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Spotlight on the Corporate Law Reform for Public Companies

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Key Take-aways

1.
The corporate law reform, which will become effective on January 1, 2023, contains a range of revisions specific to public companies.

2.
Some of the most sensitive changes are intended to enhance the ability of shareholders to weigh on the affairs of public companies.

3.
Public companies are well advised to carefully assess the potential impact of the reform on their governance ahead of the 2023 proxy season.

1 Introduction

The corporate law reform aims to draw a sharper distinction in the governance of public and privately held companies. As the corporate law reform will generally become effective on January 1, 2023, it is critical for public companies to assess how the reform may impact their organization and shift corporate powers.

This briefing is dedicated to public companies and supplements our overview of the corporate law reform in our Newsletter of October 2020 and our analysis of the requirement and timeframe for amending the articles of association of Swiss corporations in our Newsletter of October 2022.

The exercise of certain shareholders' rights is clearly being facilitated.

2 New Rules for Listed Companies

2.1 Shareholders' Rights

2.1.1 Thresholds

The corporate law reform seeks to enhance the ability of shareholders to weigh on the affairs of public companies:

- The threshold for **requisitioning a general meeting** will be reduced from 10% (or an aggregate par value of CHF 1 million) to 5% of the share capital or the voting power in the company. If the board receives a requisition to convene a general meeting – which incidentally raises *ad hoc* disclosure considerations, the Swiss Code of Obligations will now specify that the board must act within an appropriate timeframe but it must do so at the latest within 60 days from the receipt of the requisition.
- In order to **requisition an agenda item** or a **proposal relating to an existing item**, it will be sufficient for shareholders to hold 0.5% of the share capital or the voting power in the company (previously 10% of the share capital or an aggregate par value of CHF 1 million).
- A **special investigation** (previously "special audit") can be requested by shareholders holding at least 5% (previously 10%) of the share capital or the voting power in the company.

Another shift that public companies will need to navigate relates to the newly expanded **right of shareholders to access corporate books and records**. Shareholders holding together an aggregate of **5% of the share capital or the voting power in the company** will be entitled to request such access. Access must be granted within four months from the receipt of the request to the extent that (i) it can be deemed to be necessary to the exercise of the rights accruing to shareholders and (ii) it does not conflict with business secrets or other overriding corporate interests. A shareholder vote will no longer be required. Books and records access has been a major source of litigation in jurisdictions with lenient regimes.

2.1.2 Entry into the Share Register

Public companies' capital structure typically includes so-called "dispo shares": as shares are traded on the open market, investors are content with acquiring the shares without applying for their registration in the share register of the company. In an attempt to reduce the disincentives to register on the company's share register, the corporate law reform will now require public companies to ensure that investors can submit their application for **registration in the share register electronically**.

2.2 General Meetings

The corporate law reform will modify and formalize specified aspects of the conduct of general meetings for public companies:

- **The board of directors will be required to briefly explain its proposals**: When convening the general meeting, the board will be required to, consistent with current practice, briefly explain its proposals. Importantly, eligible shareholders requisitioning a general meeting or an item or a proposal on the agenda will now be entitled to also provide a brief explanatory statement that must be reproduced in the company's proxy materials. This will reduce the current control that public companies have over the content of the proxy materials.
- **Venue abroad**: A general meeting may be held abroad if such a venue is contemplated in the articles of association and the selected venue does not make it unreasonably difficult for shareholders to exercise their rights.
- **Multiple venues**: Provided that the interventions of the participants are broadcast to all venues, it will be feasible to hold a general meeting simultaneously at **several venues in Switzerland and/or abroad**.
- **Hybrid general meeting by using electronic means**: The board of directors may determine that shareholders who are unable to attend a general meeting in person may exercise **their rights by electronic means**.
- **Purely virtual general meetings**: It will be further feasible to hold general meetings **entirely virtually without an in-person meeting**, provided that the articles of association contemplate this format. If the meeting is held virtually, the board of directors must ensure that (i) the identity of the participants is known, (ii) the interventions are transmitted directly, (iii) each participant can submit proposals and take part in the discussion and (iv) the voting results cannot be falsified. If technical problems interfere with the proper conduct of the meeting, it must be reconvened. In normal circumstances, purely virtual meetings have not been favored by proxy advisors.

2.3 Delisting

The corporate law reform **shifts the authority to approve a de-listing of shares from the board of directors to the shareholders**. Shareholders' approval is subject to a qualified majority. It is however questionable whether this change will have a significant impact in practice. For a public company to go entirely private, a controlling shareholder must typically take

out the free float by way of a tender offer paired with a back-end squeeze-out, while the delisting is a technical step.

2.4 Board of Directors

The corporate law reform also seeks to streamline the conduct of board meetings. In addition to the possibility to pass resolutions by written consents, as is currently the case, resolutions may now also be passed electronically (without signatures), provided that no member of the board requests deliberations. The corporate law reform also clarifies the regime for **virtual and hybrid meetings at the level of the board**.

2.5 Share Capital and Participation Capital

In addition to (i) the denomination of the share capital in an eligible foreign currency (British Pound, Euro, US Dollar and Yen), (ii) the possibility to reduce the nominal value to any amount "greater than zero" and (iii) the introduction of the so-called "capital band" (please see our Newsletter of October 2020), the corporate law reform instituted further changes:

2.5.1 Reverse Stock Split

Existing law requires the unanimous consent of the shareholders for a reverse stock split. This requirement renders a consolidation virtually impossible for public companies. With the corporate law reform, a **resolution of the shareholders pursuant to a qualified majority** will be sufficient for a reverse stock split.

2.5.2 Non-Voting Shares / Participation Capital

The corporate law reform will liberalize the issuance of non-voting shares (also called participation certificates) by public companies: these shares can be issued up to **ten times** the amount of the share capital registered with the commercial register, instead of only twice that amount (the "two time" cap on non-voting shares continues to apply to privately held corporations).

2.6 Independent Voting Representatives

Representation at the general meeting by the board or a custodian is banned for public companies. There must be an independent representative, who typically holds proxies from the vast majority of the shareholders. Typically, the independent representative informs the board of directors of the instructions received prior to the general meeting. This may result in a perceived advantage in proxy fights: accordingly, the corporate law reform provides that the independent representative must keep the **voting instructions from shareholders confidential**. The independent voting representative may only provide the company with general information on the instructions received at the earliest three working days prior to the general meeting.

2.7 Arbitration Clause in the Articles of Association

The corporate law reform contemplates that the articles of association may provide that **an arbitration court with seat in Switzerland will have exclusive jurisdiction to adjudicate disputes over company law matters**. If properly written into the articles of association, an arbitration clause would be binding on the company itself, its corporate bodies and their members, as well as all shareholders. Proxy advisory firms are likely to scrutinize any proposal to include an arbitration clause in the articles of association.

2.8 "Say on pay" and Further Provisions Regarding Executive Compensation

The provisions of the ordinance adopted by the Swiss government giving effect to the initiative against excessive compensation for members of the board of directors, as well as management and advisory board members (and their related persons), of public companies will now be embedded in the Swiss Code of Obligations. Of note:

- **Board seats and management jobs**: The articles of association must specify **the maximum number of board seats and managerial functions** that the members of the board of directors and management, and now also the members of any advisory board, may **hold at other companies** (to the exclusion of non-profit organizations, foundations, trusts, etc.). In addition, **other board seats and management jobs** must now also be disclosed in the remuneration report.
- **Inadmissible compensation**: (i) **sign-on bonuses** that do not compensate for an actual financial disadvantage, (ii) **compensation for a non-compete** that exceeds the average compensation over the past three financial years or that is not commercially justified and (iii) **compensation** in connection with a previous board seat **that is not in line with market practice** are now expressly banned.

The general meeting will be modernized through the use of electronic means.

3 Quick Reminder – Reporting Obligations

3.1 Gender Quotas

Large public companies must ensure that each gender is represented with minimum targets of 30% on the board of directors and 20% for management. Under a **comply or explain model**, failure to reach the quotas will crystallize a duty to explain in the remuneration report the reasons as to why a gender is not sufficiently represented and any contemplated measures to promote such gender. The disclosure obligations will apply **at board level** for the first time in respect of the financial year starting on or after **January 1, 2026** and **at management level** in respect of the financial year starting on or after **January 1, 2031**.

3.2 ESG Reporting

A comprehensive ESG reporting is emerging in Switzerland. The corporate law reform introduced the requirement for certain **resources extraction companies** to report on their financial payments to governmental authorities. In parallel to the corporate law reform, new provisions will require large public interest entities to report on **non-financial matters (environ-**

mental, social and employee matters, respect for human rights, anti-corruption and bribery matters). In addition, companies that **import and process conflict minerals** or offer goods or services for which it can legitimately be suspected that **child labor** may have been involved have due diligence and reporting obligations. The new set of reporting obligations outlined in this section applies for the first time in respect of the financial year starting on or after January 1, 2023.

4 Conclusion

The reform seeks to modernize Swiss company law, in particular for public companies. However, at a time when public companies are scrutinized by proxy advisors and face a resurgence of ESG and traditional activism, any change to the playbook can have considerable importance. Public companies are well advised to carefully assess whether any necessary amendments to their articles of association and organizational rules are required to conform to the new rules, as well as to review how the reform is going to alter their processes.

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