

Update

Newsflash February 2018

Bill to implement the recommendations of the Global Forum: Proposed abolition of bearer shares and further transparency provisions

On 17 January 2018, the Federal Council opened the consultation process for the proposed law to implement the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. In particular, the bill proposes the abolition of bearer shares (respectively their conversion into registered shares) and criminal fines for breaches of the duties to notify the ultimate beneficial owner and to keep a corresponding register of ultimate beneficial owners. Companies would under the proposed bill also be required to have an account with a Swiss bank.

The legislative proposal aims at implementing the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Global Forum conducts periodic country reviews to assess the implementation of its formulated principles on transparency and exchange of information.

On 26 July 2016, the Global Forum published a report on its country review of Switzerland for the so-called phase 2 which contains several recommendations, in particular with regard to the transparency of legal entities. The duties to report the ultimate beneficial owner of an interest of 25% or more in the share capital and to maintain a corresponding register of the reported ultimate beneficial owners as well as the sanctions for breach of these duties that were introduced in 2015 in the context of the FATF proposal are considered insufficient. The Federal Council now proposes measures to implement

these recommendations with a view to achieving a positive assessment of Switzerland in the next country review.

The consultation process lasts until 24 April 2018. Based on the results of the consultation, the bill will be revised and is expected to be submitted to parliament for deliberations in winter 2018/19.

This newsflash briefly summarizes the main points of the bill.

1. Abolition of bearer shares

Although the anonymity of the holders of bearer shares has already been lifted since 1 July 2015 (with the implementation of the so-called FATF recommendations) and holders of bearer shares must identify themselves to the company, the current law does according to the Global Forum report not provide sufficient assurance of trans-

parency. The new draft law now provides that unlisted companies may only have registered shares and that existing bearer shares are automatically converted into registered shares upon the entry into force of the law. Shareholders who have not yet identified themselves to the company must do so within 18 months of entry into force, otherwise they will definitively lose their rights to the shares. Shares of unidentified shareholders become void and the board of directors has to issue new shares as treasury shares of the company instead.

2. Fines for breach

As part of the 2015 revision, criminal provisions were proposed but rejected and instead a suspension of shareholder's rights was provided (with possible forfeiture of dividend and other financial rights). With the new draft, intentional breaches of the reporting duty and the duty to maintain the register of ultimate beneficial owners would be subject to a fine. According to the proposal, the general statutory maximum fine of CHF 10'000 would apply. In addition, the failure to properly maintain the share register and the register of ultimate beneficial owners would qualify as an organizational deficiency of the company and entitle shareholders and creditors to request the court to order remedies.

3. Companies must have an account with a Swiss bank

In order to comply with the recommendation for effective supervision, the new law would require companies (as well as individual entrepreneurs with a turnover over CHF 100'000, legal entities and Swiss branches of foreign companies) to have an account with a Swiss bank. This would cause them to fall into the scope of banks' duties as financial intermediaries to identify the ultimate beneficial owners of bank customers in accordance with anti-money laundering laws (and the Agreement on the Swiss Banks' Code of Conduct with Regard to the Exercise of Due Diligence, CDB). This would create a kind of indirect supervision as banks would regularly want to see the companies' register of ultimate beneficial owners in the account opening process. It goes together with this duty that financial intermediaries (and authorities) are proposed to have a right to inspect the share register and the register of ultimate beneficial owners to this extent necessary to fulfill their statutory duties

(in particular the duty to identify the ultimate beneficial owner of bank customers).

4. Remarks

By proposing to abolish bearer shares, the Federal Council abandons the path taken in 2015 of the reporting and registration duties which comes a bit as a surprise. However, private companies with bearer shares should consider to change to registered shares anyway as bearer shares are increasingly viewed critically at an international level and newly incorporated companies rarely issue bearer shares. The proposed legal consequence of forfeiture of rights without compensation for holders of bearer shares who fail to identify themselves during the 18-month transitional period seems unnecessarily harsh. Also, the proposed new issuance of such cancelled shares into treasury raises questions in connection with rules regarding own shares under corporate law.

The threatened fine for violations of the duty to report the ultimate beneficial owner seems delicate under the principle that criminal offences must be specifically defined because, depending on the circumstances, it may be far from clear who the ultimate beneficial owner is (and whether in a specific situation there is actually a "beneficial owner" in the sense of the law).

The duty to have an account with a Swiss bank is probably quite unique, even though practical or legal circumstances may in many places make a local banking relationship necessary. It is also unclear how and by whom compliance with this duty should be controlled. Finally, it should be noted that the definition of the ultimate beneficial owner in the transparency provisions in the Code of Obligations (articles 697j and 790a) does not fully coincide with the meaning of that term in the Money Laundering Act or the CDB, which may complicate the intended control function of banks.

Finally, it would be desirable for some clarifications of the existing reporting obligation to be made in the course of the revision.

Lenz & Staehelin will follow the progress of the legislative project and inform about significant developments. Please do not hesitate to contact us in case of any questions.

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