



Swiss Corporate Law Reform Approved Modernization of Swiss Corporate Law

On June 19, 2020, the Swiss Parliament approved a bill that modernizes Swiss corporate law while maintaining its core principles. The reform covers share capital, corporate governance, shareholder rights, executive compensation, financial distress, and gender representation, among other elements. The corporate law reform will make Switzerland an even more attractive place of incorporation. The effective date of the new law will be announced later. We expect the new law to take effect in the second half of 2021 at the earliest. Swiss companies are advised to review their constitutional documents in order to benefit from the increased flexibility and new instruments and ensure compliance with the new rules.

This Bulletin highlights the key changes to Swiss corporate law that the new statute entails.

More Flexibility for Share Capital and Dividends

The new law increases flexibility in the structuring of the share capital and with regard to dividends:

- The nominal value of shares may be set below the current minimum of CHF 0.01 at any amount higher than zero.
- Existing and new companies may state their share capital in their functional currency (i.e., the most important currency of the business).
- Companies are allowed to have a so-called "capital band" of $\pm 50\%$ of the registered share capital. Within the "capital band", the board of directors may within five years increase or decrease the share capital, similar to the concept of authorized capital in Anglo-American jurisdictions. The "capital band" replaces the current "authorized share capital", which only allows increases and only for two years.
- Interim dividends may also be paid out of profits of the current financial year. This is currently not accepted by some audit firms.

Shareholder Rights

The new law expands the rights of minority shareholders. In particular, several thresholds for the exercise of shareholder rights are lowered:

- Requesting an extraordinary shareholders' meeting in a public company: 5% of the capital or voting rights (currently: 10%).
- Request that an item be included on the agenda: 0.5% (public companies) or 5% (private companies) of the capital or voting rights (currently: 10% or shares with a nominal value of CHF 1 million for all companies).
- In private companies, shareholders holding at least 10% of the capital or voting rights have the right to ask the board questions at any time (currently: only at shareholders' meetings).
- Shareholders holding at least 5% of the capital or voting rights may inspect the company's books and records without a shareholder vote, but always subject to the company's legitimate confidentiality interests.

In addition, the de-listing of a company's shares will require the approval of shareholders with two thirds of votes and half of the capital represented.

Shareholders' Meetings

The new law modernizes shareholders' meetings and allows the use of digital technology. It permits:

- virtual shareholders' meetings; and
- written or electronic shareholders' resolutions.

The independent proxy of public companies has to keep voting instructions received from shareholders confidential ahead of a shareholders' meeting. General information on the voting instructions received may, however, be provided to the company three or less days before the shareholders' meeting.

Arbitration

Companies may include an arbitration clause in their articles of incorporation for all corporate law disputes.

Shareholder Lawsuits

The shareholders' meeting may require the company to seek disgorgement of undue benefits or to sue its directors, officers or auditors for breach of their duties. Moreover, the hurdles for claims for the disgorgement of undue benefits are somewhat lowered.

The statute of limitations for directors' and officers' liability lawsuits is reduced from five to three years and thereby aligned with other statutory time limitations.

Restructuring Rules Focused on Liquidity

The new law modernizes the rules applicable to companies in financial distress. Under the new rules, the company's obligations are focused on liquidity, in addition to the current equity-related triggers. The board of directors has to monitor liquidity. In the event of imminent illiquidity, the board has to take measures to ensure liquidity and, if necessary, take further restructuring measures.

If a company is over-indebted (i.e., has negative equity), the new law clarifies that the board does not have to file for bankruptcy if there is a reasonable prospect that the over-indebtedness can be remedied within a reasonable period of time and up to 90 days after audited interim financial statements are available. However, negative equity must not be significantly increased during this period.

Executive Compensation and Say-on-Pay

The new law essentially implements the rules currently contained in the Ordinance against Excessive Compensation in Listed Companies (OaEC) of top-level executives. In particular:

- replacement awards for new hires are permissible if they constitute compensation for lost benefits granted by the former employer;
- shareholders may approve variable compensation in advance; in that case, an advisory

shareholder vote on the compensation report is required in the following year; and

- payments for post-contractual non-competes are permissible in an amount of up to 100% of the executive's three-year average total annual compensation.

Gender Diversity: "Comply or Explain"

One of the most controversial changes concerns gender diversity for board and C-suite members of large listed companies: if less than 30% of all board members or less than 20% of all members of executive management are female (or male), the reasons for such under-representation and the measures taken to promote the less represented gender have to be set out in the compensation report. No other sanctions apply. This "comply or explain" rule will take effect five years after the effective date of the new law with regard to the board of directors, and ten years after that date with regard to the executive management.

Transparency of Payments by Natural Resource Companies to Governments

Similar to the EU Directives 2013|34 and 2013|50, companies active in the exploitation of natural resources must publicly disclose in a special report all payments to public authorities that exceed CHF 100,000 per year.

Effective Date and Required Actions

The effective date of the new law will be announced later. We expect the new law to take effect in the second half of 2021 at the earliest.

After the new law has taken effect, companies will have two years to amend their articles of incorporation if needed for compliance with the new law. A company's "authorized share capital" will remain valid for two years after the new law takes effect, but may no longer be extended or amended during that period.

It is advisable for companies to review their articles of incorporation and other constitutional documents in order to benefit from the increased flexibility and new instruments and ensure compliance with the new rules.

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