NEWSLETTER – OCTOBER 2020

CORPORATE LAW

Upcoming entry into force of the revised Swiss corporate law

On November 23, 2016, the Federal Council submitted to the Swiss Parliament a draft bill aiming at modernizing Swiss corporate law. Said revised law was finally adopted on **June 19, 2020**, after several years of parliamentary debates. The referendum deadline having expired on October 8, 2020, the Swiss corporate law reform (the Reform) is now final. It essentially covers **four topics**: the first relates to the compensation rules in public listed companies, the second aims at modernizing the general provisions applicable to companies limited by shares, the third relates to gender equality, and the fourth concerns transparency obligation in the commodities sector. The last two topics will already enter into force on **January 1, 2021** and the first two should enter into force in **2022**, as announced by the Federal Council, as these changes require some implementing provisions. This Newsletter presents the main aspects of the Reform.

I. COMPENSATION OF EXECUTIVES IN LISTED COMPANIES

Further to the popular initiative known as the "Minder" initiative, the Federal Council issued a temporary regulation (ordinance of November 20, 2013, against excessive remuneration) which entered into force on January 1, 2014. The Reform transfers the provisions of said ordinance in several federal laws, namely the Swiss code of obligations, the criminal code and the law on occupational retirement, survivors' and disability pension plans.

With respect to the rules applicable to the companies limited by shares, the Reform **keeps most of the provisions of the initial ordinance**. This being said and to ensure legal certainty, the Reform adds a few clarifications, in particular the following points:

- **Sign-on bonuses**, understood as a remuneration paid at the entry into service, are allowed only if they compensate an "actual financial loss" related to the change of employment;
- **Compensation resulting from a non-compete covenant** is allowed only if the amount does not exceed the average annual compensation of the last three years and if the non-compete covenant is justified from a business perspective; and
- **Compensation paid in relation to a previous activity** as a member of a corporate body is only allowed if it is consistent with market practice.

II. MODERNIZATION OF GENERAL CORPORATE LAW PROVISIONS

1. Capital and dividends

The Reform amends notably the following provisions:

- The obligation to set the par value of shares in Swiss francs is abolished: share capital may be denominated in any **foreign currency** authorized by the Federal Council;
- The minimum par value of shares of one cent is removed: shares shall have a par value **higher than zero**;
- The formal requirements applicable to the **acquisition of assets** after incorporation are abolished;
- A "**capital band**" is now authorized: the articles of incorporation may authorize the board of directors to increase and/or reduce the share capital, in a certain range, within a maximum five years period;

- The procedure to **reduce the share capital** is amended: clear and comprehensive provisions fill in the gaps of the current law and simplify the process;

- The provisions related to the **preferential subscription right** are amended: the limitation or cancellation of the preferential subscription right or the determination of the subscription price shall not unduly favor or disadvantage the shareholders;

- The provisions on **legal reserves** are amended to be in line with the latest accounting rules and the distribution of capital reserves to the shareholders is now allowed within certain limits; and

- **Interim dividends** are permitted subject to certain conditions.

2. Corporate governance and shareholder rights

The Reform also provides for new provisions with respect to the organization of shareholders' meetings as well as the shareholder rights:

- **Virtual shareholders' meetings** are allowed provided that it is mentioned in the articles of incorporation and an independent representative is appointed by the board of directors (a waiver regarding the appointment of said representative may be included in the articles of incorporation, except for listed companies);

- Shareholders' meeting may take place in **several locations** at the same time or **abroad** under certain conditions;

- **Universal shareholders' meeting** may be held in writing or electronically, unless a discussion is required by a shareholder or his representative;

- The **thresholds** to call a shareholders' meeting or add an item to the meeting's agenda are lower: in listed companies, shareholders holding 5% of the shares or voting rights have a right to call a meeting and shareholders holding 0.5% of the shares or voting rights have a right to add an item to the agenda; in private companies, the threshold remains at 10% of the shares (before CHF 1 million in nominal value) or voting rights to call a meeting and the shareholders holding 5% of the shares or voting rights have now the right to add an item to the agenda;

- **A right to access to the company's books and records** is granted to shareholders holding at least 5% of the shares or voting rights, provided that it is necessary to exercise their rights and it does not compromise business secrecy or any other company's interests; and

- In listed companies, the right to require a **special audit** is simplified: if the shareholders' meeting refuses the initiation of a special audit, shareholders holding at least 5% of the shares or voting rights may bring the case in front of court.

3. Corporate restructuring

The Reform provides for some amendments and clarifies the rules applicable to corporate restructuring in case of insolvency:

- The board of directors shall **monitor the company's solvency** and in case of a risk of insolvency, it shall take any appropriate measure to ensure its solvency;

- In case of a **capital loss**, the board of directors shall take any appropriate measure to remove such loss of capital;

- In case of a risk of **indebtedness**, the board of directors still has the obligation to prepare interim accounts and notify the judge; such notification may be postponed if the payment of some creditors' claims is deferred or if there are reasonable reasons to believe that the indebtedness can be removed within a short period of time (at the latest, within 90 days following the establishment of the interim accounts) and the execution of the creditors' claims is not jeopardized any further; and

- A **deferral of bankruptcy** is not allowed anymore, it being specified that the composition moratorium remains the only authorized restructuring procedure.

III. GENDER EQUALITY

The Reform also aims at improving gender representation on the boards of directors and in the management.

In large public listed companies (i.e. those exceeding the threshold for ordinary audit) each gender should represent **at least 30% of the members of the board of directors** and **20% of the members of the management**.

No specific sanctions will apply. This being said, companies which do not reach these quotas will have to explain such breach in their **compensation report** and outline the contemplated measures to remedy the situation.

Companies have a transition period of **5 years** for the board and **10 years** for the management, as of January

1, 2021, to comply with said requirements or explain their non-compliance in their compensation report.

IV. TRANSPARENCY IN THE COMMODITIES SECTOR

Swiss companies, subject to an ordinary audit, which are directly or indirectly active in the production of raw materials (minerals, oil, natural gas) or in the exploitation of primary forests shall **disclose electronically in report** each payment or series of payments exceeding CHF 100'000.- per financial year, made to governments, including government enterprises.

These companies will need to comply with such new obligation as of the financial year starting one year after January 1, 2021.

Companies solely active in the **trading of commodities** are not yet subject to this obligation. This being said, the Federal Council may extend the scope of these new provisions to such companies within the framework of an international concerted procedure.

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