent despite these measures, the supervisory authority must be notified. In addition to liquidity planning, the supreme governing body of the foundation also has the duty to continuously monitor the economic and financial situation of the foundation. If there is a reasonable concern that the foundation is overindebted, the supreme governing body of the foundation must, under certain circumstances, immediately prepare an interim financial statement showing assets at going concern and liquidation values, and notify the supervisory authority.

Remuneration report requirement (effective 1 January 2023)

Pursuant to Art. 84b CC, the supreme governing body of the foundation is required, since 1 January 2023, to automatically and separately disclose to the supervisory authority on an annual basis, as part of a remuneration report, the total amount of remuneration paid directly and indirectly to it and, if applicable, to the executive board. The Federal Supervisory Authority for Foundations (FSAF) has specified the provision to the effect that all foundations under its supervision must disclose both the total amount and the amount attributable to each member, indicating the name and the function of the member (FSAF, bulletin dated 9 January 2023). How the cantonal and municipal supervisory authorities will deal with this remains to be seen. The remuneration report is not accessible to the public but is only sent to the competent supervisory authority. The duty to prepare a remuneration report resulted in a renewed discussion about the controversial honorary activities of foundation bodies in taxexempt charitable foundations. The payment of compensation to members of the foundation board of charitable foundations remains, despite the enactment of Art. 84b CC as well as important opinions in the doctrine, which plead with convincing arguments for the permissibility of such compensation, subject to certain risks with regard to the maintenance of the privileged tax status of such foundations. It is therefore recommended in any case to obtain a corresponding tax ruling from the competent tax authority.

What should be considered when making donations to foundations?

Foundations and governing bodies of foundations are in principle not financial intermediaries. Accordingly, the provisions of the Anti-Money Laundering Act (AMLA) do not apply to foundations and there is no statutory duty to comprehensively clarify the origin of donations. However, since foundations are required to provide information in part indirectly about the origin of funds, the origin of donations cannot be completely ignored in point of fact. In addition, it also corresponds to the industry standard that foundations should only accept donations if their origin is known. Particularly in the case of larger donations, however, the origin should also be sufficiently clarified for reputational risk reasons. Finally, in the case of international donations, the foundation should also always obtain advice beforehand about any tax consequences. It is thus recommended that a standardised process be implemented within any foundation to clarify and document the origin of donations in a manner that is adequate from a legal point of view. Finally, the freedom of disposition of the donor should be documented in suitable form.

Impact of the revision of inheritance law (effective 1 January 2023)

Due to the reduction of compulsory portions as part of the revision of inheritance law, testators now have a higher freely disposable share (Art. 471 CC). This enhances the option of their engaging in philanthropy by, for example, establishing their own foundation or making higher donations to foundations.

At the same time, however, the newly standardised prohibition on making gifts in Art. 494 (3) CC in the case of contracts of inheritance must be taken into account. Pursuant to this, gifts made by a testator during their lifetime may be challenged if the gifts were not reserved in the contract of inheritance and if they reduce the benefits of the beneficiary under the inheritance contract. Donors should therefore verify whether a planned donation is compatible with any contract of inheritance that may have been concluded. Foundations are well advised, at least in the case of larger donations, to obtain confirmation that the donor is not restricted in their freedom to dispose of assets. In a contract of inheritance, the parties should explicitly reserve the right to freely dispose of their assets during their lifetime. Based on these amendments, it is recommended that existing contracts of inheritance be reviewed and adapted, if necessary.

Authorisation to file a supervisory complaint (effective 1 January 2024) and data protection (effective 1 September 2023)

The intent and purpose of a supervisory complaint is that any act or omission of the bodies of a foundation that are in violation of the law or the by-laws can be challenged. Until now, the supervisory complaint was not explicitly regulated by law, but was rather derived from doctrine and case law from Art. 84 (2) CC. Up to now, a personal interest as well as a special proximity to the foundation were required. Now, the legislators want to standardise the supervisory complaint for the first time by conclusively regulating in the new Art. 84 (3) CC the group of persons

entitled to file a supervisory complaint. In future, a supervisory complaint may only be filed by beneficiaries or creditors of the foundation, the founder, donors and former and current members of the foundation board who have an interest in ensuring that the administration of the foundation complies with the law and the foundation deed. Persons not entitled to file a supervisory complaint have the option of filing a report with the competent supervisory authority. However, unlike the supervisory complaint, a report does not confer standing as a party in a supervisory proceeding.

The Federal Data Protection and Information Commissioner (FDPIC) also has more far-reaching rights of control over foundations. Based on the revised data protection law that entered into effect on 1 September 2023, the FDPIC can open investigations, in response to a report or ex officio, into foundations that violate obligations under data protection law. The reform created various new obligations under data protection law for the supreme governing body (such as duties to provide information, data processing records, creation or adaptation of privacy policies, etc.) that must be observed due to the more stringent penal provisions.

(Minor) amendments to the deed of foundation (effective 1 January 2024)

To date, the supervisory authority could only make minor changes to the deed of foundation provided that these were objectively justified and did not impair the rights of any third party (Art. 86b CC). Now, only objective reasons will be sufficient, provided that no rights of third parties are impaired (new Art. 86b CC).

Major and minor changes of purpose and organisation in the deed of foundation (new Art. 85 to 86b CC) are decided by the competent authority. Public certification of the amended deed of foundation is not required.

Reservation of the right to change the organisation (effective 1 January 2024)

Currently, for a new foundation, the foundation deed can only reserve the right to amend the purpose of the foundation (Art. 86a CC). A reservation of the right to change its organisation, on the other hand, is not possible. Any such change has to be submitted to the competent supervisory authority. In this case, such change of organisation be urgently required in order to preserve the assets of the foundation or its purpose. Analogous to the provisions on the reservation of the right to amend the purpose, with the new Art. 86a CC, the legislators wish to enshrine in law the possibility in future of reserving a right

to change the organisation. Accordingly, the competent authority will change the organisation of a foundation on request if the deed of foundation reserves the right the change the organisation and at least ten years have elapsed since the foundation was established or since the last change of its organisation. This also allows the wishes of the founder to be taken into account to a greater extent. Just as in the case of a reservation to amend the purpose, such a reservation of the right to change the organisation must be included in the deed of foundation at the time the foundation is established. For foundations that have already been established, such reservations later on are no longer possible.

Practical recommendations

- So that the will of the founder can be implemented in the best way possible, the right to amend the purpose of the foundation and to change its organisation shall be reserved in the deed of foundation, when a new foundation is established.
- The initial capital of new foundations as well as donations to existing foundations that are not received by way a testamentary disposition should be reviewed for their compatibility with any beneficiaries in contracts of inheritance. As a general rule, it is recommended that existing contracts of inheritance be reviewed in this regard.
- A standardised process should be implemented within foundations to clarify and document the origin of donations.
- As a result of the new duties for the supreme governing body of a foundation in connection with imminent insolvency, overindebtedness and data protection, it is recommended that there be a clear allocation of duties among the bodies of the foundation. A functioning system for careful liquidity planning and continuous monitoring of the financial budget are key. The data protection law amendments should already be implemented and reviewed on a regular basis.