New company transparency legislation to reinforce efforts to prevent money laundering

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1. Background
The referendum deadline for the Federal Act of 12 December 2014 for Implementing the Revised Financial Action Task Force Recommendations of 2012 expired unused on 2 April 2015. Currently numbering 36 members, the Financial Action Task Force (FATF) is an international organisation whose main goal is to develop and promote rules for combating money laundering and terrorist financing. A member from the very outset, Switzerland has always been actively involved in drafting the recommendations issued periodically by the FATF. These recognised standards for combating money laundering and terrorist financing were partially revised in 2012, necessitating modifications to various federal decrees. In addition to the company law provisions in the Swiss Code of Obligations (revCO) that are designed to ensure greater transparency in respect of legal entities and their beneficial owners, further provisions in the Civil Code, the Debt Collection and Bankruptcy Act, the Administrative Criminal Law Act and the Anti-Money Laundering Act are also to be revised.

2. Scope
The new transparency regulations apply to joint-stock companies, limited liability companies and, with regard to keeping a register of members, also to cooperatives. In the case of joint-stock companies, the provisions only apply to unlisted companies (Art. 697i para. 1 and 697j para. 1 revCO). What is more, they do not apply to shares in the form of book-entry securities in accordance with the Federal Act on Intermediated Securities (FISA).

3. Disclosure obligations
3.1 Bearer shares
In compliance with the FATF recommendations to prevent the misuse of bearer shares, the draft legislation adopts the disclosure rule, but does not go as far as to abolish bearer shares, a form of stock that is widespread in Switzerland. This means that anyone acquiring bearer shares must disclose their identity to the company within one month of the acquisition and furnish proof that they are genuinely in possession of the shares (Art. 697i revCO).

The FATF also recommends converting bearer shares into registered shares to achieve greater transparency. The conversion option provided under current legislation will become easier when the revised recommendations come into force because a general meeting will then be able to pass the necessary resolution by a simple majority of the votes cast. Articles of association may no longer be amended to stipulate a higher quorum for such a conversion (Art. 704a revCO). This change pre-empts the amendment to the quorum requirements envisaged in the revised company law under Art. 703 and 704 CO. These two articles are to be reformulated to stipulate a majority of the votes cast (rather than of the votes represented), as a consequence of which abstentions will no longer be counted as votes cast.

3.2 Threshold according to Art. 697j revCO
Under the revised recommendations, it will be mandatory to report the name of the beneficial owner in cases where the acquisition of shares (regardless of whether registered or bearer) results in a holding that makes up 25% or more of the share capital or voting rights. The acquirer, whether acting alone or in concert with
third parties, is required to make the report within one month.

3.3 Exceptions
Joint-stock companies may designate a financial intermediary to receive reports (relating to bearer shares) as per Art. 697i and 697j revCO to maintain a register and to keep supporting documents on file. Shareholders must be notified if a financial intermediary is appointed. The latter has a duty to provide information to the company.

3.4 Failure to comply
Membership and proprietary rights to the respective holdings will be suspended until the required reports have been filed within the stipulated one month. If the shareholder fails to make the mandatory disclosure by this deadline, the proprietary rights are forfeited. As soon as the report has been made, these rights can only be reinstated with effect from the time of filing. It lies within the responsibility of the board of directors to ensure that shareholders who have omitted to file a report cannot exercise voting rights without authorisation. The same applies mutatis mutandis to limited liability companies.

4. Register of shareholders or members

4.1 Contents
Companies will be required to maintain a register containing the following details:
- Bearer shareholders: first and last name or company name, address, nationality, date of birth.
- Beneficial owners of joint-stock companies and limited liability companies; members of cooperatives: first and last name or company name, address.

Persons entered in the register must notify the company of any changes to these details. The register is not public (it is accessible neither to equity holders nor to third parties) and does not establish any rights of the registered person vis-à-vis the company.

4.2 Mandatory safekeeping period
All documents supporting the reports must be held in safekeeping for a period of ten years after a registered person has been deleted from the register. The same applies to the share register and the registers of beneficial owners.

4.3 Access
Since the FATF recommendations provide that a natural person resident in Switzerland needs to be duly authorised to pass on to the competent authorities information on equity holders and where applicable, beneficial owners, Arts. 718 para. 4, 814 para. 3 and 898 para. 2 CO have been amended accordingly. Thus, company representatives resident in Switzerland must be given access to the register.

5. Transitional provisions and entry into force
The revised recommendations enter into force on 1 July 2015. Companies affected by the changes to the law are given a period of two years from entry into force to amend their articles of association and regulations. After expiry of this period, any provisions which have not been made compatible with the new legislation will be nullified ex lege. Shareholders holding bearer shares on entry into force of the revised recommendations must meet the disclosure requirements under Art. 697i and 697j revCO within six months. Failure to do so will result in the associated proprietary rights lapsing at the end of this period.

6. Summary and necessary action
Although the new legislation does not explicitly require the abolition of the institution of bearer shares, mandatory disclosure of the names of holders of bearer shares effectively results in their alignment with registered shares. Essentially, all that will distinguish bearer from registered shares are the transfer modalities. Companies affected by the new provisions will also face additional expenses and time efforts. Prior to entry into force, they need to set up an in-house process to implement the new transparency rules, amend their articles of association if necessary, and above all ensure that the prescribed registers are properly maintained.

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