

NEWSLETTER

RECENT DEVELOPMENTS IN MAJOR CORPORATE JURISDICTIONS – COMPLIANCE ISSUES



Following the introduction of Common Reporting Standards (CRS) in 2014, extra pressure is being exercised on major corporate jurisdictions by the OECD (Organization for Economic Co-Operation and Development) Global Forum on Transparency and Exchange of Information for Tax Purposes (“Global Forum”) for compliance with internationally agreed standards on exchange of information.

Additionally, European Union Directives adopted to address the threat of money laundering are compelling member countries to introduce several measures in relation to the transparency of corporate entities.

As a result, several corporate jurisdictions have recently amended or are soon expected to amend their corporate laws so as to meet the demanding standards imposed by the Global Forum and/or the European Directives.

Below is a summary of changes that have already been implemented by salient corporate jurisdictions; other jurisdictions will probably follow suit.

A. MARSHALL ISLANDS

The Marshall Islands Association Law was revised last November 2017. The more important updates are summarized as follows:

1. New Maintenance of Records Requirement:

In addition to the record keeping requirements of a Marshall Islands company (i.e. Books of account and minutes, Records of shareholders etc.) the 2017 amendments require all non-resident corporations to use all reasonable efforts to obtain and maintain up-to-date records of the names, addresses, nationalities, and, in the case of natural persons, dates of birth of all holders and beneficial owners of bearer shares, names of shareholders, type, number and class of shares issued and held by each registered shareholder/holder of bearer shares, dates of transfers of shares. Under the Marshall Islands Association Law “beneficial owner” means the natural person(s) who exercises control over a corporation through direct or indirect ownership of more than 25% of the shares or voting rights in such corporation. . If no such natural person exerts control through such an ownership interest, the natural person(s) who exercises control over such corporation through management of the corporation or other means shall be regarded as the beneficial owner(s).

2. Recordation of bearer share information and transfer:

In addition to the maintenance of the records above, the non-resident corporations, in order to maintain the validity of any such bearer shares, including any and all rights and privileges of a holder of such shares, must record with the Marshall Islands Registry the holders and beneficial owners of bearer shares as well as any subsequent transfer of bearer shares.

The information to be recorded with the Marshall Islands Registry includes the names, addresses, nationalities, and, in the case of natural persons, dates of birth of all holders and beneficial owners of such bearer shares.

For bearer shares issued on or before 14th November, 2017, corporations are given 360 days period (the “Phase-in Period”) to comply with the recordkeeping and recordation requirements under the Marshall Islands Associations Law.

By that deadline, the required details on the holders and beneficial owners of the bearer shares must be recorded with the registered agent in order to maintain the validity of the bearer shares. There is no requirement to record prior transfers.



For bearer shares issued after 14th November, 2017, there is no Phase-in Period and therefore any issuance and subsequent transfer of bearer shares must be immediately recorded with the Marshall Islands Registry.

Failure to maintain records of shareholders and beneficial owners in respect of bearer shares would result to the cancellation by the non-resident corporation of the bearer share certificates relating to those shareholders / beneficial owners for which such records are not being maintained. The term “cancel” is not defined in the recent amendments, however the same is used in the Marshall Islands Association Law in relation to reacquired shares and essentially means that shares so cancelled shall be restored to the status of authorized but unissued shares.

3. New Annual Attestation Requirement:

Upon formation and in case of corporations existing prior to the amendments of the Marshall Islands Association Law, the non-resident domestic corporations would also be required to “make” an annual attestation to the Marshall Islands Registry that all records required to be maintained under the Marshall Islands Association Law are being maintained. The attestation is expected to be integrated with the Registrar’s formation and annual invoices of non-resident domestic corporations.

Corporations that have been formed after 9th November, 2017 and have not been able to file the attestation due to the fact that the Marshall Islands Registry has delayed in finalising the attestation process yet, will not be deemed as non-compliant.

4. Requirement to Produce Records:

The new amendments authorizing the registered agent to demand production of certain records is rather a clarification of authority that pre-dated the amendments, thus not a new requirement. The Marshall Islands Association Law states that upon demand of the registered agent for non-resident domestic entities in connection with the performance of its audit functions or pursuant to a valid governmental request made to the registered agent for non-resident domestic entities, every non-resident domestic corporation shall produce within sixty (60) days upon demand all records and underlying documentation required to be maintained pursuant to the provisions of the Business Marshall Islands Association Law. It is expected at this stage that the power to request records shall be used only to the extent necessary to comply with international standards on exchange of information.

Under the Marshall Islands Association Law amendments, any person who knowingly or recklessly fails to keep, retain, or maintain records as required by the law, or who fails to produce records within sixty (60) days upon demand or to make attestations as required by the law, or who wilfully keeps, retains, maintains, or produces false or misleading records or makes false or misleading attestations, shall be liable to 1) a fine not exceeding \$50,000, or 2) revocation of the corporation’s articles and dissolution, or both. The above penalties shall not apply in cases where persons have used all reasonable efforts in compliance with the requirements of the Marshall Islands Associations Law to obtain and maintain such information.



B. LIBERIA

The Republic of Liberia is currently introducing amendments in its corporate law. The amendments are expected to take effect on 1st June, 2018 and based on information are the following:

1. Prohibitions:

Prohibition of issuing shares or other equity interests in bearer form for any Liberian entity incorporated after 31st May, 2018.

2. Requirements:

Any Liberian entity established on or before 31st May, 2018 shall be required, on the first anniversary of its date of incorporation subsequent to 31st December, 2018, to file an amendment to its articles of incorporation (or equivalent constitutional documents) so as to remove any power to issue shares or other equity interests in bearer form and to convert already issued bearer shares or any other equity interest in bearer form to registered form. Alternatively, corporations may elect to retain the powers for issuance of shares and other equity interests in bearer form, they should however enter into a Custodian Agreement with the LISCR Trust Company or any other Custodian approved by the Registrar. The details regarding the custodial arrangements and the approval of custodians have not been specified yet; however it is expected that the Liberian Registry shall specify these in the forthcoming weeks.

Any issued and outstanding shares or other equity interests in bearer form for non-compliant entities will be disabled (i.e. will not carry any of the rights that would normally attach to those shares or other equity interests and the holder of the bearer share certificate representing these bearer shares will not have any right to vote, to receive dividends or distribution of assets in the event of dissolution or to transfer any such shares or other equity interests) as of the first anniversary of the date of incorporation or formation of such entity occurring after 31st December, 2018 and until compliance with the new requirements is achieved.

The penalties for failure to comply with the above requirements shall be 1) a fine not less than USD5,000 but not exceeding USD25,000 and/or 2) revocation or cancellation of the articles of incorporation and dissolution of such Liberian Entity.



C. EUROPEAN UNION

The European Parliament and the Council of the E.U. published on 20th May, 2015 the EU Directive 2015/849 (the “4AMLD”) on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. This 4AMLD came into force on 26th June, 2015 and steps have been taken in several European jurisdictions to implement its provisions in the national field.

The 4AMLD stresses out the need to identify any natural person who exercises ownership or control over a legal entity, for the purpose of ensuring effective transparency. Therefore Member States should ensure that corporate or other legal entities incorporated within their territory should obtain and hold adequate, accurate and current information in respect of its beneficial owners. This is regarded as a necessary first step for such entities to take, in order for them to be able to transmit this information to **a central register** of beneficial ownership, once established under Article 30(3) of the 4AMLD.

The information that shall be kept by the central register in each Member State shall include the name, the date of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.

Pursuant to Article 30 (5) of the 4AMLD, Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:

- (a) Competent authorities and EU Financial Intelligence Units (FIUs), without any restriction;
- (b) Obligated entities, within the framework of customer due diligence in accordance with Chapter II of the Directive; and
- (c) Any person or organisation that can demonstrate a **legitimate interest**.

Access to the information on beneficial ownership shall be in accordance with data protection rules and may be subject to online registration and to the payment of a fee.

The central register of each Member State shall ensure timely and unrestricted access by competent authorities and FIUs, **without alerting the entity concerned**. It shall also allow timely access by obliged entities when taking customer due diligence measures.

Member States may provide for an exemption to the access referred to in points (b) and (c) above to all or part of the information on the

beneficial ownership on a case-by-case basis in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable. Such exemptions though shall not apply to credit institutions and financial institutions, and to obliged entities referred to in point (3)(b) of Article 2(1) that are public officials, etc. Article 3 (6) (a) of 4AMLD defines the term “beneficial owner”, in the case of corporate entities, as the natural person(s) who ultimately own or control the entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights in that entity or through control by other means as referred to in Article 3 (6) (a). A percentage of **25% plus one share** held by a natural person is stated to be evidence of direct ownership, and a shareholding of over 25% held by a corporate entity under the control of a natural person(s), or by multiple corporate entities which are under the control of the same natural person(s), is stated to be an indication of indirect ownership.

However, this applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control.

If the Company doesn't know who its natural person beneficial owner is, it can issue a notice requesting them to identify themselves as beneficial owners. Lawyers receiving such notices may have a legal professional privilege. If, after having exhausted all possible means and provided there are no grounds for suspicion, no person as described hereinabove is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s) are identified as beneficial owners. It is of course debatable whether a person who is a senior managing official but owns no shares can claim the rights of a beneficial owner.

In Greece, Article 30 of the 4AMLD is expected to transpose into national law shortly which shall be incorporated in the law regarding the prevention of money laundering and terrorist financing. The said law is currently under deliberation and will soon be voted at the Greek Parliament. The central registry where all information relating to beneficial owners shall be collected is expected to be in full operation by December 2018.



THOUGHTS

Corporate laws of various jurisdictions are undergoing significant changes so as to combat tax evasion and money laundering and to ensure transparency. The extensive use of bearer shares may have added to expediency, but is now thought to impose a barrier to transparency and co-operation in the field of anti-tax evasion laws and, as a result, jurisdictions enact laws to either prohibit, discourage or control the issuance of bearer shares.

The amendments which shall soon be enacted by Liberia seem to be straightforward: Liberian corporate entities shall be prohibited to issue bearer shares and those which already are allowed to issue bearer shares must either amend their articles of incorporation, so as to abolish the power to issue bearer shares or to adopt the custodian policy. In relation to the custodian policy it remains to be seen how this shall work and the type of information that the custodian should keep so as to comply with KYC and AML procedures.

The changes in EU legislation seem to be as strict. The issuance of bearer shares is not prohibited; however all entities must maintain records of their beneficial owners of a percentage of 25% plus one share and all Member States must maintain central registers of beneficial owner information. Access to such information (with the exceptions mentioned above) and subject to the relevant data protection laws, may have any person who can demonstrate a legitimate interest. This notion is vague and abuses cannot be ruled out.

Recent amendments in Marshall Islands legislation do not prohibit corporate entities from issuing bearer shares; they do however require such entities to record information in relation to beneficial owners as well as any subsequent transfer of such bearer shares (without an obligation to create a central register). All records must be maintained by the entities themselves and shall be produced upon demand of the Marshall Islands Registrar following a valid governmental request. The amendments in Marshall Islands corporate law do not include access to any person who can demonstrate a legitimate interest (e.g. in case of a judicial dispute).



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