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Abolition of bearer shares and enhanced transparency regulations for companies limited by shares (AG) and limited liability companies (GmbH).

Current situation

With the new federal act dated 21 June 2019 regarding the implementation of recommendations from the Global Forum of Transparency and Exchange of Information for Tax Purposes («Federal Act») bearer shares will de facto be abolished. In addition, transparency regulations in the Swiss Code of Obligations (CO) with regard to the notification of the beneficial owners for companies limited by shares and limited liability companies are clarified and will become stricter due to the introduction of criminal sanctions. The new regulations will enter into force on **1 November 2019**.

New sanctions

Under the previous regulation, the rights of shareholders who failed to comply with their obligation to report the beneficial owner were suspended or lapsed. With the new regulations criminal sanctions will be introduced. Whoever intentionally or with contingent intent fails to comply with the obligation to report the beneficial owner of the shares under the CO shall be sanctioned with a fine. Both the failure to report and the reporting of false information is punishable. Criminal sanctions also apply if the share register and the register of the

beneficial owners is not maintained in accordance with the regulations. The fine is limited to CHF 10'000. A person who is sentenced to a fine of more than CHF 5'000 by a court judgement will be registered in the Swiss criminal records.

The Federal Act furthermore provides that shareholders, creditors or the commercial register may file a request with the competent court for the dissolution and liquidation of the company due to a defect in the organisation of the company if the company does not maintain the share register or the register of the beneficial owners in accordance with the CO and/or if the company issued bearer shares that are neither listed on a stock exchange nor structured as intermediated securities (*Bucheffekten*).

Abolition of bearer shares

According to the Federal Act, companies limited by shares have to convert their bearer shares into registered shares **until 30 April 2021**. In case of failure to comply, the bearer shares will automatically be converted into registered shares by operation of law. The conversion has no factual implications on the rights and duties of shareholders. The shares retain their nominal value, the quota of the

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paid-up subscription amount (*Liberierungsquote*) and their characteristics with regard to voting and economic rights. The transferability of automatically converted registered shares will not be restricted. Companies affected by an automatic conversion into registered shares are required to amend their articles of association accordingly in the course of their next prospective amendment.

After the conversion, the company shall enter those shareholders into the share register who complied with their reporting obligation. Shareholders who have previously failed to disclose their status in accordance with statutory law may, within five years after the Federal Act came into force and with the consent of the company, apply to the competent court to be entered into the share register. Absent such application to the court within that grace period, the company has to request the annulment of the respective shares with the competent court. Upon full legal effect of the court decision regarding the annulment of the shares, the shareholders lose their legal rights permanently. As a consequence, the board of directors shall replace the cancelled shares with treasury shares.

In the future, bearer shares are only permissible if a company (i) has equity securities listed on a stock exchange or (ii) if the bearer shares are issued as intermediated securities. Companies that wish to have bearer shares in circulation based on these exemptions have to register this circumstance with the competent commercial register until 30 April 2021.

Specification of the obligation to report the beneficial owner

Since 1 July 2015 persons who individually or by agreement with third parties acquire shares in a company and thus reach or exceed the threshold of 25% of the share capital or voting rights have to report to the company within one month the so-called beneficial owner. The notice has to include the first name, surname and the address of the natural person for whom the shareholder is ultimately acting. Due to its ambiguity, the provision has been discussed controversially. The Federal Act is expected to bring an end to these debates. In principle, however, the aforementioned disclosure regime remains in place.

If the shareholder is a legal entity or a partnership (so-called indirect shareholding structure), each individual who, by analogy to art. 963 CO (consolidated accounts), controls the shareholder must be disclosed as beneficial owner. Thus, an individual is a beneficial owner who (i) directly or indirectly holds a majority of votes in the shareholder, (ii)

directly or indirectly has the right to appoint or remove the majority of the board of directors or the management, or (iii) is able to exercise a controlling influence based on the articles of association, a contract or comparable instruments. If no such person exercising control exists, the shareholder is also obligated to disclose this.

For listed companies, the reporting obligation is in principle governed by the applicable stock exchange regulations. According to the Federal Act, if (i) the acquiring shareholder is a listed company, (ii) a shareholder is controlled in the above mentioned manner by a listed company or (iii) the acquiring shareholder controls a listed company, then the acquirer of the shares only has to report this fact, the company name and the registered seat of the listed company. Strictly speaking, no beneficial owner has to be reported.

To Dos

In connection with the abolition of bearer shares, it is recommended that non-listed companies, which have bearer shares in place that have not been issued as intermediated securities, swiftly convert them into registered shares in accordance with the ordinary procedure **until 30 April 2021**. The board of directors should request the bearer shareholders who have not fulfilled their previous reporting obligation pursuant to Art. 697i CO to comply with their reporting obligation. This is particularly important in order to avoid costly legal proceedings at a later stage.

Due to the newly introduced criminal sanctions and the extension of the term regarding a defect in organisation, companies have to ensure that the share register and register of the beneficial owners are kept in accordance with the regulations. Companies and their competent bodies have to review the new provisions and adapt internal procedures, if necessary. Shareholders on the other hand need to ensure that they comply with their reporting obligation.

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