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GUIDELINES FOR REGULATED ENTITIES

GUIDELINES FOR THE REGISTRATION OF SERVICE PROVIDERS TO COMPANIES AND TRUSTS.

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GUIDE TO THE REGISTRATION OF SERVICE PROVIDERS TO COMPANIES AND TRUST-TYPE TRUSTS.

I. INTRODUCTION

Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of Money Laundering and Terrorist Financing sets out the persons and entities which, by virtue of their activities, should be subject to the obligations relating to Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT).

Thus, Article 2(1)(3)(c) includes among such persons natural or legal persons who, in the course of their professional activities, provide services to companies and trusts.

Furthermore, Article 3(7) of the Directive stipulates that persons who, on a professional basis, provide the following services to third parties are deemed to be service providers to companies or trusts:

a) The incorporation of companies or other legal entities.
b) Acting as a director or secretary of a company, a member of an association, or performing similar functions in relation to other legal persons, or arranging for another person to perform such functions;
c) the provision of a registered office or a business, postal or administrative address, and other related services to a company, an association or any other legal person or structure;
d) acting as a trustee in an express trust or similar legal arrangement, or arranging for another person to perform such functions;
e) acting as a nominee shareholder on behalf of another person, except in the case of companies listed on a regulated market and subject to disclosure requirements under EU law

or equivalent international standards, or to arrange for another person to perform such functions.

Meanwhile, Article 47(1) of Directive 2015/849 of 20 May provides that "Member States shall ensure that providers of services for the exchange of virtual currencies for fiat currencies and providers of electronic wallet custody services are registered, that exchange offices, cheque clearing houses and providers of services to trusts and companies are authorised or registered, and that gambling service providers are regulated."

Royal Decree-Law 11/2018 of 31 August, transposing directives on the protection of pension commitments to employees, the prevention of Money Laundering and entry and residence requirements for third-country nationals, and amending Law 39/2015 of 1 October, on the Common Administrative Procedure of Public Administrations transposes the aforementioned Directive, partially amending Law 10/2010 of 28 April on Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) (hereinafter, Law 10/2010 of 28 April).

Consequently, Article 2.1(o) of Law 10/2010 of 28 April was amended in two respects: the phrase 'services to third parties', which was used in the previously applicable version of the article, has been replaced by 'services on behalf of third parties', and the phrase 'management or secretarial functions of a company' has been replaced by 'management functions or those of non-director secretaries of the board of directors or external advisers to a company'.

In addition, the Sole Additional Provision of Law 10/2010 has been reworded; in compliance with the provisions of Article 47 of Directive (EU) 2015/849 of 20 May 2015, on the prevention of Money Laundering, imposes on natural or legal persons who, in a commercial or professional capacity, provide all or any of the services described in Article 2(1)(o) the obligation to be entered in a register of service providers to companies and trusts – which must be done by means of their registration in the Commercial Register – and to submit an

on their provision of such services, containing the information listed in the Additional Provision itself.

Furthermore, the Instruction of 30 August 2019, issued by the Directorate-General for Registries and Notaries, set out guidelines on the registration in the Commercial Register of professional natural persons who provide the services described in Article 2.1.o) of Law 10/2010 of 28 April, setting out the technical specifications and content of the online declaration they must use for their registration as providers of these services.

II. PURPOSE

The regulatory framework of both the European Union and the Spanish transposing legislation set out above could give rise to differing interpretations regarding the scope of the registration obligation in certain cases.

The purpose of this guide is to clarify the scope of services provided to companies and trust-type entities that give rise to the registration obligation in accordance with the provisions of the sole additional provision of Law 10/2010 of 28 April.

It also aims to clarify in which circumstances the registration obligation falls on the individual or the legal person for whom the professional provides their services.

All of this is intended to facilitate compliance with the registration obligation and to provide operators with greater legal certainty.

III. NATURAL AND LEGAL PERSONS REQUIRED TO REGISTER.

Legal entities.

Generally speaking, legal entities providing the services set out in Article 2.1.o) of Law 10/2010 of 28 April must register with the Register; it is not necessary for each of the professionals employed by the company to register individually.

The legal concept of a professional firm takes on particular significance, in that in such firms the service is provided by the firm itself, under its financial and professional liability, employing for this purpose the professionals who form part of its organisation, as partners or employees, such that these professionals merely provide the service in the name and on behalf of the professional firm. In such cases, it is the professional partnership itself—and not the professionals working within it—that falls under paragraph 2.1.o) and is subject to the resulting registration and reporting obligations.

Conversely, it is the professional partners who are subject to the provisions of Article 2.1.o) when the professional firm is structured as a mere vehicle, resource or intermediary entity, such that the professionals provide services to their clients in their own name, issue the corresponding invoices in the partners' own names and under their own professional liability, whilst the firm's role is limited to acting as an intermediary between the professional partners and clients and/or to providing the professionals with the means to practise their profession.

The legal entities referred to, with the exception of those mentioned in relation to professional companies of an instrumental or resource-providing nature, must be registered as a company in the Commercial Register, if they are not already so, and must also make a declaration in that Register stating that they carry out the activities set out in Article 2.1(o), which means that when filing their annual accounts, they must also submit the annual declaration containing the information specified in the Sole Additional Provision of Law 10/2010 of 28 April.

Natural persons.

The following must register as individuals:

- self-employed individuals, and
- natural persons practising a professional occupation. The latter are exempt only if they provide their professional services within a duly registered professional partnership, in accordance with the terms set out above.

Professional natural persons must register with the Register exclusively online for the purposes of submitting their declaration, using the pre-established form approved by the Minister of Justice, and must not submit their annual accounts, but only the annual declaration provided for in the Additional Provision, in accordance with the terms set out in the Instruction of 30 August 2019, the Directorate-General for Registries and Notaries, concerning the registration in the Commercial Register of professional individuals providing the services described in Article 2.1.o) of Law 10/2010 of 28 April, and any other orders, instructions or resolutions that may be issued by the Ministry of Justice in the future.

IV. SERVICES WHOSE PROVISION REQUIRES REGISTRATION OF THE PROVIDER.

The following persons are subject to the registration requirement: those who, on a professional basis, provide certain services on behalf of third parties as set out in Article 2.1.o) of Law 10/2010. These services can be grouped into five categories:

1. Incorporating companies and other legal entities.

2. Performing management, secretarial or external advisory functions (equivalent to secretarial functions) for a company, a member of an association, or similar functions in relation to other legal entities.

3. Providing a registered office or a business, postal or administrative address, and other related services to a company, an association or any other legal entity or person.

4. Acting as a trustee in a *trust* or similar legal arrangement.

5. Acting as a shareholder on behalf of another person, with the exception of companies listed on a regulated market within the European Union and subject to disclosure requirements in accordance with EU law or equivalent international standards that ensure adequate transparency of information regarding ownership.

In any event, the registration obligation applies to all persons providing this type of service, regardless of whether they are already subject to Law 10/2010 of 28 April under any other category of obliged entities.

Conversely, professionals providing the services listed in the other paragraphs of Article 2 are not, by virtue of

providing them, subject to the registration obligation imposed (without prejudice to their being required to register due to the provision of the services included in paragraph (o) mentioned above).

Thus, the following do not in themselves give rise to the registration obligation, as they are not covered by Article 2.1(o) of Law 10/2010: insurance and insurance brokerage services relating to investments; investment services; the management of collective investment undertakings and investment companies, pension funds, venture capital entities and venture capital companies; mutual guarantee societies; payment and electronic money services; currency exchange activities; money order or transfer activities; loan or credit intermediation and other related activities referred to in the legislation; property promotion, agency, commission or brokerage; auditing of accounts, external accountancy or tax consultancy (*even if these last two services are provided, as is often the case, on behalf of the company – that is, acting in place of the company's accounting or tax department*); notaries and registrars of property, commercial and movable property; lawyers, solicitors or other independent professionals who advise on or participate in transactions on behalf of clients relating to the sale and purchase of immovable property or commercial entities, the management of funds, securities or other assets, the opening or management of current accounts, savings accounts or securities accounts, the organisation of the contributions necessary for the creation, operation or management of companies or trusts, partnerships or similar structures, or when acting on behalf of clients in any financial or property transaction; professional trading in jewellery, precious stones or metals, works of art or antiques; the contracting of goods with an offer to refund the price (Article 1 of Law 43/2007 of 13 December); the professional deposit, safekeeping or transport of funds or means of payment; the transfer of means of payment; the management of payment systems and of clearing and settlement systems for securities and derivative financial products; the management of credit or debit cards; etc., in accordance with the terms of the aforementioned Article 2.

Provision of services on behalf of third parties

Before analysing the different types of services that give rise to the registration obligation, it is necessary to examine the concept of the provision of these services 'on behalf of third parties' and the scope of that concept.

'On behalf of third parties' is an indeterminate legal concept, which has been repeatedly defined in social case law, amongst other characteristics, by the fact that in such a relationship the service provider delivers or makes available to the employer the goods produced or services rendered; decisions concerning market relations and their management are taken by the employer and not by the service provider; the calculation of remuneration or its main components in accordance with criteria that bear a certain proportion to the activity performed, and the absence of the risk and special profit that characterise the employer's activity or the independent practice of the professions (Supreme Court Judgements of 7 October 2009, 24 January 2018, etc.)

Consequently, services that are integrated within the organisation of the company or entity receiving them are considered to be provided as an employee, or on behalf of another; the service is therefore generated by and for the company, but utilises the work of the self-employed professional, who is contracted to carry out that work within the company's planning and organisation, with a greater or lesser degree of dedication, but on a regular basis.

Services provided by public officials in their capacity as directors or secretaries to companies and entities within the public sector to which they belong shall not be deemed to be provided on behalf of third parties, whether or not such services are remunerated.

Incorporation of companies and other legal entities

This provision does not cover the provision of advice or support to a specific client regarding the incorporation of legal entities (which would be covered by Article 2.1.ñ), but rather aims to cover situations in which the

service provider incorporates companies directly and in their own name, or in the name of third parties other than the end client, which are subsequently resold to a third party. This service includes cases where the incorporation and subsequent sale to the client are agreed in advance with the client, but also cases where companies are incorporated without a prior mandate from a third party but with the ultimate aim of selling them.

Performing the functions of a director or non-executive secretary on a company's board of directors, or acting as an external adviser to a company, or as a member of an association, or performing similar functions in relation to other legal entities, or arranging for another person to perform such functions.

Firstly, it should be clarified that the reference to external consultancy is intended to clarify the concept of the provision of secretarial services to third parties, to prevent this from being confused with purely technical functions performed within the board of directors or with functions that are auxiliary to or concomitant with those of the entity's directors. Thus, Article 2.1.o) of Law 10/2010, when interpreted in accordance with European law, must be understood – given its nature as a provision transposing Directive (EU) 2015/849 – in line with the cases listed therein, and not through a broad interpretation encompassing all instances of external professional services provided to companies.

Consequently, this reference in no way implies the creation of a new service giving rise to an obligation to register; therefore, the mere external provision of legal, financial or other advisory services does not give rise to an obligation to be entered in the register, which is required only of so-called company secretaries or persons who actually perform functions similar to those of a company secretary. This situation may arise, for example, in relation to companies lacking complete and established corporate structures, or in the case of SICAVs, where the secretarial functions may occasionally be carried out by the management company or one of its employees.

Generally speaking, a company's board of directors has two types of functions or powers: representative functions, involving the mere execution of acts and the formalisation of transactions with legally binding effect for the company vis-à-vis third parties; and management functions, involving the organisation and execution of the decision-making process within the company. However, in cases where the work of an external adviser takes on a scope comparable to that of carrying out organic functions of management, business leadership or secretarial duties for the board of directors—to a greater or lesser extent—the organic nature of such a function becomes sufficiently significant to fall within the scope of Article 2.1(o), and therefore gives rise to the obligation to register.

Furthermore, in more general terms, in all cases where, under the guise of providing a professional service, the full management function of the entity is exercised (in the capacity of an insolvency administrator, trustee, etc.), the person providing the service falls within the scope of Article 2.1.o) and is consequently obliged to register in the special register and to submit the annual declaration.

It should also be noted that consultancy services are characterised by their external nature under the terms of the Law: consequently, those who, whilst acting as registered professionals, are linked to the company by an employment relationship are not subject to the registration requirement. Consequently, individuals acting as directors, board members or secretaries of a legal entity who are directly employed by that legal entity to hold such a position on a permanent or continuous basis, and who have an employment relationship with the company, are not required to register. Only those individuals employed by others to provide this service on a professional and regular basis, filling such positions in organisations lacking a fully developed structure, are required to register.

The concept of 'professionalism', as used in Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of Money Laundering and Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) and Law 10/2010 of 28 April, also requires clarification, particularly in relation to the role of secretaries to boards of directors. In this regard, it should be understood that

a natural person provides secretarial services on a professional basis when they carry out this activity for two or more companies during the financial year.

With regard to the reference to 'arranging for another person to perform such functions', this refers to cases in which the provision of the service in question is carried out by a third party whom the provider of services to companies and trusts appoints unilaterally, and where there is under no circumstances a direct contract between the appointed person and the client. Consequently, companies that provide recruitment and candidate-sourcing services for direct employment by the company in which the candidates are to work (recruitment agencies or headhunters) should not be considered to fall within this category.

Notwithstanding this, the provision of such services to legal entities forming part of the same business group as the provider is exempt from registration, as it is regarded as the provision of internal services.

Providing a registered office or a business, postal or administrative address, and other related services to a company, an association or any other legal entity or person.

The registration obligation applies to natural or legal persons providing registered office, postal or administrative address services (including tax domicile), regardless of:

- whether or not the service is included in the provider's corporate purpose, and
- whether it forms part of a package of services including tax or legal advice or is provided on a stand-alone basis.

This definition does not include cases where a registered address is provided solely for the purposes of service of process.

Excluded from this definition is the provision of office or space rental services for use by professionals or businesses, whether on a temporary or

intermittent, provided that such a rental service does not include any of the services described in the first paragraph.

Acting as a trustee in a trust or similar legal arrangement, or arranging for another person to act in that capacity.

This refers to the provision of services for the management and administration of the assets constituting the trust in accordance with the purposes and circumstances set out in the trust deed.

Consequently, this definition does not include cases where advisory services are provided for the establishment of a trust. This function is, however, covered by the Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) regulations, within the scope of the obliged entities referred to in Article 2.1.ñ) of Law 10/2010.

With regard to the reference to 'arranging for another person to perform such functions', this refers to cases where the provision of the service in question is carried out by a third party whom the provider of services to companies and trusts designates unilaterally, and where there is under no circumstances a direct contract between the designated person and the client; this third party may or may not be an employee of the service provider.

To perform shareholder functions on behalf of another person, with the exception of companies listed on a regulated market within the European Union and subject to disclosure requirements in accordance with EU law or equivalent international standards ensuring adequate transparency of information on ownership, or to arrange for another person to perform such functions.

With regard to the reference to 'arranging for another person to perform such functions', this refers to cases where the provision of the specified service

is carried out by a third party whom the provider of services to companies and trusts appoints unilaterally and without there being, under any circumstances, a direct contract between the appointed person and the client; this third party may or may not be an employee of the service provider.