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Swiss Corporate Law Reform: Board of directors, management and auditors

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This legal update is part of a series summarising the most important upcoming amendments to Swiss corporate law in a condensed form as relevant for legal practitioners. Previously published legal updates can be found on our website at Corporate Law Reform 2020. New legal updates on the Corporate Law Reform are regularly mailed to our subscribers and published on our website.

Key takeaways

Besides transferring the provisions on compensation at listed companies to the Swiss Code of Obligations (legal update on Swiss Corporate Law Reform: Transfer of the provisions on compensation in listed stock corporations to the Swiss Code of Obligations) and introducing gender quotas (New Provisions in Swiss Corporate Law and Changes to the Commercial Register Ordinance), the Corporate Law Reform will bring further changes and clarifications to the current provisions governing the board of directors.

- **In future, members of the board of directors will in principle be elected individually even in private companies, and the board of directors will no longer have to appoint a secretary.**
- **Delegation of management duties to the executive committee will no longer require authorisation in the articles of association.**
- **As with electronic shareholders' meetings, there will be greater flexibility for boards of directors in passing resolutions; electronic circular resolutions will no longer require a signature.**
- **A new provision will govern the duties of the board of directors in case of conflicts of interests.**
- **There is also a new provision governing restructuring duties upon imminent insolvency, and the determination of 50% capital loss will become more company-friendly.**
- **Over-indebted companies must file for bankruptcy within a new maximum period; the instrument of bankruptcy postponement is abolished.**
- **Changes will be made regarding the calculation of a bankrupt company's damages in connection with directors'/auditors' liability and the respective statute of limitations; the auditors will continue to be jointly liable.**

Introduction

As part of the Corporate Law Reform, which according to current estimates by the Federal Office of Justice is not expected to come into force before 2023, various provisions concerning the board of directors will cause changes and clarifications to the provisions in force today. The following summary attempts to provide an overview.

Election and organisation of the board of directors and management

Individual election of board members even in private companies

Already today, board members of listed companies are elected individually pursuant to the provisions of the Ordinance against Excessive Compensation in Listed Stock Corporations (VegüV/OaEC).

Following incorporation of the provisions of the VegüV/OaEC into the Swiss Code of Obligations (CO) in the course of the Corporate Law Reform (see our legal update: Transfer of the provisions on compensation in listed stock corporations to the Swiss Code of Obligations), this rule also applies in principle to private companies. However, in order not to impose excessive compliance burdens on smaller companies, the articles of association may provide otherwise. Alternatively, the chairperson of the shareholders' meeting may, with the consent of all shareholders represented, order the collective election of the board members.

Secretary to the board of directors no longer required

Due to changed demands in practice, the provisions regarding the secretary to the board of directors will be deleted. Accordingly, the board of directors will no longer have to appoint a secretary in the future if there is no such need. Consequently, instead of the secretary, the respective keeper of the minutes will sign the minutes of board meetings.

Delegation of management no longer subject to authorisation in the articles of association

Under current law, the board of directors must be authorised by the articles of association to delegate management duties to the executive committee by way of organisational regulations. The removal of this requirement will strengthen the discretionary powers of the board of directors. In the future, the board of directors will therefore be able to issue organisational regulations which delegate the management of the company to executive directors also without a corresponding authorisation in the articles.

Contrary to current law, the articles would in future need to contain a proviso depriving the board of directors of this authority and conferring it on the shareholders if they are to retain the power to decide on the delegation of management.

Resolutions of the board of directors

Electronic and virtual board meetings

The rules governing board meetings will become more flexible. In line with the new provisions on shareholders' meetings, board meetings may also be held electronically or virtually in future. In this regard, we refer to our legal update on shareholders' meetings (Swiss Corporate Law Reform: New provisions concerning shareholders' meetings).

Signature no longer required for electronic circular resolutions

For electronic circular resolutions, the Corporate Law Reform also expressly provides that signatures are no longer required. In future it should thus also be possible to pass resolutions by email (without scanned signatures) or by chat.

If such informal passing of resolutions is undesired, the board of directors can declare in writing (not necessarily in organisational regulations) that the valid passing of circular resolutions will continue to be subject to the signatures of the board members.

Conflicts of interest

Article 717a of the new CO (nCO) introduces a specific duty to inform the board of directors of conflicts of interest of board or executive committee members. The conflict of interest then triggers a duty on the part of the board to take measures “necessary to safeguard the interests of the company”. This, however, does not automatically lead to the recusal of the conflicted person. In essence, the provision incorporates in law today’s practice on how conflicts of interest are already dealt with.

Duty to restructure

Codification of duties in the event of imminent insolvency

Duties of the board to restructure upon imminent insolvency of the company are also now addressed in a specific provision (Art. 725 nCO). Yet again, this is more about codifying the practice already existing today than imposing new duties:

The board of directors monitors the company’s solvency. In the event of imminent insolvency, it must, with reasonable urgency, take steps to ensure solvency. Further restructuring measures must only be proposed to the shareholders’ meeting to the extent necessary, e.g. capital increase. In addition, the law explicitly highlights the possibility of a debt-restructuring moratorium.

It should be noted that the Corporate Law Reform does not require the preparation of liquidity plans despite such an obligation initially having been envisaged in the legislative process.

Only non-distributable legal reserves relevant for calculation of 50% capital loss

The abstract determination of 50% capital loss will become more company-friendly in the future, which should particularly relieve growing companies. According to Article 725a nCO, 50% capital loss will in the future be assumed if, in the last annual financial statements, 50% of share (and participation) capital plus non-distributable legal reserves are uncovered. In contrast to today, it will thus be clear in future that only non-distributable legal reserves (50% or, for holding companies, 20% of share (and participation) capital) are relevant for the calculation of this figure instead of the total legal reserves.

Limited statutory examination required upon 50% capital loss

A company that has opted out (i.e. a company without auditors) and that has incurred a 50% capital loss will, in future, have to submit its last annual financial statements to a limited statutory examination.

Maximum period of 90 days until notification of over-indebtedness

The definition of over-indebtedness remains unchanged by the Corporate Law Reform (Art. 725b nCO). However, in contrast to today, it will suffice in future to prepare the interim financial statements upon reasonable concern of over-indebtedness at either only going concern values or only liquidation values, depending on whether there is a presumption of going concern or not.

Further, it should be noted that the notice of over-indebtedness can in future only be averted by subordination if the creditor subordinates not only the principal loan amount but also the accrued and future interest. The notice of over-indebtedness to the court must be made no later than 90 days after the audited interim financial statements are available. By contrast, the current practice takes consideration of the individual case. In future as today, notification may only be deferred if creditors' risks are not additionally increased by drain of equity.

Postponement of bankruptcy proceedings abolished

The Corporate Law Reform entirely abolishes the instrument of bankruptcy proceedings postponement. Instead, over-indebted companies can apply in future to the probate court for a moratorium (Arts. 293 et seqq. Debt Enforcement and Bankruptcy Act). Already as of 20 October 2020, it is possible to request an extension of a provisional debt-restructuring moratorium for an additional four months. This means that a provisional debt-restructuring moratorium, which may be granted silently, can last for eight months in total already today.

Dismissal of auditors: only important reasons

The position of minority shareholders will be strengthened in the shareholders' power to dismiss the auditors. In contrast to current law, the shareholders' meeting may in future only dismiss the auditors for important reasons, which must further be disclosed in the notes to the annual financial statements.

Liability under corporate law

Subordination claims no longer count as company damage in bankruptcy cases

Rejecting current case law of the Swiss Federal Supreme Court, the legislators decided that bankrupt companies' damages in liability proceedings should no longer include subordinated claims. It is reasoned that board members' efforts to arrange subordination of claims does not constitute misconduct. Rather, the board of directors is encouraged to pursue subordination of claims more actively in the event of over-indebtedness of the company.

Adjusted statute of limitations and right to sue after release resolution

The time limits for liability claims will also be adjusted:

The relative time limit for liability claims will be shortened from five to three years whereas the absolute time limit will remain at ten years. The time limit will be frozen for the duration of special investigations ('Sonderuntersuchung'; known under current law as special audits ('Sonderprüfung')). For the respective statutory changes, see our legal update Swiss Corporate Law Reform: Personal membership rights). Those shareholders who did not approve the release resolution will see their right to sue extended from six to twelve months following such resolution. This time limit will also be frozen during a special investigation.

Continued joint liability of auditors

During the long legislative process, the auditing industry unsuccessfully lobbied for the reduction of auditors' liability. Consequently, auditors will continue to be jointly liable with the board of directors and management (but on a differentiated basis).

Next steps

Depending on companies' specific needs, the pending amendments to the law may require an amendment to the articles of association. This is the case in particular if the board of directors shall continue to be elected collectively; also if the board's authority to delegate the management of the company shall be restricted.

If not already implemented, the Corporate Law Reform is a good opportunity to update the organisational regulations to include more detailed provisions on the board's duties regarding conflicts of interest and financial planning. In addition, the provisions of the organisational regulations on board meetings should be reviewed and, if desired, adapted to reflect the more flexible statutory framework.

Finally, in order to comply with Art. 725b(4)(1) nCO, pre-existing subordination agreements should also be amended if they presently do not provide for a subordination of future interests.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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