

Newsletter No.

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## Compulsory Conversion of Bearer Shares (Inhaberaktien/actions au porteur) into Registered Shares as per 1 May 2021:

By 30 April 2021, companies having bearer shares outstanding should take the necessary measures to convert all bearer shares into registered shares or file the fact that they rely on an exception with the commercial register. Within the same deadline, holders of bearer shares should comply with their reporting obligations. Failure to do so would result, for companies, in a compulsory conversion by law of all bearer shares into registered shares and, for holders of former bearer shares, in the need to apply to a court in order to obtain recognition of their shareholder status to avoid permanent loss of shareholder rights.

# Compulsory Conversion of Bearer Shares into Registered Shares as per 1 May 2021



By **Jessica Aeschbach Flórez**  
Dr. iur., Attorney at Law  
Senior Associate  
Direct phone: +41 58 658 14 58  
[jessica.aeschbach@walderwyss.com](mailto:jessica.aeschbach@walderwyss.com)



and **Christian A. Schmid**  
MLaw, LL.M., Attorney at Law  
Associate  
Direct phone: +41 58 658 52 70  
[christian.schmid@walderwyss.com](mailto:christian.schmid@walderwyss.com)



and **Alexander Sorton**  
MLaw, LL.M., Attorney at Law  
Associate  
Direct phone: +41 58 658 30 24  
[alexander.sorton@walderwyss.com](mailto:alexander.sorton@walderwyss.com)

This Newsletter describes the steps to be taken in connection with the legislative changes adopted by the Swiss Parliament on 21 June 2019, in response to the criticisms of the Global Forum on Transparency and Exchange of Information for Tax Purposes made against the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012. These new legislative changes, which entered into force on 1 November 2019, impose on both the companies having bearer shares outstanding and the holders of bearer shares to take gradual steps within 3 deadlines (30 April 2021, 31 October 2024 and 31 October 2034), starting with (i) the obligation for companies to either (a) convert all bearer shares into registered shares or (b) file one of two exceptions with the commercial register and (ii) the obligation for the holders of bearer shares to comply with reporting obligations.

## Introduction

On 12 December 2014, the Swiss Parliament approved the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012. This act imposed inter alia reporting, respectively registration obligations on both the holders of bearer shares and the companies limited by shares (Aktiengesellschaft/société anonyme) that have bearer shares outstanding. Thus, since 1 July 2015 and subject to the exemptions mentioned below, persons who acquire bearer shares must report the acquisition and identify themselves to the company and the company must keep a register of the reported holders of bearer shares (cf. newsletter No. 114 [here](#)). As long as holders of bearer shares fail to comply with their reporting duty, the voting and economic rights attached to their bearer shares are suspended. After one month of non-compliance with the obligation to give notice, the suspended economic rights lapse. If the holders fulfil their reporting duties at a later date, they may claim the economic rights arising from that date onwards. The company's board of directors has a duty to ensure that holders of bearer shares do not exercise their rights as long as such holders are in compliance with their reporting duties.

Following criticism of the aforesaid law as being too lax by the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Swiss Parliament adopted another act on 21 June 2019, taking into account such criticism (cf. newsletter No. 128 [here](#)). Thereby, since 1 November 2019, bearer shares have de facto been abolished, except for a) companies which have at least one category of shares, participation certificates, dividend right certificates or other equity securities listed on a stock exchange as well as for b) bearer shares that are structured as intermediated securities and are deposited with a custodian in Switzerland designated by the company or entered in the main register. If a company wishes to rely on one of these two exceptions, it must have the relevant exception registered with the commercial register by 30 April 2021. Without such registration, a company cannot rely on an exemption.

As of 1 May 2021, any outstanding bearer shares for which the above-mentioned exceptions do not apply will be converted by operation of law into registered shares. This does not mean that holders of non-reported former bearer shares can thereafter remain anonymous. Rather, different transitional provisions apply. Eventually, former holders of bearer sha-

res who fail to comply with the reporting obligations will permanently lose their shares and all rights attached to them.

The described change in law has the following consequences for shareholders and the company, and requires the appropriate steps, explained below, to be taken.

### **I. Steps to be taken by 30 April 2021/ Legal situation after 30 April 2021**

All companies with bearer shares outstanding have to observe the deadline of 30 April 2021. Companies that fall under one of the two exceptions and wish to rely on an exception must register this with the competent commercial register by 30 April 2021. All other companies which have bearer shares outstanding should hold a general meeting at which they resolve to convert their bearer shares into registered shares. Such general meeting may also resolve restrictions on the transferability of the registered shares. When convening and holding the general meeting, the board of directors shall also take into account its duty to ensure that no shareholders exercise their rights while in breach of their obligations to give notice. This means, in particular, that non-reported holders of bearer shares must not be allowed to vote. Once a voluntary conversion into registered shares has been resolved by the general meeting, the board of directors has to file the application for registration of the conversion by 30 April 2021, with the competent commercial register.

A company that fails to file with the commercial register by 30 April 2021 the conversion of its bearer shares or to file with the commercial register its reliance on an exception by the same deadline will face an automatic conversion by law of all bearer shares into registered shares effective 1 May 2021. The new registered shares will be freely transferable regardless of any pre-existing transfer restriction in the articles of association (as the case may be if the company previously had bearer and registered shares co-

existing). The conversion by law will also be reflected in the entry in the commercial register of the concerned companies, by a general remark that the supporting documents (articles of association) contain information that differs from the entry. The company will be prevented from registering any other modifications to its articles of association with the commercial register until it has either converted the registered shares back into bearer shares by a resolution of the general meeting and filed with the commercial register that it relies on one of the above-mentioned exceptions, or it has updated its articles of association as to reflect the conversion of its former bearer shares into registered shares.

Immediately after share conversion (and independent from the fact whether the conversion was voluntarily executed by the company or by operation of law), the board of directors has to update the company's share register. On one hand, the board of directors must register the reported information of the shareholders who complied with their notification obligations. On the other hand, the board of directors must note the shares for which no notification was made. The board of directors should exercise due care in maintaining the share register. Board members who willfully fail to comply with their duty to properly maintain the share register of the company risk a fine of up to CHF 10,000. Fines over CHF 5,000 are listed in the criminal record (although they generally do not appear in the extract for private individuals). Furthermore, if the share register is not properly maintained, the company may, upon denunciation by a shareholder, a creditor or a commercial registrar, come under court-imposed measures ranging from the issuing of a corrective deadline up to the dissolution and liquidation of the company.

Shareholders who have not yet notified their acquisition of bearer shares must identify themselves to the company by providing the name/surname or business name, domicile address, a proof of ownership as well as:

- for natural persons: a copy of an official identity document;
- for Swiss legal entities: an extract from the commercial register; and
- for foreign legal entities: a current certified extract from a foreign commercial register or an equivalent document.

Shareholders should ensure that they can prove that the company received their notification within the statutory time limit. In case of doubt, the shareholders should send the notification by registered mail. The board of directors must have appropriate processes in place, depending on the size of the shareholder base, to ensure that incoming notifications are properly recorded and entered into the register and that rights attached to non-reported shares are not exercised.

### **II. Steps to be taken by 31 October 2024**

Shareholders who fail to comply with their notification duty by 30 April 2021 will have to apply for registration in the share register and prove their shareholder status before a court if they want to recover their shareholders' rights. Such a process will generate court fees borne by the shareholder and will notably require supporting documents to be submitted to the court. The application to a court for recognition of a shareholder's status requires the prior consent of the company. In other words, the court only approves the application of the former bearer shareholder if the company does not oppose the entry in the share register. Otherwise, the concerned shareholder must first take action against the company in order to have his or her rights recognized. In addition, the voting rights attached to non-reported former bearer shares remain suspended and the accrued economic rights are forfeited. Such rights can only again be redeemed from the moment in which the application is granted by the court. Until then, the board of directors must ensure that non-compliant shareholders cannot exercise their shareholders' rights.

Subject to the above, shareholders who failed to report their bearer shares by 30 April 2021 can still rectify their omission by 31 October 2024 at the latest. After 31 October 2024, the situation changes significantly. All former bearer shares of shareholders who have not applied to the court for their inscription in the share register by 31 October 2024 will become null and void by operation of law. The holders of such shares will lose their shareholder status permanently and thereby, in principle, any social and economic rights linked to the shares concerned. The legislator assumes that the non-compliant shareholders rather waive their rights attached to such shares than identify themselves to the company. The respective shares are therefore replaced by treasury shares, owned by the company. The board of directors must have this replacement recorded in the company's share register and balance sheet. Non-compliance can trigger criminal sanctions.

Treasury shares can only be held by a company within the legally permissible thresholds. If the relevant threshold is exceeded, the company will have to reduce its treasury shares to the permitted level. The company may for this purpose sell or otherwise allocate the treasury shares within the constraint of Swiss corporate law, in particular, the duty of equal treatment of the remaining shareholders. The company may also carry out a capital decrease, thereby cancelling the shares.

### III. Steps to be taken by 31 October 2024

Shareholders whose shares have become null and void can claim compensation from the company. This is subject to the following conditions: i) the shareholders must be able to prove that the shares became null and void through no fault of their own and ii) that they were indeed shareholders on the date the shares became null and void. The value of compensation then corresponds to the lower of (a) the true value of the shares at the time the shares were converted into registered shares pursuant to the transitional provisions and (b) the true value of

the shares at the time compensation is claimed. Any compensation is excluded if the company does not have the required freely disposable shareholders' equity to pay the compensation. If a compensation is only partially covered by freely disposable shareholders' equity, the compensation needs to be reduced accordingly. When confronted with the respective claims, the board needs to assess the validity of the claim and based thereon, whether it is in the best interest of the company to satisfy the claim or to challenge the compensation claims in court.

### Conclusion

Bearer shares have been gradually abolished, starting, as of 1 July 2015, with a general lifting of the anonymity of bearer shareholders, and the entry into force of a general obligation for bearer shareholders to report and identify themselves to the company and following, as of 1 November 2019, with a general prohibition of bearer shares. Exceptions have nevertheless been made for bearer shares of listed companies and bearer shares organized as intermediated securities. Companies with outstanding bearer shares were granted a transitional period until 30 April 2021 to either convert their bearer shares into registered shares or file with the commercial register the fact that they rely on one of two exceptions. The concerned companies which fail to take either of the appropriate measures by 30 April 2021 will see their bearer shares converted by law into registered shares on 1 May 2021.

The deadline of 30 April 2021 will not only impact the bearer shares as such, but also the status of the holders of bearer shares who have not reported and identified themselves to the company by 30 April 2021. As of 1 May 2021, such former bearer shareholders will have to ask a court to recognize their shareholders' status and thereafter require of the company their inscription in the company's share register. If no such court application has been filed by 31 October 2024,

the newly converted registered shares of a non-reported former bearer shareholder will thereafter become null and void and be converted by law into treasury shares of the concerned company. The legal transitional provisions have nevertheless left the door open to hardship cases, for situations in which the shares of former bearer shareholders became null and void through no fault of their own.

In connection with the reporting obligations of bearer shareholders, which remain also applicable after the conversion of the bearer shares into registered shares, the board of directors shall ensure that any bearer shareholders who did not comply with their reporting obligations cannot exercise their shareholders' rights. Furthermore, the board of directors shall keep the company's share register updated. In particular, the share register must include after 1 May 2021 a remark whether or not former bearer shareholders complied with their notification obligations. The proper maintenance of the share register by the board of directors is of key importance, given the fact that the omission by the board of directors to properly maintain the company's registers may give rise to criminal and company law sanctions.

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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