ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

As usual, this issue of *The Globe* contains an interesting range of subject matters and authors. International and Immigration Law Section Council Chair, Tejas Shah, is consistently supportive of *The Globe*, not only by providing his own "Message from the Chair," but also by recruiting additional authors.

Patrick Kinnally, Vice Chair of the International and Immigration Law Section Council and a constant contributor of excellent articles, has provided the, "Conditional Residency and Immigration Family Law Cases: Who Has the Burden of Proof?"

Sofia Zneimer, a new member of the International and Immigration Law Section Council, authored, "Immigration Status Needs Expert Testimony If Relevant."

Florian Jörg submitted, "Updates in Swiss Business Law." Florian, with the law firm of Bratschi Wiederkehr & Buob Ltd in Zurich, Switzerland, is admitted to practice law in Switzerland and in New York.

If you or your clients are interested in trade or other business transactions between the Midwest and the Pacific, especially Japan, you should consider contacting the Japanese External Trade Organization in Chicago and request to be added to their quarterly newsletter. Their current issue includes coverage of the 47th Annual Joint Meeting of the Japan–Midwest U.S. and Midwest U.S.-Japan Associations, which was held in Tokyo in September. Other articles include a description of the trade partnership between the State of Wisconsin and Japan

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Message from the Chair

BY TEJAS SHAH

Dear Readers,

As Chair of the Illinois State Bar Association's International and Immigration Law Section Council, I thank you for your continuing interest in our committee's work and offer suggestions for your involvement. Since the passage of the Illinois Consular Notification Bill, which was the subject of our recently published stand-alone issue of the Globe newsletter, our Section Council has focused on organizing a CLE for stakeholders in the criminal bar on this important law. We have been ably led by Juliet Boyd, our section council's CLE coordinator, and a program is now scheduled to be broadcast as a hot topic by webcast from 12-1 pm on Thursday, December 10th, 2015. The

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and the release of the JETRO Global Trade and Investment Report 2015.

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As always, thank you to all of our contributors.

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panel is expected to include members of the bench and bar, and will be led by Professor Cindy Buys from Southern Illinois University. Her dedication and efforts have been instrumental to the passage of this law.

Other CLE programs and event that our section council is currently planning include:

- A CLE program on the immigration developments of 2015 that all practitioners must know about (led by Tejas Shah and Scott Pollock). This program will cover:
  - Many executive actions that the Obama administration has taken this year; and
  - Significant Supreme Court, Court of Appeals, and Board of Immigration Appeals decisions;
- A CLE program focusing on the legal challenges involved with moving people and goods across borders (led by Shama Patari);
- Student outreach programs at law schools in Chicago and in downstate Illinois (led by Alexander Konetzki and David Aubrey);
- A tour of the criminal courts for members of the consular/diplomatic corps in Chicago, and other programming with the Consular Corps (led by Lynne Ostfeld and Juliet Boyd);
- Continuing our engagement on the Equal Rights Amendment (led by Cindy Buys);

Our section council's next meeting will be held on Saturday, December 12, from 9:30-11:00 am, during the ISBA's mid-year meeting (the Sheraton Chicago Hotel and Towers, 301 East North Water Street, Chicago, IL). This meeting is open to all members of the Section, regardless of your membership of the Section Council, and we invite you to attend our section council's meeting. We would like your feedback on programming ideas and questions such as:

- CLE topics and potential speakers or volunteers for such topics;
- Organizations that you have found useful in your practice of international and immigration law work with whom we can partner on programming;
- Suggestions on other legislative priorities for the Section Council

Finally, that time of year when can self-nominated (or be nominated) to serve on the section council is not that far away! Anybody interested in serving on the section council or learning more about the section council's work is invited to contact me (tns@franczek.com) or Vice-Chair, Patrick Kinnally (pkinnally@kfkllaw.com). We thank you for your participation and engagement, and as always, many thanks to our tireless editor, Mr. Lewis Matuszewich, for putting together another wonderful issue of the Globe.

Sincerely,

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Conditional residency in immigration family law cases: Who has the burden of proof?

BY PATRICK M. KINNALLY

In an administrative Immigration proceeding the following maxims seem odd. Let's remember the Citizenship and Immigration Services (USCIS) and its administrative courts, the Executive Office of Immigration Review (EOIR) and the Board of Immigration Appeals (BIA) are creatures of Congressional fiats. Notwithstanding, the BIA, the appellate tribunal in this system has stated clearly the Federal Rules of Evidence do not apply to immigration proceedings. (*Matter of D-R-* (BIA 2011) 25 I&N Dec. 445, 458) Why would these federal tribunals not adhere to Federal evidentiary rules? Especially, since they have been created under federal law? Perhaps, because EOIR has the authority to make its own rules with respect to not only the procedural parameters, but the substantive decisions it makes. Sometimes, this regime runs awry of the law. (*Gerardo Hernandez Lara vs. Loretta E. Lynch* 789 F. 3d 800 (7th Cir. 2015) (*Lara*)

In 1988, Gerardo Hernandez Lara (Gerardo) became a conditional permanent resident. He did so by marrying a United States Citizen, Diana Winger (Diana) . He was unable to complete the process to make such status unconditional because he and Diana never appeared for the joint interview which is not always a prerequisite to establish whether their marriage was *bona fide*. The purpose of that interview, if successful, is to remove the conditional residency status. 8 U.S.C. 1186 a(c),(d). If the petitioner loses he can be deported. Such an outcome can be life changing.

Diana and Gerardo scheduled their joint interview but Diana never showed. At that time, Gerardo told USCIS officials that Diana had left him six weeks earlier because she said he was working too much and never was home. Later, he rescheduled the interview but did not attend. He sent a letter informing USCIS he was in jail and obviously, unavailable.

A decade and one half later, Gerardo filed a request with USCIS requesting a waiver of filing the joint petition requirement (8 U.S.C. 1186 a (c)(4)(B). In support of his application, Gerardo filed joint tax returns with Diana from 1988 and 1989. Additionally, he submitted letters from friends saying they had seen Diana and Gerardo together, as well as a letter from Diana saying that in 1991 they had reconciled.

At this time, 2009, Gerardo was interviewed by USCIS. The latter concluded he had failed to establish his marriage to Diana was entered in "good faith." It denied his application for a "lack of evidence." It terminated his conditional resident status and placed him in removal proceedings seeking his deportation.

At his removal hearing, Gerardo renewed his request for a discretionary waiver of the joint petition requirements. He submitted documentary evidence of his divorce to Diana; their joint income tax returns, his own tax returns spanning 1998 to 2011; and his criminal history of misdemeanors the latest of which was *circa* 2000. He testified at his removal hearing in 2013 and explained his relationship to Diana in explicit terms. He stated the reasons for their separation, and his attempts to locate her. He presented no photographs of their wedding because he testified his apartment had been burglarized. A friend of Gerardo's testified he knew of his marriage, had seen the couple together and knew they lived together. Gerardo testified he hired a private investigator to locate Diana but he was unsuccessful.

The government presented no evidence: nary a witness nor a document. The immigration judge did not find Gerardo to be unbelievable. Notwithstanding, it denied his renewed request for a discretionary waiver and ordered him removed. The court held his testimony was inconsistent since Diana appeared in the divorce proceeding in 1998. What that supposedly proved was not explained by the administrative court. The immigration judge believed, in her opinion, that he failed to meet his burden of proof by a preponderance of the evidence that he was entitled to a discretionary waiver. The BIA affirmed, even assuming the credibility of Gerardo and his witness, holding the immigration judge properly concluded that Gerardo failed to show by a preponderance of the evidence that he entered into his marriage in good faith.

The Seventh Court of Appeals granted Gerardo's Petition for Review and remanded the case for further proceedings.

Of course the issue in marriage conditional residence cases, is whether the marriage conferring the status was entered into in good faith. Where USCIS has terminated the conditional resident status the conditional resident may request a review of that decision in removal proceedings. (*Matter of Herrera del Orden* (BIA 2001) 25 I&N Dec 589, 593 ("*Herrera*") In such proceeding it is the government's burden of proof to establish by a preponderance of the evidence that the facts and information described in the petition are not true with respect to the marriage (INA 216 (c)(3)(D)). There is no doubt a conditional resident whose status has been terminated can seek a waiver in a removal hearing and adduce new evidence not considered originally by USCIS in its termination decision. *Herrera*, at 593; 8CFR par 1216.5 (f). And, the Immigration and Nationality Act provides:

> Hearing in removal proceedings- Any alien whose permanent resident status is terminated under subparagraph

> © may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that the facts and information described in subsection (d)(1) and alleged in the petition are not true.

(8 U.S.C. 1186 a (c)(3)(D)) That, shifts the burden of proof.

What constitutes a preponderance of the evidence comprises two considerations. First, the issue presented by Gerardo asked the immigration court to decide was whether it was it more likely than not that he entered into his marriage with Diana in good faith? See, (*Lopez-Esparza v. Holder* (7th Cir. 2014) 770 F3d 606) In other words, did his testimony and documentary evidence support such conclusion. In this regard, Gerardo's testimony alone, if credible, was sufficient to meet this standard (*Lara*, (sl.op. at pp8-9), citing, *Unites States v. Cedano. Rojas* 999 F.2d 1175 (7th Cir.1993) The government produced no countervailing evidence to indicate otherwise. Supposition is not evidence. Gerardo testified unequivocally that he did not marry Diana to obtain residency status. He said he "loved her, liked her body, her face and the way she dressed." Some evidence, the 7th Circuit observed in *Lara* preponderates over no evidence.

Sometimes the standard of proof gets confounded with the burden of proof. They are distinct. First, the standard of proof in a conditional residency waiver request is set by regulation. They type of evidence USCIS or an immigration judge is supposed to consider, includes: evidence relating to the amount of commitment by the parties to the marriage relationship; documentation relating to whether the parties had combined marital assets; the length of time in which the parties cohabited after the marriage and after the conditional resident obtained conditional resident status. This list is a template, not a limitation on advocacy. 8 C.F.R. 216.5 (e)(2)(I). It can be quantitive, as well as qualitative. That is the evidence which needs to be submitted. *(Matter of Chawathe* (AAO, 2010) 25 I&N Dec 369,375 fn. 7) Gerardo did that. The quality of that evidence depends on its probative value as well as its credibility. It is this proof which must preponderate in the applicant's favor. Gerardo met that standard. Perhaps it was not compelling, but it was some evidence that supported his claim.

The burden of proof or more accurately, the risk of non-persuasion, with respect to the benefit sought in immigration proceedings remains with the applicant. Yet, on that issue the measure of the burden is whether the evidence shows the claim is more likely than not, true. This is a greater than 50 percent chance of the event occurring (*Chawathe*, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421,431 (1987). So it is in some measure, a matter of degree. The government's absence of evidence when it had the burden of proof was evident.

Nor is the predicate for what constitutes a "preponderance of the evidence" a recent phenomenon. What this regimen denotes is when considering all the evidence is the proposition to be proved more probably true than not true. (See, generally, *Illinois Pattern Jury Instruction* (2011) 21.01, citing *Reivitz v. Chicago Rapid Transit Co.* 327 Ill. 207 (1927). For Gerardo, this burden was met since the government produced no evidence to contradict the proof he adduced.

Perhaps, due to the provisions of the Immigration and Nationality Act's wide ranging view of what constitutes the burden of proof (8 U.S.C. 1361) government prosecutors believe it exempts them from the rule of law. The point being, that it was the government's burden to establish by a preponderance of the evidence that the facts and information in Gerardo's application for a waiver of the joint filing requirements were untrue. Proving a negative is, admittedly, problematic. But, that is the rule Congress required. Regulatory interpretations to the contrary do not alter a statutory mandate. Furthermore, presenting no evidence does not meet that test.

Statutory words are plain. Where no ambiguity exists, the interpretation of a statute is apparent. Shifting a burden to a litigant where none is authorized is wrong. The court's opinion in *Lara* explains precisely how USCIS the immigration judge and BIA failed to understand the fundamental concepts of what constitutes a preponderance of the evidence and who has the burden of proof in a conditional residency waiver case. *Lara* is a welcome read. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently a member of the International and Immigration Law Section Council, can be reached at Kinnally, Flaherty, Krentz & Loran, PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

Immigration status needs expert testimony if relevant

BY SOFIA ZNEIMER

A client, Jesus, suffered serious injuries in an accident and his doctors opine that he will not be able to do the job he used to do in the future. Significant part of Jesus' damages depends on his claim for a future wage loss. The opposing counsel suspects that the Spanish-speaking client may be in the country illegally, and argues that since Jesus is claiming a future wage loss, the opposing counsel is entitled to know if Jesus is an "illegal alien." The opposing counsel argues that Jesus' illegal status is relevant because if Jesus is an "illegal alien" then he cannot work in the United States in the future and, therefore, cannot claim a future wage loss. The opposing counsel has sent the following Request to Admit to Jesus "Admit or deny that you are an illegal alien."

Jesus tells me that he and his wife are indeed, undocumented. Jesus entered without inspection from Mexico in 1997, and has been working without permission ever since. He and his wife have three children. One of their children was born in Mexico before they all came to the United States, and the other two children were born in the United States after their entry. Their youngest child has a serious medical condition that requires specialized medical care. Jesus is afraid that if he has to leave the United States, his child would not be able to receive the specialized treatment she needs. In addition, a few years ago his oldest child was a victim of a violent drug crime and Jesus helped the police and the prosecution put the perpetrator in jail for a long time. Jesus is afraid to go back to Mexico because the perpetrator's family has recently vowed revenge and this family is connected to the drug cartels.

I ask Jesus to tell me more about his background.

He tells me that he was born in 1966 in Mexico to a single mother. His mother, Maria, was born in Mexico in 1940. Maria's mother and Jesus' maternal grandmother, Carmen, was born in Mexico in 1915. Carmen was married to his grandfather Ernesto who was born in Mexico in 1920.

Carmen's mother and Jesus' great grandmother, Ana, was born in 1890 in Delaware where her parents resided for a few years, but later she went to live in Mexico after she married Jesus' great grandfather Martin who was from Mexico. Jesus' grandfather, Ernesto, and his grandmother, Carmen, had met and married in the United States where they lived for a few years without documents, but later returned to Mexico where Jesus' mother, Maria, was born.

When Maria was 15 years old, she and her parents entered the United States where they lived without documents for about three years but then went back to Mexico. Jesus does not know who his father was and his father was never married to his mother. Jesus never had a visa to enter the United States and has never had work permit to work here. He tells me that he is afraid to answer the Request to Admit because he is scared that he may be removed from the United States.

What should I do? Should I withdraw Jesus' wage loss claim? Should I have Jesus admit that he is an "illegal alien"? Is my client an "illegal alien"?

The answers to the above questions are "No," "No," and "No."

Jesus is not qualified to give an answer to this Request to Admit because he is not an expert in immigration law. I need to file a written objection pursuant to Illinois Supreme Court Rule 216(c) and ask the judge to rule that the request to admit is improper.

Relevancy of Immigration Status

The Illinois Supreme Court Rule 216(a) limits requests to admit to "relevant" facts, and the immigration status of an injured claimant is not relevant. Evidence that a person may be undocumented is immaterial, confusing, incendiary, derogatory, and will create a substantial danger of undue prejudice to the plaintiff. Such evidence is irrelevant.[1] Even assuming that Jesus may not be able to remain and work in the United States, and there is a big "if" in this assumption, Jesus' reduced job opportunities as a result of his inability to work will have even more profound and devastating consequences for him and his family if he returns to Mexico where he will have less job opportunities and social services as a disabled individual. The inability to work does not end with a person's stay in the United States.

Who is an "illegal alien"?

This is a good question. The term "illegal alien" does not exist anywhere in the Immigration and Nationality Act. A person who has entered the United States may be removable from the United States if he or she is inadmissible under INA ' 212, 8 U.S.C. '1182, or deportable under INA ' 237, 8 U.S.C. '1227. Generally, only an immigration judge can determine removability of an alien in removal proceedings.[2]

Even if an immigration judge finds that an alien is removable from the United States, the judge considers whether there is any relief from removal. The Immigration and Nationality Act provides for various waivers, political asylum, withholding of removal, cancellation of removal, adjustment of status, and other relief that may allow a removable alien to remain and work in the United States permanently.

If Jesus is a removable alien from the United States, does he have any relief from removal?

Jesus appears to have several forms of relief from removal. First, Jesus' family appears eligible for a U visa because his

child was a victim of a violent crime and Jesus and his family assisted the prosecution. The Immigration and Nationality Act provides that an alien who was a victim of certain criminal activity and "has been helpful, is being helpful, or is likely to be helpful" can file a petition for a U visa status.[3] If the victim is under 21 years of age the victim's "spouse, children, unmarried siblings under 18 years of age, …and parents of such alien" qualify for a U visa as well.[4] Jesus may be eligible for a U visa and not even know it. If Jesus receives a U visa, he will be able to live and work in the United States. After three years in U status, Jesus will be eligible for a green card and can work in the United States.

Second, Jesus may be eligible for cancellation of removal.[5] Cancellation of removal is available to aliens who have been physically present in the United States for ten years, who have been persons of good moral character during the ten years, who have not been convicted of certain crimes, and who can show that removal would result in exceptional and extremely unusual hardship to the alien's U.S. citizen or permanent resident spouse, child, or parent.[6] As Jesus has two US citizen children, one of whom has a serious medical condition, he may be able to meet the "exceptional and extremely unusual hardship" burden and receive cancellation of removal from the immigration judge. If the judge grants Jesus cancellation of removal, Jesus can become a permanent resident and can live and work in the United States.

A third avenue for relief for Jesus may be asylum or withholding of removal because Jesus' life may be in danger in Mexico as a result of the assistance he provided to the prosecution for the crime against his child. The family of the perpetrator has recently threatened revenge against Jesus and he may be eligible to file for political asylum[7] or withholding of removal,[8] which provide for relief from removal if Jesus' life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Arguably, Jesus may claim asylum and withholding based on political opinion that criminals must be prosecuted by the government, and a membership in a particular social group as persons who have assisted in prosecutions of members of drug cartel. If Jesus is granted asylum or withholding of removal, he will be able to live and work in the United States.

Inability to Speak English

The suspicion that if someone cannot speak English he or she must be in the country illegally is more evident of societal prejudices than alienage. Under the Immigration and Nationality Act, certain long term permanent residents over a certain age can become United States citizens even if they are not able to speak English.[9]

The question, then, is why the opposing counsel is seeking information about Jesus' immigration status. If Jesus spoke English and did not look Hispanic, would the opposing counsel even consider requesting immigration information? Probably not, and neither should the opposing counsel be permitted to request such information from Jesus.

Is Jesus an Alien?

The immigration law is a labyrinth and after going through it, it may turn out that Jesus is not even an alien, but a United States citizen. Jesus has provided us with background information, which is worth investigating further.

His family tree includes a great grandmother Ana, who was born in Delaware in 1890. Because his great grandmother Ana was born in the United States, Ana was a United States citizen.

Ana's daughter, and Jesus' grandmother, Carmen, was born in 1915 in Mexico. Was Carmen a United States citizen? The answer is, most likely. Because Ana was a United States citizen and had residence in the United States before Carmen's birth in Mexico, Jesus' grandmother Carmen was a United States Citizen by birth according to citizenship law in effect at the time of her birth.[10]

Jesus' mother Maria was born in 1940 in Mexico. Is Maria a United States citizen? The answer again is, most likely.

Prior to Maria's birth in Mexico, her mother Carmen, who we determined was a United States citizen by birth, lived in the United States for a few years before Maria was born in 1940. Because Carmen was a United States citizen at the time Maria was born, and had resided in the United State before Maria's birth in 1940, Maria was a United States Citizen by birth according to citizenship law in effect at the time of her birth.[11] However, after May 24, 1934, a child that was born a United States citizen had to live in the United States for a certain amount of time in order to retain her citizenship. When Maria was 15, she lived in the United States with her parents for about three years, and therefore retained her United States citizenship.[12]

Thus, when Jesus was born in Mexico in 1966, his mother was a United States citizen. Jesus would be a U.S. citizen if, on the day he was born, his mother could transmit citizenship under the law in effect on his date of birth. The law in effect in 1966 stated that a child born out of wedlock to a United States citizen mother is a United States citizen by birth, if the mother was physically present in the United States or its possessions continuously 12 months prior to the child's birth.[13] As Maria lived for three years in the United States before Jesus' birth, Maria transmitted her United States citizenship to Jesus.

Therefore, even though Jesus was born in Mexico, cannot speak English, and entered the United States without inspection, he may be a United States citizen and has every right to live and work in the United States. All he has to do is document the birth records and residency of his ancestors.

The Case for Experts

Determining Jesus' status and eligibility to remain in the United States is not a fact but a legal conclusion. It requires analysis of statutes, regulations, memoranda, administrative, state, and federal law. With "only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity."[14] The Ninth Circuit described immigration law as a "labyrinth almost as impenetrable as the Internal Revenue Code."[15] Even the federal courts, which have jurisdiction over immigration matters and have more knowledge in immigration law than state courts, have recognized the need for an expert witness in immigration law in order to explain the complex body of immigration doctrines: "We agree with the plaintiffs that [expert] testimony about the nature and extent of federal immigration law-a large and complex body of doctrine-would help us to reach our own

decision about the constitutionality of the ordinances."[16]

Therefore, even if the court considers Jesus' immigration status relevant (which I insist it is not), the court must require an expert in immigration law to render an opinion about Jesus' status and eligibility to work in the United States.

The story of Jesus is fictional, but the point is that immigration law is simply too complex to permit either party to discuss immigration status without expert testimony. In my practice I have represented people born abroad that did not know that they were United States citizens on the day they were born in a foreign country. ■

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1. *Diaz v. Chicago Transit Authority*, 174 Ill. App.3d 396, 406, 528 N.E.2d 398, 404-405 (1988).
2. INA §240(e)(2), 8 U.S.C. §1229a(e)(2).
3. INA §101(a)(15)(U)(i), 8 U.S.C. §1101(a)(15)(U)(i)
4. Id.
5. INA §240A(b)(1), 8 USC §1229b(b)(1).
6. Id.
7. INA §208, 8 U.S.C. §1158
8. 8 C.F.R. §208.16
9. INA §312 (b)(2).
10. Sec. 1933, Revised Statutes; 7 FAM 1135; Sec. 301(h) INA; P.L. 103-416. "A person born before noon (eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States."
11. Rev. Stat. §1993, as amended in 1934; 7 FAM 1135.6,
12. Revised Statutes as Amended in 1934 §1933; 7 FAM 1135.1, 1135.2.
13. INA Sec. 309(c) (1952)
14. E. Hull, Without Justice For All 107 (1985); *Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization*, 847 F.2d 1307 (9th Cir. 1988).
15. *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1334 (9th Cir.2000).
16. *Lozano v. City of Hazleton*, 241 F.R.D. 252 (M.D.Pa.,2007).

Updates in Swiss business law

BY FLORIAN JÖRG

In the period from January 1, 2015 to August 1, 2015, only one significant change has become effective from the perspective of Swiss business law.

Implementation of the 2012 recommendations made by the FATF with regard to company law The Financial Action Task Force (FATF) revised its recommendations concerning the fight against money laundering and against the funding of terrorism in 2012. Part of the Federal Act on the implementation of these recommendations became effective as from 1 July 2015 (particularly the changes in company law and the Collective Investment Schemes Act), and part of it will enter into force as from 1 January 2016 (including adjustments to the Criminal Code and the Anti-Money Laundering Act). The more stringent transparency provisions for legal entities (effectiveness as from 1 July 2015), the restrictions on the acceptance of cash payments in excess of CHF 100,000 and the adoption of qualified tax offences as a predicate offence for money laundering (effectiveness as from 1 January 2016) can be called the core elements of this revision.

1. Obligation to report the acquisition of bearer shares

Any person who acquires bearer shares in a company whose shares are not listed on a stock exchange must give notice of their acquisition, if it occurred after 1 July 2015, together with their first names and surnames or their firm, their date of birth, as well as their nationality and their address, to the company within one month. Persons who already owned bearer shares on 1 July 2015 have to fulfil this obligation by 31 December 2015 at the latest. These obligations are also likely to be applicable to owners of participation certificates. Whenever a name, firm or address is changed, notice must be given of this again. Existing owners of registered shares and capital contributions are exempt from this kind of obligation. Furthermore, it may be stipulated that notification is made to a financial intermediary rather than the company.

2. Obligation to report holdings in excess of 25% of the share capital or the votes

Persons who alone or by agreement with third parties acquires shares in a company whose shares are not listed on a stock exchange, and thus reaches or exceeds the threshold of 25 percent of the share capital or votes, must within one month give notice to the company of the first name and surname as well as the address of the natural person for whom they are ultimately acting (the beneficial owner). This obligation applies to both bearer shares and registered shares. Only natural persons can be beneficial owners. If there is no beneficial owner (for instance in a charitable organization), the shareholder will have to notify the company of this fact and establish the identity of the chairperson of the company's executive body. Again, the company has to be notified of the beneficial owner's change of name or address. If this is so stipulated in the articles, this notification can also be made to a financial intermediary. Shares in companies listed on a stock exchange and shares in a private company which are issued as uncertificated securities are exempt from the above obligation to make notification if its custodian where the shares are held or recorded or its main register are located in Switzerland.

3. Obligations in connection with the share and shareholder registers

In addition to the share register, the board of directors of the company concerned now has to keep a register of its bearer share owners and—provided that their holding amounts to a minimum of 25 percent—of the beneficial owners of the bearer shares and registered shares. This register contains those persons' first names and surnames or the firm, their addresses, as well as the

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bearer share owners' nationalities and dates of birth. In the case of companies with bearer shares, the obligation to keep a register of the beneficial owners of the bearer shares is likely to become applicable by December 31, 2015 at the latest. Both, the share register as well as the register of bearer share owners and beneficial owners, must be accessible in Switzerland.

4. Sanctions for failure to make notification

As long as a shareholder fails to meet his obligations to make a notification as outlined above, his membership rights are in abeyance and can only be claimed once such notification has been made. If a partner fails to meet his obligation to make such notification within the period stipulated, he will forfeit his previous pecuniary rights. Even if he makes such notification at a later date, he will only be able to claim any pecuniary rights arising from this point in time pursuant to the (strict) wording of the law. Furthermore, the board of directors of the company concerned is derelict in its duties if it fails to keep an up-to-date register of bearer share owners and of any beneficial owners of shares in the company or if it permits persons to attend annual general meetings whose voting rights are actually dormant owing to the failure to meet obligations to make the requisite notification.

5. Further scope of application of the new provisions

An obligation to make notification of beneficial owners is now also being introduced for capital contributions to private limited liability companies (GmbH). The relevant provisions of stock company law are applicable in analogy. Cooperatives are now obliged to keep a register of all their members. The provisions of stock company law with regard to the accessibility of the register and to safe-keeping duties are applicable in analogy. According to the provisions of the Collective Investment Schemes Act (CISA), SICAVs (investment companies with variable capital) are also subject to the obligation to keep a register of the beneficial owners of the company shareholders. Anyone who knowingly fails to keep the share register correctly will be punished with a fine of up to CHF 500,000. The relevant obligations to make notification and the sanctions of stock company law are applicable in analogy. ■

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