EXPERT GUIDE

CorporateLiveWire

July 2015

Mergers & Acquisitions 2015

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New Transparency Requirements for Swiss Companies

By Stéphane Konkoly

In response to the FATF Recommendations 2012, the Swiss Parliament promulgated a new law in December 2014 which purports to combat money laundering more effectively. This law will likely enter into force on 1 July 2015 for the most part (with some provisions applying as from 1 January 2016 only) and will in particular impose new transparency requirements for non-listed Swiss companies.

Disclosure of identity for acquirers of bearer shares

Acquirers of bearer shares of a Swiss company will have to disclose their identity and address, together with evidence of the acquisition and ID resp. commercial register excerpt, within one month from the acquisition and keep such information up-to-date. There is no threshold: The acquisition of even one share triggers the obligation to disclose.

This obligation does not apply to:
– *Listed companies;*
– *Shares issued as intermediated securities if the depository is located in Switzerland.*

Identification of the beneficial owner

Acquirers of bearer or registered shares of a Swiss company will have to disclose the name and address of the beneficial owner of the shares within one month from the acquisition. This only applies if, after the acquisition, the acquirer (acting alone or in concert with third parties) holds shares representing 25% or more of the share capital or of the voting rights of the company. The beneficial owner disclosed must be a natural person; legal entities must be looked through for the purpose of disclosure. The shareholder has to keep such information up-to-date.

This obligation does not apply to:
– *Listed companies;*
– *Shares issued as intermediated securities if the depository is located in Switzerland.*

Addressee of disclosure

Shareholders must disclose their identity and the identity of the beneficial owners to the company.
However, the general assembly can decide that such disclosure has to be made to a financial intermediary according to the Anti-Money Laundering Act. [Note: The articles of association can delegate such power to the board of directors.] Pursuant to the wording of the law, this can only be used for disclosure in relation to bearer shares: Identity of beneficial owner of registered shares can be disclosed to the company only.

New register to be kept

The company (or the financial intermediary, if applicable) must keep a register of the holders of bearer shares and of the beneficial owners disclosed, mentioning their name and address and, for holders of bearer shares, their nationality and date of birth.

Such register must be accessible in Switzerland. Supporting documents provided for the disclosure must be kept as long as a person appears on the list and 10 years thereafter.

Consequences of breach

As long as the holders of bearer shares have not disclosed their shareholding to the company and/or as long as the holders of bearer shares or registered shares representing more than 25% of the share capital or of the voting rights have not disclosed the identity of the beneficial owner, they are deprived of their voting rights and of their rights to receive dividends. If the disclosure is not made within one month following the acquisition, the right to receive dividends will definitely lapse; future dividends can only be claimed once the shareholding and/or the identity of the beneficial owner have been disclosed. Board members are liable for votes cast by, or dividends paid to, shareholders that have not properly disclosed their shareholding or the identity of the beneficial owner.

Stock companies and limited liability companies

The new rules described above ap-

ply above all to stock companies (Aktiengesellschaften [AG] / sociétés anonymes [SA]) which are not listed.

The new rule regarding the identification of the beneficial owner (including the keeping of the corresponding register) and consequences for breach also applies to limited liability companies (Gesellschaft mit beschränkter Haftung [GmbH] / société à responsabilité limitée [sàrl]). However, for such companies, the disclosure cannot be made to a financial intermediary.

Conversion of shares

Bearer shares must be convertible into registered share with a decision of the general assembly taken at the majority of the votes. The articles of association cannot provide for more restrictive rules for the conversion.

Timing for implementation

Companies must adapt their articles of association and by-laws to the new legal provisions within two years following the enactment of new law.

Existing holders of bearer shares must comply with the new legal requirements as from the enactment date of the law and must therefore disclose their identity and the identity of the beneficial owner (if they hold more than 25% of the share capital or of the voting rights). In this context, the right to receive dividends will lapse only six months after the enactment of the law. This subsequent disclosure obligation does not apply to holders of registered shares which will only have to disclose the identity of the beneficial owner upon a future transfer of their shares.

In other words, the consequences of breach (see above) will apply as from the enactment date of the law for the holders of bearer shares. Therefore, the company will have to make sure that, at the following general meeting, only those holders of bearer shares which have disclosed their shareholding and the identity of the beneficial owner can vote and request payment of dividends.

Even though the law does not specifically provide it, the board of directors would be well-advised to invite officially the holders of bearer shares to disclose their shareholdings and the identity of the beneficial owner before the following general assembly.

What is to be done

The board of directors of non-listed stock companies should:
Before the enactment of the law:
– Discuss whether bearer shares should be transformed into registered shares or issued as intermediated securities;
– Discuss whether disclosure should be made to the company or to a financial intermediary. In the latter case, it should take measures to choose such intermediary and negotiate the necessary agreements. Otherwise it should prepare the necessary register for future disclosure of shareholding and identity of beneficial owner;
– Discuss whether the articles of association should be amended (existing limitations for the conversion of shares; delegation of power to the board of directors regarding the designation of a financial intermediary for the disclosure);
– Make the corresponding proposals to the following general assembly;
Upon enactment of the law:
– For stock companies with bearer shares, officially invite the holder of such shares to disclose their shareholding and the identity of the beneficial owner.

For limited liability companies, the managers should prepare the necessary register for the future disclosure of beneficial owners.

Impact on M&A transactions

The new law will also have some impact on M&A transactions. In the due diligence phase, both the seller and the purchaser of shares in non-listed companies should make sure that no resolution of the general meeting has been taken by, and no dividend has been paid to, shareholders that have not complied with the disclosure requirements.

The purchaser must also be aware that it will have to disclose its shareholding and, if he holds more than

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25% of the share capital or of the voting rights, the identity of the beneficial owner(s) who must be a natural person. Depending on the structure of the purchaser, this might imply preliminary researches to identify the beneficial owner and a more extensive disclosure than in the purchaser's own jurisdiction (if outside of Switzerland).

It must be noted that the disclosure requirements also apply in case of transfer of shares for security purposes. This should be taken into consideration when structuring the financing of an acquisition.

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