Bloomberg BNA

WORLD SECURITIES LAW REPORT >>>

News and analysis of securities law developments around the world.
For the latest updates, visit www.bna.com

International Information for International Business

VOLUME 21, NUMBER 1 >>> JANUARY 2015

The Swiss Federal Council's Proposed Corporate Law Revisions

By Urs P. Gnos and Markus Vischer, of Walder Wyss Ltd., Zurich.

On November 28, 2014, the Swiss Federal Council released its new preliminary draft (Vorentwurf) of the revised Swiss corporate law (Preliminary Draft).

The Preliminary Draft would not only integrate most of the provisions of the Swiss Federal Ordinance against Excessive Compensation in Listed Corporations (Ordinance against Excessive Compensation), which went into force on January 1, 2014, temporarily governing the subject matter of the so-called "Minder Initiative", but also strengthen corporate governance requirements, in addition to making several fundamental changes to certain features of Swiss corporate law.

Interested parties may comment on the Preliminary Draft as part of the consultation procedure, which will end on March 15, 2015.

This article presents a brief overview of some of the key proposals.

Capital, Reserves, Dividends, Purchase of Own Shares

The Preliminary 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 Preliminary Draft provides that the denomination of shares may be in currencies other than Swiss francs. Moreover, under the Preliminary Draft, the nominal value per share shall just exceed the amount of 0 Swiss francs.

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 Preliminary Draft, it is further suggested to combine the provisions governing capital decreases 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 plus or minus 50 percent of the share capital registered in the register of commerce) during a limited period of time not exceeding five 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 Preliminary Draft, the articles of association may provide that shareholders attending or being represented at the shareholders' meeting may get up to 20 percent higher dividends.

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

Implementation of Ordinance Against Excessive Compensation/Minder Initiative

While the Preliminary Draft would integrate most of the provisions of the Ordinance against Excessive Compensation, several new features are being proposed.

It goes without saying that many of these new features, if they become 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 into compliance with the Ordinance against Excessive Compensation in 2014.

The Preliminary 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 Ordinance against Excessive Compensation left discretion on how to vote on the approval of variable compensation, the Preliminary 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 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 Preliminary Draft suggests that listed companies shall provide in their articles of association a maximum ratio of fixed compensation to total compensation.

Gender Diversity

The Preliminary Draft proposes that, at the latest five years following the entry 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 percent. 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 Preliminary Draft proposes not only to implement the Ordinance against Excessive Compensation (which applies to listed companies only; non-listed companies may apply it voluntarily, though) but also 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 of the compensation of the top management on the occasion of the annual shareholders' meeting.

Pursuant to the Preliminary 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 convening of an extraordinary shareholders' meeting shall be lowered from 10 percent to 3 percent 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 percent of the share capital or an aggregate nominal value of 1 million Swiss francs (U.S.$1,006,180) to 3 percent of the share capital or voting rights; the right to ask the judge to order a special audit shall be lowered from 10 percent of the share capital or an aggregate nominal value of 2 million Swiss francs (U.S.$2,012,360) to 3 percent of the share capital or voting rights). It can be debated whether these lowered thresholds would strengthen shareholders' rights or rather hinder companies due to increasing shareholder activism.

Finally, the Preliminary 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 extraordinary shareholders' meeting and propose and resolve on restructuring measures.

As concerns the notification of the court in case of over-indebtedness, the Preliminary Draft introduces a 90-day

   ISSN 1357-0889

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 Preliminary 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 120,000 Swiss francs (U.S.$120,741) must be disclosed in a special written report).

Comment

While the Preliminary Draft integrates the provisions of the Ordinance against Excessive Compensation and tries to further strengthen shareholders' rights, some of the proposals set forth in the Preliminary Draft seem to be either too ambitious, not practical or at least debatable.

Interested parties may comment on the Preliminary Draft as part of the consultation procedure which will end on March 15, 2015.

The text of the Preliminary Draft is available, in German, at http://www.ejpd.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/aktienrechtsrevision14/vorentw-d.pdf.

The Report of the Swiss Federal Council on the Preliminary Draft is available, in German, at http://www.ejpd.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/aktienrechtsrevision14/vn-ber-d.pdf.

Urs P. Gnos and Markus Vischer are Partners at Walder Wyss Ltd., Zurich. They may be contacted at urs.gnos@walderwyss.com and markus.vischer@walderwyss.com.