

Newsletter No.

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**Swiss Corporate Law to be heavily impacted** by FATF recommendation NO. 24: In implementing the revised Financial Action Task Force (FATF, or *Group d'action financière, GAFI*) recommendations, the federal legislator adopted changes to the Swiss Code of Obligations (CO) which will fundamentally impact well-established corporate law. Bearer shares will *de facto* be abolished and holders of 25% or more of registered shares will also be severely punished if they do not comply with the obligation to disclose the beneficial owner of such shares. Companies will face additional work and expenses in their corporate housekeeping and the board of directors will become liable if it does not ensure compliance with the new disclosure obligations.

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# Revision of Swiss Code of Obligations

On 12 December 2014, the Swiss Parliament approved the draft bill for a revised CO (revCO) and thus stringent disclosure obligations for shareholders of private companies. The revCO will presumably enter into force later on this year. The revision aims at implementing FATF recommendation no. 24, which requires countries to «ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons» and that «countries that have legal persons that are able to issue bearer shares [...] should take effective measures to ensure that they are not misused for money laundering or terrorist financing».



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## Obligation to Disclose Holders of Bearer Shares

Art. 679i para. 1 revCO requires the holders of bearer shares to report the acquisition as well as the name and address of the acquirer to the company within a period of one (1) month from acquisition. Such shareholder must prove it actually possesses the shares and identify itself by submitting certain documentation (passport, ID, extract from the commercial register). It must also report to the company any future changes in name or address.

## Obligation to Disclose Beneficial Owner also of Registered Shares

Art. 697j revCO states that whosoever solely or acting in concert with third parties acquires (bearer or registered!) shares in a company and thereby attains or exceeds the threshold of 25% of the share capital or voting rights must notify the company within a period of one (1) month of the name and address of the individual who actually enjoys the benefits of ownership of the respective shares although they are held in another name (beneficial owner, BO). Accordingly, the disclosure obligation remains with the formal owner of the shares, who is also responsible for reporting any future changes in name or address of the BO. Pursuant to art. 2 para. 3 of the draft revised Swiss Money Laundering Act (MLA, *Geldwäschereigesetz, GWG*), the BO of a legal entity may only be an individual that, solely or acting in concert with third parties, controls such legal entity either

by holding 25% of the share capital or voting rights or, if there is no such controlling stake, otherwise by controlling the management. If no individual shareholder can be identified as per the preceding sentence, the chairman of the board of directors of the legal entity is deemed the BO.

## Sanctions

Non-compliance with the above disclosure duties results in the following sanctions (art. 697m revCO):

- Voting rights attached to the shares which should have been disclosed are suspended;
- Distribution rights (dividend, liquidation proceeds) may only be exercised upon fulfilment of the disclosure obligations;
- Distribution rights are forfeited if the disclosure obligations are not fulfilled within the one (1) month period; and
- In case of belated notification, distribution rights may only be exercised with respect to rights originated as from notification.

## Obligations of Companies

Companies that have issued bearer shares must keep a register of their holders. Furthermore, all companies that have shareholders holding 25% or more of the share capital or voting rights (be it bearer or registered shares) must keep a record of the disclosed BOs (art. 697l para. 1 revCO). In the case of registered shares, this must be done in addition to the share ledger (*Aktienbuch*) listing the

holders of registered shares in accordance with art. 686 CO. Such registers must list the names and addresses of the holders of bearer shares and BOs. The companies have to ensure that such registers may be accessed in Switzerland at any time. Further, the companies must store the documents based on which a holder of bearer shares or a BO has been recorded for a period of ten (10) years from deletion of the respective person from the register.

#### Exemptions and Easements

The revCO provides for the following exemptions and easements:

- No disclosure obligations for shareholders of companies listed at a stock exchange (and thus no obligation of listed companies to keep such registers);
- No disclosure obligations for holders of uncertified securities (*Wertrechte*) pursuant to the Swiss Uncertified Securities Act (*Bucheffektengesetz, BEG*); and
- The shareholders' meeting may resolve that disclosure notifications must not be made to the company but to a financial intermediary (*Finanzintermediär*) within the meaning of the MLA.

#### Further Changes to CO

In connection with the FATF recommendations, the revision of the CO will include the following further changes:

- Easement for converting bearer into registered shares: provision in articles no longer required due to statutory legal basis in art. 704a revCO, conversion resolution requires majority of votes cast (not represented) and prohibition to impede conversion in articles;

- Limited liability company (*GmbH*): holders of shares in limited liability companies have the obligation to disclose the BOs if they, solely or acting in concert with third parties, hold 25% or more of the share capital or voting rights (art. 790a revCO). The sanction provisions of art. 697m revCo (see above) apply *mutatis mutandis*; and
- Cooperative (*Genossenschaft*): cooperatives must keep a member register (art. 837 revCo).

#### Entry into Force

The referendum period ends on 2 April 2015. To our knowledge, no referendum has been initiated.

The revCO is expected to enter into force in the second half of 2015.

#### Transitional Provisions

The new rules become applicable to existing companies upon entry into force of the revCO.

Current holders of bearer shares must make the notifications to the respective company pursuant to art. 697i and 697j revCo within six (6) months from entry into force of the revCO. In contrast, holders of registered shares must only comply with the applicable disclosure obligation if they reach or exceed the 25% threshold after entry into force of the revCO.

Necessary changes to the articles will have to be implemented within two (2) years from entry into force of the revCO.

#### To Dos

Companies and shareholders must assess the legal and beneficial ownership in shares. Shareholders must make the necessary disclosure notifications and companies must set up appropriate processes and structures for the keeping of (additional) registers and the accessibility thereto.

#### Conclusion

The latest revision of the CO will fundamentally impact Swiss corporate law. It is expected that because the holders of bearer shares must disclose their identities, irrespective of the amount of shares, only very few (even fewer than now) companies will issue or keep issuing bearer shares, with the result that with the revCO bearer shares will *de facto* be abolished. Moreover, companies that have issued registered shares will be heavily impacted due to the shareholders' duty to disclose the BO if the 25% threshold is reached or crossed. The companies' housekeeping work and expenses will increase significantly and the sanctions for non-compliant shareholders are quite drastic. In addition, the board of directors will become liable *vis-à-vis* its shareholders if it does not take appropriate measures to ensure compliance with the new disclosure obligations.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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