Switzerland transposes the Revised Financial Action Task Force recommendations:

new transparency rules for shareholders of Swiss companies and financial intermediaries

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On 12 December 2014, the Swiss Federal Chambers adopted the new Federal Act for implementing the Revised Financial Action Task Force (FATF) Recommendations.

This legislative package introduces significant amendments and new rules through several existing Swiss laws in the following areas:

- the transparency of Swiss corporations and bearer shares;
- new identification duties for Swiss financial intermediaries;
- extension of the regime applicable to a politically exposed person (PEP);
- introduction under Swiss law of the tax crime offence as a predicate for money laundering;
- new obligations imposed on 'dealers' accepting cash payments for the purchase of movable and immovable assets in excess of CHF100,000;
- improvement of the communication system with the Swiss Money Laundering Reporting Office (MROS); and
- codification of the existing practice regarding the exchange of information on targeted financial sanctions connected with terrorism.

This article focuses on the new rules on transparency and on the identification of beneficial owners, which affect both commercial operating companies incorporated under Swiss law and financial intermediaries which are, or intend to be in, a business relationship with Swiss or foreign companies with business operations.

New reporting duty for holders of bearer shares in Swiss companies

The new regime imposes a reporting duty –

introduced in the Swiss Code of Obligations – to shareholders of non-listed corporations limited by shares incorporated under the laws of Switzerland.

As a result, any person – whether as an individual or as a legal entity – acquiring bearer shares of a Swiss corporation limited by shares has the duty to report his/its holding to the company even if he/it only holds one bearer share. In order to prove that he/it effectively holds the share(s), the shareholder shall give identification information as name and address if he is an individual or an excerpt of the Swiss trade registry, or any equivalent document if the shareholder is a Swiss or foreign company.

This new reporting duty imposed on the holders of bearer shares was technically not required to make Swiss legislation on anti-money laundering consistent with FATF Recommendations. Rather, it reflects Switzerland's desire to meet the requirements set forth by the Global Forum on Transparency and Exchange of Information for Tax Purposes, whose aim is to avoid the abusive use of bearer shares for the purpose of circumventing any Swiss or foreign tax legislation.

The Global Forum will review Switzerland's legislation by next autumn. The new rule, along with the other amendments to the Swiss Code of Obligations, entered into force on 1 July 2015 to ensure the levelling of the Swiss provisions.

The transparency required for bearer shares may call into question the interest of Swiss corporations limited by shares to issue or maintain this category of shares instead of using registered shares. The Swiss legislator has addressed this concern by allowing corporations limited by shares to appoint a financial intermediary to which the reporting of bearer shares may be made.

However, the shareholder's anonymity will ultimately depend on the terms and conditions agreed in the delegation agreement entered into between the company and the financial intermediary, to which shareholders are not a party. The delegation agreement may provide that the financial intermediary limits itself to communicating to the company the specific shares (for example bearer shares 1 to 10) being reported without disclosing the identity of the bearer shares' holder. The legislator wanted indeed to keep the instrument of bearer shares, considering the significant number of bearer shares issued in Switzerland – 50,000 out of the 195,000 corporations limited by shares would have issued bearer shares.

As the practical benefits of bearer shares become less obvious, Swiss corporations limited by shares may privilege registered shares. Taking this situation into account, the Code of Obligations now allows a simplified conversion of bearer shares into registered shares, decided by the majority of the votes cast in the company's general meeting.

The new provisions impose on every legal entity or individual acquiring bearer shares of a Swiss company limited by shares after 1 July 2015 the duty to report his/its identity to the company. The deadline for individuals or legal entities holding bearer shares as at 1 July 2015 to comply with their reporting duty is 31 December 2015.

Duty to disclose beneficial owner(s)

Under the revised Code of Obligations, any person who:

- purchases shares of a non-listed Swiss corporation limited by shares or of a limited liability company, and
- whose participation, alone or together with a third party's, equals or exceeds 25 per cent of the share capital or of the voting rights;

shall disclose to the company either:

- his/its name and address; or
- the name and address of the individual on behalf of whom he/it purchased the shares, if he/it is not himself/itself the ultimate beneficial owner of the shares.

This disclosure duty applies to bearer and registered shares; it reflects, at the company's level, the new obligation imposed on financial intermediaries to identify the beneficial owners of commercial companies (discussed below). If a shareholder which meets the 25 per cent threshold is a legal entity, it lies on the legal entity's representative to seek information on the ultimate beneficial owner of the company, which could prove to be challenging in practice.

Each Swiss company must list the holders of bearer shares as well as the beneficial owners of bearer and registered shares, for as long as a shareholder has not complied with this reporting and/or disclosure duty, he/it can neither exercise his/its participation rights (voting rights) nor assert his/its economic rights (right to dividends).

The economic rights shall definitively lapse if the shareholder does not comply with his/its reporting duties within a month as from the purchase of the shares, but he/it can recover his/its economic rights if he/

it complies with the reporting duty after this deadline. As regards voting rights, the new provisions impose on the board of directors the duty to ensure that shareholders in breach of their reporting and disclosure duties may not exercise their rights.

As mentioned above, the new provisions of the Code of Obligations allow Swiss corporations limited by shares to appoint a financial intermediary to which reporting relating to bearer shares may be made. This possibility is also available with respect to disclosure of beneficial owner of bearer shares of Swiss corporations limited by shares. On the other hand, the Code of Obligations does not provide for the appointment of a financial intermediary by Swiss limited liability companies, since these companies do not issue bearer shares.

Shareholders of Swiss corporations limited by shares who acquired bearer shares after 1 July 2015 and whose participation equals or exceeds 25 per cent of the share capital or voting rights must disclose the beneficial owner(s) of his/its shares within one month as from acquisition. Individuals or legal entities holding bearer shares of Swiss corporations limited by shares as at 1 July 2015 must comply with their duty to disclose the beneficial owner(s) by 31 December 2015 at the latest.

Holders of registered shares do not have the duty to report their existing participation; indeed, the legislator considered that this type of shares was less risky than bearer shares from a money laundering point of view. On the other hand, should their participation reach or cross the 25 per cent threshold on 1 July 2015, the holders of registered shares must disclose the beneficial owner of their participation in the company within one month as from acquisition.

If the shares – whether bearer or registered shares – have been acquired in the form of intermediated securities within the meaning of the Swiss Federal Intermediated Securities Act, the above mentioned duties to report and to disclose do not apply to the holder of such securities.

Identification of the Beneficial Owner by the Financial Intermediary

The revised Swiss Act on Anti-Money Laundering introduces new identification duties for financial intermediaries which are in a contractual relationship with a company having business operations, whether the company is incorporated in Switzerland or abroad. This includes general partnerships and limited partnerships.

Until now, financial intermediaries could consider that the beneficial owner of a commercial company was the company itself. In other words, contrary to what has prevailed and still prevails, for domiciliary companies whose beneficial owners must systematically be identified, the financial intermediary did not have to determine the beneficial owner when its co-contractor was a company with business operations. According to the new regime, the beneficial owner shall, by definition, always be an individual. This constitutes the counterpart of the new duties of transparency imposed on legal entities, the reporting of the shareholder being the first step of the beneficial owner's identification process.

The mechanism of identification has been specified in the revised Ordinance of the Swiss Financial Market Supervisory Authority (AMLO-FINMA) as well as, for banks and securities dealers, in the newly issued Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 16).

A new concept has been created for the purpose of identifying an individual or individuals who are beneficial owners of a company with business operations. The 'control holder' over the company, inspired directly by FATF Recommendation 10. The control holder over the company is the individual that, solely or acting in concert with third parties, controls such legal entity by holding 25 per cent of the share capital or voting rights. The 25 per cent threshold has been set for the sake of consistency with the above-outlined disclosure duty introduced in the revised Code of Obligations.

In the event no individual holds at least 25 per cent of the share capital or voting rights, the financial intermediary must determine who effectively controls the company. Such control may be exercised by one or several individuals over the management of the company. This kind of information must be provided by the shareholders to the Swiss company according to the new disclosure duty provided in the revised Code of Obligations.

Should the representatives of the company not be able to identify the beneficial owner(s), notably due to a dispersed ownership, the financial intermediary must identify the senior member of the company's management body, that is the CEO. In this

case, the CEO would be the control holder even if he is not the beneficial owner. The identification of the CEO must then be used as an alternative to the identification of the beneficial owner(s).

There may be other situations where the identification of the control holder does not necessarily lead to the beneficial owner(s). By way of example, the owner of a fiduciary company which is the financial intermediary's co-contractor would be the control holder, whereas the client on behalf of whom the fiduciary company acts towards the financial intermediary would be the effective beneficial owner. The latter must be identified only if the financial intermediary has specific indications that the assets beneficially belong to him or if this fact is publicly known.

The rules on the identification of the beneficial owner of commercial companies apply from 1 January 2016 to all new business relationships. As regards business relationships existing as at 1 January 2016, each financial intermediary must identify the beneficial owner(s) if a renewal of the establishment of the contracting party or the beneficial owner's identity is necessary.

Conclusion

The new legislative package represents a paradigm shift for financial intermediaries interacting with companies having business operations. The implementation of the new concept of control holder will increase compliance costs and will also require financial intermediaries to adapt their IT infrastructure accordingly.

Swiss companies are also heavily impacted by the new reporting and disclosure duties. In order to be able to provide financial intermediaries with comprehensive and accurate information on their beneficial owner(s), executives of such companies, especially when they are part of a corporate group, will need to have a clear understanding of the group's structure. This may prove difficult within international groups in which trusts, foundations or collective investment schemes may be interposed.

The new regime represents an important change from a Swiss regulatory standpoint as it not only impacts on financial intermediaries, on which Swiss anti-money laundering legislation was oriented so far, but now also on other economic players such as non-listed commercial companies, as well as their shareholders and beneficial owners.

The new transparency duties applicable to shareholders of Swiss companies also reflect the increasing importance of tax aspects in Switzerland's anti-money laundering arsenal.