

New anti-money laundering rules affect bearer shares in Swiss companies

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Regulation

In 2012 the Financial Action Task Force (FATF) – an inter-governmental body whose member jurisdictions represent the world's most important financial centres⁽¹⁾ – issued revised recommendations for the fight against money laundering, terrorism funding and other dangers to international financial market integrity.

To meet these standards, Switzerland – a FATF member – modified its company and anti-money laundering legislation. On July 1 2015 a new regime for bearer shares in Swiss companies was enacted, which aims at increasing ownership transparency. The regime introduced new legal obligations for Swiss company boards and shareholders and severe penalties for non-compliance. As a result, immediate action is required.

Facts

Before July 1 2015 Swiss company law provided for no mechanism to identify and control beneficial ownership of Swiss legal entities with bearer shares. Holders of bearer shares could remain unknown, even to the board of the company which they owned. However, pursuant to FATF Recommendation 24, the following should now be newly implemented:

"Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities... countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing."

To achieve this, FATF has established four examples of potential measures:

- abolition of bearer shares;
- conversion of bearer shares into registered shares;
- immobilisation of bearer shares through the deposit in the hands of financial intermediaries; and
- obligation for major shareholders (of 25% or more) to disclose their ultimate beneficial owners.

New law

New information duties

To achieve transparency the new Article 697i of the Code of Obligations has established a general

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duty for all owners of bearer shares (and participation certificates) in non-listed Swiss companies to disclose their ownership, identity (ie, surname, family name in case of natural persons or business name in case of entities) and address to the company within one month of their acquisition or if the following changes occur:

- As there is no minimum threshold, the transfer of a single share will lead to these legal notification duties. Under FATF Recommendation 24, the transfer of a bearer share warrant must be characterised as such transfer. On receipt of such notifications, the Swiss company (ie, board members) are legally bound to maintain and update a shareholder registry for bearer shares.
- If, in addition to the above, a threshold of 25% or more of the share capital (including warrants) or voting rights in a Swiss company are acquired alone or jointly, the ultimate beneficial owner(s) of the shares (ie, the natural persons directly or indirectly behind a legal entity or nominee shareholder owning such shares and all changes thereof) must be notified to the Swiss company. This means that it is no longer possible to hide the identity of their ultimate indirect natural person owner.

Shareholders (including ultimate beneficial owners where applicable) must prove their identity (by passport for natural persons or by a commercial registry excerpt for Swiss entities or foreign equivalent documentation for foreign entity shareholders). The Swiss authorities must have access in Switzerland to the shareholder registry and related identity documentation on request at any time.

For bearer shares, the general assembly of shareholders of a Swiss company may waive the legal duty to directly notify the Swiss company and appoint a financial intermediary under the Swiss anti-money laundering legislation for this purpose (Article 697k of the Code of Obligations). In such a case, all notifications of bearer shareholders will go to such financial intermediaries, which in turn limit the notification of the Swiss company as to which bearer shares are entitled to exercise their shareholder rights. This way, holders of bearer shares can remain anonymous for the Swiss company, but not for the Swiss authorities. All shareholder registry documents must be stored for 10 years by the company or financial intermediary.

The above notification obligations are not applicable to Swiss companies listed in Switzerland or abroad. For such companies, the Swiss stock exchange law requires disclosure of:

- the ultimate natural persons involved;
- when shares, voting rights or warrants in 3% (or more) of a Swiss-listed company are acquired or sold; and
- all changes to such holdings (Article 663c of the code).

New penalties and their enforcement

In case of non-compliance, Swiss company law provides for civil law penalties and remedies, but not criminal ones. Board members should be aware of the following:

- All membership rights in Swiss companies may not be exercised for as long as a shareholder is not compliant with the above legal duties. This primarily affects the voting rights in the general meeting of shareholders, as well as shareholder control rights and information rights in Swiss companies. A general assembly resolution in which non-compliant shareholders have wrongfully participated may, as a remedy, be challenged in court by any other shareholder.
- Financial shareholder claims may not be raised against Swiss companies for as long as the company or the financial intermediary (in case of bearer shares for which the above general assembly waiver in favour of a financial intermediary has been made) is not duly informed and documented about all necessary ownership details. A shareholder which does not comply with the information and documentation duties within one month of acquisition forfeits its financial rights until such compliance. Pursuant to prevailing doctrine, this includes subscription rights. Board members wrongfully honouring illegal financial shareholder claims will become personally liable with their private wealth to the Swiss company for all resulting damage.

Action points

Holders of bearer shares (including warrants) or voting rights in a Swiss company must contact the

company as soon as possible and notify it in writing of the holding and supporting documentation, including address and the required identification documentation. This also applies to heirs or groups of heirs with Swiss bearer shares in their estate, as otherwise the holder(s) risk(s) losing important financial benefits without the option of any later remedy.

Companies holding bearer shares (including warrants) or voting rights in 25% or more of a Swiss company must inform the company about the ultimate beneficial owner(s) to the best of their knowledge. This means that a foreign parent company must disclose all shareholders if it purchases 25% or more, even if such foreign company shareholders do not exceed the threshold of 25% in the parent. In case of parent companies which are listed, companies holding bearer shares must notify all shareholders known to the parent as a result of stock exchange laws.

Board members of a Swiss company with bearer shares (including warrants) should be aware that the Swiss company at issue must:

- immediately compile a shareholder registry for its bearer shares (including warrants, if any), holders and (to the extent applicable for holdings of 25% or more) their ultimate beneficial owners;
- immediately stop honouring the financial claims of bearer shareholders (including warrant holders) which are not compliant with the new law;
- ensure that all related shareholder (including warrant holder) information and supporting documentation is accessible for the Swiss authorities as soon as it becomes available; and
- amend its articles of incorporation and other company regulations to comply with the new law by December 31 2015.

Consultants or auditors to a Swiss company or holders of bearer shares (including warrants for bearer shares) in a Swiss company must alert the company of the new law, with a view to enabling the company to comply and ensure that they do not lose any rights or financial claims by non-compliance or become personally liable to the Swiss company for non-compliance, in the case of board members of Swiss companies with bearer shares.

For further information on this topic please contact:

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Endnotes

(1) See www.fatf-gafi.org.

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