

SWITZERLAND

Bär & Karrer



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Corporate law reform

On November 23 2016 the Swiss Federal Council published its dispatch for a reform of Swiss corporate law. Along with the dispatch, a draft act amending the Swiss Code of Obligations (Draft Act) was presented. The Draft Act seeks to modernise Swiss corporate law with a focus on increasing the flexibility of the provisions governing company formation and capital structure. Furthermore, it aims at modernising corporate governance by strengthening shareholder rights and promoting gender diversity on corporate boards and senior management of listed companies. It also replaces the provisions of the (interim) Ordinance on Excessive Compensation (Minder-Ordinance) by a federal act of parliament with only a few changes. Depending on how parliament receives this project, we expect the Draft Act to enter into force as early as 2019.

Provided here, is a brief overview of the most relevant suggested amendments in the field of share capital and dividends.

Introduction of the capital band: The capital band will replace the authorised capital available under existing law. As the name suggests, the capital band enables the board of directors of a company for a period of up to five years to increase *and* reduce the capital within the limits of the capital band and thus provide for more flexibility. The lower limit may not fall below 50% of the share capital registered in the commercial register. The upper limit may not exceed 50% of the share capital registered in the commercial register. This will allow more flexibility and for faster changes to be made to the share capital.

Further relaxation of rules governing share capital increases and decreases: The rules on capital increases and decreases will be simplified in several respects. For instance, resolutions on ordinary share capital increases will be valid for a period of six months instead of only three months, share capital decreases must only be published in the commercial gazette once, and the creditors' call may take place before

the general meeting resolving on the decrease. The period for the creditors' call is shortened from two months to one month, and creditors' claims need not be secured if it can be shown that the capital decrease does not jeopardise the claims.

Share capital in foreign currency: It will be possible to state the amount of the share capital in a foreign currency (for example, US dollars or euros), provided that same currency is also used as reporting currency in the company's financial statements.

Further reduction of nominal value: Under the new regime, the nominal value of shares can be reduced indefinitely as long as it stays above zero. The existing minimum is CHF 0.01 (\$0.01) per share. This will allow companies with low nominal share values to split shares without undue complications or tax burdens.

Abolishment of provisions on acquisitions in kind: If a company acquires assets from a related person after incorporation or a capital increase (so-called acquisition in kind), the prevailing law imposes cumbersome requirements similar to a contribution in kind. The reform provides that these provisions will be abolished entirely.

Increased flexibility regarding issuance of participation certificates (non-voting shares): Participation certificates listed on a stock exchange may be issued in an unlimited amount. The existing limit is twice the issued (voting) share capital.

Interim dividends are permissible: The distribution of interim dividends out of the prevailing year's profits will be permissible if allowed under the articles of association and are based on audited interim financial statements. Under existing law this is not entirely clear and some audit firms do not issue the respective opinion letters required for the distribution of such dividends.

New restrictions in the case of accrued losses: In cases where a company has accrued losses, the repayment of share capital by way of a capital reduction and distributions out of legal capital and earnings reserves will no longer be permissible. According to the wording of the Draft Act there is uncertainty as to whether it aims at prohibiting such distributions irrespective of the amount of accrued losses. This may force companies to first set off losses against capital contribution reserves, which may have potentially adverse tax consequences.

Treatment of treasury shares: The treatment of treasury shares will be aligned

with the accounting rules; in other words, they will be deducted from equity of an amount corresponding to the acquisition price.

The Draft Act was generally received well among legal scholars and practitioners, in particular due to the suggested relaxations and modernisation of the rules governing the share capital and distributions. Nevertheless, there are a number of details which should be addressed to ensure full benefit of the new provisions. It remains to be seen if the Swiss parliament will make the necessary tweaks and adjustments in connection with its upcoming review later this year. Already now it can be summarised that Swiss corporate law will generally become even more attractive for companies, due to the increased flexibility and continued legal security.

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