

Company law revision / the Federal Council's proposal Unregistered registered shares and shareholders' rights

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 «registered» shares that have not actually been registered and shareholders' rights.

You can consult the other «In a nutshell» articles by choosing the appropriate links:

- Rules on establishing companies and capital [LINK](#);
- General meeting and board of directors [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. Unregistered registered shares and voting shares: no real change

«Registered» shares in listed companies that have not actually been registered are known in German as «Dispoaktien». It is a situation which arises when shares are transferred from one shareholder to another going through the securities exchange but for which the purchaser fails to register himself or herself with the company as a shareholder with the right to vote. The effect of this is that the purchaser, not being entered in the share register, cannot attend general meetings and, more particularly, cannot make use of his or her voting rights. This is bound to lead to a reduction in the number of shares represented at the general meetings of Swiss public companies by at least the proportion of unregistered registered shares and thereby to bring about a shift in the relative majorities within the body of shareholders. It is estimated that the proportion of such shares in large public companies in Switzerland is in the range of 20-40%, meaning that it is a far-from-negligible phenomenon.

In the process of revising company law, the Federal Parliament considered various measures for tackling the problem of registered shares not being registered. At the centre of its deliberations was the proposal for a nominee model, according to which the securities depository would have had to register itself as a shareholder with the right to vote. It also considered an incentive model, whereby lower dividends would have been paid to unregistered holders of registered shares than to registered ones. The Federal Council's proposal examines these models yet again, but finishes up discarding them and, in the end, abandons the idea of an amended version. In the eyes of the Federal Council, things are thus to remain as they were as far as unregistered registered shares are concerned.

The Federal Council also sees no fundamental need for action as far as voting shares are concerned. Questions are raised every now and then as to whether they are desirable at all from an economic point of view, which is why the Federal Council and the Federal Parliament have repeatedly considered amendments, which would also have meant the complete

abolition of voting shares. Meanwhile, the Federal Council's proposal has abandoned the idea of a change, referring to various advantages of voting shares. The upshot is that voting shares are to remain admissible and are to be understood as shares with different face values, whereby each share confers one vote regardless of its face value. The only modification that has been kept in the proposal is abolition of the exceptional privilege in Art. 693 para. 3 of the Code of Obligations, laying down that, if a company's capital is to be reduced for the purposes of restructuring, it is possible to maintain voting rights in accordance with the original face value. As the Federal Council sees things, this provision may have the effect of making restructuring more difficult; it is therefore quite right to postulate its abolition.

II. Shareholders' rights: improved rights to information and lowering of certain thresholds

Under the banner of improving corporate governance, the Federal Council would like to strengthen the position of the shareholders in non-listed companies too. To achieve that, it is proposing amendments to the shareholders' rights at various levels:

A) Further-reaching right as regards information and inspection of documents; adaptations as regards the right to instigate a special investigation

As the law stands at present, shareholders only have the right to demand information about the company at general meetings. Moreover, they can only inspect company books and correspondence if the general assembly agrees to that or if the board of directors takes an express decision to that effect. This does not give rise to problems in the case of listed companies, since other provisions exist that require them to provide information on important occurrences to the capital market and thus also to their shareholders (ad hoc publicity). In the case of non-listed companies, however, shareholders requesting for information may, depending on the circumstances, have to wait up to a year to receive a reply.

The Federal Council would like to improve the right to information and inspection of

documents for shareholders representing at least 5% of the share capital or the votes. A new provision would lay down that such shareholders are permitted to request information or inspection of documents at any time and that the board of directors must provide a reply or allow the inspection within a period of four months. In the same way as the law already stands today, refusal of information or inspection would only be possible if it is not necessary for the exercise of the shareholders' rights or if it might endanger business secrets or other priority interests of the company. In future, the very least is that a refusal will have to be justified in writing. This is intended to strengthen the information situation of minority shareholders in non-listed companies in throughout the year.

If a reply is given to a request for information, then it must also be made available for inspection at the latest at the next gen-

eral meeting. By that point in time at the latest, there will be a guarantee of equal treatment of shareholders as far as the distributed information is concerned.

Hardly any significant changes are to be made to the right to instigate a special investigation apart from a lowering of the threshold (cf. next section). It is, nevertheless, worth mentioning that a court will no longer have to wait to order a special investigation until, for instance, it has been credibly claimed that there has been a breach of the law. In future, it will already be able to make such an order in a situation in which a breach of the law is likely to cause damage.

B) Partial lowering of thresholds

The Federal Council is intending to strengthen the shareholders' rights further by bringing down the relevant thresholds. In specific terms, it is proposing to lower

the threshold for the right for shareholders to table motions and to place items on the agenda from 10% of the share capital today to 0.5% (for listed companies) or 5% (for non-listed companies).

It is only for listed companies, on the other hand, that there is to be a lowering of the threshold for convening the general assembly and for instigating a special investigation – to be precise: from 10% of the share capital to 5% (for convening the general meeting) or 3% (special investigation). The currently valid threshold of 10% is to remain in force for non-listed companies.

December 2016

Dr. Karim Maizar
karim.maizar@kellerhals-carrard.ch

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please approach your Kellerhals Carrard contact or the author of this Newsletter.

This Newsletter is available on our website www.kellerhals-carrard.ch in English, German and French.

Basel
Hirschgaesslein 11
P.O. Box 257
CH-4010 Basel
Tel. +41 58 200 30 00
Fax +41 58 200 30 11

Berne
Effingerstrasse 1
P.O. Box
CH-3001 Berne
Tel. +41 58 200 35 00
Fax +41 58 200 35 11

Lausanne
Place Saint-François 1
P.O. Box 7191
CH-1002 Lausanne
Tel. +41 58 200 33 00
Fax +41 58 200 33 11

Sion
Rue du Scex 4
P.O. Box 317
CH-1951 Sion
Tel. + 41 58 200 34 00
Fax + 41 58 200 34 11

Zurich
Raemistrasse 5
P.O. Box
CH-8024 Zurich
Tel. +41 58 200 39 00
Fax +41 58 200 39 11