

New Reporting Obligations for Shareholders of Non-Listed Companies

The Swiss parliament introduced last December extensive reporting obligations for shareholders of non-listed Swiss companies limited by shares (*Aktiengesellschaften; sociétés anonymes*) and matching obligations for such companies to maintain a register and retain the documents support entries. To a lesser extent, these changes also affect listed companies as well as, beyond the scope of this briefing, limited liability companies (*GmbH; Sàrl*) and cooperatives (*Genossenschaften; coopératives*). These new rules are due to enter into force on 1 July 2015.

Overview

This reform is part of the Act on the implementation of the Financial Action Task Force's ("FATF") Recommendations ("**FATF Implementation Act**"), which aims to align Swiss law with international standards against money laundering and financing of terrorism. The FATF Implementation Act amends the Code of Obligations by introducing obligations:

- to report the **acquisition of bearer shares** in non-listed Swiss companies;
- to report **the beneficial owner(s)** of substantial shareholdings of more than **25% of the voting rights** in non-listed Swiss companies;
- for non-listed Swiss companies, to **maintain a register of holders of bearer shares, if applicable, and the beneficial owners** of substantial shareholdings and retain documentation supporting entries.

Companies may avoid the latter obligations by **delegating this responsibility to a financial intermediary** under the Anti-Money Laundering Act. Alternatively, they may disapply all three obligations

by issuing shares as intermediated securities (*Bucheffekten, titre intermédiés*) held with a Swiss depository (*Verwahrungsstelle, dépositaire*).

Breaches of the reporting obligations are sanctioned by the **suspension of voting rights** and the **forfeiture of financial rights**.

Furthermore, while these obligations do not apply to listed companies, the FATF Implementation Act also introduces certain **limited requirements for listed companies** to have their share ledger available in Switzerland and to retain documentation supporting entries. Moreover, it remains uncertain whether and how listed issuer are required to report their purchases of shares of non-listed companies.

Reporting Duties for Bearer Shares

Under Swiss corporate law, companies can either issue registered shares or bearer shares. Although Swiss law does not subject holders of registered shares of non-listed companies to any reporting obligations, they must be registered in the share

ledger in order to be recognized as a shareholder and exercise their rights. By contrast, until the FATF Implementation Act was adopted, holders of non-listed bearer shares were not subject to reporting or disclosure obligations. All that was needed to exercise rights to vote or to collect dividends was to present their shares or otherwise evidence their ownership.

The FATF Implementation Act marks the end of this era. Under the new rules, **acquirers of bearer shares** and bearer participating certificates, the Swiss equivalent of non-voting shares, are required to report the acquisition as well as their **name and address** within **one month of the acquisition**. This filing must be **supported with an official identification document**, an excerpt from the registry of commerce or their equivalent in other jurisdictions.

Furthermore, to ensure that the records are current, shareholders are **required to report any change of name or address** to the company within the same deadline from the change.

Overall, these rules are stricter and more extensive than the existing rules regarding the share ledger, which do not require evidence relating to the identification of the shareholder nor notices of changes of name or address.

Enhanced Reporting Duties for Substantial Shareholders

The FATF Implementation Act also introduces an **obligation to report the beneficial owner(s) of significant shareholdings**. This obligation is triggered by acquiring, alone or acting in concert with third parties, shares in a Swiss non-listed company and thereby **reaching or exceeding 25% of the share capital or the voting rights** and must be complied with within one month's time. Unlike the obligation mentioned in the previous section, which applies only to holders of bearer instruments, this reporting obligation **applies to all shareholders regardless whether they hold bearer or registered shares**. A similar obligation is introduced for partners of limited liability companies.

This **reporting obligation** always lies with the **direct shareholder**. This implies that the direct shareholder is required to inquire who is its beneficial owner. Interestingly, the Code of Obligations as amended by the FATF Implementation Act **defines beneficial owner as the physical person for whom the shareholder acts**. While the legislative materials suggest that where no such person exists, as, *e.g.*, with a charity, this fact should be recorded, it is uncertain how this obligation applies to listed companies. Indeed, Swiss anti-money laundering regulations continue to exempt financial intermediaries from identifying the beneficial owners of listed companies and their subsidiaries. This raises the question whether listed companies are required to disclose their beneficial owners upon acquiring 25 % interest in a non-listed company as any other shareholder would need to or whether they are exempt from this obligation as is the case under the general anti-money laundering framework.

Sanctions for Non-Compliance

These rules are enforced by companies under the responsibility of their board of directors. Failure by a shareholder to comply with any of these obligations is sanctioned by the **suspension of voting rights** and the forfeiture of financial rights, including the **right to receive dividends**. Notably, the company itself can decide to take such measures without involving a court or a regulator before taking action.

As soon as the shareholder complies, it is reinstated in its rights going forward **without regaining the rights it forfeited**.

Obligations for Swiss Companies

Registration and Record Keeping

The flip-side of these reporting obligations is the obligation for companies to keep certain records relating to their shareholders.

Companies are, in principle, required to maintain a **register including the name, address, nationality and date of birth of holders of bearer shares**

as well as the **name and address of beneficial owners of substantial shareholders** and retain the supporting documentation for each entry. This record-keeping obligation will also apply to the share ledger maintained in connection with registered shares both listed and non-listed. Moreover, these obligations also apply by analogy to limited liability companies.

The share ledger and the register of shareholders and beneficial owners must **be accessible in Switzerland at any time**. To ensure the effectiveness of this rule, at least one person with signature authority must be a Swiss resident and have access to both registers.

Furthermore, all registers and the supporting documentation for each entry are subject to a **mandatory retention period of ten years** from the earlier of the striking the entry out of the register or the completion of the liquidation of the company.

Alternatives

To avoid this additional burden, companies may **appoint a financial intermediary** as defined by the Federal Anti-Money Laundering Act ("**AMLA**") to receive and record reports regarding bearer shares and beneficial owners.

Such a delegation must be authorized by way of a resolution of the general meeting. Once authorized, the board of directors is competent to appoint the financial intermediary of its choice. The financial intermediary will then be responsible to maintain the records in lieu of the company.

Alternatively, companies may **avoid the reporting and record keeping obligations** related to bearer shares and beneficial owners by **structuring their shares as intermediated securities** (*Bucheffekten, titres intermédiés*). If a company decides to do so, it must deposit the securities or register them in the principal register **with a Swiss depository** (*Verwahrungsstelle, dépositaire*). As a consequence, companies are required to go through Switzerland if they want to have the benefit of this provision, even

if the bulk of their shareholders are located abroad and rely on another central securities depository.

These two exceptions are, however, **not available for the share ledger**, which can be maintained by a third party, but remains the responsibility of the company.

Next Steps

For Shareholders

From **1 July 2015 onwards**:

- persons **acquiring bearer shares** of non-listed companies must **report their name and address within one month of the acquisition**;
- persons acquiring substantial shareholdings of non-listed companies and limited liability companies must **report the beneficial owners within one month**.

As a transitional rule, by 31 December 2015:

- **Existing shareholders holding bearer shares** of non-listed Swiss companies must report their shareholding and, if applicable, their beneficial owner;
- By contrast, **no such obligation applies to holders of registered shares or quotas in limited liability companies**, who are subject to the obligation to report substantial shareholdings only if they reach or exceed of the 25%-threshold on or after 1 July 2015.

For Non-Listed Companies

- Non-listed Swiss companies must maintain a **register for holders of bearer shares**, if they issued bearer shares, and – regardless whether they issued bearer or registered shares – **record substantial shareholders** and retain the documentation supporting entries in this register and the share ledger. This obligation also applies to limited liability companies.

- In any event they must ensure that these registers and ledgers are **accessible from Switzerland** and that a **director or officer** with signature authority residing **in Switzerland** has access to them.
- To avoid these obligations, companies may **appoint a financial intermediary** to receive disclosures and maintain the registers and records relating to **holders of bearer shares and beneficial owners**. Alternatively they may avoid these obligations altogether by **structuring their shares as intermediated securities**, which may prove difficult without the cooperation of existing shareholders.
- In any event, companies have **two years to amend their articles of association and internal regulations** to the new rules. This requirement relates mainly to the new provisions which allow the conversion of bearer shares into registered shares by a simple majority of the votes cast.

For Listed Companies

Although the bulk of these rules do not apply to listed companies, they must ensure that

- the share ledger (for registered shares) is **accessible at all times from Switzerland** and
- the **documentation supporting entries** in the share ledger are **retained**;
- at least one director or officer with signatory authority **residing in Switzerland** has **access to the share ledger**;
- by 30 June 2017, they **adjust their articles of incorporation and internal regulations**, in particular to comply with the simplified rules on the conversion of bearer shares in registered shares.

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