

NATIONAL GAZETTE

NATIONAL DECREE, LAYING DOWN GENERAL PROVISIONS, of June 15, 2010 for the enforcement of article 12, second paragraph, of the National Ordinance on the Supervision of Trust Service Providers¹, to the effect of immobilizing securities to bearer (National Decree on the obligation to retain securities to bearer)

BY THE QUEEN

THE GOVERNOR of the Netherlands Antilles,

Having considered:

that in view of continuous establishment of the identity of the beneficial owners of international companies of which the capital is divided into shares issued to bearer, it is desirable for the implementation of article 12, second paragraph, of the National Ordinance on the Supervision of Trust Service Providers, to establish regulations aimed at immobilizing bearer securities by means of an obligation to retain records;

Having heard the Advisory Council, has resolved:

Article 1

Bearer securities will be understood to be: shares or certificates of shares in the capital of an international company issued to bearer or converted into bearer securities.

Article 2

1. The trust company that provides management services to an international company with regard to which bearer securities exist or will be issued, will be under an obligation to take such bearer securities into safe custody without delay against issue of a depositary receipt to the party entitled to the bearer securities.
2. In order to prevent the bearer securities from being mixed with the capital of the trust company, the trust company will make use of a foundation for taking bearer securities into safe custody.
3. The trust company may contract out the obligation to retain records referred to in the first paragraph to an external depositary, whether or not established outside the Netherlands Antilles, provided such depositary issues a depositary receipt in which at least the following is represented:

¹ National Gazette 2003, No. 114

- a. the data of identity and the address of the natural or legal person in whose behalf the bearer securities involved are kept in safe custody and also a statement that the trust company will be given notice of any change in the aforementioned data without delay, including the new data of identity and address;
 - b. a statement to the effect that the bearer securities will not be transferred from the deposit to any new depositary before the trust company being informed to such effect;
 - c. a statement to the effect that as soon as the bearer securities are held for any party other than the original party (parties) entitled, the trust company or the persons will be informed to such effect by the depositary.
4. Entities that may act as depositaries of bearer securities as contemplated in the third paragraph are the following:
 - a. foreign establishments of the trust company or foreign intra-group companies affiliated with the trust company;
 - b. other trust companies, banks and other financial institutions which in their countries of establishment are under supervision with regard to combating money laundering and preventing terrorist financing, which will be understood to include at least identification of clients and reporting unusual or suspicious transactions, comparable with the supervision applicable to the trust company;
 - c. civil law notaries who in their countries of establishment are under supervision with regard to combating money laundering and preventing terrorist financing, which will be understood to include at least identification of clients and reporting unusual or suspicious transactions, comparable with the supervision applicable to the trust company.
5. The persons referred to in article 2, second paragraph, subsection b, of the National Ordinance on the Supervision of Trust Service Providers who provide management services to an international company of which bearer securities exist or will be issued, will be under an obligation to deposit such bearer securities for safe custody with the depositaries designated in the present national decree who will issue a depositary receipt for such securities.
6. Country will not be understood to be: the country, referred to in the fourth paragraph, which matches 10 or more of the core recommendations made by the Financial Action Task Force.

Article 3

Bearer securities already issued at the time of commencement of the present national decree should have been deposited for safe deposit with the trust company or another depositary in accordance with the provision laid down in article 2, no later than 6 months after the commencement of the present national decree.

Article 4

The present national decree will not be applicable to shares or certificates in the capital of a company listed on the stock exchange in the Netherlands Antilles or abroad.

Article 5

The present national decree will come into force as from the day after the day of issue of the National Gazette in which it has been promulgated.

Article 6

The present national decree will be cited as: National Decree on the obligation to retain securities to bearer.

Given at Willemstad, June 15, 2010
F.M.D.L.S. GOEDGEDRAG

The Minister of Finance,
E.T.M. DE LANNOOY

The Acting Minister of Justice,
O.V.E. LEEFLANG

Issued on June 30, 2010
The Minister of General Affairs
and Foreign Relations,
E.S. DE JONGH-ELHAGE

EXPLANATORY STATEMENT belonging to the National Decree laying down general provisions, for the enforcement of article 12, second paragraph, of the National Ordinance on the Supervision of Trust Service Providers, to the effect of immobilizing securities to bearer (the National Decree on the obligation to retain securities to bearer)

Introduction

The proposed enactment of the national decree aims at carrying, among other things, the Financial Action Task Force (hereinafter to be referred to as FATF) Recommendation No. 33 into effect, thus being in agreement with the regulations and recommendations of the FATF.

FATF recommendation No. 33 (revised in 2003) reads as follows:

“Countries should take measures to prevent illegal use of legal entities by money launderers. Countries should ensure that timely relevant and accurate information is available about the beneficial owner and control of legal entities, which can be obtained or consulted in a timely manner by the competent authorities. Specifically countries that recognize legal entities which can issue bearer shares, should take proper measures to guarantee that they are not misused for money laundering and should be able to prove that such measures are adequate. Countries should consider measures to simplify access to information about the beneficial owner and control for financial institutions which have undertaken to observe the requirements contained in recommendation 5.”

The main purpose of FATF recommendation No. 33 is for competent authorities to be able to trace, when necessary, the beneficial owner (ultimate beneficiary) of bearer shares issued by legal entities. Currently there is no FATF recommendation that prohibits the issue of bearer shares or advises against it altogether. In addition to FATF recommendation No. 5, which regulates matters with regard to “Customer Due Diligence” (CCD: Know Your Customer Principle), also the following recommendations may be considered in relation with recommendation No. 13: FATF recommendation No. 13: which tries to make it compulsory on financial entities to report suspicious transactions, and FATF recommendation No. 16 which deals with reporting by lawyers, civil law notaries, other professional practitioners, auditors, and also trust companies and providers of business services.²

Regulations in book 2 of the Civil Code of the Netherlands Antilles (BWNA) regarding bearer shares

² For the recommendations of the FATF, see www.fatf-gafi.org.

Book 2 of the Civil Code of the Netherlands Antilles deals with legal entities, in which connection present article 104 lays down regulations with regard to registered shares and bearer shares of a Public Limited Liability Company. It lays down that “Shares to bearer cannot be issued as such”. The same article continues, however, stating that in the deed of incorporation it may be provided with regard to shares subscribed for at the time of incorporation that, at the request of a shareholder, a bearer certificate may be issued against surrender of the registered share certificate, if issued. Present article 104 further provides regulations to the effect that starting from the issue of the bearer certificate the share involved is considered to be a share to bearer.

Present article 105 of the Civil Code of the Netherlands Antilles continues to state that it cannot be brought up against the subsequent acquirer in good faith of bearer shares that it was not validly put into circulation or that the liability to pay-in capital or the margin call has not been met. The articles of incorporation may provide that a body designated by such articles is authorized to impose upon holders of bearer shares of a certain type or series, or all holders of bearer shares, an obligation to convert their bearer shares into registered shares. Present article 110, book 2 of the Civil Code of the Netherlands Antilles further provides that shares are transferable; however, subsequently it regulates only transfer of registered shares. So it can be stated that the Civil Code of the Netherlands Antilles makes the transfer of bearer shares possible, in which regard no international standards of the FATF will be considered.

As regards local (onshore) persons and institutions this is no problem as, in pursuance of the policy that the island governments have pursued for decades, they are not permitted to hold bearer shares. So the beneficial owners will always be known or can be easily traced, as the case may be, as they are registered in the relevant share registers.

As regards international companies it can be stated that in pursuance of the National Ordinance on the Supervision of Trust Service Providers (National Gazette 2003, No. 114) and also the regulations of the Central Bank of the Netherlands Antilles (BNA) with regard to combating money laundering and preventing terrorist financing, beneficial owners of these companies should be identified and put on record.

It will also be necessary, for continuous establishment of the identity of the beneficial owners of international companies of which the capital is divided into shares issued to bearer, to establish further regulations aimed at compulsory immobilization of bearer securities by means of an obligation to retain records. Otherwise, in practice such obligation is already met by trust companies. The present national ordinance aims to provide existing practice with a legal basis.

Financial section

It is not foreseen that the obligation to retain records contained in this National Decree for trust companies and other persons who have obtained an exemption from the Central Bank for the purpose of carrying on trust activities, will constitute any burden on the national budget.

Advisory Council

On April 15, 2010 the Advisory Council issued a recommendation (RvA, No. RA/04-10-LB). The recommendation has been followed in full and, where necessary, the national decree and the explanatory statement have been adapted and supplemented.

Explanation article by article

Articles 1

In the present national decree an obligation to retain bearer securities is introduced for all trust companies that hold a licence and also persons who have obtained an exemption from the Central Bank of the Netherlands for the purpose of undertaking trust activities on the ground of the National Ordinance on the Supervision of Trust Service Providers. In this article it is described what is understood by bearer securities. They are not understood to include shares or share certificates issued to bearer or converted into bearer securities, except insofar as such shares or certificates are of a company listed on the stock exchange in the Netherlands Antilles or abroad.

The national decree herewith aims to carry into further execution article 12, first paragraph, subsection b, of the National Ordinance on the Supervision of Trust Service Providers (National Gazette 2003, No. 114), in which regulations are provided to such effect that for the combating of money laundering and prevention of terrorist financing, among other things, the identity of beneficial owners of international companies should be established. With regard to companies listed on the stock exchange, in which connection, as a result of stock exchange dealings, widespread and regularly changing shareholdership is involved, there will be no beneficial owners holding a qualifying interest of at least 25% in the capital of the company. Therefore, the aim is to be able to establish the identity of the beneficial owners of bearer shares at any time, in conformity with the requirement of article 12, first paragraph, subsection b, of the National Ordinance on the Supervision of Trust Service Providers (National Gazette 2003, No. 114). Insofar as listed companies make use of a system of bearer securities for dealings on the stock exchange, trading on the stock exchange in itself is well regulated to such a degree that separate regulation through the present national decree for the purpose of preventing abuse would not add anything to it, but could rather form an obstacle to stock exchange trading.

Article 2

Trust companies should deposit the bearer securities for safe custody with a separate foundation created especially for such purpose or with the institutions specifically designated in the present national decree.

Persons holding an exemption as contemplated in article 2, second paragraph, subsection b, of the National Ordinance on the Supervision of Trust Service Providers should deposit any bearer securities held by them with the institutions specifically designated in the present national decree. If the depository should proceed to keep securities for safe

custody for any other party, for example, in case of transfer of such securities to another party, the depositary should give notice to such effect to the trust company or the person holding the exemption, as the case may be, stating also the name of the new beneficial owner. Thus the names of beneficial owners of all bearer securities will be known at any time.

Sanctions may be applied to non-compliance with the obligations arising from the present national decree, by imposition of an administrative penalty (Article 22 of the National Ordinance on the Supervision of Trust Service Providers).

In accordance with the new procedures of the FATF, any country that has 10 or more Non Compliant or Partially Compliant ratings for the “Key and Core” FATF recommendations in their evaluation report of the FATF, the IMF or FSRB (FATF Regional Style Body) will automatically qualify for being placed on a *review* list of the ICRG (International Cooperation Review Group) of the FATF. In this connection, see also the FATF document “Third Round of AML/CFT Mutual Evaluations & Procedures (April 2009). This *review* list may ultimately give rise to a new “black” list of the FATF or to public warnings. The core FATF Recommendations are: 1, 3, 4, 5, 10, 13, 23, 26, 35, 36, 49 and Special Recommendation I, II, III, IV and V.

When and insofar as a list is available or public, the supervisor of compliance with the National Ordinance on the Supervision of Trust Service Providers will make it public in a manner to be decided by such supervisor.

Article 3

Trust companies and persons who have obtained an exemption from the Central Bank of the Netherlands Antilles for the purpose of performing trust activities, should be allowed time to put their administration in order, so that they can meet the obligation to retain records contained in the present National Decree.

The Minister of Finance,
E.T.M. DE LANNOOY

The Acting Minister of Justice,
O.V.E. LEEFLANG