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In a nutshell

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Company law revision / the Federal Council's proposal
General meeting and board of directors

At the end of 2005, the Federal Council fired the starting shot for a revision of company law by presenting a preliminary draft and an accompanying report. Back at the end of 2007, the Federal Council submitted a dispatch and a comprehensive draft, which also contained provisions of accounting legislation. Before the Federal Parliament, however, was even able to start deliberating company law, the popular initiative «against fat-cat salaries» was launched in February 2008. The effect of that was that the company law revision was placed on the back burner. The revision of accounting legislation was separated from the revision of company law. In the meantime, the new accounting legislation has come into force.

After the Swiss people had accepted the initiative «against fat-cat salaries», it was implemented with the Ordinance Against Excessive Remuneration in Listed Companies dated 20 November 2013 (the «Ordinance»). On 28 November 2014, the Federal Council reopened the discussion on reforming company law by submitting a new preliminary draft for consultation. This led to numerous, detailed opinions, and, having worked its way through them, the Federal Council adopted a dispatch on company law revision on 23 November 2016. It is to be expected that in the course of the forthcoming deliberations, the proposal will still undergo several amendments.

We have produced six articles in our «In a nutshell» series, in which we present the proposed changes. This particular «In a nutshell» deals with the general meeting and board of directors

You can consult the other «In a nutshell» articles by choosing the appropriate links:
- Rules on establishing companies and capital **LINK**;
- Unregistered registered shares and shareholders' rights **LINK**;
- Return on benefits **LINK**;
- Threat of insolvency, loss of capital and overindebtedness **LINK**;
- Implementation of Art. 95 para. 3 of the Federal Constitution and gender representation guidelines for listed companies **LINK**.

I. Corporate governance

The proposal is setting out to improve the corporate governance of non-listed companies too by strengthening the shareholders' rights in individual points, by simplifying their participation and by increasing transparency through procedures inside the company.

It is to be welcomed that, compared with the preliminary proposal, the current one does without subjecting decisions by the board of directors to the authorisation of the general meeting, which would have led to demarcation difficulties and legal uncertainty. In that way, the tried-and-tested parity principle in Swiss company law has been maintained, assigning inalienable powers to both the board of directors and the general meeting. Voting shares are also to remain (despite pressure in connection with the Sika case to abolish them); they represent an important instrument for small and family companies for forming leadership heavyweights.

II. General meeting

The draft envisages a shift in the **thresholds** for convening a general meeting (5% of the share capital or votes instead of the 10% to date for listed companies, with unlisted companies remaining at 10%) and also for the **right to place items on the agenda and to table motions** (0.5% instead of 10% to date for listed companies and 5% instead of 10% to date for non-listed ones). It is, however, to be regretted that it is to remain possible to table motions at the general meeting itself on items already on its agenda (without any thresholds). As has been the case to date, each and every shareholder can demand **information** from the board of directors about company affairs at the general meeting; away from the general meeting, the duty of ad hoc publicity ensures that shareholders in listed companies have access to important information; a new point is that shareholders in non-listed companies holding at least 5% of the share capital or votes would also be able to demand information outside of the general meeting, and the board of directors would have to reply to them within four months.

Another new provision is that the same preconditions as for the right to information outside of the general meeting also apply to exercising the **right to inspect documents**. If information or the inspection of documents is refused (in whole or in part) or rendered impossible, the shareholders can take court action against the refusal within 30 days.

As it has been the case to date, shareholders can file court action if the general meeting refuses a motion to set up a **special audit**. The threshold for this is 3% (instead of 10% for listed companies) or 10% (for non-listed companies, which remains the same). The provisions governing the setting up and carrying out of the special investigation are to remain basically unchanged. One new point, however, is that it is always the company that must bear the costs of it.

As far as **representation at the general meeting** is concerned, the proposal takes over the bulk of the provisions for listed companies contained in the Ordinance Against Excessive Remuneration in Listed Companies. The corporate proxy is now to be abolished for non-listed companies as well, whereas the custodial proxy is to be permitted for these, as are permanent or general instructions to the custodial proxy (for instance contained in general terms and condition). It remains permissible for the articles of association to specify that shareholders may only be represented by fellow shareholders; if this is the case, any shareholder may demand that an independent proxy be appointed. The situation is different for listed companies. The custodial proxy remains prohibited, as do permanent instructions to the independent proxy. There is a new rule that is applicable in all cases: unless there is an explicit, general or implicit instruction, the proxy holder must abstain. As an alternative, it is possible for a company to make provision for the shareholders' rights to be exercised electronically (so-called **direct voting**).

One new provision is that either the articles of association or the board of directors is to determine the **venue** for the general meeting. It is permissible

(i) for this to be held in more than one location simultaneously subject to

direct transmissions to all locations,

(ii) for it to be held virtually and

(iii) for it to be held outside of Switzerland, provided an independent proxy is named in the convocation to the general meeting (a requirement that can be waived for non-listed companies with the unanimous consent of all the shareholders). Mandatory requirements in all cases are for the identity of the participants to be recorded, for the speeches to be transmitted directly and for all participants to be able to participate in the discussion and to table motions, without it being possible for the result to be falsified. If technical problems arise, the elections or votes – or even the entire general meeting – must be repeated.

The proposal provides an answer to a controversial question that is of importance in practice concerning the taking of decisions. What is new is that the decisive figure for establishing the majority is no longer the number of share votes represented but the number of share votes actually **cast**. In line with that, abstentions are also no longer counted in establishing the numerical basis for decisions and elections and abstentions are no longer deemed to be votes against. That makes genuine abstentions possible and reduces the influence of the independent (custodial) proxy without instructions.

The list of decisions requiring a **qualified majority** is being adapted to the new legal provisions. One new point is that delisting the shares is going to require a decision by the general meeting taken by a qualified majority; up until now, the board of directors has been competent to do that.

III. Board of directors

The proposal states that only natural persons can be elected as members of the **board of directors**, a point which has not been a matter of controversy heretofore. The period in office is still limited to one year for listed companies and, in a spirit of compromise, has been set at a maximum of four years for non-listed companies, to be specified in their articles of association. Re-election, elections en bloc and election of the chairperson by the board of directors remain permissible for non-listed companies.

The **compulsory powers of the board of directors** as laid down in art. 716a of the Code of Obligations remain fundamentally the same and are having the provisions from the Ordinance added to them along with the new restructuring instruments (application for a moratorium on debt enforcement), which are provided for in the company and composition law.

Whereas the provisions dealing with the delegation of management remain substantially the same, the draft formally lays down minimum contents for the **organisation regulation**. For big, listed companies that does not go far enough, for small non-listed ones it goes too far.

Finally, the proposal spells out what is to be done in the event of **conflicts of interest**. Any member of the board of directors or the company management must immediately provide complete information. It is the board of directors that then decides what is to be done. The proposal rightly does not impose the compulsory withdrawal of those concerned, since that is not always an adequate way of dealing with such a situation.

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