Business structuring: mechanisms to ensure confidentiality (for LLCs, JSCs, ZPIFs, DITs)

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The issue of confidentiality of information about business owners has always been relevant. Six to eight years ago, before changes in bankruptcy legislation and judicial practice, anonymization was considered a good way to reduce the risk of being held liable, and even earlier it was actively used to combat corporate raids.

Some businessmen want to remain in the shadows, avoiding publicity so that the fact of their connection with the business does not affect the private life of themselves and their families. In recent years, with the multiplication of sanctions and their tightening, many owners seek to ensure the confidentiality of their participation in the business in order to reduce the risk of personal sanctions, or so that they and their families with interests abroad have fewer problems with foreign banks and regulators.

In this article we will consider the following questions:

- levels of transparency of information in the current realities;
- what can ensure confidentiality ownership of a limited liability company;
- JSC: closed register, nominal account, op- tion and escrow;
- ZPIF is a “completely anonymous” registry;
- investment partnership agreement — Privacy is not for everyone.

TRANSPARENCY LEVELS INFORMATION IN CURRENT REALITIES

Let's start with the fact that it is currently impossible to ensure complete confidentiality of business ownership. It is important to understand the goal that the owner decides, from whom he or she wants to protect information about his or her connection with a specific asset.

In practice, three categories of entities have emerged to whom owners want to prevent disclosure of information.

1 **Any "unofficial" third parties.**Protection of information from third parties persons - foreign regulators, competitors, journalists, simply curious people - can be provided at a high level, using the tools that we will discuss below, with the obligatory condition of ensuring “information hygiene”.

2 **Banks.**Confidentiality of information information about owners from Russian and foreign banks could be called as high as from third parties. However, we will single out this category of information consumers for one simple reason: businesses and their owners are often forced to disclose information to them, since without it the bank will not open a vital account or issue an equally necessary loan.

3 **Government agencies.**This is the third level. In relation to the subjects consuming information, a very low level of security is possible. Everyone understands perfectly well that government agencies (Federal Tax Service, Ministry of Internal Affairs and others), if necessary, will receive information about the ultimate owner in a more or less short time: from registrars, notaries, and other persons related to business. **For government agencies new information about the actual owner of the business is confidential until the moment when an employee of these authorities sees the need to obtain this information.**

We will discuss legal instruments that allow us to achieve confidentiality below. Before that, it is important to note that the level of their effectiveness directly depends on the level of “information hygiene” provided by the parties themselves.

owners and their entourage. You can use several levels of protection, put in place nominal owners, use closed registries, etc. - but none of this will matter if the owner tells some media outlet in an interview that he was the founder and is the happy owner or manager of the Romashka Group of Companies. OSINT[1]

is only gaining momentum every day, and even such a banal thing as a photo on a social network from a company’s corporate event, in which the owner is marked, indicating his position or status, can completely “break” all the levels of protection that have been built up for so long and at such a high cost.

WHAT CAN PROVIDE CONFIDENTIALITY OWNERSHIP OF THE COMPANY WITH LIMITED RESPONSIBILITY?

The most banal option is good old nominal ownership. Although it is difficult to call it “good”. The number of risks arising from the use of nominees is so great that working with them should have long ago become a thing of the past. Nevertheless, quite a lot of businessmen still trust both well-known and unfamiliar people with companies, often with assets, money, and large contracts.

Our experience shows that the instruments of protection against disobedience or other excesses associated with nominal ownership are often more psychological than actually protective. For example, a will, which in theory should insure the owner against the death of the trustee, can be changed at any time without notifying anyone. In addition, there may be heirs on the side of the “nominee” himself,

1 Open source intelligence.

entitled to a compulsory share, which cannot be "gotten rid of" by a will. A marriage contract can also be changed or terminated at any time. The offeror can violate the put option by selling or gifting a share in the company to another person, without critical consequences for himself.**A pledge of a share is perhaps the most effective effective instrument for maintaining control over a share in a company belonging to a "trusted" person. However, information about the pledge and the pledgee is disclosed in the Unified State Register of Legal Entities. Therefore, if it is necessary to maintain confidentiality, a pledge on the share of a "trusted person" can only be executed in favor of another "trusted" person.**

Since 2019, limited liability companies have the opportunity to restrict the dissemination of information about themselves, including their participants, quite officially. Article 6 of the Federal Law of 08.08.2001 No. 129-FZ "On State Registration of Legal Entities and Individual Entrepreneurs" allows you to restrict access to certain information about a legal entity based on an application. RF Government Resolution No. 1625 of 16.09.2022 established that access to information about a legal entity is subject to restriction if the legal entity is included in the list of persons to whom restrictive measures imposed by foreign states, associations, and institutions are applied or may be applied and to whom they are subject.

So, if the goal of maintaining confidentiality is to reduce the negative consequences for the owner from imposed or possible sanctions, then you can quite officially try to remove information about the founders of your LLC from the Unified State Register of Legal Entities, which many companies are already using.

In addition, ownership of shares in an LLC can be "veiled" if these shares are transferred to the ownership of a JSC or a closed-end mutual fund.

JSC: CLOSED REGISTER, NOMINAL ACCOUNT, OPTION AND ESCROW

Joint-stock companies are usually the first tool that comes to mind when the question of the need to ensure confidentiality of ownership arises. Starting from October 2014, the responsibility for maintaining the registers of all joint-stock companies (including the abolished closed JSC) was transferred to the registrar - a professional market participant with a license, which keeps records of the owners of securities, transactions with them, the imposition of encumbrances and carries out other specialized operations.

Duty save confidential-
The requirement to provide information about the person for whom the personal account has been opened, as well as information about the account itself, including transactions on it, is directly enshrined in the Federal Law of 22.04.1996 No. 39-FZ "On the Securities Market". Registrars place a high value on compliance with this requirement. Even owners of a large block of shares cannot, under normal circumstances, obtain information about other shareholders. Information from the register is disclosed (in the form of an extract) only to the sole executive body of the company (CEO) upon request, or on the eve of a general meeting.

And again, the "information hygiene" of the shareholders themselves is very important. Thus, according to subparagraph "d" of paragraph 1 of Article 5 of the Federal Law of 08.08.2001 No. 129-FZ "On state registration of legal entities and individual entrepreneurs", the Unified State Register of Legal Entities must contain information that the joint-stock company consists of a single shareholder, and information about such a shareholder. Thus, when creating a new legal entity or changing the composition of its participants, it is necessary to ensure that 100% of the shares are not concentrated in the hands of one person, otherwise

the information will have to be disclosed publicly. As an example, a joint-stock company, 100% of whose shares are transferred to a closed-end mutual fund, will be required to disclose this structure in the Unified State Register of Legal Entities, which will attract additional attention to such ownership. Therefore, it is recommended to leave 0.01% to the formal shareholder. In some cases, this will also solve the problem of eliminating the "matryoshka" effect, which is directly prohibited by the Civil Code of the Russian Federation.

The effect of confidentiality of participation in a joint-stock company can be enhanced through the institution of a nominee holder. In the sense According to the Federal Law of 22.04.1996 No. 39-FZ "On the Securities Market" and by-laws, a nominee holder is a legal entity that has a license as a professional participant in the securities market (depository), which records in the register of shareholders on its own behalf shares that do not belong to it. Accordingly, the shareholder transfers his securities for recording to the depository, as a result of which a change occurs in the register of shareholders of the target company and an entry is made on the ownership of the shares by the nominee holder. If the nominee holder is transferred shares of several shareholders of the same joint-stock company, data on the total number of shares will be reflected in the register maintained by the depository for all concluded agreements, which further enhances the effect.

It should be emphasized that in this design the right of ownership is not transferred: the shareholder retains the shares, but interaction with third parties is carried out through the depository. In certain cases, information about the actual owners of shares may still be disclosed to the registrar, for example, to hold a general meeting of shareholders or pay dividends.

The degree of anonymity can also be increased by using a combination of the mechanisms of "nominal ownership", option and "escrow". In some ways, this structure is similar to the "instrument" described at the beginning of the article of nominal ownership of shares of an LLC by a trustee with whom an option is concluded.

Used combination "nominal-option -"escrow" covers certain risks, but is associated with its own nuances. It is assumed that the underlying owner of the shares sells them to the title owners (those same well- or little-known people), simultaneously concluding a reverse option agreement (Article 429.2 or Article 429.3 of the Civil Code of the Russian Federation), in addition to which an escrow agreement is concluded.

Recently, the escrow instrument has been actively gaining popularity and is a tripartite agreement between the owner of the asset (the depositor), a third party (the escrow agent) and a potential acquirer of the asset (the beneficiary). Under the terms of the agreement, the depositor transfers the asset (in our case, the title owner transfers shares) to the escrow agent for deposit to execute the transfer of such asset to the beneficiary, which occurs upon the occurrence of certain triggers by the parties (receipt of documents, filing of claims, the onset of a deadline, direction of payment, etc.).

The current practice is that the escrow agent is the registrar (registry holder) or depository, which can make an entry about the write-off of shares from the depositor's account to the beneficiary's account independently without the need for the title owner to submit an order.

An unconditional positive aspect of the escrow mechanism, which distinguishes it from a regular option, is that when it is introduced, a deposit record is made in relation to shares, which, by law, prohibits foreclosure, seizure, or the adoption of security measures in relation to the asset.

The depositor will also not be able to sell or transfer shares to any person other than the beneficiary, nor will he be able to unilaterally cancel the agreement. However, there is a drawback: the duration of the instrument is limited to a five-year period, which does not provide for automatic extension. Moreover, the Central Bank is extremely strict in this regard and insists on maintaining the instrument's fixed-term nature.

ZPIF - "TOTALLY ANONYMOUS" REGISTER

Information about shareholders of JSC, as already mentioned, can sometimes become public knowledge, for example, when there is only one shareholder. Information about shareholders of closed-end mutual funds is not officially published.

The register of owners of investment units of the closed-end mutual fund is maintained by a specialized depository of this fund, on the basis of an agreement with the management company. Extracts from the register are issued to shareholders in the manner established by the rules for maintaining the register.**At the same time, When using a closed-end mutual fund solely for the purpose of anonymizing ownership, it should be borne in mind that information about shareholders, although not published, is available (or can become officially available without any particular difficulty to a fairly wide range of people:**

- specialized depository of the fund (to the registrar);
- Central Bank;
- Federal Tax Service;
- Rosreestr (despite the fact that in the open in the access the owner of the property is indicated as the management company of the ZPIF, data on shareholders are still submitted to Rosreestr);
- banks (carrying out the procedureKYC, banks usually ask to disclose the ultimate beneficiaries, i.e. shareholders).

In addition, as already mentioned at the beginning, often the owners themselves are forced or accidentally disclose this information to certain persons, or even to "an unlimited number of persons."

At the same time, shareholders of closed-end investment funds, whose shares are intended for qualified investors, remain one of the groups most protected from public attention.

It is also worth mentioning here an incident that occurred with another type of fund at the end of 2023. Personal funds, of which there were no more than two dozen at the beginning of 2024, were initially considered as a confidentiality tool, since data on their founders was not entered into the Unified State Register of Legal Entities. However, the already mentioned subparagraph "d" of paragraph 1 of Article 5 of the Federal Law of 08.08.2001 No. 129-FZ "On State Registration of Legal Entities and Individual Entrepreneurs", which requires disclosure of data on the sole shareholder of a JSC from December 25, 2023, also requires disclosure of data on the founder of a personal fund. This, unfortunately, completely negated the effect of a personal fund as a method of protecting sensitive information.

INVESTMENT PARTNERSHIP AGREEMENT — CONFIDENTIALITY NOT FOR EVERYONE

Agreement investment partnerships (DIT) is not a very common structuring tool, not many people understand how it works, so there are many myths around it. One of them is that DIT is a tool that allows you to completely hide your comrades from absolutely anyone except the comrades themselves.

The investment partnership agreement is certified by a notary, and at least the notary himself knows the list of all partners. Copies of documents certified by the notary are kept by him and can be obtained by third parties upon receipt of the written consent of the managing partner..Is- An exception is made for the provision of copies of documents based on federal laws, which primarily include requests from government agencies. Documents for such requests are provided by a notary without the consent of the managing partner.

The register of participants in the investment partnership agreement is maintained by the managing partner. At the request of other participants, he must provide information on the size of the share of each partner-investor in the common property. The managing partner must also provide information from the register of participants at the request of authorized state bodies and persons entitled to receive information on the participants in the investment partnership agreement.

Information about the managing partner himself is not confidential in principle. His data is published on the notary's website as part of the information about the registration of the DIT and changes to it.

The data of the managing partner, along with the identification data of the DIT, are indicated in state registers in relation to property transferred as contributions, as well as acquired in common shared ownership of partner-investors within the framework of an investment partnership. Thus, the data of the managing partner are publicly available in the Unified State Register of Real Estate in relation to real estate and in the Unified State Register of Legal Entities in relation to legal entities (primarily in relation to shares of LLCs).

Securities, including shares of JSC, are recorded in separate depository accounts and personal accounts opened by the depository and registrar for the investment partnership. If there is more than one shareholder of JSC, then the data on the managing partner are not indicated in the Unified State Register of Legal Entities, but the registrar receives them, since the managing partner is authorized to exercise all rights on securities on behalf of the partnership.

Similarly, the data of the managing partner are indicated in the register of owners of investment units and the register of participants in the investment partnership agreement in relation to units and shares in the investment partnership that constitute the common property of the partner investors. The data of such registers are not public.

CONCLUSION

In the context of universal digitalization and maximum openness of data, it is becoming increasingly difficult to maintain the confidentiality of information about business owners. Regular publications, journalistic investigations, the popularity of forensic services and the like indicate that confidentiality and anonymity are difficult to achieve categories in the modern world.

However, one should not go to any extremes: either to believe that one can “hide” reliably from everyone, or to believe that no actions protect from anything.

When setting a goal to ensure confidentiality, you need to clearly define from what circle of people and what information exactly you want to keep. This will determine what tools you can use and what budget it is reasonable to plan for this. In addition, maintaining anonymity is always a set of actions, and not only corporate ones.