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Tax Free Quarterly Dividends Revisited – Same Story, New Theme: Staggered Dividend out of Additional Paid-In Capital (APIC)

(Gestaffelte Agio Dividende aus Reserven aus Kapitaleinzügen)

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On January 1, 2011, a new tax law will enter into force, allowing, *inter alia*, the tax free repayment of capital contributions. This will, *inter alia*, allow Swiss domiciled companies to use their additional paid-in capital (Agio, «APIC») for tax-free dividend payments to their shareholders. One can expect that Swiss listed companies having APIC on their balance sheet will start to have their shareholders benefit from the new law by dis-

tributing tax-free APIC in lieu of the traditional cash dividend that is subject to income and withholding tax.

The same applies for listed companies with quarterly dividend schemes. After a brief look at the system under which Swiss listed companies currently distribute tax free quarterly dividends and a short overview on the relevant principles of the new tax law, this note discusses the mechanics of a staggered APIC dividend, allowing the payment of tax free quarterly dividends.

I. Status Quo

Under current corporate law, Swiss companies can provide for tax efficient quarterly dividends through staggered par value reductions.¹ Technically, these dividend distributions are not dividends in the sense of article 675 Swiss Code of Obligations («CO»), but represent a return of share capital in accordance with articles 732 et seq. CO.

Staggered capital reductions are challenging in two ways. On the one side, the whole procedure is rather complicated and burdensome for the companies involved, as every single tranche in the capital reduction requires the publication of three creditors' calls in the Swiss Official Gazette as well as an auditor's report.² On the other side, – and in most cases this is the one aspect with immediate consequences for the company – the various creditors' calls that have to be made can substantially limit a company's financial freedom. Upon a creditors' call, a creditor may request satisfaction or security for his claim. As soon as a real or alleged creditor files such a request, the whole timeline of the planned capital reduction process can easily be derailed as solving the issue usually either takes too long or ties-up a lot of financial resources. Bearing in mind the leverage that creditors have, a group is normally well advised to structure its debt accordingly in a manner that avoids

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¹ MARTIN L. MÜLLER, Staggered Capital Reduction – New Approach to Tax-Free Quarterly Dividends for NYSE-listed Swiss Companies, GesKR 2009, p. 363–367.

² Articles 732 and 733 CO.

significant liabilities at the top level. This is often easier said than done, as capital market transactions such as bond issues, almost always require an undertaking by the top parent company.

However, several Swiss companies have in the meantime repeatedly approved staggered par value reductions under the existing rules.³

II. New Tax Regime from January 1, 2011: Tax Reform and APIC Distribution

Generally, any financial benefit distributed by a Swiss domiciled company to its shareholders or to persons related to its shareholders is subject to a 35 % Swiss withholding tax. Currently, only the repayment of paid-up share capital can be made tax-free, whereas the repayment of any other capital contributions such as APIC is considered as income from investment (*Vermögensertrag*) for the purposes of applicable tax laws and is therefore subject to income and withholding tax. Consequently, in an international context in which full double tax treaty relief cannot be granted, a non-recoverable Swiss withholding tax burden remains. Also, where the shareholder is a Swiss domiciled individual holding the shares as private assets, the repayment of any type of shareholder's contributions other than share capital is subject to Swiss income tax.

From January 1, 2011, the tax treatment of returns on capital contributions will change fundamentally in the wake of the Corporate Tax Reform II (*Unternehmenssteuer Reform II*). According to the new tax law, the return of capital contributions made by the shareholder will be exempt from Swiss withholding tax. Further, such proceeds will not be subject to income tax (at least for Swiss resident shareholders) provided that (a) the capital contributions are shown on a separate account on the company's balance sheet; (b) the tax authorities are notified about the amount of the capital contributions as per the end of the business year ending after January 1, 2011, and all changes to such capital; and (c) the relevant capital contributions have been made after December 31, 1996.

³ However, at least one of such capital reductions did not go as planned: On August 13, 2010, Transocean Ltd., Zug (NYSE: RIG; SIX: RIGN) announced that the Commercial Register of the Canton of Zug rejected Transocean's application to register the first of four planned staggered capital reductions. As long as the par value reduction is not registered, Transocean Ltd. will not be able to proceed with its staggered dividend payments through par value reductions. Transocean Ltd. informed that the Commercial Register's rejection is related to the fact that Transocean has been served in Switzerland with several complaints from lawsuits filed in the U.S. with respect to the Deepwater Horizon incident in the Gulf of Mexico. Transocean Ltd. has appealed the Commercial Register's decision. The case seems to be still pending, and no judgment has yet become public.

As a result, Swiss companies will be able to return share capital and other capital contributions (including APIC) to their shareholders on a tax free basis. In the following sections, this note goes on to focus, in particular, on a staggered return of APIC, which will allow for the payment of tax free quarterly dividends under the new tax law.

III. Mechanics of APIC Dividend

Under current corporate law, a company cannot make an APIC dividend directly, but needs to re-classify APIC into free reserves prior to the distribution.⁴

In order to benefit from the new tax regime as of January 1, 2011, the reclassification needs to be shown on the balance sheet, i.e. the reclassified amount has to be booked on a special line item (e.g. «APIC Distribution Reserve», *Reserve aus Kapitaleinlagen*), and must not be included in the general free reserves, as has been the traditional practice.

1. Reclassification

As long as the direct return of APIC is not possible, the shareholders will have to reclassify the amount of APIC that is to be distributed into the APIC Distribution Reserve.

The prevailing view among the Swiss corporate community is that APIC can be distributed to shareholders through reclassification.⁵ However, this position does not go unchallenged as some commentators argue that the shareholders designate APIC as financing equity that must not be distributed to shareholders (save for the liquidation of the company).⁶ According to this view, APIC can be returned to shareholders only by way of capital reduction or upon the liquidation of the company, but not as a dividend.⁷

2. Special Line Item

In order to safeguard the tax-free treatment of APIC dividends, it is absolutely essential that the amount of APIC reclassified into APIC Distribution Reserve is al-

⁴ Unfortunately, the Swiss legislator has not yet managed to harmonize the corporate law aspects of an APIC dividend with the new tax regime. However, the direct distribution of a dividend from APIC might become possible upon the introduction of new corporate rules, c.f. below Section V. C.f. also KURT SCHÜLE, Das vom Volk beschlossene Kapitaleinlageprinzip ist auch im Gesellschaftsrecht zu respektieren, ST 2010, 686 et seq.

⁵ E.g. BSK OR II-KÜRER, 675 n. 19; and also supported by the Swiss Audit Society, c.f. Schweizer Handbuch der Wirtschaftsprüfung, Zurich 2009, Vol. 1, p. 319.

⁶ PETER BÖCKLI, Schweizer Aktienrecht, Zurich 2009, 12 n. 526.

⁷ PETER BÖCKLI (footnote 6), 12 n. 528a and footnote 1236.

ways booked individually as a separate line item; as the source of funding of a dividend payment must be clear in order to benefit from the new tax regime.

3. Shareholders' Resolution

The shareholders' approval required for an APIC dividend is twofold:

- First, the shareholders have to approve the reclassification of APIC into an APIC Distribution Reserve.
- Secondly, the shareholders have to approve the payment of the APIC dividend and the funding of such dividend from the APIC Distribution Reserve.

These two approvals can be combined into one resolution which must be carefully drafted so that the shareholders can approve the reclassification of APIC and the payment of the APIC dividend in one go. As long as the tax authorities have not had a chance to establish the precise formal requirements with regard to tax free APIC dividends,⁸ companies are well advised to include a wording in the shareholders' resolution which makes clear that the APIC dividend is funded from the APIC Distribution Reserve.

Companies contemplating to use their APIC for dividend payments have to decide how much APIC needs to be reclassified into APIC Distribution Reserves. The Federal Tax Administration seems to take the position that the reclassified APIC Distribution Reserve needs to be distributed to the shareholders immediately, i.e. the shareholders just reclassify the amount of APIC that will be used for the dividend payment.⁹ If the shareholders approved the reclassification for APIC that will not be immediately distributed, such excess amount would lose the preferential tax treatment.

4. Auditor's Confirmation: Three Criteria – Required General Reserve in Particular

As for every dividend payment, the auditor will have to sign-off on the proposed APIC dividend¹⁰. The auditor will check three aspects of the APIC dividend: First of all, the distribution of an APIC dividend will have to comply with statutory law and the company's articles of association, i.e. the company will need to have suffi-

cient freely distributable reserves. Secondly, the auditor will have to confirm that sufficient general reserves remain in the company after the payment of the dividend. Finally, professional standards require that the auditor also verifies whether the company has sufficient net current assets even after payment of the dividend.¹¹

The second criterion, i.e. the various contributions to general reserves in accordance with article 671 CO, is not entirely clear. For a distribution of APIC, Swiss audit standards, referring to article 671 para 3 CO, require that the company's general reserve amounts to at least half of the share capital (and in case of a holding company, 20 % of the share capital).¹² The question is whether this rule really applies to APIC dividends. Due to the reclassification, APIC dividends are not part of the general reserve in the sense of Article 671 para 2 CO but are free reserves¹³. That's why one can argue that the limitations of article 671 para 3 CO are not applicable, but the company has just to observe the contribution obligations in accordance with article 671 para 2(3) CO and the 20 % threshold in accordance with article 671 para 1 CO. According to this position, the company would need to allocate just 10 % into the company's general reserve in case the total amount of the APIC dividend exceeds 5 % of the share capital.¹⁴ However, this understanding contradicts the requirements for the use of general reserves as stipulated by article 671 para 3 CO: A reclassification of APIC into free APIC reserves constitutes a use of the general reserves that is clearly governed by this article. Consequently, the reclassification is subject to the company having general reserves in the amount of at least half of the share capital (and in case of a holding company, 20 % of the share capital, respectively)¹⁵.

IV. Staggered APIC Dividend

Swiss companies having a strong Anglo-American shareholder base normally need to pay quarterly dividends in order to meet market expectations. So far, staggered capital reductions have been the way to go and it is fair to say that they are now widely accepted by the

⁸ The respective directive by the Federal Tax Administration («*Kreisschreiben Kapitaleinlageprinzip*») is currently still in draft form.

⁹ The Federal Tax Authority seems to argue that article 5 para 1bis VStG just talks about one special account («*ein gesondertes Konto in der Handelsbilanz*»), which in my view is too rigid a textual interpretation. The current position of Federal Tax Administration is most likely not consistent with its earlier position, where at least one company was allowed to book more APIC than it actually distributes in the year when the reclassification took place.

¹⁰ Article 728a para 1 (2) CO.

¹¹ Handbuch der Wirtschaftsprüfung, Vol. 1, p. 323.

¹² Handbuch der Wirtschaftsprüfung, Vol. 1, p. 230; c.f. also BSK OR II-KURER, 675 n. 19. Again, PETER BÖCKLI (footnote 6), 8 n. 309 et seq., not allowing the distribution of APIC requires that the threshold corresponds to 50 % (and in case of a holding company 20 %, respectively) of the share capital plus the aggregate amount of APIC.

¹³ «*freie Reserven*», c.f. BSK OR II- KURER, 675 n. 21.

¹⁴ In case of authorized/conditional share capital, the relevant amount is the total of the potential dividend amount, c.f. discussion below Section 7.

¹⁵ Articles 671 para 4 CO in connection with 671 para 1 CO; c.f. Handbuch der Wirtschaftsprüfung, Vol. 1, p. 321; BSK OR II-NEUHAUS/BALKANYI, 671 n. 38.

various commercial registries and auditors. As pointed out above, however, staggered capital reductions have their various drawbacks and shortcomings.

As from January 1, 2011, the tax-free return of APIC will be possible. This opens the door to a new possibility for mirroring quarterly dividends, namely the staggered APIC dividend (*gestaffelte Agio Dividende*): In addition to the reclassification of APIC into APIC reserves, the shareholders approve a staggered payment of an APIC dividend.

5. Shareholders' Resolution

The shareholders will have to approve the reclassification of APIC into APIC reserves and the payment of an APIC dividend as discussed above, including the payment details and schedule of the various tranches. Again, the shareholders can approve a staggered APIC dividend in one resolution.

6. Sale/Purchase of Shares During an Ongoing Staggered APIC Dividend

What happens to the entitlement to a dividend, if a shareholder sells a share (a) after the shareholders' meeting approved a dividend, but (b) prior to the dividend having become due and payable (or – in the context of a staggered APIC dividend – the shareholder sells his shares, for instance, after the payment of the 2nd tranche, but prior to the payment of the 3rd tranche)? Will the dividend entitlement transfer to the purchaser or will it remain with the seller who then collects the dividend even though he is no longer a shareholder at the date of payment?

No special rules exist for the sale of shares in private companies and it is up to the seller and purchaser to agree on the treatment of dividend entitlements that have already been approved but which have not yet become due. The following is relevant for listed companies.

6.1 Financial Interest that Automatically Transfers with the Sale of the Shares

There is no doubt that the dividend entitlement is a financial interest (*vermögensmässiges Recht*) for which the Swiss corporate law provides quite elaborate rules regarding the transfer from the seller to the purchaser.¹⁶ The question is, however, what falls under the concept of «financial interest» that is governed by those rules: Is such a financial interest just the generic right of a shareholder to receive a dividend (in the sense of

Gewinnstrebigkeit), is it also a dividend payment already approved but which has not yet become due, or is it even a dividend payment that has become due and payable?

On the one hand, the generic right to a dividend clearly qualifies as financial interest that transfers from the seller to the purchaser because it is inherent to the position of a shareholder. On the other hand, a dividend payment that has become due and payable is no longer such a financial interest but rather a liability of the company and a claim of the person who was a shareholder at that time, respectively.¹⁷ In the absence of an agreement to the contrary, such claim remains with the seller and does not automatically transfer to the purchaser of the share.

The dividend payment already approved but not yet due falls in between these two classes. As far as I can tell, a dividend with a later due date has not yet been able to attract much interest from the Swiss corporate legal community.¹⁸ Nevertheless, it is not at all *terra incognita*: on the one hand, Swiss corporate law provides for quite a lot of flexibility regarding the payment mechanics for a dividend. On the other hand, listed companies have always provided for an «Ex-Dividend Date». These principles apply to staggered APIC dividends *mutatis mutandis*.

6.2 Flexibility for Dividend Payment: Due Date and Beyond

As a general rule, a dividend payment becomes immediately due and payable upon the shareholders' meeting approving such dividend. As already mentioned above, the shareholders can resolve, however, that the dividend shall become due at a later date.

However, a later due date is not the end of the story: Shareholders may just approve a dividend amount but delegate to the board of directors the power to pay such dividend in installments. BÖCKLI even stipulates that the shareholders also approve a maximum dividend amount and grant the board of directors' discretion for dividend payments under such maximum amount.¹⁹ In this case, the board of directors is free as to the dividend amount (and, in the extreme, the board can decide

¹⁶ C.f. article 685c CO for private companies and article 685f CO for listed companies.

¹⁷ BGE 114 II 57; c.f. also KARL STEIGER, *Der Anspruch des Aktionärs auf die Dividende*, thesis Bern 1947: «Mit der Festsetzung der Dividende durch die GV löst sich das Dividendenrecht von seinen mitgliedschaftlichen Bindungen und wird zum selbständigen Gläubigerrecht.»

¹⁸ Most commentators just mention that the shareholders' meeting can resolve on a later due date for the payment of a dividend, e.g. PETER FORSTMOSER/ARTHUR MEIER-HAYOZ/PETER NOBEL, *Schweizerisches Aktienrecht*, Bern 1996, 40 n. 62; and the various commentators usually just discuss the tax treatment but do not clarify the various corporate issues of a later due date.

¹⁹ PETER BÖCKLI (footnote 6), 12 n. 519.



not to pay a dividend at all, or to pay the full maximum dividend amount approved by the shareholders) and the date of payment.

6.3 Ex-Dividend Date: Inherent Condition for a Dividend Payment

Shares in listed companies need to be traded in a harmonized way. This means that all market participants must be clear about the respective derivative rights and obligations of a traded share, such as «dividends, capital repayments, subscription rights or other forms of distribution»²⁰. Consequently, shares are always traded with all «rights and obligations [...], as well as all risks attached to the securities»²¹.

In case of a dividend payment, the market needs clarity on when a share is traded without the dividend. The ex-dividend date is the cut-off date for the dividend entitlement.²² The company informs the market about the ex-dividend date, which is normally 2 – 3 business days after the day of the shareholders' meeting. Prior to the ex-dividend date, shares are traded with the dividend entitlement, after the ex-dividend date, they are traded without such entitlement.²³ Consequently, a shareholder selling his shares prior to the ex-dividend date loses the dividend entitlement. The new acquirer, however, will get the dividend, although he was – at the moment of the shareholders' meeting approving the dividend – not a shareholder of the company.

On a corporate level, being a registered shareholder until the ex-dividend date is a condition for getting the dividend. The shareholders know prior to the shareholders' meeting approving the dividend that they must be shareholders until the ex-dividend date for getting the dividend. Being a shareholder until the ex-dividend date is thus an inherent condition of the dividend proposal. By approving the dividend, the shareholders implicitly approve their continuing to be shareholders until this date in order to get the dividend.

6.4 What About a Staggered APIC Dividend?

Both the mechanism of a later due date of a dividend and the concept of the ex-dividend date are strong indications that the entitlement to future tranches of an APIC dividend automatically transfers from the seller to the purchaser. Nevertheless, there is no clear law

and no relevant precedents yet. A company is therefore well advised to implement clear rules which will be binding on the shareholders. Otherwise, there is the (remote) risk that the company has to pay the future tranches of an APIC dividend to the old shareholder and the new shareholder (double payment).

A staggered APIC dividend is nothing but a dividend with multiple (usually four) due dates and corresponding ex-dividend dates. As for the ex-dividend date, it is not necessary that the shareholders explicitly approve a dividend that has not yet become due transfers from the seller to the purchaser. However, for each tranche of the staggered APIC dividend, the company has to clearly stipulate until when the share is traded with dividend entitlement. Consequently, being a shareholder prior to the ex-dividend date for the respective tranche becomes an inherent condition for the payment of the relevant installment of a staggered APIC dividend.

7. Additional New Shares During the Distribution Process

During the term of a staggered APIC dividend, the share capital of the company might increase due to an ordinary capital increase, or an increase out of conditional or authorized share capital. The question is whether the newly issued shares will automatically participate in the ongoing staggered APIC dividend.

7.1 Ordinary Capital Increase

In case the shareholders approve a staggered APIC dividend and later on (during the term of the staggered APIC dividend) also approve an ordinary capital increase, the new shares do not automatically participate in the APIC dividend.

In case of an ongoing per-share APIC dividend, the shareholders may resolve to equip the new shares from the ordinary capital increase also with staggered APIC dividends so that all shareholders participate in an ongoing APIC dividend, always provided that there is sufficient APIC Dividend Reserve available to cover the APIC dividend obligations on the newly issued shares and that the underlying audit report is not more than 6 months old.²⁴

7.2 Capital Increase out of Authorized and/or Conditional Share Capital

Once shareholders approve an authorized share capital²⁵ and/or a conditional share capital²⁶, the share capital of

²⁰ Article 14.2.1 para 2 Rule Book SIX.

²¹ Article 14.2.1 para 1 Rule Book SIX.

²² C.f. Article 14.2.1 para 3 Rule Book SIX: «As of the ex date, trading in a security shall take place exclusive of any claims to dividends, capital repayments, subscription rights or other forms of distribution (ex).»

²³ Due to such loss of the dividend entitlement, it is reasonable to expect that the shares will be traded at a lower price after the ex-dividend date.

²⁴ Article 652d CO

²⁵ Article 651 et seq. CO.

²⁶ Article 653 et seq. CO.

the company can quite easily (and without shareholders' participation) be increased. In case of a staggered APIC dividend payment, the shareholders have to agree on how to treat shares newly issued out of authorized and/or conditional share capital during the term of the staggered APIC dividend. There are two possibilities for dealing with such newly issued shares: The shareholders either resolve on a maximum total APIC dividend amount, or they approve a per share amount.

a) Maximum Amount

If the shareholders resolve on a maximum APIC dividend amount, the old shareholders are diluted for future installments as soon as new shares are issued out of authorized and/or conditional share capital. Because of this dilution effect, it is not very likely that listed companies will opt for this approach.

b) Per Share Amount

If the shareholders resolve on an APIC dividend amount per share, no dilution occurs but the aggregate amount of the APIC dividend might increase as a result of the potential increase of the share capital out of the authorized and/or conditional share capital.

It is therefore necessary that a sufficiently funded APIC Dividend Reserve exists so that the company could also satisfy the dividend entitlements of additional new shareholders. The APIC Dividend Reserve is sufficiently funded if, at the time of the shareholders' resolution, it covers the number of issued shares plus the number of shares that, during the term of the staggered APIC dividend, can potentially be issued out of authorized and/or conditional share capital.

In case of a per share amount, the auditors have to check for the purposes of their confirmation²⁷ whether the APIC Dividend Reserves cover the total potential dividend amount.²⁸

7.3 Provisions Necessary for Potential APIC Dividend Payment on Shares Issued out of Authorized/Conditional Capital

Swiss corporate law requires that the company has to make provisions to the extent required by generally accepted accounting principles, whereby provisions shall be made «to cover uncertain contingent liabilities [...]»²⁹. «Contingent liabilities» is not a clear-cut term and also the Swiss audit practice does not precisely define when contingent liabilities need to be covered by provisions.³⁰ In case of a staggered APIC dividend, the

question is whether potential APIC dividend installments payable on shares newly issued out of conditional and/or authorized capital demand provisions? The answers are different for conditional and authorized capital.

For authorized capital, no provisions are necessary as long as the board does not contemplate to use the authorized capital. If, however, a capital increase out of authorized capital becomes imminent, the company has to book the respective APIC dividend provision. Upon implementation of the capital increase, the provision will automatically become a liability in the amount of the outstanding APIC dividend installments on the newly issued shares.

In case of conditional share capital, a provision is necessary to the extent the company has issued conversion rights or granted options to employees and these rights are exercisable. Provisions need to be made e.g. for option awards if the respective options vest during the term of the staggered APIC dividend.³¹ No provisions are necessary for the portion of the conditional share capital not subject to such conversion rights or options. Again, the company has to book a liability in the amount of the outstanding APIC dividend installments on the newly issued shares upon the exercise of the conversion or option rights.

Transactions with shareholders are always booked via equity and do not go through the profit and loss account. As the provisions for potential APIC dividend installments are recorded directly on the balance sheet, they will also be released directly on the balance sheet again (and do not run through the profit and loss account).

V. New Corporate Law and the Reduction of APIC – Initial Thoughts and Decision to Make

The Swiss legislator contemplates to change the Swiss corporate law, and, inter alia, the rules on the distribution of APIC.

According to a very first draft of the new law, APIC qualifies as a legal reserve, and legal reserve may only be used for (a) coverage of losses, (b) actions necessary for continuing the business in case of bad business, and (c) avoiding unemployment or mitigation of its conse-

²⁷ Article 728a para 1 (2) CO.

²⁸ C.f. section 4 above.

²⁹ Article 669 para 1 CO.

³⁰ Handbuch der Wirtschaftsprüfung, vol. 1, p. 238; IFRS, however, is trying to be clearer by identifying four different types of li-

abilities (from remote to actual), c.f. IAS 37; a somewhat similar principle should be implemented into Swiss law by the new accounting law, c.f. article 959 c para 2 no. 10 draft law.

³¹ As an exception, no provisions are necessary if the options are significantly out of the money.



quences. This first draft law seems to take the position that a return of APIC will no longer be permitted.³²

The first draft of the new law has encountered wide criticism. The critics have particularly complained about the contradiction of the wording of the first draft to the tax law effective as of January 1, 2011, which expressly allows for the tax free distribution of APIC. That's why the Council of States, when discussing this first draft as the first parliamentary chamber, decided to amend the draft law: Pursuant to the Council of States' amendments, the company will be able to directly distribute APIC to the extent the legal reserves cover at least half of the share capital. The Council of States' version of the new law has not yet been put forth to the National Council, who will discuss it as the second parliamentary chamber. However, the National Council's legal commission (*Rechtskommission des Nationalrats*) already came to the conclusion to support the Federal Council's approach. It remains to be seen what approach the members of parliament will finally take. In any event, it is not at all clear which wording will make it into the final law and when the new law will enter into force.

Such legislative uncertainties make planning impossible, which is a very uncomfortable situation for the companies involved. Were the Federal Council's draft to survive, the direct distribution of APIC will most probably not be possible. Further, there is the substantial risk that even a reclassification of APIC into a free reserve will no longer be allowed due to the intention of the new law as communicated in the *Botschaft*.³³ It has been argued that even under the Federal Council's regime, however, shareholders can always return APIC in the form of a capital reduction.³⁴ Were the Council of States' approach to become the new law, both the direct distribution of APIC and the detour via reclassification and then distribution of an APIC dividend should be possible. In both cases, the procedure will be that for a dividend distribution and not that applicable to the reduction of share capital in accordance with article 732 CO.

VI. Conclusion

As of January 1, 2011, Swiss companies can, on a tax free basis, distribute APIC to its shareholders. In order to distribute APIC to shareholders, Swiss corporate and tax law require that the shareholders approve the reclassification of APIC into reserves (APIC Dividend Reserve) and a distribution to the shareholders in the same

amount. In case of conditional/authorized share capital the APIC Dividend Reserve needs to cover the total amount of the APIC dividend payable on all potential shares.

A staggered APIC dividend is one that is to be paid in multiples (usually four) installments. Each of the various installments has its own due date and its own ex-dividend dates. Staggered APIC dividends allow Swiss companies to make tax free dividend payments over a certain period of time. The company has to implement clear rules as to when future APIC dividend installments transfer to the purchaser in case of a shareholder selling his shares.

³² Draft Article new 671 CO; c.f. *Botschaft zur Änderung des Obligationenrechts*, BBl 2007 1660.

³³ C.f. footnote 30.

³⁴ C.f. GEMA OLIVAR PASCUAL/FRANCESCA AZZI PRICE, *Agio-Ausschüttungen an Aktionäre umstritten*, in: *Finanz und Wirtschaft*, No. 72, September 16, 2009, p. 25.