

Newsletter June 2015

Action required for privately held companies and their members due to the implementation of the FATF-recommendations as of 1st of July 2015

The Swiss Federal Act on the Implementation of the Revised Recommendations of the Financial Action Task Force (FATF) of 2012 aims to tighten the combating of money laundering and results among others in the introduction of new provisions for non-listed corporations (hereafter "AG"), limited liability companies (hereafter "GmbH") and cooperatives and their members. These provisions enter into force on 1st of July 2015.

1. Obligations of holders of bearer shares of a privately held corporation

Holders of bearer shares, who already own bearer shares of a privately held AG on 1st of July 2015, have to report to the AG or to a financial intermediary as designated by the AG their current number of bearer shares, their first name, name or company name, respectively, and their address until 1st of January 2016.

As of 1st of July 2015, acquirers of bearer shares in a privately held company have to notify such acquisition to the AG or to a financial intermediary as designated by the AG by disclosing the aforementioned data within one month since the acquisition. The duty of notification also applies if only a single bearer share is acquired. It is unclear at present, whether the subscription for bearer shares in the context with an incorporation of a company or an increase of share capital is subject to notification.

As of 1st of July 2015, the acquirer of bearer shares (alone or in agreement with third parties), has to additionally notify the first name, the name and address of the individual for whom the acquirer finally acts (i.e. the beneficial owner), provided that the acquirer of the bearer shares reaches or exceeds the threshold of 25% of the share capital or of the voting rights. These facts have to be reported within one month from the acquisition of the bearer shares on. Also within groups of companies,

the beneficial owner must mandatorily be an individual. In this case the ultimate beneficial owner at the end of the control chain has to be disclosed. It is not yet clear what concretely has to be notified, if the shares at the end of the control chain are owned by diverse shareholders or if they are listed at a stock exchange.

All subsequent changes to the notified data have to be reported to the AG or to the financial intermediary as designated by the AG.

2. Obligations of shareholders with registered shares in a privately held AG and of members of a GmbH, respectively

Contrary to holders of bearer shares, neither holders of registered shares of an AG nor members of a GmbH have to report their holdings as per 1st of July 2015 to the AG or GmbH.

However, as of 1st of July 2015, they have the same notification duty as acquirers of bearer shares if they acquire (alone or in agreement with third parties) registered shares in an AG or share quotas in a GmbH, respectively, and reach or exceed the threshold of 25% of the capital or of the voting rights by way of such acquisition. In such case the acquirer has to disclose to the AG or GmbH, respectively, for which beneficial owner he finally acts, by disclosing the first name, name and address of the beneficial owner within one month from the acquisition on.

Here as well the legislator keeps silent if these prescriptions also apply in case of the subscription for registered shares in an AG or share quotas in a GmbH on the occasion of the foundation or a capital increase. Furthermore, it is unclear what concretely has to be notified, if the shares at the end of the control chain are owned by diverse shareholders or if they are listed at a stock exchange.

All subsequent changes to the notified data have to be reported to the AG or GmbH, respectively.

3. Sanctions in the event of a breach of the reporting duties according to sections 1 and 2

As long as the acquirer who is obliged to notify has not complied with his duty of notification, he is barred from exercising his membership rights, in particular the voting rights, regarding the acquired shares or share quotas, respectively. The financial rights, in particular the right to dividends, regarding the acquired shares or share quotas, respectively, can only be claimed upon compliance with the duty of notification. If the acquirer does not fulfil his duty to notify within one month from the acquisition, the financial rights are deemed to be forfeited. If the acquiring shareholder makes the notification later than one month after the acquisition, he is entitled to such financial rights which accrue as from the moment of the notification.

4. Exceptions from the reporting duties according to sections 1 and 2

The aforementioned reporting duties do not apply provided that the bearer or registered shares of an AG are issued as book-entry-securities according to the Federal Act on Book-Entry Securities. In such case the AG designates the depositary, which must be in Switzerland, where the shares are deposited or registered in the main register. In practice, book-entry-securities are especially created, if the shares are owned by a large number of shareholders or in case of a high volume of transactions.

No exceptions from the reporting duties apply to share quotas of a GmbH.

5. Action required for members of the Board of Directors of a privately held AG and for Managing Directors of a GmbH

5.1 Register of beneficial owners and of holders of bearer shares and new regulations regarding shareholders' register and quotaholders' register

As of 1st of July 2015, both the privately held AG and the GmbH have to establish a register about the beneficial owners. As of the same date, AGs having issued bearer shares have to establish a register about the holders of bearer shares or they can delegate this duty as well as the establishment of the register of beneficial owners to a designated financial intermediary. In particular AGs and GmbHs which are controlled by shareholders abroad have to ensure that these registers are accessible in Switzerland at any time. This also

applies to the shareholders' register of the AG and the quotaholder register of the GmbH which must also be accessible in Switzerland anytime as of 1st of July 2015.

Furthermore, as of 1st of July 2015, the supporting documents for an entry in the aforementioned registers must be kept for ten years after the respective person has been deleted from the register.

5.2 Enforcement of the sanctions in the event of a breach of the reporting duties according to sections 1 and 2

The Board of Directors of the AG and the Managing Directors of the GmbH, respectively, are obliged to ensure that the acquiring parties do not exercise their membership rights, in particular the voting and dividend rights, if such party is in breach of its duty of notification. The enforcement of the duty of notification will have to be made in particular when examining the legitimation of a shareholder or quotaholder, respectively, prior to the shareholders' or quotaholders' meetings, respectively.

5.3 At least one member of the Board of Directors or of the Managing Directors, respectively, or a Director with domicile in Switzerland must be authorized to represent the AG or GmbH

Up to now, the AG and GmbH have to be represented by at least one person with domicile in Switzerland and this person does not have mandatorily to be a member of the Board of Directors or of the Managing Directors, respectively, or a Director. Under the revised law, the company will have to be represented by at least one member of the Board of Directors or one Managing Director, respectively, or by a Director who has domicile in Switzerland. This person must also have access to the registers as mentioned in section 5.1, unless the respective registers regarding bearer shares are kept by a financial intermediary, designated by the AG having issued bearer shares.

Up to now, it is not yet clear how the commercial registers will enforce this requirement. Therefore, it is recommended that the rules of representation of an existing AG or GmbH, respectively, are examined and – if necessary – are adapted on the occasion of applications to the commercial register which take place after 1st of July 2015.

5.4 Tightened safekeeping duties in the event of liquidation

In the event of a liquidation of the AG and the GmbH, not only the accounting records have to be kept at a safe spot for 10 years after the deletion of the AG or GmbH, respectively, from

the commercial register, but also the registers as mentioned in section 5.1. The supporting documents for entries in the beneficial owner-register and in the register about holders of bearer shares have to be kept during the same period of time. Furthermore, it has to be ensured that the registers as mentioned in section 5.1 are accessible in Switzerland at any time.

5.5 Alignment of the articles of association and of internal regulations until 1st of July 2017

AGs and GmbHs which are already registered in the commercial register being not compliant with the aforementioned provisions will have to adjust their articles of association and their internal regulations until 1st of July 2017. Regulations which are not compliant with these new provisions will remain in force until their adjustment, but not longer than 1st of July 2017.

6. What is new for cooperatives?

As of 1st of July 2015, all cooperatives (not only cooperatives with a personal liability of their members or with a duty to make further contributions) will have to establish a register about their members and such register must be accessible in Switzerland at any time. It is no longer required to file the register of the members with the commercial register.

Regarding the prescriptions of domicile for the management of a cooperative it applies the same as for the AG and GmbH: At least one member of the management or of the directorate with domicile in Switzerland must be in a position to represent the cooperative and must have access to the register of members.

In the event of liquidation, the prescriptions of safekeeping as for the AG and GmbH apply analogously (see section 5.4). For the adjustment of the articles of association and the internal regulations to the new provisions applies the same deadline as for the AG and GmbH (1st of July 2017, see section 5.5).

Because the members of a cooperative have no duty of notification, the cooperatives are not obliged to establish a register of beneficial owners.

The content of this Newsletter does not represent legal advice and may not be used as such. For a personal consultation, please get in touch with your contact at Suter Howald Attorneys at Law. Should you have further questions in relation to the topics in this Newsletter, please contact:

Bettina Rudin, Partner
bettina.rudin@suterhowald.ch
Tel.: +41 44 630 48 43

Urs Suter, Partner
urs.suter@suterhowald.ch
Tel.: +41 44 630 48 00

Dr. Mauro Loosli, Partner
mauro.loosli@suterhowald.ch
Tel.: ++41 44 630 48 17

Suter Howald Attorneys at Law
Stampfenbachstrasse 52
P.O. Box
8021 Zürich
Tel.: +41 44 630 48 11
Fax: +41 44 630 48 15
www.suterhowald.ch