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Adjusted Disclosure Rules Under Swiss Corporate Law («GAFI-Rules»); Criminal Sanctions Will Apply.

The Swiss federal legislator adopted changes to the Swiss Code of Obligations (**CO**) and other statutes in line with the recommendations of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes.

Apart from the abolishment of bearer shares for non-listed companies, the new law clarifies the relevant criteria for identifying beneficial owner(s) of shareholdings of 25% or more, using an analogy with the consolidation rules (art. 963 paras. 1 and 2 CO). The reform includes the introduction of criminal sanctions in case of non-compliance with the disclosure rules and the duty to maintain the respective registers.

walderwyss attorneys at law

By Alex Nikitine
Partner
Dr. iur., LL.M., Attorney at Law
Phone +41 58 658 56 32
alex.nikitine@walderwyss.com

and Dario Galli
Associate
MLaw, Attorney at Law
Telefon +41 58 658 56 62
dario.galli@walderwyss.com

and Dimitrios Berger
Associate
MLaw, Attorney at Law
Telefon +41 58 658 55 81
dimitrios.berger@walderwyss.com

Revision of the «GAFI-Rules»

In December 2014, the Swiss Parliament approved the bill and introduced stringent disclosure obligations for shareholders of private companies. The law entered into force in July 2015. Said disclosure regime is commonly referred to as the Swiss «GAFI-Rules» (originating from the Groupe d'Action Financière, the Financial Action Task Force, an inter-governmental body established in 1989 fighting money laundering, terrorist financing and other related threats to the integrity of the international financial system).

In June 2019, the Swiss Parliament adjusted the GAFI-disclosure regime with the «Federal Act on the Implementation of the Recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes» (the **Act**). The Act amends several statutes, most importantly the CO and the Swiss Criminal Code.

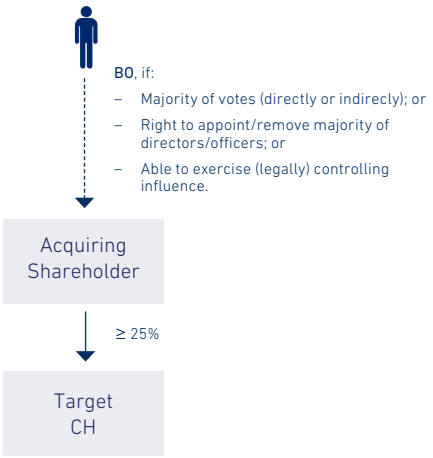
Duty to Disclose the Beneficial Owner: Important Changes to the current Regime

Since 1 July 2015, persons acquiring, alone or acting in concert with third parties, shares (i.e. bearer or registered shares) in a Swiss stock corporation (*Aktiengesellschaft*) and who thereby reach or exceed the threshold of 25% of the share capital or voting rights must report to the company within 1 calendar month the surname and first name as well as the address of the natural person for whom they are ultimately acting (i.e. the so called beneficial owner [**BO**]; art. 697*j* para. 1 CO). The same duty and threshold applies to acquirers of shares in a Swiss limited liability company (*Gesellschaft mit beschränkter Haftung*) (art. 790*a* para. 1 CO).

Under the revised CO (**revCO**), the disclosure regime as described above remains, in principle, applicable. However, the legislator has amended the disclosure concept as follows, thereby clarifying a number of unclear and in practice controversially disputed points:

- Persons acquiring **bearer shares** in a Swiss corporation 18 calendar months after the entry into force of the Act must no longer report the BO (exceptions apply in case of delistings). This adjustment seems appropriate, since bearer shares will effectively be abolished by the revCO and may in the future only be issued if the company has equity securities listed on a stock exchange or if the bearer shares are issued as intermediated securities (*Bucheffekten*) (see chapter below). In both cases, acquirers are exempted from reporting the BO (art. 697*j* paras. 1 and 5 revCO).
- When the «GAFI-Rules» entered into force in July 2015, it had remained unclear who must be reported as beneficial owner in **indirect shareholding structures**, i.e., if a legal person acquires the shares. This question has now been answered by the legislator, using a familiar control concept by means of the incorporation of the Swiss consolidation rules: The beneficial owner of a legal entity or a partnership is an individual who (i) directly or indirectly holds a majority of votes in the highest

management body, (ii) directly or indirectly has the right to appoint or remove a majority of the members of the supreme management or administrative body, or (iii) is able to exercise a controlling influence based on the articles of association, the foundation deed, a contract or comparable instruments (art. 697*j* para. 2 and art. 790*a* para. 2 revCO). These are the same criteria already used under Swiss accounting law when determining whether an entity must prepare consolidated annual accounts (art. 963 paras. 1 and 2 CO).



- So far, it has also been disputed among practitioners how to proceed if no BO can be determined: Pursuant to the revCO, an acquirer being a legal entity or partnership must file a **negative declaration** as per art. 697*j* para. 2 revCO and art. 790*a* para. 2 revCO if no individual exercises control as described above.
- The new law introduces a special regime for **listed companies and their affiliates**: If the acquirer of shares is a listed company, controlled by a listed company or controlling a listed company, such acquirer does not have to report the BO, but the acquirer must report to the company this particular fact as well as the name and seat of the listed company (art. 697*j* para. 3 and art. 790*a* para. 3 revCO).
- **Notice of changes**: Already today, the reporting shareholder must notify the company of any change of the first name or surname or of the address of the BO (art. 697*j* para. 2 and art. 790*a* para. 2 CO). However, the CO remained silent on the question as to within which timeframe such notification must be filed. Under the revised legislation the shareholder must fulfil his reporting obligation within 3 calendar months (art. 697*j* para. 4 and art. 790*a* para. 4 revCO).

Abolition of Bearer Shares

Art. 622 para. 1bis revCO provides for a newly introduced general abolition of bearer shares applicable to Swiss stock corporations (*Aktiengesellschaften*) and, by way of reference (cf. art. 764 para. 2 CO), partnerships limited by shares (*Kommanditaktiengesellschaften*), subject to the following two exceptions, which, if applicable, have to be registered by the respective company with the competent commercial register:

- Companies with equity securities **listed on a stock exchange** may retain existing and newly issue bearer shares.
- Companies may also retain and newly issue bearer shares, if such bearer shares (i) are issued as **intermediated securities** pursuant to the Federal Act on Intermediated Securities dated 3 October 2008 (**FISA**) and (ii) either are deposited with a Swiss custodian pursuant to the FISA or registered in the main register of said custodian.

Therefore, the revCO effectively abolishes the possibility to issue bearer shares for the overwhelming majority of Swiss stock corporations and partnerships limited by shares.

Transitional Provisions

As a consequence of the reform and as provided for by art. 4 of the Transitional Provisions, existing bearer shares will, subject to the two exceptions outlined above, be converted into registered shares, either (i) by the company itself or (ii) **automatically by operation of law and with effect against third parties** upon lapse of a **18 calendar months transitional period** starting from entry into force of the revCO, whereas, absent any decision of the shareholders' meeting to the contrary, the new registered shares will be freely transferrable. The same is applicable if an eligible company fails within the transitional period to register an exemption (as outlined above) with the commercial register.

All companies affected by an automatic conversion of bearer shares into registered shares will nonetheless have to **amend their articles of association** accordingly. In order to enforce such duty, the commercial register office will **reject any prior application to amend the articles of association** which does not implement (at least simultaneously) said automatic conversion.

After conversion of their bearer shares into registered shares, a **grace period of 5 years** is foreseen for shareholders, who have previously not complied with their reporting obligation according to art. 697*i* CO, in order to apply with the consent of the company for registration of their shareholder status before the court. Until registration of the respective shareholder in the company's share register, the voting rights conferred by affected shares will remain suspended and the respective economic rights will be forfeited.

If no action is undertaken during the grace period, the respective **shares will become null and void** and will be replaced by treasury shares held by the respective company, whereas, subject to

sufficient freely disposable capital of the company, shareholders will only be entitled to compensation from the company if they can prove that their shares became null and void without their fault.

Non-Compliance

Liquidation

In order to further strengthen the enforceability of the «GAFI-Rules», the revCO newly introduces the possibility of shareholders, creditors and the commercial register to apply in a court proceeding for the **liquidation of companies** which do not keep a share register and/or a register of reported beneficial owners in accordance with the provisions of the CO and the revCO and/or which have issued bearer shares without being eligible for an exemption as outlined above (cf. art. 731*b* revCO).

Introduction of Criminal Offences

In an effort to overcome arguable shortcomings around compliance with the current disclosure rules, the Swiss Parliament decided to introduce criminal sanctions for non-compliance with certain rules. This decision was taken despite stringent sanctions already in place under the current legislation which include (and remain applicable) the suspension of voting rights and forfeiture of certain economic rights (such as dividends) as per art. 697*m* paras. 1–3 CO. Under the new rules, the criminal sanctions apply in case of failure to comply with the duty to disclose the BO in accordance with art. 697*j* paras. 1–4 and art. 790*a* paras. 1-4 revCO and in case of failure to maintain the share register, the register of beneficial owners (as well as equivalent registers for other entities), as already provided under the current «GAFI-Rules». All sanctions require that the action/omission be committed *intentionally* (contingent intent [*Eventualvorsatz*], however, being sufficient) and the punishment is limited to (criminal) fines up to a maximum of CHF 10,000; negligence remains outside the applicable scope.

Persons who have been sentenced to a (criminal) fine of more than CHF 5,000 will be recorded in the Swiss register of criminal convictions (*Strafregister*).

Entry into Force

The referendum period is expected to end in October 2019. The revCO is expected to enter into force at the end of this year or at the beginning of 2020. As to the abolishment of the bearer shares, specific transitional provisions apply (see above).

To Dos

In light of potential criminal sanctions, the spotlight is going to intensify on those who must fulfil the relevant duties, and their (external and internal) advisors. Swiss companies and their board of directors are well advised to evaluate the reform and update internal disclosure documentation forms and policies. In order to avoid costly and time-consuming mandatory court proceedings, we also recommend to review prior to entry into force of the revCO (and take appropriate measures, if required) whether all holders of bearer shares have made a notice according to art. 697*i* CO.