

## **FMA Communication 2015/7**

concerning identification of the beneficial owners under the Due Diligence Act

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| Annexes:       | Form for information concerning a deceased founder or settlor (Form V)<br><br>Form for the identification of the ultimate beneficial owner regarding the fiduciary receipt and transfer of assets for third parties (natural persons) (service companies) (Form Y) |

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## 1. Control within the meaning of Article 3(2) DDO

### 1.1 Explanation of the term "control" within the meaning of Article 3(2) DDO

The natural persons controlling a legal entity are considered beneficial owners. "Control" within the meaning of Article 3(2) DDO means in particular the ability:

- a) to dispose of the assets of the legal entity;
- b) to amend the provisions governing the essential nature of the legal entity;
- c) to amend the beneficiaries; or
- d) to influence the exercise of the control powers under (a) to (c) above.

It must be clarified in this regard that the definition of "control" for purposes of due diligence law is not identical with the equivalent definitions under tax law, even though there are certain parallels. The consequence of control under tax law will often be that the assets of the legal entity or the income from those assets are attributed for tax purposes to the controlling person (e.g., a founder or (minority) shareholder who continues to have control over the assets held by the foundation or legal entity). This means that the element of control plays a decisive role in tax law as well.<sup>1</sup> The question whether there is control for purposes of tax law or not must be answered on the basis of the law applicable in the tax domicile of the client.

The preconditions for control under Liechtenstein due diligence law will now be described below. These preconditions apply not only to Liechtenstein legal entities but also to foreign legal entities for which a Liechtenstein person subject to due diligence performs services relevant to due diligence law.

#### Power of disposal over the assets of the legal entity (Article 3(2)(a) DDO)

The core of the issue here is to determine fact patterns in which a person (typically the founder or settlor, although other persons such as protectors or (minority) shareholders may be possible) can dispose of the assets of the legal entity such as via a bank account. The circumstances in the individual case must always be taken into account. In general, persons administering a legal entity (e.g., members of the foundation council or the trustee) do not fall within the scope of this provision. If, however, the founder is for example also a member of the foundation council, if the founder has individual signing authority and could therefore obtain a pecuniary advantage for himself or herself, then it cannot be disputed that the founder has power of disposal over the assets of the legal entity.

As a rule, this will also be the case if this person has power of attorney on an account of the legal entity or an underlying company and could therefore obtain a pecuniary advantage for himself or herself. Another case where control applies is, as a rule, if this person has a credit card or EC card on the bank account of the legal entity and is thereby able to obtain a pecuniary advantage for himself or herself.

#### Amendment of the provisions governing the essential nature of the legal entity (Article 3(2)(b) DDO)

In contrast to Article 3(2)(c) DDO, this clause is not about amending the beneficiary rights. Provisions governing the essential nature of the legal entity may for instance affect the purpose of the legal entity, rights of revocation, or important organizational elements (e.g., voting rights in the foundation council). It must again be considered that the amendment of such a provision may at least potentially allow a person to obtain a pecuniary advantage. It is thus irrelevant whether a person is, for instance, entitled to do so via a reserved right of amendment or can indirectly bring about such an amendment via a mandate agreement.

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<sup>1</sup> References to tax law serve only to illustrate potential parallels to due diligence law. Tax law does not fall within the FMA's scope of competence.

### Amendment of beneficiary rights (Article 3(2)(c) DDO)

If a person is able to bring about an amendment of beneficiary rights and thus obtain a pecuniary advantage, then that person exercises control over the legal entity. If, e.g., the founder is able to appoint himself or herself at any time as a beneficiary, then the founder exercises control over the legal entity. Here again, it is irrelevant whether a person is entitled to amend the beneficiary rights on the basis of a written mandate agreement or whether the person simply has the power to do so as a matter of fact.

### Influencing of control powers (Article 3(2)(d) DDO)

If a person is indirectly entitled to the control powers referred to in Article 3(2)(a) to (c) DDO through the ability to influence a person who is directly entitled to the control powers, then the person is considered the beneficial owner who ultimately has control.

### Non-relevant fact patterns

It follows from the above that not all rights of influence constitute control for purposes of Article 3(2) DDO. The following in particular are not relevant in connection with Article 3(2) DDO:

- the right to exchange members of the foundation council or the trustee, although in such cases it certainly must be analysed in detail whether the person in question can exercise a controlling influence within the meaning of Article 3(2) DDO over the new members of the foundation council or the new trustee;
- the right to exchange the manager of the assets of the legal entity;
- periodic consultations discussing the development of the assets of the legal entity;
- rights of veto or approval.

## **2. Identification of the beneficial owners in the case of corporations**

### **2.1 Approach for identifying beneficial owners in the case of corporations**

#### First step

According to Article 3(1)(a)(1) and (2) DDO, first of all those natural persons are considered beneficial owners who ultimately directly or indirectly:

- hold or control a share or voting rights amounting to 25% or more of such legal entities; or
- receive 25% or more of the profits of such legal entities;

Accordingly, in a first step, all those persons must be identified as beneficial owners who participate in a legal entity in the form described above. In this regard, both direct and indirect participations (e.g., through a chain of participations; see in detail question 4) must be taken into account.

When determining the participation levels of a person, the shares/voting rights or shares in the profit must be included that the person is entitled to on the basis of any contracts or verbal agreements with other shareholders (e.g., shareholder agreements, control over several shareholders by a person on the basis of family or other ties, etc.). As part of ongoing monitoring of the business relationship, attention must be paid to indications of such agreements or arrangements.

Second step

Independently of whether persons have been determined in the first step to have a direct or indirect participation as described above, the person subject to due diligence must additionally examine whether there are persons who in other ways exercise control over the legal entity and, where applicable, identify them as beneficial owners.

With regard to the concept of control, Article 3(2) DDO and the answer to question 1 are also relevant. Here again, existing individual signing authorities as well as powers of attorney relating to accounts and assets must be examined critically.

The second step of the identification process is important especially if, on the basis of the economic circumstances, it does not appear plausible that a person determined in the first step himself or herself holds shares, voting rights, or rights to profit of 25% or more of the legal entity in question.

Third step

Only if no persons have been determined in the steps described above, and provided there are no suspicious facts, then the members of the governing body of the legal entity are identified as the beneficial owners.

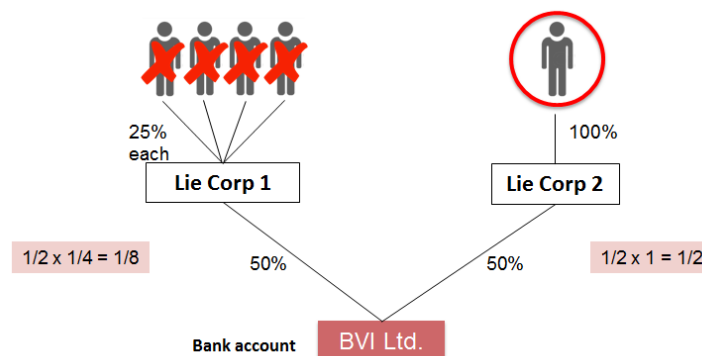
The FMA assumes that especially in the case of non-operating legal entities that primarily manage private assets, beneficial owners can generally be determined in the first or second step. Identification of the members of the governing body as beneficial owners should therefore be necessary only in exceptional situations.

For the purposes of combating money laundering, the identity of the members of the governing body is less informative than the identity of the shareholders or of the persons who in other ways exercise control over the legal entity. This information deficit must be taken into account especially in the case of non-operating legal entities when the origin of assets is being clarified.

The explanations above under point 2.1 apply analogously to the identification of beneficial owners of establishments structured as corporations and companies without legal personality.

**2.2 Calculation of relevant shares, voting rights, or rights to profit in the case of indirect participations in corporations (multilayer structures)**

In the case of multilayer structures, the question arises in particular how the threshold of 25% is to be calculated. This will be illustrated using the following example:



The direct shareholders of BVI Ltd. are Liechtenstein Corporation 1 and Liechtenstein Corporation 2. But because the beneficial owner must always be a natural person, it must be examined whether the shareholders of Lie Corp 1 and Lie Corp 2 are considered beneficial owners of BVI Ltd.

In this example case, the shares must be multiplied as follows:

The shareholders of Lie Corp 1 each hold the following share in BVI Ltd.:  $1/2 \times 1/4 = 1/8$

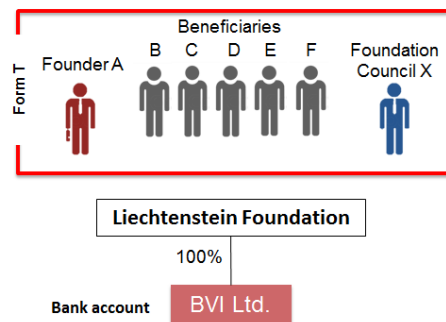
The shareholders of Lie Corp 1 therefore do not hold shares of 25% or more of BVI Ltd. and – provided that none of these persons exercise control in another way<sup>2</sup> – are not beneficial owners of BVI Ltd.

The shareholder of Lie Corp 2 holds the following share in BVI Ltd.:  $1/2 \times 1 = 1/2$

This means the shareholder of Lie Corp 2 holds shares of 25% or more in BVI Ltd. and is thus a beneficial owner of BVI Ltd. (in the role of a shareholder exceeding 25%). The totality of the ownership and control structure must be documented in the due diligence files and must be made comprehensible to third parties (e.g., in the form of an organizational chart or other appropriate manner). This must be disclosed or explained to other involved persons subject to due diligence with which the legal entity maintains a business relationship.

### 2.3 Identification of the beneficial owner of a corporation held by a foundation

100% of BVI Ltd. is held by a Liechtenstein foundation. The Liechtenstein foundation has a founder A, five beneficiaries B, C, D, E, F (each of which receives 20% of the benefits), and a foundation council X.



The following remarks refer to a fact pattern that will be governed by the law effective 1 January 2016 (in the version of Liechtenstein Law Gazette LGBl. 2015 No. 250).

Because the foundation holds more than 25% of the shares in BVI Ltd., the interim result is that it is deemed the beneficial owner of BVI Ltd. But because the foundation must be considered as transparent, the final result is that all persons according to Article 3(1)(b) DDO are deemed beneficial owners of the foundation and thus beneficial owners of BVI Ltd. In that case, Form T exclusively must be used. In the case of distributions by discretionary legal entities, Form D must additionally be used. On Form T, it must be indicated in what role each person is considered a beneficial owner; B, C, D, E, and F are considered beneficial owners only if they have a legal claim.

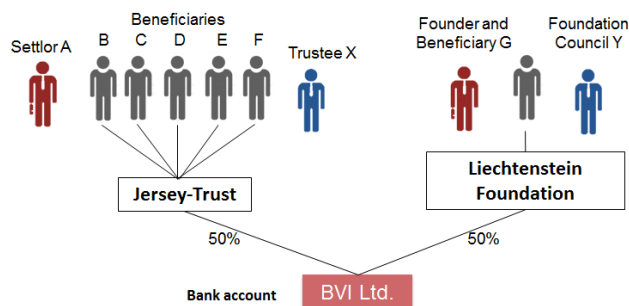
This means that in this example, A (as the founder), B to F (as beneficiaries, provided they have a legal claim), and X (as the foundation council) are considered beneficial owners of the foundation and accordingly also beneficial owners of BVI Ltd. The benefit levels of the individual beneficiaries are irrelevant in this regard.

Even though in the present case the use of Form T and, where applicable, Form D are considered sufficient, the totality of the ownership and control structure must be documented in the due diligence files and must be made comprehensible to third parties (e.g., in the form of an organizational chart or other appropriate manner). This must be disclosed or explained to other involved persons subject to due diligence with which the legal entity maintains a business relationship.

### 2.4 Identification of the beneficial owner of a corporation held by a trust and a foundation

50% each of BVI Ltd. is held by a Liechtenstein foundation and a Jersey trust. The Jersey trust has a settlor A, five beneficiaries B, C, D, E, F, and the trustee X. For the Liechtenstein foundation, G is the founder and beneficiary, and Y is the foundation council.

<sup>2</sup> see point 2.1, second step



The following remarks refer to a fact pattern that will be governed by the law effective 1 January 2016. Applying the principles set out under point 2.3, the following is the case:

The Jersey trust and the Liechtenstein foundation each hold more than 25% of the shares in BVI Ltd. and are therefore deemed, as an interim result, to be beneficial owners of BVI Ltd. But because both the trust and the foundation are also considered as transparent, the final result is that all persons according to Article 3(1)(b) DDO are deemed beneficial owners of the foundation and thus beneficial owners of BVI Ltd. In that case, Form T must be used; in the case of distributions by discretionary legal entities, Form D must additionally be used.

This means that in this example, A (as the settlor), B to F (as beneficiaries, provided they have a legal claim), and X and Y (as the governing bodies) as well as G (as the founder and beneficiary) are considered beneficial owners of BVI Ltd.

Even though in the present case the use of Form T and, where applicable, Form D are considered sufficient, the totality of the ownership and control structure must be documented in the due diligence files and must be made comprehensible to third parties (e.g., in the form of an organizational chart or other appropriate manner). This must be disclosed or explained to other involved persons subject to due diligence.

**2.5 New business relationship with an underlying company of an existing legal entity (discretionary foundation)**

Since 2010, professional trustee X has exercised the functions of a governing body in the discretionary foundation A (Article 12 DDOold). During the year 2016, professional trustee X for the first time exercises the functions of a governing body in BVI Ltd. B, 100% of which is held by foundation A. Who does professional trustee X have to identify as the beneficial owner of BVI Ltd. B?

According to Article 5(2) DDA, identification and verification of the identity of the beneficial owner (as well as the other due diligence obligations set out in Article 5(1) DDA) must be carried out when establishing a business relationship.

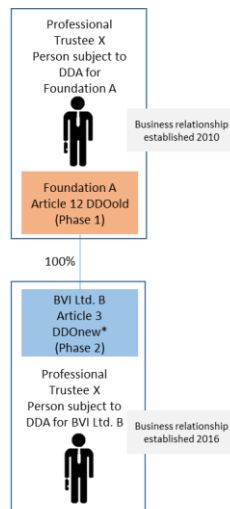
If, therefore, activities relevant to due diligence (e.g., functions of a governing body on a professional basis) are performed for a legal entity for the first time on or after 1 January 2016, then the rules applicable since 1 January 2016 to the identification of beneficial owners and thus the new, expanded definition of the term "beneficial owner" must be applied.

If activities relevant to due diligence are performed for several legal entities connected to each other through holdings (multilayer structure), then for the purposes of due diligence law, every legal entity must be treated as an independent business relationship.

In this example, professional trustee X established a business activity with the discretionary foundation A for purposes of the DDA for the first time in 2010 and obtained a written statement in accordance with Article 12 DDOold.

During 2016, professional trustee X established a business relationship with BVI Ltd. B, 100% of which is held by foundation A.





\*refers here to identification of founder, foundation council, protector, etc., of Foundation A as beneficial owner of BVI Ltd. B

Because the business relationship with BVI Ltd. B was established after 1 January 2016, the rules applicable after that cut-off date to the identification of beneficial owners and thus the new, expanded definition of beneficial owner must be applied. When identifying the beneficial owners of BVI Ltd. B, the principles set out in points 2.1 and 2.4 of the FMA Communication must be complied with:

More than 25% of the shares of BVI Ltd. B are held by foundation A. As an interim result, it is therefore deemed to be a beneficial owner of BVI Ltd. B. Because foundation A must also be considered as transparent, the beneficial owners of foundation A must be identified in accordance with Article 3(1)(b) DDOnew. These persons that must be identified under the new rules – founder, (category of) beneficiaries, foundation council, any protectors, and other controlling persons of foundation A – are thus as a final result deemed beneficial owners of BVI Ltd. B.

This identification does not have an impact on the due diligence obligations that professional trustee X has in relation to foundation A. The identification of the beneficial owner at BVI Ltd. B does not in principle necessitate a repetition of the identification of the beneficial owner at foundation A until 31 December 2018 or 31 December 2020 at the latest (see transitional provisions in Liechtenstein Law Gazette LGBl. 2017 No. 161). Such a repetition may only become necessary if there are doubts regarding the information contained in the statement pursuant to Article 12 DDOold.

However, professional trustee X is free, already upon determining the beneficial owner of BVI Ltd. B, to adjust the information on the beneficial owner of foundation A to the requirements that must be fulfilled by 31 December 2018 or 31 December 2020 at the latest (see transitional provisions in Liechtenstein Law Gazette LGBl. 2017 No. 161).

The principles outlined here also apply to banks, to the extent they perform activities relevant to due diligence for a legal entity on or after 1 January 2016 for the first time (e.g., opening of a bank account). In principle, it can be assumed that for each legal entity, there is only one business relationship (client relationship) per bank. But if a legal entity establishes several business relationships (client relationships) at a bank, then for those business relationships established on or after 1 January 2016, the rules applicable since 1 January 2016 to the identification of beneficial owners apply. That means that the new, expanded definition of the term "beneficial owner" must be applied to those business relationships.

### 3. Identification of the founder or settlor

#### 3.1 Deposits by third parties to a foundation

For the purposes of Article 3(1)(b)(1) DDO, those persons who have effectively (not on a fiduciary basis) deposited assets to the legal entity are deemed founders.

In principle, only persons who deposit assets to the legal entity at the time of its legally effective formation have to be identified as founders or settlors. This provision may not be used for purposes of abuse or circumvention, however (see also the comments on the abuse provisions in the AEOI fact sheet of the Liechtenstein Fiscal Authority<sup>3</sup>).

If there are indications that third parties might have influenced the drafting of the foundation deed, the supplementary foundation deed, or the regulations and deposit assets after formation of the legal entity, then these persons must be identified (additionally) as founders for the purposes of Article 3(1)(b)(1) DDO and thus as beneficial owners. These indications must be taken into account by the bodies subject to due diligence. The bodies subject to due diligence must immediately and without being requested to do so forward information on additionally identified founders to the banks maintaining a business relationship with the legal entity in question, using Form T.

The FMA furthermore draws attention to the obligations incumbent upon all persons subject to due diligence to engage in risk-adequate monitoring of the business relationship in accordance with Article 9 DDA and the obligation to engage in intensified monitoring in accordance with Article 11 DDA. When third parties deposit assets, it may therefore be necessary to obtain additional information on these third parties and to document them, even if the body subject to due diligence has not identified them as founders.

### 3.2 Deceased founders or settlors

Article 3 DDO does not differentiate between living and deceased founders and settlors (hereinafter for the sake of simplicity: founders). Excluding deceased founders would in principle not be compatible with the goals of the DDA and the DDO. It is the view of the FMA that while the deceased founder does not have to be treated as a beneficial owner in accordance with Article 3(1)(b)(1) DDO, detailed information on the deceased founder is nevertheless crucial, in part to assess the plausibility of the origin of assets and for the purposes of ongoing monitoring (e.g., checking against relevant media reports).

For the purposes of a risk-based approach, information on the deceased founder must be gathered as follows:

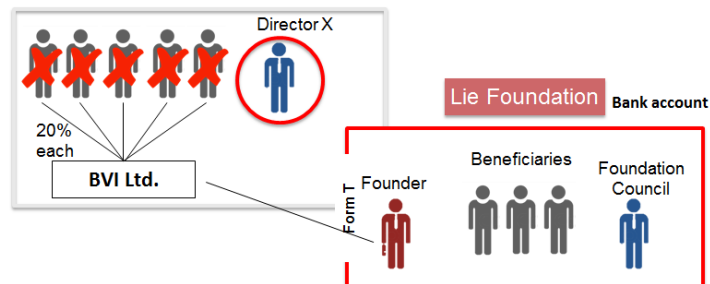
| <b>Founder deceased within the last 10 years</b>  | <b>Founder deceased more than 10 years ago</b>                |
|---|---|
| Last name   | Last name   |
| First name  | First name  |
| Date of birth   | <i>Date of birth (if available)</i>                           |
| Nationality   | <i>Nationality (if available)</i>                             |
| Last country of residence   | <i>Last country of residence (if available)</i>               |
| Date or year of death   | Date or year of death   |
| This information must be transmitted by the bodies subject to due diligence <u>by way of the form included in the Annex</u> to the banks maintaining a business relationship with the legal entity in question. For existing business relationships, this form must be transmitted at the time the beneficial owner is identified in accordance with DDOnew (LGBI. 2015 No. 250). | This information need only be recorded in the client profile. |

<sup>3</sup> <http://www.llv.li/files/stv/int-mb-aia-merkblatt.pdf>

|  |   |
|--|---|
| Name checking upon establishment of business relationship          | Name checking upon establishment of business relationship |
| Ongoing monitoring (e.g., checking against relevant media reports) | No ongoing monitoring                                     |

**3.3 Formation of a foundation by a corporation ("corporate settlor")**

BVI Ltd. is the legal and economic founder of the Liechtenstein foundation. BVI Ltd. has five shareholders A, B, C, D, and E, each of which holds 20% of the shares. The board of management of BVI Ltd. is composed of X, who serves as director.



Because the founder of the Liechtenstein foundation is a legal person, the foundation must be considered as transparent. Due to the fact that none of the shareholders of BVI Ltd. exceed the threshold of 25% and – exceptionally – nobody exercises control over the business management of BVI Ltd. in any other way, X (as the director of BVI Ltd.) is considered the beneficial owner after 31 December 2015. Form T can be used for documentation, indicating X as the founder. But the due diligence files must make it comprehensible for third parties that BVI Ltd. is the legal and economic founder, as well as the reason why the person subject to due diligence X has been identified as the beneficial owner of BVI Ltd. (see Article 11a DDO).

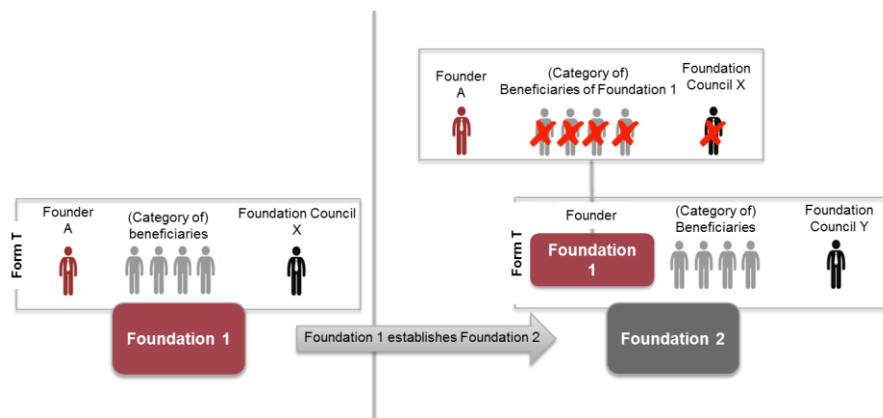
As already indicated under point 2.1, the FMA assumes that especially in the case of legal entities that primarily manage private assets, beneficial owners can generally be determined in the first or second step (shares of 25% or more or control in another way). Identification of the members of the governing body as beneficial owners should therefore be necessary only in exceptional situations.

It should furthermore be recalled that due to Article 8 DDA in conjunction with Article 20(1)(c) and (d) DDO, origin of the deposited assets and the financial background of the total assets (of the effective depositor) must be assessed in terms of plausibility and documented in the business profile. The assessment of the plausibility of the origin of the assets requires knowledge and documentation of the names, professions, and business activities of the effective depositors of the assets. The economic background and the origin of the assets should also be taken into account when assessing the risk of the business relationship in accordance with Article 11(1) DDA.

**3.4 Formation of a foundation by a foundation**

Liechtenstein foundation 1 is the legal founder of Liechtenstein foundation 2. A is the founder of Liechtenstein foundation 1, B to E are the beneficiaries, and X serves as the foundation council.

The following remarks assume that Liechtenstein foundation 1 and Liechtenstein foundation 2 are established after 1 January 2016.



Because the founder of Liechtenstein foundation 2 is a legal entity, it must be considered as transparent. Beginning on 1 January 2016, every founder, every beneficiary with a legal claim, and every body of a foundation is considered a beneficial owner. In the case of Liechtenstein foundation 1, the beneficial owners are persons A to E as well as X. All these persons would thus automatically be considered founders of Liechtenstein foundation 2 (irrespective of the economic circumstances. In this case, however, the FMA deems it sufficient to record founder A as the founder of foundation 2. In addition, the beneficiaries or the category of beneficiaries of foundation 2 as well as foundation council Y must be identified as beneficial owners of foundation 2 using Form T.

### 3.5 Criteria for classification as an "establishment with a structure similar to that of a foundation"

Independently of the interpretation under civil law, for the purposes of due diligence law an establishment is considered to have a "structure similar to that of a foundation" if it has beneficiary rules (generally internal regulations). This means that if beneficiaries have been designated, Article 3(1)(b) DDO applies to the determination of beneficial owners.

If the establishment is set up pursuant to a mandate assigned to a professional trustee, the beneficial client is to be considered the "effective founder" in accordance with Article 3(1)(b)(1) DDO.

If, alongside any beneficiary rules, founder's rights have also been specified, then the (beneficial) owner of those rights is to be considered a controlling person in accordance with Article 3(1)(b)(6) DDO. Additionally, of course, the persons referred to in Article 3(1)(b)(2) to (5) DDO must also be determined.

If no beneficiary rules exist, then organization as a corporation in accordance with Article 3(1)(a) DDO must be assumed. This applies irrespective of the legal presumption (in accordance with Article 545(1bis) PGR) that the owner of the founder's rights is a beneficiary, as long as no third parties have been appointed as beneficiaries. Finally, the owner of the founder's rights must be identified anyway pursuant to Article 3(1)(a) (according to the principles under point 2.1 of the FMA Communication).

The principles outlined above apply analogously to trust enterprises (Trust regs.).

### 3.6 Transfer of the founder's rights in the case of an establishment with a structure similar to that of a foundation

The beneficial owners of an establishment with a structure similar to that of a foundation were identified in accordance with the principles outlined under point 3.5. The founder's rights are then transferred at a later time. After the transfer of the founder's rights, the new (beneficial) owner of the founder's rights must be identified as the controlling person in accordance with Article 3(1)(b)(6) DDO. The previous owners of the founder's rights are to be kept documented in the due diligence file.

The transfer of the founder's rights does not lead to any change in the documentation of those persons who were identified at the time of formation as (effective) founders in accordance with

Article 3(1)(b)(1) DDO. In the case of founders who are already deceased, Article 11a(4) DDO and point 3.2 of this Communication apply.

### **3.7 Change in the beneficial owners of a corporate founder**

At the time the foundation was formed, a corporation served as founder. After the formation of the foundation, the beneficial owners of this corporation change.

For the purposes of Article 3(1)(b)(1) DDO, those natural persons must be considered founders who at the time of the formation of the foundation were beneficial owners of the corporate founder (with respect to deposits by third parties, see point 3.1 of the FMA Communication).

If the beneficial owners of the corporate founder change after the formation of the foundation (for example through the transfer of shares or through a change in the members of the governing body), this has no effect on the original identification of the founder within the meaning of Article 3(1)(b)(1) DDO. However, if control of the foundation can be exercised within the meaning of Art. 3(2) DDO, any new beneficial owners of the corporate founder must be identified as other controlling persons of the foundation within the meaning of Article 3(1)(b)(6) DDO.

## **4. Identification of the members of the foundation council, board of directors or, the trustee**

### **4.1 Corporation as member of the foundation council, board of directors, or trustee ("corporate trustee")**

According to Article 3(1)(b)(2) DDO, the "*natural or legal persons who are members of the foundation council or board of directors or of the trustee*" (italics added) must be identified as beneficial owners. In the case of a legal person that is a member of the foundation council or board of directors or of the trustee, it is sufficient to identify that person as a beneficial owner. In the present case, the corporation ("corporate trustee") therefore does not have to be considered as transparent, i.e., the ultimate beneficial owners of the corporation do not have to be identified. If, additionally, natural persons also serve as trustees, then they must be identified as beneficial owners in accordance with Article 3(1)(b)(2) DDO.

### **4.2 Liechtenstein members of the foundation council, board of directors, or trustee**

The obligations set out in Articles 11 and 11a DDO also apply with respect to members of the foundation council, board of directors, or trustee who reside in Liechtenstein.

## **5. Identification of the protectors**

### **5.1 Corporation as protector ("corporate protector")**

Yes. According to Article 3(1)(b)(3) DDO, "*any natural persons who are protectors or persons in similar or equivalent functions*" must be identified as beneficial owners. Accordingly, the corporation ("corporate protector") must be considered as transparent, i.e., in this case the natural persons must be identified who ultimately are beneficial owners of the corporation.

## **6. Identification of beneficiaries or category of beneficiaries**

### **6.1 Legal entities as potential beneficiaries of a discretionary foundation**

Some legal entities are potential beneficiaries of a discretionary foundation. How detailed must the potential beneficiaries be documented on Form T?

An abstract description (e.g., subtrusts A, B, C, and D) suffices to document potential beneficiaries on Form T. The potential beneficiaries must be documented on Form T under the point "Discretionary legal entities primarily established or operated in the interest of the following group of persons".

At the latest when a distribution is made, the natural persons must be identified on a separate Form D who are beneficial owners of the legal person receiving the distribution (see point 7.2).

## 6.2 Single person as potential beneficiary of a discretionary foundation

Only a single natural person is mentioned as the potential beneficiary of a discretionary foundation. Only the time or level of the distribution is at the discretion of the foundation council. Does this person have to be identified under Article 3(1)(b)(4) or 3(1)(b)(5) DDO?

From the perspective of due diligence law, this case can also be considered one of a discretionary beneficial interest, because according to prevailing case law, the potential beneficiary has not yet obtained any legal claim to the beneficial interest. The person must be identified in accordance with Article 3(1)(b)(5) DDO (group of persons in whose interest the legal entity is primarily established or operated).

## 6.3 Prospective beneficiaries

A person is a prospective beneficiary if, after a condition precedent has been met or a point in time has been reached, especially after elimination of a higher-ranked beneficiary, the person has a legal claim to a beneficial interest on the basis of the foundation deed, the supplementary foundation deed, or the regulations. Once the condition precedent has been met or the relevant point in time has been reached, prospective beneficiaries must be identified as beneficial owners within the meaning of Article 3(1)(b)(4) DDO, and this information must be transmitted immediately to other persons subject to due diligence with which a legal entity maintains a relevant business relationship (e.g., bank).

## 6.4 Identification of the beneficial owner of a purpose trust?

The trust law of some jurisdictions expressly provides the option of dedicating assets to a purpose without designating specified or specifiable beneficiaries (purpose trust).<sup>4</sup>

For such a purpose trust, it must be noted on Form T or in the due diligence files that there are no beneficiaries or categories of beneficiaries. Instead, the purpose of the purpose trust must be recorded (e.g., "Holding of the shares of Private Trust Company XY"). This is only permissible, however, to the extent that the trust law under which the trust in question was established expressly recognizes such purpose trusts.

Additionally, the following must be recorded on Form T:

- the effective (not fiduciary) settlor (point 1)
- the trustee (point 2)
- protectors or persons in similar or equivalent functions (e.g., enforcers) (point 3), and
- any natural persons who ultimately control the legal entity in another way (point 6).

In the case of a pure purpose trust, distributions might of course not be made to beneficiaries. If distributions nevertheless occur, any recipients of distributions must be identified using Form D.

## 7. Identification of recipients of distributions

### 7.1 Definition of "recipient of a distribution"

According to Article 2(1)(p) DDA, the recipient of a distribution is a discretionary beneficiary who receives an allotment from the assets or the proceeds of a legal entity established on a discretionary basis. This economic benefit may consist of both bankable and non-bankable assets. This is the person specified in the distribution resolution of the foundation council, trustee, etc., who in

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<sup>4</sup> In contrast, the stipulation of an entirely non-self-serving and specifically designated purpose of the foundation and of the beneficiaries is one of the *essentialia negotii* required for the legal formation of a foundation (see § 1(1) of the Foundation Law). Bearing this in mind, the following remarks are not applicable to Liechtenstein foundations. This means that in a Liechtenstein foundation, beneficiaries within the meaning of Article 3(1)(b)(4) DDO or the potential category of beneficiaries within the meaning of Article 3(1)(b)(5) DDO must be identified in all cases.

turn belongs to the category of potential beneficiaries within the meaning of Article 3(1)(b)(5) DDO.

## 7.2 Definition of "legal entity organised on a discretionary basis"

A legal entity organised on a discretionary basis (discretionary legal entity) as referred to in Article 7a DDA is a legal entity with one or more discretionary beneficiaries (see Article 2(1)(n) DDA). Discretionary beneficiaries are persons who belong to the category of beneficiaries specified by the founder or settlor and whose possible beneficial interest is placed within the discretion of the foundation council, the trustee, or another body appointed for this purpose. They do not have a legal claim to a beneficial interest. The term also includes persons whose beneficial interest is subject to the discretion of the foundation council or another body appointed for this purpose only in regard to time or level (see Article 2(1)(o) DDA).

## 7.3 Legal entity with beneficiaries with a legal claim as well as discretionary beneficiaries (without a legal claim)

Such a legal entity qualifies as a discretionary legal entity within the meaning of Article 7a DDA. Consequently, distributions to discretionary beneficiaries must be documented using Form D. On Form T, the beneficiaries with a legal claim must be documented as beneficial owners in accordance with Article 3(1)(b)(4) DDO, and additionally the category of beneficiaries must be described in the abstract.

## 7.4 Distributions to legal persons

The recipients of distributions to be identified on Form D must always be natural persons. If the recipient of the distribution is a legal entity, the legal entity must be considered as transparent in accordance with Article 3(1)(a) or (b) DDO (but see the facilitation under point 9.3). For distributions in 2016, the law applicable effective 1 January 2016 must be applied.

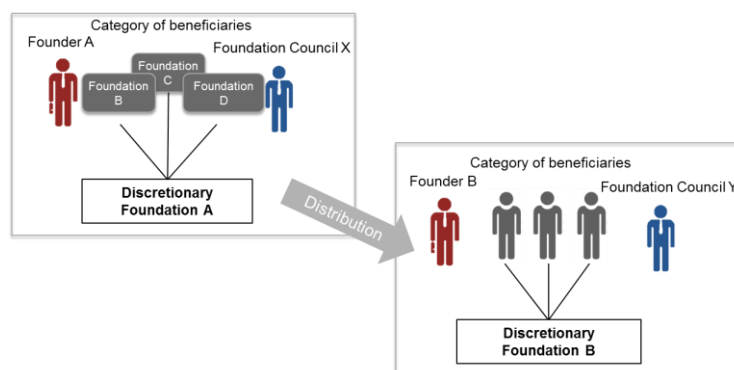
## 7.5 Distributions in the case of existing discretionary legal entities

The recipients of distributions have to be identified using Form D also in the case of existing discretionary legal entities in accordance with Article 12 DDOold.

This also applies in cases where a person has the possibility of controlling a discretionary legal entity in accordance with Article 3(2) DDO and that person has been identified as a beneficial owner in accordance with Article 3(1)(b) DDO.

## 7.6 Distribution to a discretionary foundation

A discretionary foundation A makes a distribution to the discretionary foundation B, which belongs to the category of beneficiaries. The group of persons in whose interest foundation B is primarily established or operated is described in the abstract (e.g., the descendants of Mr XY).



In the event of a distribution to foundation B, the beneficial owners of foundation B must be identified on their separate Forms D. The founder, the members of the foundation council, any protec-



tors, and any other persons exercising control must be identified using Form D. It is not necessary to identify the category of beneficiaries using Form D, because in this case, the category of beneficiaries has to be described only in the abstract. But the information may be necessary as part of ongoing risk-adequate monitoring in accordance with Articles 9 and 11 DDA.

### **7.7 Payout of a distribution to a third-party account**

A distribution is to be paid out to an account that is not in the name of the person specified in the resolution of the foundation council or on Form D. (Example: Payment to an account of a school for the settlement of education costs of the recipient of the distribution.) How should this be dealt with from the perspective of due diligence law?

It has to be documented why the payout is not being made directly to the person specified in the resolution of the foundation council or on Form D. For that purpose, the foundation council must provide the bank with sufficient information so that the payment is comprehensible to the bank and the bank can assess the plausibility of whether the payment to the third party economically benefits the person specified in the resolution of the foundation council or on Form D.

### **7.8 Multiple distributions within the same calendar year**

In the case of discretionary legal entities, the persons subject to due diligence must establish the identity of the recipient of the distribution at the time of payout, verify that identity, and record it on Form D. Optionally, this obligation may be fulfilled as follows in the case of multiple distributions per calendar year:

#### Case constellation 1:

In the case that at the time of the first distribution, the level of the distribution amount has already been specified by the resolution of the foundation council for the calendar year, but will be paid out in tranches, a person subject to due diligence may prepare a Form D in accordance with Article 7a(3) DDA at the time of the first distribution and transmit it to the bank upon prior consultation.

Form D must include the total amount, the amount of the individual tranches, and the distribution date. Upon payout of the tranches specified in the resolution of the foundation council, no additional Form D has to be prepared and transmitted to the bank. In the event of deviations from the originally specified amount or payment modalities, the persons subject to due diligence must immediately transmit a corrected Form D to the banks in accordance with Article 7a(3) DDA.

#### Case constellation 2:

If, in accordance with Article 7a(3) DDA, a person subject to due diligence assumes that several distributions per calendar year are made to the same recipient, but if the distributions are not specified in regard to level and time, the person subject to due diligence may upon prior consultation with the bank prepare a Form D at the time of the first distribution with the note "applies to distributions in the calendar year XXXX" and transmit it to the bank. At the same time, the expected level and expected times of the distributions shall be provided.

The distributions made thereafter shall be documented in accordance with the further resolutions of the foundation council. At the latest by the end of a calendar year, an updated Form D with the total amount must be transmitted to the bank. The obligation to transmit the total amount distributed per calendar year using an updated Form D is the responsibility of the person subject to due diligence referred to in Article 7a(3) DDA.

The approaches described here for dealing with multiple distributions (case constellations 1 and 2) are only permissible, however, to the extent that the relevant payouts are always made to the same account in the name of the person referred to in the first resolution of the foundation council or on the first Form D.

In the case of legal entities in which no domestic person subject to due diligence exercises a function, the person subject to due diligence must obtain a Form D at each time of payout.



The FMA furthermore draws attention to the additional obligation to engage in risk-adequate monitoring of the business relationship in accordance with Article 9 DDA and the obligation to engage in intensified monitoring in accordance with Article 11 DDA. Accordingly, the transactions carried out over the course of the business relationship must be subject to risk-based monitoring to ensure that they correspond to the business profile.

## 7.9 Definition of "distribution"

What should be classified as a distribution within the meaning of Article 7a(2) DDA? See the comments of the Fiscal Authority contained in the fact sheet on automatic exchange of information between the Principality of Liechtenstein and its partner countries (AEOI fact sheet of the Liechtenstein Fiscal Authority<sup>5</sup>).

In the case of transactions that are not considered distributions according to the fact sheet, Form D does not have to be completed. Irrespective of this, however, the obligations to engage in risk-adequate monitoring of the business relationship in accordance with Article 9 DDA and the obligation to engage in intensified monitoring in accordance with Article 11 DDA must be fulfilled. In the case of transactions that are not classified as dividends, it may therefore still be necessary to obtain and document additional information about the transaction recipients.

## 8. Signing of the forms

### 8.1 Signing of Forms C, T, and D

#### Forms C and T

The persons subject to due diligence must obtain confirmation of the accuracy of the information on the beneficial owners from the contracting party or a person authorized by the latter, by means of a signature (Article 11(2) DDO).

From the perspective of a bank, the contracting party is generally the legal entity represented by its bodies.

From the perspective of a professional trustee or a person with a 180a licence, a distinction must generally be made between two phases of the business relationship:

During the formation phase, the person must be considered the contracting party who assigns the mandate to establish the legal entity. Because the effective depositor of the assets is best acquainted with the relevant economic circumstances, the effective depositor should ideally be treated as the contracting party and requested to sign the forms. In principle, however, that person's (authorized) representative (e.g., a different domestic or foreign financial intermediary) may serve as a potential contracting party and thus as signatory of the forms.

After the formation of the legal entity, the legal entity itself – represented by its bodies – should generally be considered the contracting party. They are in the best position to assess who should be considered the beneficial owner of the legal entity in light of the relevant documents of the legal entity as well as the actual circumstances.

In the event of any amendments after the formation of the legal entity, the forms should thus be signed by the bodies. In principle, however, the representative of the effective depositor of the assets (e.g., a different domestic or foreign financial intermediary) may continue to serve as the contracting party. Accordingly, the forms would continue to have to be signed by the representative of the effective depositor of the assets.

It must at all times be clearly evident from the due diligence files what person has served as the contracting party at what time and thus has confirmed the accuracy of the information on the beneficial owners.

#### Form D

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<sup>5</sup> <http://www.llv.li/files/stv/int-mb-aia-merkblatt.pdf>

Form D must be signed by the bodies of the legal entity.

It should furthermore be recalled that the authorization of all persons must be verified who indicate that they are acting on behalf of a legal entity (Article 6(2) DDO).

## **8.2 Joint signing authority**

The contracting party is X PLC. According to the commercial register entry, A and B have joint signing authority for X PLC. Does Form C set out in Annex 1 DDO have to be signed by A and B, or is it sufficient if either A or B signs?

According to Article 11(2) DDO, the persons subject to due diligence must have the accuracy of the information confirmed by the contracting party or a person authorized by the contracting party by means of a signature.

It follows that Form C set out in Annex 1 DDO must be signed by a person who can legally represent the contracting party (see also the first sentence of Article 6(2) DDO). In this case, A and B must therefore sign Form C. But A and B may also authorize a person to sign the forms. This authorization would in turn have to be signed by A and B.

## **8.3 Forms to be signed in the case of foundations and trusts**

The person subject to due diligence must have the accuracy of the information on the identity of the beneficial owner confirmed by the contracting party or by a person authorized by the contracting party by means of an original signature.

The term "beneficial owner" was expanded by the recent amendment to the Due Diligence Ordinance and now covers all persons referred to in Article 3(1)(b) DDO in regard to foundations and trusts. The contracting party must therefore confirm the information referred to in Article 6(1)(a) DDO in regard to all relevant persons by means of a signature. In the case of a foundation, for instance, this encompasses the founder, the members of the foundation council, the protectors, the beneficiaries (or potential category of beneficiaries), and any persons who exercise control in another way. In regard to existing business relationships, the transitional provisions set out in LGBI. 2017 No. 161 apply.

## **9. Facilitations**

### **9.1 Regional body or authority serving as founder**

The founder of a foundation is a regional body or authority from an EEA Member State or Switzerland.

According to Article 3(1)(d) DDO, it is sufficient in the case of regional bodies or authorities from EEA Member States or Switzerland to identify the legal entity as the beneficial owner. In this case, it therefore suffices to document the regional body or authority as the founder (in addition to the other persons to be identified under Article 3(1)(b) DDO).

### **9.2 Legal entity majority-owned by a listed company subject to EEA-equivalent disclosure requirements**

According to Article 3(4) DDO, the identity of the beneficial owners does not have to be determined in the case of units or voting rights directly or indirectly held by legal entities and in respect of which the shareholding instruments are listed on a regulated market that is subject to disclosure requirements in conformity with EEA law or subject to equivalent international standards that guarantee adequate transparency of information concerning ownership.

This necessitates, however, that the existence of the preconditions referred to for application of Article 3(4) DDO must be documented in the due diligence files. This includes documentation of the name of the subsidiary and the listed parent company as well as the relevant stake.

If, in addition to the listed company, there are other persons who hold shares or voting rights of 25% or more in the subsidiary or otherwise exercise control, these persons must be identified in accordance with Article 3(1)(a) DDO as beneficial owners.

### **9.3 Exclusively common-benefit tax-exempt entity as entitled beneficiary or discretionary beneficiary (without legal claim)**

If the contracting party proves that the beneficiary or discretionary beneficiary (recipient of the distribution) is an exclusively common-benefit tax-exempt entity in the State of domicile within the meaning of Article 2(1)(b) DDA, then it suffices to identify the legal entity as the beneficiary on Form T or as the recipient of the distribution on Form D. Forms T or D and the proof of common-benefit activities and tax exemption must be provided by the contracting party to the person subject to due diligence. The proof must be documented in the due diligence files.

The FMA furthermore draws attention to the obligations incumbent upon all persons subject to due diligence to engage in risk-adequate monitoring of the business relationship in accordance with Article 9 DDA and the obligation to engage in intensified monitoring in accordance with Article 11 DDA. It may therefore be necessary even in the case of distributions to tax-exempt common-benefit legal entities to obtain and document additional information about the transaction recipients (e.g. distribution to a common-benefit, tax-exempt legal entity in countries with higher risk of terrorist financing, higher corruption risk, or countries against which sanctions, embargos, or similar measures have been imposed).

### **9.4 Legal entities held directly or indirectly by regional bodies, authorities, or institutions within the meaning of Article 3(1)(d) DDO**

In the case of legal entities held directly or indirectly by regional bodies, authorities, or institutions within the meaning of Article 3(1)(d) DDO, it is permissible to apply Article 3(1)(d) DDO *mutatis mutandis*.

Examples include:

- a public library held by a regional body;
- a non-listed bank in an EEA country or Switzerland held by a regional body;
- a telecommunications company held by a regional body.

In these cases, it suffices to identify the regional body (the legal entity) as the beneficial owner of the legal entity held.

If, in addition to the regional body, authority, or institution, there are other persons with shares or voting rights amounting to 25% or more of the legal entity or otherwise exercising control, they must be identified additionally as beneficial owners in accordance with Article 3(1) DDO.

Article 3(1)(d) DDO may also be applied in the case of contracting parties that are Liechtenstein citizens' cooperatives.

These remarks apply *mutatis mutandis* to legal entities held by legal entities as referred to in Article 3(1)(e) to (g) and (i) DDO. In the case of a subsidiary of a Liechtenstein or foreign bank meeting the requirements set out in Article 14(1)(b) DDA (equivalence), for example, it suffices to identify the holding bank (the legal entity) as the beneficial owner.

## **10. Transitional rules**

### **10.1 Change of or in the person of an existing legal entity**

According to the transitional provisions set out in Section II(6) of the Due Diligence Act in the version of 1 September 2017 (LGBl. 2017 No. 161):

"If the identification and verification of the identity of the beneficial owner has to be repeated in respect of existing business relationships commenced prior to the entry into force of this Act, the

persons subject to due diligence shall accomplish this in accordance with the new law." This means that if, in the case of a legal entity, the identification and verification of the identity of the beneficial owner (BO) has to be repeated, all relevant persons must be identified in accordance with the definition of beneficial owner in effect as of 1 September 2017 ("complete changeover at Level 2").

The following fact patterns require that the identification and verification of the identity of the beneficial owner be repeated:

- a) an existing, non-discretionary legal entity is converted into a discretionary entity after 31 December 2016
- b) in the case of an existing, non-discretionary legal entity, it is established after 31 December 2016 that it must be correctly qualified as a discretionary legal entity

From the interplay of Article 35a DDA, the aforementioned transitional provision, and FMA Communication 2015/7, it is thus evident that in the event of corrections and transformations of an existing legal entity, the new law applies to the entire legal entity, and the persons subject to due diligence may not permit any outflow of assets as long as the information and documents are not available that are required under the provisions of the due diligence law in force as of 1 September 2017.

Only in the following cases (based on the explanations of the Government regarding the amendment of the Due Diligence Ordinance (LGBl. 2015 No. 250) (motive report on Level 2)) do not necessarily all relevant persons have to be identified as beneficial owners under the provisions of the due diligence law in force as of 1 September 2017, but rather only those persons for whom a change occurs ("no complete changeover at Level 2"):

| BO according to Art. 3(1)(b) DDO   | Treatment under due diligence law  |
|--|--|
| Sponsors, founders, settlors   | <p>The <u>elimination</u> of an entitled beneficiary or controlling sponsor, founder, or settlor makes an establishment, trust, trust enterprise, or foundation discretionary. This fact pattern does not in principle<sup>6</sup> require that the identification of the beneficial owner be repeated. The deceased effective contributor (founder) must be documented using Form V and the category of beneficiaries as well as any protector, etc.,<sup>7</sup> using Form T, including the note "Disclosure under Level 1", and notified to the bank.</p> <p><u>Deposits from a third party</u></p> <p>Under the conditions specified in point 3.1 of the FMA Communication, a third party depositing assets with the legal entity after its legal formation is not a beneficial owner as defined in Article 3(1)(b) DDO. In that case, the fact pattern therefore does not require that the identification of the beneficial owner be repeated.<sup>6</sup></p>   |
| Foundation board/foundation council, board of directors, trustees, other members of governing bodies | <p><u>New appointment</u></p> <p>Only for the newly appointed member of a governing body must the identification of the beneficial owner be repeated using Form T under the DDAnew and documented accordingly. With respect to other already existing members of the governing bodies, protectors, sponsors, founders, settlors, beneficiaries, controlling persons, etc., the fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated.</p>   |
| Protectors or persons in similar functions (according to definition under due diligence law)         | <p><u>New appointment</u></p> <p>Only for the newly appointed protector or person in a similar function must the identification of the beneficial owner be repeated using Form T under the DDAnew and documented accordingly. With respect to other already existing protectors, members of the governing bodies, sponsors, founders, settlors, beneficiaries, controlling persons, etc., the fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated.</p>  |
| Beneficiaries  | <p><u>Elimination</u> of an entitled beneficiary (death, disqualification, relinquishment, resignation, fulfilment of beneficial interest, etc.)</p> <ul style="list-style-type: none"> <li>• Scenario 1: Succession of a new entitled beneficiary<br/>Only for the new entitled beneficiary must the identification of the beneficial owner be repeated using Form T under the DDOnew and documented accordingly. With respect to other already existing entitled beneficiaries, protectors, members of the governing bodies, sponsors, founders, settlors, other beneficiaries, controlling persons, etc., the fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated.</li> <li>• Scenario 2: According to the statutes/internal regulations, only discretionary beneficiaries now exist.<br/>This means the legal entity becomes discretionary. The fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated. The effective contributor, category of beneficiaries, as well as any protector, etc.,<sup>7</sup> must be documented using Form T, including the note "Disclosure under Level 1", and notified to the bank. If the effective</li> </ul> |

|   |  |
|---|--|
|   | contributor is deceased, Form V must be used.  |
| Category of beneficiaries                                 | Changes to the category of beneficiaries are in principle not be expected. If, pursuant to existing provisions in the statutes, entitled beneficiaries have been added, the new category of beneficiaries must be documented using Form T, including the note "Disclosure under Level 1", and notified to the bank. The fact pattern in principle <sup>6</sup> does not require the identification of the beneficial owner to be repeated.   |
| Persons exercising control as defined in Article 3(2) DDO | <p><u>Death / dismissal / relinquishment / new appointment</u></p> <ul style="list-style-type: none"> <li>• Scenario 1:<br/>Another controlling person is added: Only for the newly added controlling person must the identification of the beneficial owner be repeated using Form T under the DDAnew and documented accordingly. With respect to other controlling persons, protectors, members of the governing bodies, sponsors, founders, settlors, beneficiaries, etc., the fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated.</li> <li>• Scenario 2:<br/>No person exercises control, there is no beneficiary with a legal claim, and the legal entity becomes discretionary. The fact pattern in principle<sup>6</sup> does not require the identification of the beneficial owner to be repeated. The effective contributor, category of beneficiaries, as well as any protector must be documented using Form T, including the note "Disclosure under Level 1", and notified to the bank. If the effective contributor is deceased, Form V must be used.</li> </ul> |
| Discretionary legal entity under Article 12 DDOold        | The effective contributor or protector, etc., dies or is eliminated, and no new protector is appointed. <sup>7</sup> The fact pattern in principle <sup>6</sup> does not require the identification of the beneficial owner to be repeated. The fact pattern must be notified to the bank in an appropriate form.  |

## 10.2 Change of country of residence of the effective depositor

In the case of an existing discretionary legal entity, the country of residence of the effective depositor identified in accordance with Article 12(1)(a) DDOold has changed. Does the new Form T have to be used to record the change of address?

The change of the country of residence of the effective depositor identified in accordance with Article 12(1)(a) DDOold in principle does not necessitate a repetition of the identification and verification of the identity of the beneficial owner for purposes of the transitional provision in LGBl. 2017 No. 161. The change of the country of residence therefore does not require use of the new Form T set out in Annex 1 of the DDO. However, the change of the country of residence must be documented immediately in the due diligence files.

The comments above apply to the extent there are no suspicious facts as referred to in Article 9(4) DDA that would necessitate special clarifications and thus supplementation of the due diligence files in accordance with Article 39(3) DDA.

<sup>6</sup> But the person subject to due diligence is also free to repeat the identification of all beneficial owners of a legal entity in accordance with the provisions set out in DDOnew ("Level 2"). At the latest upon expiry of the transitional periods set out in the transitional provisions contained in Section II(7) and (8) of the Due Diligence Act in the version of 1 September 2017 (LGBl. 2017 No. 161), this identification becomes mandatory. Upon expiry of the transitional periods in 2018 and 2020, Article 35a(2) and (3), respectively, must be observed.

<sup>7</sup> Personal roles for discretionary legal entities determinable under Article 12 DDOold.

### **10.3 Existing discretionary legal entity is an entitled beneficiary, controlling person, or shareholder of an existing legal entity**

If the entitled beneficiary, controlling person, or shareholder of an existing legal entity is an existing discretionary legal entity, the persons to be recorded pursuant to Article 12 DDOold (effective contributor, category of beneficiaries, protector where applicable, etc.) must be documented in the due diligence file until identification and verification of the beneficial owners at Level 2.

If, for example, shares in an existing public limited company are held by an existing discretionary foundation, all persons of the foundation to be recorded under Article 12 DDOold must be documented in the due diligence file until identification and verification of the beneficial owners of the public limited company at Level 2. This is also applicable, for instance, if the owner of the founder's rights of an establishment is an existing discretionary foundation.

### **10.4 Identification and verification of the identity of beneficial owners in the case of existing business relationships to which enhanced due diligence under Article 11 DDA is applicable**

According to the transitional provisions set out in Section II(7) of the Due Diligence Act in the version of 1 September 2017 (LGBI. 2017 No. 161), the identification and verification of the identity of the beneficial owners in existing business relationships that were commenced prior to 1 January 2016, and to which enhanced due diligence as referred to in Article 11 is applicable must be repeated no later than 31 December 2018, in accordance with the due diligence legislation in effect on 1 January 2016.

The FMA further specifies that this rule applies exclusively to business relationships referred to in Article 11(4) to (6) DDA, to which enhanced due diligence automatically applies. It does not apply to business relationships to which enhanced due diligence is applicable solely on the basis of the individual risk assessment (taking into account the criteria mentioned in the Annex to the DDA and FMA Guideline 2013/1 on the risk-based approach). The latter must be dealt with no later than 31 December 2020, unless events already occur at an earlier time that necessitate a repetition of the identification and verification of the identity of the beneficial owners (see point 10.1).

## **11. Special aspects**

### **11.1 Receipt and forwarding of assets for third parties (service companies)**

Please note that the provision of payment services in Liechtenstein as a business activity is reserved to payment service providers as defined in Article 3(1)(21) of the Payment Services Act (ZDG). A payment service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee, may therefore require a licence.

This depends on the particular circumstances of each case. In this regard, please also refer to the explanations provided in FMA Communication 2013/9 (Communication on the Payment Services Act of 17 September 2009).

The following remarks concern the specific due diligence obligations in the case of transactions carried out via the account of a service company from the perspective of the banks involved as persons subject to due diligence.

Under Article 2(1)(e) DDA, a natural person on whose initiative or in whose interest a transaction is ultimately carried out is considered the beneficial owner. In the case of legal entities, the beneficial owner is also the natural person in whose possession or under whose control the legal entity ultimately is situated. In the case of a bank account, if assets are received and forwarded on the



initiative of a third party (fiduciary acceptance and forwarding of third-party assets), that person must also be identified as a beneficial owner (generally referred to as "beneficial owner of the transaction").

In the event of a payment being made on the initiative of (on behalf of) a natural person via a service company, Form Y (see Annex) may be used. Form Y covers the legal minimum requirements. Alternatively, a bank's own form may also be used, provided that it covers the legal minimum requirements.

On a supplementary basis, the FMA refers here to the Fiscal Authority's AEOI fact sheet in connection with AEOI due diligence as well as to Annex 3 of the Due Diligence Ordinance containing "Indicators of money laundering, organised crime and financing of terrorism".

The following examples are intended to illustrate which documentation must be made available to the bank executing the transaction in a given case by the other involved persons subject to due diligence, in addition to identifying the beneficial owner of the service company, so that due diligence obligations can be properly fulfilled.

**Example 1:** A foundation decides to make a discretionary distribution. The payout is to be transferred to the beneficiary's account on behalf of the distributing legal entity via a fiduciary account (e.g. service company). The transaction is therefore ultimately carried out on the initiative of (i.e. on behalf of) the distributing legal entity. Therefore, Form T must also be obtained for the distributing entity. In the case of a discretionary beneficiary (recipient of the distribution), Form D must be obtained in addition to Form T.

**Example 2:** On a fiduciary account (e.g. service company), the purchase price of a real estate transaction is received on a fiduciary basis from Person A. The purchase price is then to be forwarded to Person B (real estate seller) for the purpose of payment. The forwarding of the payment relating to the real estate transaction is ultimately on the initiative of (i.e. on behalf of) Person A. Person A must therefore also be recorded as a beneficial owner using Form Y (in the case of a legal entity, at least Form C or T must be obtained).

**Example 3:** Person B receives brokerage commissions from an art trade from Person A. Person B instructs the service company to accept this brokerage commission on a fiduciary basis and then transfer it to an account of Person B. In this case, the transaction is ultimately carried out on the initiative of (i.e. on behalf of) Person B. Person B must therefore also be recorded as a beneficial owner using Form Y (in the case of a legal entity, at least Form C or T must be obtained).

In summary, it can be said in simple terms that the bank executing the transaction must, in addition to the due diligence documentation regarding the service company, also have the due diligence documentation regarding the beneficial owner of the transaction at its disposal. This means that due diligence must additionally be performed as if there were no service company as an intermediary and as if the bank were to manage the account of the beneficial owner of the transaction (or of the beneficial owner's legal entity) itself.

## **11.2 Accounts or custody accounts exempt from the obligation to identify and verify the identity of beneficial owners according to Article 22b(4) DDO**

According to Article 22b(4) DDO, banks and investment firms (under the Banking Act) may in the case of a lawyer or law firm authorised under the Liechtenstein Lawyers Act and legal agents as defined in Article 108 of the Lawyers Act be deemed to have performed the obligation referred to in Article 7(1) and (2) of the DDA if the lawyer or legal agent confirms in a declaration made in writing that the accounts or deposits exist purely to serve one of the following purposes:



- a) settlement and, if applicable, short-term investment in association therewith of advance payments on court costs, security deposits, taxes and duties payable under public law (identified for example as "Advance payments on court costs, security deposits, taxes and duties payable under public law");
- b) deposit and, if applicable, investment in association therewith of assets from a pending inheritance distribution or execution of a will (identified for example as "Deceased estate" or "Inheritance distribution");
- c) deposit/investment of assets from a pending division of property in a divorce or separation (identified for example as "Division of property divorce");
- d) security deposit/investment of assets in civil-law or public-law matters (identified for example as "Blocked deposit share purchase", "Security deposit contractor's deposit", "Security deposit real estate gains tax");
- e) security deposit/investment of assets in civil-law or public-law matters before ordinary courts or arbitration tribunals and in proceedings of enforcement law (identified for example as "Advances", "Provision of security bail bonds", "Bankruptcy estate", "Arbitration tribunal proceedings").

The bank or investment firm must label the accounts or custody accounts in accordance with the above categories (see Article 22b(5) DDO). The notary, lawyer, or legal agent must confirm in a written declaration that the account or custody account in question serves exclusively one of the above-mentioned purposes.

Payments between parties or third parties (formerly: "Client funds processing account/custody account") no longer fall within the scope of the rule set out above. The designation "Escrow account/custody account" (see point (d) above) is also no longer provided for.



**Form for information concerning a deceased founder or settlor (Form V)**

Legal entity or account holder:  
.....  
Mandate or account number:  
.....

The following natural person was an effective (not fiduciary) founder or settlor of the legal entity referenced above:

Last name .....  
First name .....  
Date of birth .....  
(Last) residence .....  
Date/year of death .....

Place/date: .....

For the contracting party .....

Name(s) of the signatory/ies:  
.....

Deliberately providing false information on this form is a punishable offence under the Liechtenstein Criminal Code. The person subject to due diligence is to be informed of any amendments immediately.



**Form for the identification of the ultimate beneficial owner regarding the fiduciary receipt and transfer of assets for third parties\* (natural persons) (service companies) (Form Y)**

Legal entity or account holder:

.....

Mandate or account number:

.....

The following natural person has been identified as beneficial owner regarding the fiduciary receipt and transfer of assets for third parties:

Last name .....

First name .....

Date of birth .....

Nationality .....

Residential address .....

Postcode/ Town .....

Country of residence .....

Place/date: .....

For the contracting party

.....

Name(s) of the signatory/ies:

.....

\* In the event that assets are received and transferred in trust on the initiative or in the interest of a legal entity, the identification of the beneficial owner must be carried out by using Form C or T/D.



**Abbreviations:**

|                              |   |
|------------------------------|---|
| <b>DDOold</b>                | Due Diligence Ordinance in the versions before 1 January 2016 (through LGBl. 2015 No. 249)    |
| <b>DDO or DDOnew</b>         | Due Diligence Ordinance in the versions from 1 January 2016 (from LGBl. 2015 No. 250)         |
| <b>existing legal entity</b> | legal entity with which a business relationship was established already before 1 January 2016 |

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