

NOMINEE MANAGEMENT OF AN OFFSHORE COMPANY: SOME ASPECTS OF DOCUMENTATION AND CARRYING OUT

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The intensification of the phenomena of international integration and economic globalization is radically changing the composition of participants in economic relations both in Ukraine and in other countries of the world. The desire of most countries to increase the tax burden on business entities and strengthen control over their activities leads entrepreneurs to seek schemes and options for appropriate avoidance measures. Thus, offshore companies are a specific category of business entities that are created for the purpose of tax planning and enhancing the level of protection of commercial and banking secrets. Set up in the territory of offshore jurisdictions, such companies carry out their economic activities and make a profit exclusively outside the territory of the place of their registration. The economic and legal status of offshore companies has a number of specific features. This includes non-implementation of economic activities within the country of registration, the commerce-related specifics of the legal subject's agency, the procedure for setting-up, registering and operating such companies, etc.

The running of offshore companies is also characterized by certain distinctive features. The easiest way to control an offshore company is sole ownership, where the owner himself/herself acts as both a shareholder and the managing director. This option is the simplest, but in terms of maintaining the confidentiality of ownership of the company, it is completely useless [1], since the real owner appears in all official documents of the company. One of the goals of creating an offshore company is, as a rule, to enhance the level of confidentiality of information about the real owners of the company, and sole ownership is therefore not common. On the contrary, one of the most characteristic features of managing an offshore company is the widespread use of the nominee services, i.e. the services of nominee shareholders, directors, secretaries and other company executives. Such persons, while not actually running the company, officially act on its behalf keeping undisclosed the names of the real owners or top managers of the company. Behind the known nominee shareholder (managing director, secretary) of the company, there is an unknown real shareholder (managing director, secretary). Using nominee services makes it possible to keep the ownership of an offshore company secret. The use of the

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nominee services may also be necessary to meet the requirements of the country of registration towards the company's presence in it. Indeed, some offshore jurisdictions legally provide for the need of at least one resident of the country of registration being a director on the company's board. In any case this is to keep the identity of the company beneficiary out of the public eye, hence, for a fee, a person appears on the public records as the owner, but this nominee is not granted neither administrative nor management powers [2].

At the same time, the use of the nominee services may involve certain risks, the worst of which is the complete or partial loss of control over the company by the real owner, as well as the possibility of disclosure by the nominee of the information about the real owner of the company. Proper regulation of the relationship between the real owner and the nominee makes it possible to reduce the risks associated with the use of the nominee services.

The fundamental document aimed at defining the powers of the nominee and regulating his/herrights is the declaration of trust. It is the declaration of trust that determines the real beneficiary of the company [3].

The Declaration of Trust is an instrument that allows the international company owner to ensure protection from possible arbitrary decisions of a nominee shareholder [4]. The document confirms that the registered shareholder holds the shares on behalf of the beneficial owner, and has no voting rights and cannot dispose of the securities at their discretion [4].

A nominee shareholder is someone that «lends his name» to you to act as the registered owner of shares in a company [5]. Nominee shareholder would appear to the world to be the owner of the shares, and beneficial owner gets to keep the arrangement a secret. The nominee shareholder is usually the same person as the nominee director [5].

By its legal nature, the declaration of trust is a unilateral irrevocable statement by the nominee shareholder that recognizes the rights of the real beneficiary. The content of the declaration of trust may slightly vary and contain a number of conditions, which is necessary taking into account the requirements of a particular jurisdiction, the organizational and legal specifics of the incorporation, as well as the nature the company's activities. However, five provisions are considered fundamental for the declaration of trust, according to which the nominee shareholder: 1) recognizes his/her nominal nature; 2) recognizes the right of the real owner to receive dividends and any other income from shares; 3) undertakes not to use or alienate shares without the instructions from the real owner; 4) undertakes to use his/her right to vote as a shareholder only in accordance with the instructions received from the real owner; 5) recognizes the irrevocability of such a statement.

The most common way to set up a nominee shareholder arrangement is for the nominee to declare a trust over the shares for your benefit, and to sign a

declaration of trust [5]. While there are other ways of doing so, such as using call option agreements or loan agreements, these are more complex, and are more appropriate for countries which do not recognise the concept of a trust or which prohibit the use of nominee structures [5].

The documents that ensure the preservation of the rights of the real owner and his/her control over the company may include the so-called deed of transfer that allows the real owner to transfer his/hershares to another person at any time, as well as a notice of rejection renouncing the nominee shareholder. The date is not entered in such documents.

In order to exercise authority on behalf of the company, the nominees are granted a power of attorney in the name of the real owner of the company. At the same time, the exercise by the real owner of his/her powers through an offshore company on the basis of a power of attorney does, as a rule, not contribute to maintaining the confidentiality of the actual running of the company, and can therefore be applied to a very limited extent.

While the declaration of trust is submitted by a nominee shareholder as a unilateral statement, an agreement regulating his/her rights and obligations is usually signed with the nominee director. This does not preclude, however, the possibility of providing a statement by the nominee director, in which he/she declares that he/she has no claim to the company's assets and that he/she will act solely in the interests of the beneficial owner or representatives thereof, as well as providing a letter of consent to his/her appointment to the position in question [6]. The form and content of the agreement with the nominee director may vary significantly depending on the requirements and specifics of a particular offshore jurisdiction. Speaking in the simplest and most generalized way, the terms of the agreement with the nominee director can be reduced to confirming the latter's obligation to act only in accordance with the decisions and instructions of the beneficiary, while the beneficiary shall undertake to pay for the services of the nominee in full and on time. Also in this agreement, the beneficiary must confirm that the company will not engage in illegal activities. There may also be a separate indemnity agreement [6], under which the beneficiary shall release the director from liability for any obligations, duties, losses, damages, fines, actions, legal actions, court rulings, claims, expenses and payments of any nature, in which the company may be involved. It is also possible for the beneficiary to provide the nominee director with a deed of indemnity and guarantee, under which the beneficiary guarantees the nominee compensation for all losses related to the position held, damages related to possible lawsuits; guarantees timely payment for all services of the director; guarantees that he/she, the beneficiary, will not give illegal directives and instructions, and also confirms that he/she, the beneficiary, will assume all financial and legal obligations of the company related to the activities thereof [6].

The use of the nominee services, i.e. those of nominee shareholders, managing directors, secretaries and other executives, is one of the most characteristic features of managing an offshore company. The nominee services make it possible to keep the real owners (directors, etc.) almost completely undisclosed to other participants in economic relations and the state, can positively influence the company's image and contribute to meeting the requirements for the company's presence in the offshore jurisdiction. However, the nominee services can also cause significant risks including the complete loss by the real owner of the control over the company set up. Proper regulation of the relationship between the real owner and the nominee, as well as a generally balanced legal and economic approach to creating nominee management structures for the company make it possible to prevent the relevant risks from materializing or at least significantly reduce them.

References:

1. Imeyut li vladel'cy offshornoj kompanii pravo podpisi? [Do the owners of an offshore company have the authority to sign?]. Retrieved from: <https://www.offshore-pro.com/ru/imejut-li-vladelcy-offshornoj-kompanii-pravo-podpisi/>

2. What is a Nominee Shareholder – Declaration of Trust. Retrieved from: <https://www.offshoreaffairs.com/post/what-is-a-nominee-shareholder-declaration-of-trust>

3. Obrazec trastovoj deklaracii [Sample trust declaration]. Retrieved from: https://offshore.su/blog/offshore_registration/obrazec-trastovoj-deklaracii.html

4. Offshore Companies: What Do the Declaration of Trust and the Beneficial Owner Declaration Say? Retrieved from: <https://internationalwealth.info/en/offshore-wisdom-en/offshore-companies-what-do-the-declaration-of-trust-and-the-beneficial-owner-declaration-say/>

5. What is a nominee shareholder and a nominee director? Retrieved from: <https://irblaw.com.sg/learning-centre/nominee-director-shareholder/>

6. Naznachenie nominal'nogo direktora v inostrannuyu (ofshornuyu) kompaniyu [Appointment of a nominee director to a foreign (offshore) company]. Retrieved from: <https://gsl.org/ru/glossary/docs/naznachenie-nominalnogo-direktora-v-inostrannuyu-kompaniyu/>