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The New Swiss GmbH Law



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The limited liability company *(Gesellschaft mit beschränkter Haftung;* "GmbH") was added to the Swiss Code of Obligations in 1936. Since then, the Swiss law applicable to GmbHs has never been revised. The reform of this law aims to make the GmbH similar to the corporation *("Aktiengesellschaft")*, and it generally brings the law applicable to GmbHs up to date. The new law is expected to enter into force on 1 January 2008.

Incorporation of a GmbH

Under the current law, the incorporation of a GmbH by a single partner is not possible, but the revised law will allow this. In addition to natural persons, all forms of legal entities, including associations and foundations, can become partners in a GmbH. The current upper limit of CHF 2 million on the contribution capital will be eliminated, but the minimum required contribution capital remains CHF 20,000.–, which must be fully paid in. The use of the same provisions which apply to the *Aktiengesellschaft* for contributions in kind and (intended) acquisitions of assets makes it possible to eliminate the joint liability of partners for the payment of the contribution capital that exists under current law.

Contribution Capital and Transfer Restrictions

Under the current law, each partner may only possess one company share. Except for the transfer of the entire company share interest to a non-partner, each change in the ownership structure currently requires a division or consolidation of company shares in the GmbH, which, in turn, requires an amendment of the articles of incorporation *(Statuten)*. Partners under the new law can hold more than one company share, which must have a par value of at least CHF 100.–, rather than CHF 1,000.– under the current law.

The form of transfer of company shares also will be simplified. The new law provides, in contrast to the current law, for the elimination of the transfer deed. A written declaration of assignment and the registration of the transfer of the ownership interest in the Commercial Register will be sufficient.

Under the current law, the transfer of company shares is limited by statute. Company shares may be transferred only with the approval of a qualified majority of the partners. The new law maintains such restrictions, but the new statutory rules will be more flexible and practical. Unless otherwise specified in the articles of incorporation, the transfer of company shares only requires the approval of a partners' meeting, which can, however, decline to vote in favour of the transfer without any obligation to give reasons for refusing to do so.

The new law provides a conclusive list of the types of permitted transfers of company shares and the articles of incorporation should specify the grounds for refusing to permit a transfer. As before, the transfer of an equity interest can be prohibited completely; but for the first time, unrestricted transferability will be permitted.

Rights and Duties of the Partners

The new law improves the legal protections for holders of minority interests, specifically in the areas of access to records and other information and preemptive subscription rights if there is an increase in the contribution capital.

In contrast to the *Aktiengesellschaft*, provisions can be made in the articles of incorporation for a GmbH for the performance of additional obligations and for an obligation to contribute additional capital.

The payment and refund of additional capital contributions are subject to special requirements. Additional capital contributions will no longer be used solely to cover losses of the contribution capital, but also may be used for liquidity shortages or to meet capital needs which have been specified in the articles of incorporation.

All of the partners, not just those who are active in the management of the business, are bound by a duty of loyalty to the company. The new law imposes,

in addition to the duty of loyalty, an express prohibition of activities which compete with the GmbH. This obligation can be excluded in the articles of incorporation or expanded to include partners who are not involved in the management of the GmbH.

Organisation
The allocation of responsibility between the partners of the GmbH and the managing directors *(Geschäftsführer)* is not adequately addressed by current law. The new law makes clear which matters are to be dealt with by a partners' meeting, by the managing directors or, if applicable, by the auditors. It nevertheless leaves room for a customised allocation of authority. Accordingly, the articles of incorporation may specify types of decisions by the managing directors which require partner approval. Similarly, if permitted by the articles of incorporation, the managing directors also will be able to submit issues for approval by the partners.

Audit of the Financial Statements
The current law applicable to the GmbH does not require the annual financial statements to be audited. The new law includes more nuanced rules. In deference to small enterprises, there is no general requirement to appoint auditors; this is only required if specific criteria are met. If these requirements are not met, then only a limited review of the financial statements is necessary. If a GmbH does not have more than 10 full-time employees, then the partners may, by unanimous resolution, agree that no audit of the financial statements shall be made *(opting out)*. Nevertheless, an individual partner can demand a limited independent audit up to 10 days before the annual partners' meeting.

Withdrawal and Exclusion of Partners
As before, each partner can, for a valid reason, petition the court for an authorization to withdraw from the GmbH. In addition to this provision of mandatory law, the GmbH can elect to include in its articles of incorporation a broader right to withdraw from the company and, if so elected, to make such withdrawal rights subject to the fulfillment of conditions. Because the withdrawal of a partner can work to the disadvantage of the remaining partners, the other partners also have a right to simultaneously withdraw from the company.

In parallel to the right of a partner to withdraw for a valid reason, the new law grants the GmbH the right to petition the court for the exclusion of a partner, again upon proof of a valid reason for such exclusion. In addition, it is now possible for the GmbH to include in its articles of incorporation a provision permitting the exclusion of a partner by a resolution adopted by the partners when one of the grounds for such exclusion specified in the articles of incorporation exists.

The new law also specifies that an excluded or withdrawing partner has the right to be compensated in an amount equal to the actual value of his or her company share in the company because an expropriation of the partner's interest is not permitted.

Other Amendments
In order to maintain uniformity and consistency in Swiss corporate law, the statutory provisions applicable to other legal entities also have been, in certain instances, harmonized with the new GmbH law. The new law includes, among other things, necessary amendments in the laws applicable to the *Aktiengesellschaft* (such as, for example, the incorporation of an *Aktiengesellschaft* by a single shareholder, the elimination of nationality and residency requirements or the requirement that members of the board of directors are shareholders and revised creditor protection rules in connection with an [intended] acquisition of assets).

Need for Further Action
The new audit requirements must be observed as from 2008. Likewise, direct applicable law must be complied with immediately upon entry into force of the new law while there is a transition period of two years to bring current articles of incorporation in compliance with the new law.

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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