FATF-compliant Reporting Duties of Shareholders of Private Stock Corporations

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- **More transparency**
- **Stricter rules related to shareholdings in privately held Swiss stock corporations**
- **Reporting duties**
- **Duty to keep register for shareholders of bearer shares and beneficial owners**

1. Introduction

Based on the revised 2012 Recommendations of the Financial Action Task Force (2012 FATF Recommendations), the Swiss Parliament adopted the new Act on the Implementation of the 2012 FATF Recommendations on 12 December 2014 (FATF-Implementation Act) in order to align Swiss transparency and anti-money laundering regulation with international standards.

Consequently, the national FATF-Implementation Act provides, among others, for more transparency of shareholdings in privately held Swiss stock corporations. Thus, shareholders must now comply with the newly implemented reporting and notification duties. Also, privately held Swiss stock corporations (respectively their board of directors and/or the management) are required to abide by specific duties with respect to maintaining particular registers for shareholders and for ultimate beneficial owner(s).

The new provisions do, however, not apply to stock exchange-traded Swiss stock corporations.

All in all, the new provisions of the Code of Obligations (CO), in particular on the shareholders' reporting (notification) duties, which (among others) entered into force on 1 July 2015, go beyond mere FATF-compliance.

On 31 December 2015, the transition period of six months elapsed. In this period, the shareholders were supposed to identify and report their existing shareholding of bearer shares, and also to notify the respective privately held Swiss stock corporation (or, if so provided, to a

financial intermediary) about the existing ultimate beneficial owner(s) if the shareholding of bearer shares is above a threshold of 25%.

Thus, by no later than 31 December 2015, the shareholders and the privately held Swiss stock corporations had to comply with the newly enacted obligations as specified below.

2. Shareholders' Reporting (or Notification) Duties

a. Shareholders' duty to report the purchase of bearer shares

According to the shareholders' reporting duty concerning the purchase of bearer shares set forth in the amended CO, the purchaser of bearer shares in a privately held Swiss stock corporation must - within one (1) month following the share purchase - report the purchase as well as the name and surname to the respective Swiss stock corporation or, if so provided, to an instructed financial intermediary.

Such a shareholder must report and provide the aforesaid information irrespective of reaching or exceeding any threshold. That is, the shareholder must even report the purchase of only one bearer share (trigger event).

In particular, the reporting shareholder is obliged to evidence its possession of bearer share(s) and must provide the following documentation:

- passport or identification card (in original or copy) if the respective shareholder is a natural person;
- an excerpt of the commercial register if respective the shareholder is a Swiss legal entity; or
- a notarized excerpt of the foreign commercial register if the respective shareholder is a foreign legal entity.

Additionally, the shareholder of bearer shares has to observe its duty to report any change concerning its name, surname, firm and/or address.

However, the amended CO exempts bearer shares that are transformed into book-entry securities (intermediated securities) and for which the Swiss stock corporation has designated a custodian for such a reporting duty.

b. Shareholders' duty to report the beneficial owner(s) subject to certain conditions

According to the shareholders' duty to report the ultimate beneficial owner(s) of bearer shares and/or registered shares set forth in the amended CO, the reporting duty is triggered if the purchaser of bearer shares or registered shares, acting on its own or in concert, reaches or exceeds the threshold of 25% of the Swiss stock corporation's share capital or voting rights.

Hence, such a share purchaser must identify the ultimate beneficial owner(s), and particularly report the beneficial owner's name, surname and address to the respective Swiss stock

corporation or, if so provided, to an instructed financial intermediary.

In other words, there is no such a reporting duty if a "significant shareholding" of 25% is not reached or exceeded (trigger event) by the share purchaser (or shareholder). Also, there is no reporting duty if a shareholder falls below the threshold of 25%.

The direct shareholder as well as the indirect shareholder (via a third party, such as a fiduciary) can be the ultimate beneficial owner(s) of the bearer shares or registered shares (the ultimate beneficial owner always being a natural person). However, it is always the direct shareholder that must identify and report the ultimate beneficial owner(s) of the bearer shares or registered shares to the respective Swiss stock corporation or, if so provided, to an instructed financial intermediary.

The direct shareholder (respectively the share purchaser) has to fulfil its reporting duty within one (1) month following the share purchase.

Later on, the respective shareholder has the duty to report any change concerning the beneficial owner's name, surname and/or address.

As stated above however, the amended CO exempts bearer shares or registered shares that are transformed into book-entry securities (intermediated securities), and for which the Swiss stock corporation has designated a custodian, from the reporting duty.

3. Duties of Privately Held Swiss Stock Corporations concerning the Registers

Privately held Swiss stock corporations, respectively their board of directors that are in principle responsible for keeping books and registers, have the following new duties:

- they must register the shareholders of their bearer shares in a bearer share register. Such a bearer share register must, at any time, be accessible in Switzerland;
- they must register the ultimate beneficial owner(s) of the bearer shares and/or registered shares in a register for beneficial owner(s). Also, such a register must, at any time, be accessible in Switzerland; and
- they have to ensure that no non-compliant shareholder can invoke its membership rights or financial rights (please see Section 4 below).

Both the bearer share register and the register for beneficial owner(s) must be kept in custody for a period of ten (10) years after a person has been deleted from the relevant register by the board of directors, for example, if the shareholder falls below the threshold of 25%.

Alternatively, shareholders of bearer shares are not required to notify the respective Swiss stock corporation if the Swiss stock corporation's general meeting has resolved the following: that such shareholders may identify and report its shareholding in the Swiss stock corporation and notify the ultimate beneficial owner(s) to a financial intermediary subject to the Anti-Money Laundering Act (AMLA). In this case, the board of directors (or management) is

obliged to inform the shareholders of the designated financial intermediary.

In any case, the board of directors or management of the Swiss privately held Stock corporation should fulfil the aforesaid duties with due care and diligence. Otherwise, it is at risk to be held liable under the CO.

4. Consequences of Non-Compliance

According to the non-compliance rule set forth in the amended CO, the shareholder of bearer shares or registered shares will be barred from exercising membership rights and financial rights, particularly the voting rights and the right to receive dividends if the (acquiring) shareholder does not comply with the aforesaid reporting duties.

Consequently, the shareholder's registration in the bearer share register is necessary to be eligible for exercising shareholders' rights. Specifically, the voting rights are suspended or dormant until a noncompliant shareholder complies with the respective reporting duties. In case that shareholders, whose voting rights are suspended, exercise their voting rights in the general meeting, the general meeting's resolutions will be challengeable.

Likewise, the shareholder can only invoke its financial rights when the shareholder complies with the respective reporting duties. If the shareholder does not fulfill its reporting duties within one (1) month upon the share purchase, the financial rights are deemed forfeited.

In other words, non-compliant shareholders are at risk to lose their right, for example, to receive dividend payments or to be allocated preemptive rights.

5. Selected Key Points for Shareholders and Swiss Stock Corporations

Direct shareholders of existing bearer shares must be registered in a bearer share register by no later than 31 December 2015.

Going forward, shareholders must comply with the reporting duties. Conversely, non-compliance with the reporting duties may trigger severe negative consequences with regard to the shareholders' eligibility to exercise their membership and financial rights in privately held Swiss stock corporations.

Privately held Swiss stock corporations (respectively their board of directors or management) are required to keep the registers and ensure that no non-compliant shareholder can exercise its rights resulting from the shares in order to avoid being held liable under the CO.

Thus, it is advisable for the (direct) shareholders and/or the privately held Swiss stock corporations (respectively their board of directors or management), to be able to answer, inter alia, the following questions:

- What kind of information in relation to the shareholder, beneficial owner and shares has to be reported and provided, and which conditions trigger the reporting duties?
- What kind of exceptions to the reporting duties does exist?

- What kind of modalities have to be observed if the reporting duty is triggered in cases, for example, where shareholders act in concert or on a fiduciary basis?
- Is it permissible to delegate the performance of the reporting duty and the custody of the registers, and if yes, under which circumstances?
- What are the consequences for the shareholders, privately held Swiss stock corporations and board of directors (or if so provided, for the financial intermediary) if non-compliant shareholders exercise their "suspended or forfeited membership rights"?

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