

Company law revision / the Federal Council's proposal Implementation of Art. 95 para. 3 of the Federal Constitution and gender representation guidelines for listed companies

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 implementation of Art. 95 para. 3 of the Federal Constitution and gender representation guidelines for listed companies

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](#);
- Unregistered registered shares and shareholders' rights [LINK](#);
- Return on benefits [LINK](#);
- Threat of insolvency, loss of capital and over-indebtedness [LINK](#).

I. Implementation of Art. 95 para. 3 of the Federal Constitution (Say on Pay)

This draft proposes to essentially **transfer the provisions of the Ordinance**, whereby the Federal Council has, in particular, abandoned the tightening up of certain provisions originally proposed in the preliminary draft, such as the prohibition of prospective voting on variable remuneration, the duty to fix the ratio between the fixed and variable remuneration components in the articles of association, the individual disclosure of the remuneration of all members of the company's executive management and the introduction of a specific fiduciary duty of the executive management with respect to remuneration. The Federal Council further decided not to propose an extension certain provisions of Art. 95 para. 3 of the Federal Constitution (disclosure of remunerations) to big cooperatives.

In addition to the Ordinance, the Federal Council's draft envisages an obligation to submit the remuneration report to the annual general meeting for a **consultative vote** in those companies in which the variable remuneration is submitted to a prospective vote. This is considered today's best practice already.

In order to clarify the legal uncertainties, the draft confirms that **sign-on bonuses** are prohibited but that a compensation for entitlements with the previous employer that have lapsed as a consequence of changing jobs do not constitute prohibited a sign-on bonus (without the requirement for documentary evidence that had been drafted earlier).

Further, the compensation for a **non-compete** obligation after the end of the employment contract shall be limited to the aggregate of the annual salaries of the previous three years, always provided the existence of a proper business interest of the company.

The remuneration report is proposed to require disclosure of the **activities** of the members as member of boards of directors or executive management positions **in other companies**. This aims at allowing shareholders to check compliance with the limitations in numbers of such man-

dates as per the articles of associations.

Pension funds shall always be exempted from reporting in cases they follow the motions of the board of directors. Their duty to vote shall remain limited to direct holdings in Swiss listed companies.

The **criminal-law provisions** contained in the Federal Constitution shall by and large be transferred to a new Art. 154 of the Swiss Criminal Code (prohibited remuneration, use of custodial or corporate proxies, delegation of management to a legal entity, deliberate obstruction of the implementation of (i) required provisions in the articles of association, (ii) individual elections on an annual basis, (iii) votes on remuneration or (iv) the possibility to cast votes electronically) as well as to Art. 71 b and 76 Federal Law on Occupational Retirement, Survivors' and Disability (breach of the obligation to vote and report); they are proposed to continue to be offences investigated ex officio and not offences investigated only upon application/complaint, while the threatened sanctions differentiated in accordance with the degree of wrongdoing.

II. Gender Diversity on boards of directors and in executive management of public companies (Quota)

According to the Federal Council's thinking, each gender shall be represented with at least **30%** on the board of directors and at least **20%** in the company management. In specific, this means that there must be at least two minority members on boards of directors with three to six members and at least three minority members on boards with seven to nine members and also at least two minority members of company managements with six members or more, and so on.

In case one of the genders is not represented at the required level, the reasons for non-compliance shall have to be stated in the remuneration report along with the measures planned or already introduced to promote the gender with the weaker representation («**comply or explain**»).

Setting a legal quota has come in for strong criticism, especially as far as the company

executive management is concerned, because it clearly interferes with the company's economic freedom. By adopting the «comply or explain» approach, however, the pressure has been reduced clearly, in particular in comparison with the strict rules applying in some other European countries.

The proposed **transitional arrangement** gives listed companies five years in which to implement the «comply or explain» approach as far as their board of directors is concerned and ten years as regards their company management, with these deadlines counting from the time the revised law comes into force.

December 2016

Ines Pöschel
ines.poeschel@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