

Newsletter No.

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Bearer Shares to be abolished. More constraining Disclosure Rules of Beneficial Owners of Shares ("GAFI-Rules") adopted. Revision of the Swiss Code of Obligations brings major changes as of 1 November 2019.

The revision of the Swiss Code of obligations (CO) will essentially abolish the bearer shares, with a few specific exceptions. Modifications and clarifications of the rules regarding the duty to disclose the beneficial owners of shares will be put into place. New criminal sanctions for non-compliance will apply in this context. Foreign legal entities with effective management in Switzerland need to keep a register of their owners.



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Duty to disclose the beneficial owner and abolishing bearer shares: the rules under the new system.

In our Newsletter No. 128 published in June 2019 we gave an overview of the new GAFI-Rules and their implementation under Swiss law. These new rules entered into force on 1 November 2019. This revision implements several changes, especially a quasi-abolition of bearer shares that this article will look into.

Context of the Changes

The "Federal Act on the Implementation of the Recommendations of the Global Forum on Transparency and Exchange of Information on Tax Purposes" (the Act) which will amend the Swiss Code of Obligations has been adopted by the Federal Parliament on 21 June 2019 and the optional referendum's deadline has expired on 10 October 2019 without being used. Thus, the new rules, which have already been described in detail in the Walder Wyss Newsletter No. 128 of June 2019, entered into force on 1 November 2019. On 31 October 2019, the State Secretariat for International Finance (SIF) published a Guidance on the implementation of the Act, which has been prepared in collaboration with the Federal Office of the Commercial Register.

Abolition of Bearer Shares

In essence, the CO will be modified in the following ways:

- The revised CO (**revCO**) effectively prohibits the new issuance and (following a grace period) the existence of bearer shares and (according to the SIF Guidance) of non-voting bearer shares (*Bons de participation / Inhaberpartizipationsscheine*) for a large majority of Swiss companies, with certain exceptions.
- Those exceptions apply to (i) companies with equity securities listed on a stock exchange and (ii) bearer shares that are issued as intermediated

securities (*Titres intermédiés / Bucheffekten*) and which are either deposited with a Swiss custodian or registered in such a custodian's main register.

- A company should, by a resolution of the shareholders' meeting and an amendment of its articles of association, convert its issued bearer shares into registered shares before 1 May 2021.
- Upon the expiration of the aforementioned transitional period and if no action was taken by the company, existing bearer shares will automatically be converted into registered shares by operation of law and thereby with effect towards third parties.
- All companies affected by an automatic conversion upon the expiration of the transitional period will have to amend their articles of association to reflect the changes in their shares, and the commercial registers will not record any new amendments of the articles of association of companies which have not complied with this duty.
- New information will henceforth be registered in the commercial register: (i) if the articles of association are not changed within the 18 months period; or (ii) if equity securities are publicly traded and/or bearer shares are issued as intermediated securities (*Titres intermédiés Bucheffekten*)

- Only the holder of bearer shares who have complied with their reporting duties under Art. 697i CO (duty to declare the ownership over the bearer shares to the company) will be registered as shareholders of the converted shares.
- After the automatic conversion of the shares, holders of former bearer shares who had not complied with their reporting duties under Art. 697i CO will have grace period ending on 31 October 2024 to apply, with the consent of the company, for registration of their shareholder status before the court. It is unclear on which basis the company could refuse to give its consent. In any case, this can put the affected shareholder in a more difficult position, especially in case of dispute with a majority shareholder having control over the board of directors of the company. The shareholder would then first have to act in court against the company to request its approval, before being able to apply to the court for registration in the share register.
- If no action is undertaken, the relevant shares will become null and void and will be replaced by treasury shares (held by the company), and the shareholders can only be entitled to compensation if they can prove that they did not take action without their fault. The compensation will only be possible to the extent that the company disposes of free distributable reserves in order to pay for such compensation. The limitation set out in Art. 659 para. 1 CO according to which the company can only acquire up to 10% of treasury shares applies and all shares above this threshold have to be disposed of or cancelled by way of a capital reduction.

Duty to Disclose the Beneficial Owners of Shares

The provisions on bearer shares are not the only ones to be affected by the entry into force of the revCO on 1 November 2019. The rules related to the duty to disclose the beneficial owners of shares are also being amended:

- The revCO clarifies the definition of "beneficial owner" in indirect shareholding structures. Under the new rules, the beneficial owner of a legal entity or a partnership (acting as a direct shareholder of the relevant Swiss company) is the individual who "controls" the shareholder, i.e. the natural person(s) 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 instrument.
- If the beneficial owner cannot be determined in a specific case, the relevant shareholder must file a corresponding negative report to the company.
- For listed companies and their affiliates, a special regime is applied: if the shareholder is a company that (i) is a listed company, (ii) is controlling a listed company or (iii) is controlled by a listed company, such shareholder does not have to report the beneficial owner, but report this circumstance to the company in which it holds the shares and communicate the name and seat of the company holding the shares.
- Under the new rules, the reporting shareholder must notify the company of any change of the first name, surname, or address of the beneficial owner within a newly introduced 3 calendar month deadline.

Introduction of Criminal Offences

The Act introduces new criminal offenses into the Swiss Criminal Code. These offences mainly sanction (i) the failure by a shareholder to disclose the beneficial owner of its shareholding (art. 697j revCO); and (ii) the failure by a company to maintain the share register or the list of beneficial owners to be kept by the relevant company (Art. 697l revCO).

These offences require that the action or omission is committed intentionally, and provide for a fine of up to CHF 10,000 as sanction. Fines may be recorded in the criminal register if the amount is higher than CHF 5,000.

Deficiencies in the Organisation of the Company

Under the revCO, the compliant holding of the share register and the register of beneficial owners becomes part of the proper organisation of the company. If these registers are not held as required by law, a shareholder or a creditor can request from the court that it takes appropriate measures to correct these deficiencies which could lead as far as to the liquidation of the company.

Duty for Foreign Entities with Effective Management in Switzerland

The Act further provides for amendments of the Federal Act on International Administrative Assistance in Tax Matters of 28 September 2012. One of the consequences of these amendments affects legal entities with a registered seat outside of Switzerland which have their effective management in Switzerland, meaning that decisions allowing the pursuit of the purpose of the company and its day-to-day business are taken in Switzerland. Those legal entities have to keep a list of the legal owners (and not the beneficial owners) of the company, at the place of such effective management. This list must contain the name or company name as well as the address of the owners of the entity concerned.

To Dos

As already mentioned in the Walder Wyss Newsletter 128 of June 2019, Swiss companies and their board of directors are well advised to evaluate the reform and update internal disclosure documentation forms and policies, since non-compliance with the applicable rules may result in a criminal offence. In order to avoid costly and time-consuming mandatory court proceedings, we also recommend to verify (and take appropriate measures, if required) whether all holders of bearer shares have made a notice according to art. 697i CO. Acquirers of registered non-listed shares should also assess and comply with their duties to report the beneficial owner of the shares, since the intentional violation of such duties may lead to criminal sanctions. Given the risk for shareholders to see their rights forfeited, they should also be wary and liaise with the company as soon as possible to request their proper registration. Finally, foreign legal entities who are effectively managed in Switzerland must keep a register of their owners.

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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