反洗钱：瑞士公司股东新的报告义务

Money laundering: New reporting duties for Swiss company shareholders



Jana Essebier
菲谢尔律师事务所
银行及金融团队
合伙人
Partner
Banking and Finance Team
VISCHER



Fiona Gao Yue
菲谢尔律师事务所
中国业务团队
律师
Associate
China Desk
VISCHER

VISCHER
SWISS LAW AND TAX

Schützengasse 1
P.O. Box 1230
8021 Zurich

电话 Tel: +41 58 211 34 00
传真 Fax: +41 58 211 34 10

电子邮件 E-mail:
jana.essebier@vischer.com
fgao@vischer.com

www.vischer.com

旨在贯彻金融行动特别工作组（FATF）《2012 年修订版建议》，新联邦法律涉及更加严格的反洗钱规定的第一部分于 7 月 1 日开始生效，特别是对法律实体的透明度增加了要求。笔者在下文以有限公司为例，总结了有关透明度、违反透明度规定可能受到的处罚，以及何时需要采取行动的主要条款。该法律修正案也对有限责任公司和合作社有影响。

不能再隐瞒身份

此前，无记名股票的购买人基本上可以隐瞒身份，而新规定则完全改变了这一状况。即使只购买了一份股票，购买人也必须将所购股票及其姓名和地址报告给公司。

购买人的身份必须（通过附照片的正式身份证明或商业登记摘要）披露给公司。股东必须将其姓或名的任何变更、所涉公司或地址的变更向公司报告。与股票交易法规定不同的是，此类披露要求不设置最低门槛标准。董事会必须保留一份名录，载有购买人或股东的出生日期和国籍、以及他们的姓名或企业名称和地址。立法机关的新要求因此超出了原先仅针对记名股票实施的披露要求范围。

报告实益所有人

如果任何人购买某公司的股份后直接或间接达到或超过了该公司股本或表决权 25% 的限额，即使该股份未在股票交易所上市，也不是以证券间接持有的形式发行，购买人仍必须向公司报告该交易的最终受益自然人（即实益所有人）的全名和地址或者确认其本人即为实益所有人。此项披露义务同样适用于记名和不记名股票。与上市公司披露相关法律规定不同的是，此项披露义务不是针对实益所有人，而是针对股东施加的。股东必须向公司报告实益所有人的姓名或地址的变更。

> *“[新联邦法律]特别是对法律实体的透明度增加了要求”*

记录保存

公司必须保存所收到的有关实益所有人的记录。在实益所有人从股东 / 购买人名录中删除后，有关其报告内容的证明文件还须保留十年。该名录必须始终保证可在瑞士境内查阅。

处罚措施

有关不记名股票的新股东以及报告实益所有人的义务都应当在购买交易完成后的一个月内履行。如果股东未能履行报告义务，相应的表决权和其他股东权利都将暂停，而且股东可能不能就相关股份主张财产权——特别是获得股息的权利。需要强调的是，如果股东未在购买股票后的一个月内履行报告义务，则会丧失与所购股份相关的财产权。即使后来补上了报告，财产权也只会从实际报告之日起生效。

董事的责任风险

董事会必须确保违反报告义务的股东不能行使相关权利，特别是参加股东大会或者获得股息等权利。否则，董事会成员可能会被要求承担责任。

另外，如果股东大会有未获许可的人员参与其中，大会做出的相关决定可能会被申诉。公司对不履行义务的股东派发股息也涉嫌实施了非法的保证金退还或者隐藏收益分配。

过渡条款

在 7 月 1 日已经持有不记名股票的个人必须在一个月内履行报告义务。这个规定也适用于有关实益所有人的报告义务。在 7 月 1 日之前持有记名股票的人，不需要追溯性地履行报告义务，只需要就其自 7 月 1 日起购买的股票履行报告义务即可。

需要采取的行动

发行记名和不记名股票的所有有限公司必须尽快采取必要的预备措施。对于有法人股东的瑞士公司，董事会应当根据公司的具体情况，解决如何履行有关报告实益所有人的义务的问题。考虑购买瑞士公司股份的个人或实体必须注意这些新的报告义务。

对于住所地在瑞士或者在瑞士受监管的托管机构所保存或登记的间接持有证券，这些机构不履行上述义务不会受到处罚，因此购买人可根据具体情形考虑这是否是一个好的替代性选择。

尚未解决的问题

如果违反强调透明度的新规定，其后果对于股东和董事会来说都是很严重的。因此，在法律对许多问题尚无明确规定的情况下，新联邦法的第一部分就开始实施，这确实令人意外。考虑到许多问题还不明确，无论在任何情况下，在下一个派息日之前必须对所实施的报告义务进行检查，以确认是否需要进行调整。■

On 1 July the first part of the new federal law to implement the 2012 Revised Recommendations of the Financial Action Task Force concerning the tightening of money laundering provisions entered into force. This relates to, in particular, the provisions concerning increased transparency requirements for legal entities.

Taking limited companies as an example, the following summarizes the key provisions on transparency and potential sanctions and explains when action is necessary. The amendments also affect limited liability companies and cooperatives.

No more anonymity

Previously, the acquirer of a bearer share remained basically anonymous. This is no longer possible. Whoever acquires even a single bearer share must report the acquisition as well as their first and last names and address to the company.

The acquirer must be identified to the company (by an official photo ID or an extract from the commercial register). The shareholder must report to the company any change of first or last name, company or address.

In contrast to the stock exchange law, there are no thresholds for these reporting requirements. The board of directors must keep a directory containing the date of birth and nationality of the acquirer or shareholder in addition to the first and last name or the business name and the address. The requirements of the legislator thus go beyond what the law requires in the case of registered shares.

Reporting of beneficial owners

Whoever acquires shares in a company whose shares are neither listed on an exchange nor issued in the form of intermediated securities and thereby, directly or indirectly, reaches or exceeds the limit of 25% of the share capital or voting rights, must report to the company the first and last name and the address of the natural individual(s) for whom they are ultimately dealing (i.e. the beneficial owner) or confirm that they themselves are the beneficial owner.

This disclosure obligation applies to the acquisition of both bearer and registered shares. In contrast to the disclosure law for listed companies, the obligation to report is not imposed on the beneficial owner, but rather on the shareholder. The shareholder must notify the company of any change in the first or the last name or the address of the beneficial owners.

Record keeping

The companies must keep a record of the reported beneficial owners. The supporting documents for the report must be kept for 10 years after the deletion of a person from the directory. The directory must be kept in such a way that it can be accessed at any time in Switzerland.

Sanctions

Both the obligation to report the new shareholder of bearer shares and the obligation to report the beneficial owners are to be fulfilled within one month of purchase. As long as the shareholder fails to meet its reporting obligations, the corresponding voting and other membership rights are suspended. The relevant property rights – especially the right to receive dividends – can also not be claimed.

It should be emphasized that the shareholder, if they do not fulfil the reporting requirements within one month of acquisition, forfeits their property rights. Even if reporting is completed at a later time, their property rights are only effective from the actual reporting date.

Directors' liability risk

The board of directors must ensure that no shareholder can exercise their rights in violation of the reporting requirements, in particular to take part in the general meeting of shareholders or receive a dividend. Otherwise, the members of the board of directors may be open to responsibility claims.

In addition, relevant decisions of the general meeting of shareholders can be subject to appeal due to the participation of unauthorized persons. There is also the question of whether dividend payments to a defaulting shareholder would be an infringing deposit refund by the company or a hidden distribution of earnings.

Transitional provisions

Individuals who already had held bearer shares on 1 July have to comply with their respective reporting obligations within one month. This also applies in respect of the reporting of the beneficial owners. There is no retrospective reporting requirement for registered shareholders who were in possession of shares prior to 1 July, only for those shares which are purchased from 1 July.

> *"[The new law includes] provisions concerning increased transparency requirements"*

Actions required

All limited companies with registered or bearer shares should take the necessary preparatory measures as soon as possible. For Swiss companies in which legal persons are invested, the board of directors should deal with the question of how the obligation to report the beneficial owners must be implemented in their particular case. Any person or entity who is considering an acquisition of shares in a Swiss company should pay attention to these new reporting obligations.

Since no sanctions apply if the shares are issued in the form of intermediated securities, i.e. deposited or registered with a Swiss domiciled and regulated custodian, it should be considered whether this might be an alternative in the particular case.

Open questions

The consequences of a violation of the new rules on transparency are hard for both shareholders and the board of directors. It is therefore all the more surprising that this part of the revision came into force despite the law not explicitly addressing many questions.

Given the ambiguities, the implementation of the reporting obligations must, in any case, be checked again before the next dividend date in case the implementation needs to be adjusted. ■

作者：菲谢尔律师事务所银行及金融团队合伙人 Jana Essebier、中国业务团队律师高悦
Jana Essebier is a partner of VISCHER's banking and finance team; Fiona Gao Yue is an associate on VISCHER's China Desk