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New Swiss Corporate Law: Swiss Federal Council Releases New Pre-Draft.

On 28 November 2014, the Swiss Federal Council released its new preliminary draft *(Vorentwurf)* of the revised Swiss corporate law (Pre-Draft). Under the Pre-Draft, many fundamental changes to the Swiss corporate law are being proposed. Further, the Pre-Draft would integrate most of the provisions of the Swiss Federal Ordinance against Excessive Compensation in Listed Corporations (CompO). Interested parties may comment on the Pre-Draft as part of the consultation procedure which will end on 15 March 2015. This Newsletter presents a brief overview of some of the proposals.

walderwyss attorneys at law

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By **Urs P. Gnos**
Partner
Dr. iur., LL.M., Attorney at Law
Telephone: +41 58 658 55 39
urs.gnos@walderwyss.com

and **Markus Vischer**
Partner
Dr. iur., LL.M., Attorney at Law
Telephone +41 58 658 55 32
markus.vischer@walderwyss.com

Back in 2007 and 2008, the Swiss Parliament was debating changes to Swiss corporate law. On 1 January 2014, the CompO was put into force, temporarily governing the subject matter of the Minder initiative. Now, the Swiss Federal Council released the Pre-Draft which would, however, not only integrate most of the provisions of the CompO into the Swiss corporate law, but in addition to several fundamental changes to certain features of Swiss corporate law strengthen corporate governance

Capital, Reserves, Dividends, Purchase of Own Shares

The Pre-Draft provides considerable flexibility with regard to the share capital.

As per current Swiss corporate law, the nominal value of the share capital must be denominated in Swiss francs. The nominal value of a share must be at least 1 cent. The Pre-Draft provides that the denomination of shares may be in currencies other than Swiss francs. Moreover, under the Pre-Draft, the nominal value per share shall just exceed the amount of CHF 0.

Current Swiss corporate law provides that the articles of association must indicate the nature of an acquisition of assets *(Sachübernahme)* or an intended acquisition of assets *(beabsichtigte Sachübernahme)*, the name of the person providing them and the consideration given by the company. This feature shall be abolished. Shareholders and creditors shall be protected by strengthening respective rights in connection with the so-called claim on return of benefits *(Rückerstattungsklage)*.

As per the Pre-Draft, it is further suggested to combine the provisions governing the capital decrease with the provisions governing capital increases. It is envisaged to introduce a «capital band» *(Kapitalband)* which shall entitle the board of directors to increase and decrease the share capital of the company (up to +/- 50% of the share capital registered in the register of commerce) during a limited period of time not exceeding 5 years. Details will need to be set forth in the articles of association.

The provisions governing the creation and dissolution of legal reserves as well as the declaration of dividends will offer more flexibility. Subject to certain creditor protection rules, the paid-in capital surplus may be repaid to the shareholders and declaration of interim dividends shall become permissible. As per the Pre-Draft, the articles of association may provide that shareholders attending or being represented at the shareholders' meeting may get up to 20% higher dividends.

Finally, the Pre-Draft proposes facilitations in connection with the purchase of own shares, aligning these with already effective accounting provisions.

Implementation of CompO/Minder Initiative

While the Pre-Draft would integrate most of the provisions of the CompO, several new features are being proposed. It goes without saying that many of these new features, if becoming law, would require companies with listed shares to amend their articles of association again which seems odd for those companies which just brought their articles of association in compliance with the CompO in 2014.

The Pre-Draft provides that companies with listed shares will need to introduce an «e-forum» prior to shareholders' meetings allowing shareholders to discuss agenda items among themselves but also with the board members.

Although the CompO left discretion on how to vote on the approval of variable compensation, the Pre-Draft revisits one particular point by prohibiting prospective approvals of variable compensation.

It might be reasonable to provide that payment for non-compete undertakings of managers must be justified by business reasons and correspond to market standard. However, taking into consideration that the average compensation for non-compete undertakings stands at a 20-months' salary, we doubt that 12 months can be claimed to be market standard.

Likewise, it makes sense to provide some guidance on permissible sign-on bonuses. However, it is debatable whether an employer can prove the financial disadvantage suffered by the relevant manager which would be the test to be met so that a sign-on bonus can be justified.

A further proposal in the Pre-Draft suggests that listed companies shall provide in their articles of association a maximum ratio of fixed compensation to total compensation.

Gender Diversity

The Pre-Draft proposes that at the latest five years following the entering into force of the new act each gender shall be represented on both the board of directors and the executive management of major listed companies by at least 30%. The provision is structured as a «comply or explain» provision, i.e. a failure to meet this requirement will require the relevant company to explain in its compensation report the efforts taken to reach the thresholds and the reasons why they were not reached.

Corporate Governance

The Pre-Draft proposes not only to implement the CompO (which applies to listed companies only; non-listed companies may apply it voluntarily, though) but to strengthen the rights of shareholders of non-listed companies, as well. Subject to certain limitations, respective shareholders may ask the board of directors in writing to provide the information which is necessary to exercise the shareholders rights. The board of directors will have to react at least twice per year. The information provided will have to be shared with all shareholders. Likewise, the board of directors will have to inform the shareholders on the compensation of the top management on the occasion of the annual shareholders' meeting.

Pursuant to the Pre-Draft, some of the thresholds applicable to the exercise of shareholders' rights shall be lowered, mainly with regard to listed companies (e.g. the right to ask for the convention of an extraordinary shareholders' meeting shall be lowered from 10% to 3% of the share capital or voting rights; the right to ask for an item being listed on or a proposal being added to the agenda shall be lowered from 10% of the share capital or an aggregate nominal value of CHF 1 million to 3% of the share capital or voting rights; the right to ask the judge to order a special audit shall be lowered from 10% of the share capital or an aggregate nominal value of CHF 2 million to 3% of the share capital or voting rights). It can be debated whether these lowered thresholds would strengthen shareholders' rights or rather block companies due to increasing shareholder activism.

Finally, the Pre-Draft envisages to also strengthen shareholder rights with regard to shareholders lawsuits.

Restructuring and Insolvency

The current provisions dealing with loss of capital and over-indebtedness shall become more precise. The board of directors will have to establish a liquidity plan if the company faces illiquidity problems for the forthcoming 12 months. If the liquidity plan shows that the company is liquid, the board of directors has to submit the liquidity plan to a licenced auditor. Only if the licenced auditor disagrees or the liquidity plan established by the board of directors shows that the company is illiquid, the board of directors will have to call for an extra-ordinary shareholders meeting and propose and resolve on restructuring measures.

As concerns the notification of the court in case of over-indebtedness, the Pre-Draft introduces a 90-day tolerance period to do so if there is a positive outlook that the company can be financially restructured during such period.

Further, it shall be clarified that claims against a distressed company may be set-off by the creditor in the course of a debt-equity-swap.

Further Transparency

Finally, the Pre-Draft introduces a special disclosure obligation for companies active in the exploitation of natural resources which are subject to an ordinary audit (all payments to public authorities exceeding an amount of CHF 120,000 must be disclosed in a special written report).

Conclusions – Further Proceedings

While the Pre-Draft integrates the provisions of the CompO and tries to further strengthen shareholders rights, some of the proposals set forth in the Pre-Draft seem to be either too ambitious, not practical or at least debatable. WalderWyss will participate in the consultation procedure and will submit a commenting paper early 2015.

Walder Wyss Ltd.
Attorneys at Law

Phone + 41 58 658 58 58
Fax + 41 58 658 59 59
reception@walderwyss.com

www.walderwyss.com