CORPORATE GOVERNANCE

Switzerland

LEXOLOGY
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Corporate Governance

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Quick reference guide enabling side-by-side comparison of local insights into corporate governance issues worldwide, including sources of rules and practice; responsible agencies and notable opinion formers; shareholder powers, decisions, meetings, voting, duties and liabilities; employee role in governance; corporate control issues; board structure and composition, duties, leadership, committees, meetings and evaluation; director and senior management remuneration; director protections; disclosure and transparency; hot topics, such as shareholder engagement, and sustainability, pay ratio and gender gap reporting; and other recent trends.

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Table of contents

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SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a ‘comply or explain’ basis?

The primary sources of law are the provisions on stock corporations in the Swiss Code of Obligations and, for listed companies, the Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading . In the financial sector, the regulations and practice of the Swiss Financial Market Supervisory Authority (FINMA) regarding corporate governance also have to be complied with.

Further, there are the listing rules and circulars of the two Swiss stock exchanges, SIX Swiss Exchange (SIX) and BX, in particular the SIX Directive on information relating to corporate governance , obliging issuers to disclose certain information with regard to corporate governance in a separate section of their annual reports on a comply or explain basis.

Also of relevance is the Swiss Code of Best Practice for Corporate Governance published by Economiesuisse, a federation representing the interests of the Swiss business community. The Swiss Code of Best Practice for Corporate Governance contains non-binding recommendations that serve as guidelines for good governance. The Swiss Code of Best Practice for Corporate Governance primarily addresses listed companies, but it is also used by non-listed companies and other organisations. Economiesuisse, in addition, has issued the Guidelines for institutional investors governing the exercise of shareholder rights in Swiss listed companies, containing best practice for the exercise of shareholders’ rights by institutional investors.

Lastly, there are proxy voting guidelines of influential proxy advisers, such as Ethos or ISS , which include corporate governance principles. The answers in this chapter are focused on generally applicable corporate law and do not address specific regulations applicable to regulated companies, in particular in the financial sector.

Law stated - 28 March 2023

Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

The Swiss parliament (legislative body) and the Federal Council (executive body) enact laws and ordinances. As regards regulations applicable to listed companies, FINMA and the Swiss Takeover Board are responsible for enforcing stock exchange and public takeover law. Stock exchange law is also enforced by SIX and BX.

There are various proxy advisers active in Switzerland, among which Ethos is probably the most influential.

Law stated - 28 March 2023

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The shareholders' meeting elects and removes the members of the board of directors (the board). This duty is nontransferable. The shareholders' meeting of listed companies is required to hold these elections on an annual basis; non-listed companies may provide for a term of office of three years, unless the articles of association provide otherwise; but the term of office may not exceed six years. Members of the board must be elected individually; for non-listed companies the articles of association or the chair of the shareholders' meeting in accordance with the consent of all shareholders represented may provide otherwise. Reelection is permitted. The shareholders' meeting of listed companies also elects the chair of the board and the members of the compensation committee, which must be established mandatorily; in non-listed companies, the board may define its organisation without requiring a shareholders' vote but the articles of association may provide otherwise.

Pursuant to the Swiss Code of Obligations, one or more shareholders representing at least 5 per cent of a listed respectively 10 per cent of a non-listed company's share capital or votes may request that the board convene a shareholders’ meeting. These shareholders, or any other shareholders representing at least 0.5 per cent of a listed respectively 5 per cent of a non-listed company's share capital or votes may demand that an item be put on the agenda.

There are various rights of individual shareholders, for example, to request information about the company's affaires in shareholders' meetings – in non-listed companies also outside of shareholders' meetings –, to request inspection of certain books and records of the company, to request a special investigation to be conducted regarding the conduct of business by the board (subject to a shareholders' vote with the required quorum) and to present motions to shareholders' meetings, to the extent covered by the agenda items.

Elections of board members and most other resolutions of the shareholders’ meeting require the absolute majority of the votes represented at the respective meeting. Beyond these resolutions regarding shareholders' matters, the shareholders have no right to require the board to pursue a particular course of action.

Law stated - 28 March 2023

Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

In listed and non-listed companies, the following non-transferable matters require a resolution by the shareholders' meeting:

- adoption and amendment of the articles of association;
- election of the members of the board and the auditors;
- approval of the management report and, if applicable, the consolidated group financial statements;
- approval of the annual financial statements and use of the balance sheet profits; in particular, the determination of dividends;
- determination of interim dividends and approval of the interim financial statements required therefore;
- repayments out of the statutory capital reserve;
- discharge of the members of the board; and
- adoption of decisions reserved for the shareholders' meeting by law or the articles of association.

In listed companies, the following additional matters require a resolution by the shareholders' meeting:

- delisting of the shares;
- election of the chair of the board;

- election of the members of the compensation committee
- election of the independent proxy; and
- approval of the compensation of the board, the top-level management (the management) and the advisory body.

Swiss corporate law does not provide for non-binding shareholder votes. However, non-binding votes regarding past compensation reports are still held in shareholders' meetings of most listed companies to allow the shareholders to express their opinion.

Law stated - 28 March 2023

Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Companies may introduce classes of shares with a voting preference or a voting limit in their articles of association (ie, a clause that limits the ability to exercise voting rights by a shareholder or group of shareholders to a certain percentage of the total votes). The maximum ratio permitted between common shares and shares with a voting preference is 1:10. Voting preferences do not apply to certain decisions of the shareholders' meeting, in particular the appointment of experts to audit the company's management, special investigations or the initiation of a liability claim against board members.

Law stated - 28 March 2023

Shareholders’ meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

In the case of registered shares, a shareholder must be registered in the share register to participate and exercise its membership rights in a shareholders’ meeting. With respect to bearer shares, the authority to participate and to exercise the membership rights derives from the possession and presentation of the bearer shares. A shareholder may be represented by a third party, which, unless otherwise provided for in the articles of association, must not be a shareholder.

The membership rights (including the right to vote) in non-listed companies are suspended if and as long as the shareholder fails to comply with its reporting obligation regarding the beneficial ownership of the shares. This reporting obligation applies, with respect to registered shares, if a stake of 25 per cent or more of the share capital or votes is acquired and, for bearer shares, in respect of any acquisition, in both cases unless the shares are issued as intermediated securities in accordance with the Federal Act on Intermediated Securities.

Provided that no shareholder or its representative raises an objection and requests a verbal discussion, shareholders' resolutions may be passed by written consent (wet ink or qualified electronical signature) or in electronic form (eg via email) as a shareholders' circular resolution.

Virtual shareholders' meetings (without a physical meeting) are permitted, provided that the articles of association provide so and the board appoints an independent proxy. For listed companies, the appointment of an independent proxy is mandatory; for non-listed companies, the articles of association may provide the option to waive this requirements. The board is required to regulate the use of electronic means by issuing regulations or directives to ensure that:

- shareholders participating are identified;
- oral contributions are directly transmitted;
- shareholders participating are enabled to propose motions and participate in discussions; and
- voting results may not be manipulated.

Additionally, the board may decide for the conduct of multisite and hybrid shareholders' meetings (including video and sound transmission as well as direct voting). If the articles of association provide so and an independent proxy is appointed, a shareholders' meeting with its location outside of Switzerland is permitted. In this case, the appointment of an independent proxy may be waived by non-listed companies, with the approval of all shareholders.

Law stated - 28 March 2023

Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

Outside of shareholders' meetings, shareholders may require extraordinary shareholders' meetings to be convened by the board if, alone or together, they represent at least 5 per cent of a listed respectively 10 per cent of a non-listed company's share capital or votes. Such a request to the board must be made in writing and be sufficiently precise. If such a request is not complied with within a reasonable time period, the shareholders may request a court to convene a shareholders’ meeting.

With the exception of resolutions on the convocation of a shareholders’ meeting, on the appointment of an auditor, or to carry out a special investigation, an amendment of the agenda will generally be necessary to vote on resolutions against the wishes of the board. Shareholders representing at least 0.5 per cent of a listed respectively 5 per cent of a non-listed company's share capital or votes may demand such an amendment of the agenda, which must be requested sufficiently early to allow the amended invitation to the shareholders' meeting to be issued in time (ie, in accordance with the law, at least 20 days before the shareholders' meeting (the articles of association may prolong this deadline but not shorten it)). However, it is often impossible to obtain a decision of the court in time, so usually it is also necessary to request a convocation of a new shareholders' meeting.

It should be noted that:

- the aforementioned requirements may be made less (but not more) stringent by the company's articles of association (this is often the case in listed companies and is addressed by the Swiss Code of Best Practice for Corporate Governance as a way to comply with the recommendation that companies should endeavour to facilitate the exercise of shareholders' statutory rights);
- during a shareholders' meeting, any shareholder may require a vote on the convocation of another shareholders' meeting; and
- shareholders representing 100 per cent of the share capital are always free to hold a universal assembly, in which case the limitations mentioned above become irrelevant.

Dissident shareholders may require statements to be made into protocols in the minutes of the shareholders' meeting. However, they may not request that the board circulate dissenting statements prior to or after shareholders' meetings. Any shareholder of listed and non-listed companies may request access to the shareholders' meeting minutes within 30 days following the respective meeting. For listed companies, the resolutions and election results with details on the percentage of votes must be accessible electronically within 15 days following the shareholders' meeting.

Law stated - 28 March 2023

Controlling shareholders’ duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

In non-listed companies, the only duty of all shareholders, including controlling shareholders, is to pay the issue price for their shares.

In listed companies, shareholders (or groups of shareholders) reaching or exceeding the threshold of 3 per cent of all voting rights have certain disclosure obligations, and shareholders (or groups of shareholders) reaching or exceeding the threshold of one-third of the voting rights have the duty to make an offer to all other shareholders to acquire their shares at a certain minimum price. The threshold for this duty to make a mandatory offer may be increased in the articles of association to up to 49 per cent of the voting rights, or the company may opt out from the requirement to make such an offer. The Swiss Financial Market Supervisory Authority and the Swiss Takeover Board may enforce these duties.

It has become more common for controlling shareholders to enter into relationship agreements with the (listed) company they control. These agreements typically contain provisions regarding the composition of the board, information flow to the shareholders, the decision-taking process, and other matters found in shareholders' agreements.

Law stated - 28 March 2023

Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

The piercing of the corporate veil and, thus, a direct liability of a shareholder for acts or omissions of a legal entity is limited to highly qualified abuse of right situations. Additionally, if a shareholder is involved in the management of a company, he or she may be deemed to be a de facto body of this company and, thus, be held liable for intentional or negligent breach of his or her duties.

Law stated - 28 March 2023

Employees

What role do employees have in corporate governance?

Employees have no specific role under Swiss corporate law. In particular, there is no obligation to elect an employee representative to the board.

Law stated - 28 March 2023

CORPORATE CONTROL

Anti-takeover devices

Are anti-takeover devices permitted?

Yes, in particular, the following:

- transfer restrictions on registered shares;
- voting limits;
- privileged voting shares; and
- introduction of an increased quorum for certain shareholders' decisions.

Law stated - 28 March 2023

Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Shares may only be issued with prior authorisation by the shareholders' meeting.

Each shareholder has a pre-emptive or preference subscription right to acquire new shares in proportion to its actual participation in the company. However, the shareholders' meeting may exclude pre-emptive rights (or grant the board authorisation to do so) for good cause by at least two-thirds of the voting rights represented in the shareholders' meeting and an absolute majority of the par value of shares, if this cancellation of the pre-emptive rights does not result in any improper advantage or disadvantage to any shareholder.

Law stated - 28 March 2023

Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Non-listed companies may provide in their articles of association that registered shares may only be transferred with the board's approval, which can be denied based on important reasons specified in the articles of association. In any case, the company may acquire the respective shares for its own account, the account of other shareholders or for the account of a third party at fair market value, or refuse the transfer and the registration of the transferee in the company's share register if the acquirer does not explicitly state that it has acquired the shares in its own name and on its own account. In the case of transfers based on inheritance, division of an estate, matrimonial property law or compulsory execution, the company may withhold its consent only if it offers to purchase the shares at their fair market value.

Listed companies are more restricted and may only refuse a share transfer if the acquirer:

- exceeds a certain percentage of the company's voting rights (subject to a respective transfer restriction being included in its articles of association); or
- fails to state that it holds the acquired shares in its own name and on its own account.

In each case, the listed company may only prevent the shareholder from exercising its voting rights but not the transfer of title of the acquired shares (ie, the acquirer will be entitled to any resolved dividends in any case). Transfers based on inheritance, division of estate or matrimonial property law may not be refused by listed companies.

Law stated - 28 March 2023

Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Companies may repurchase their own shares up to a limit of 10 per cent of their share capital (if the repurchase is made in connection with transfer restrictions, a threshold of 20 per cent applies) provided that the company has sufficient freely available equity. These share repurchases are not, and cannot be made, mandatory. The voting right of own shares of a company is suspended.

Law stated - 28 March 2023

Dissenters' rights

Do shareholders have appraisal rights?

No, there are no appraisal rights of shareholders. However, in connection with a squeeze-out merger, the company may compensate the squeezed-out minority shareholders with a cash payment at fair market value.

Law stated - 28 March 2023

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

In listed companies, the predominant board structure is a two-tier structure, as the board normally delegates some of its duties to the management.

Law stated - 28 March 2023

Board's legal responsibilities

What are the board's primary legal responsibilities?

The board is responsible for managing the business of the company, in accordance with its duty of care and fiduciary duty, to the extent that tasks have not been delegated to the management. In general, the board may adopt decisions on all matters that are not explicitly reserved to the shareholders' meeting by law, by the articles of association or delegated to the management based on organisational regulations. The board often delegates a major part of the transferable responsibilities to management. In such a case, however, the board remains liable for the due selection, instruction and supervision of the parties to whom it has delegated responsibilities.

Law stated - 28 March 2023

Board obligees

Whom does the board represent and to whom do directors owe legal duties?

The board represents the company, and directors are obliged to act in the company’s best interest. The company’s purpose is stated in its articles of association. There is no clear view in legal literature or court practice as to which interests must be considered by the directors, in particular, whether the focus must be on shareholders’ interests or whether and to what extent other stakeholders’ interests may have to be taken into account.

The Swiss Code of Best Practice for Corporate Governance is focused on safeguarding ‘sustainable company interests’, which implies a time component (long-term perspective) often taken into account by boards in their decision-making process.

Law stated - 28 March 2023

Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgment rule?

Any director and any other persons engaged in, and with a significant influence on, the management or the liquidation of a company may, irrespective of whether or not formally appointed as directors, liquidators or any other similar function, be held liable for any intentional or negligent breach of their duties.

Whenever shareholders or creditors suffer direct damage (as opposed to indirect damage resulting from direct damage to the company itself), they are entitled to bring an action for compensation of the damage. With respect to damage to the company, the company as well as the shareholders and, in the case of insolvency only and subject further to the insolvency administrators not having taken legal action, the creditors may bring an action whereby both the shareholders and the creditors may only ask for compensation for the company's damage (ie, payment to the company). The shareholders' meeting may also resolve to oblige the company or its management to file liability claims against directors at the cost of the company.

It is established case law that decisions of the board in compliance with the business judgment rule do not constitute a breach of duty, even if these decisions prove to be wrong retrospectively. To be compliant with the business judgment rule the board must apply the following principles when making business decisions:

- an unbiased and independent board and no conflicts of interest;
- a decision-making process based on appropriate information;
- consideration of alternative scenarios; and
- test of justifiability.

Law stated - 28 March 2023

Care and prudence

Do the duties of directors include a care or prudence element?

Yes, the directors must act in compliance with their duty of care and loyalty.

Law stated - 28 March 2023

Board member duties

To what extent do the duties of individual members of the board differ?

The duties of the individual members of the board do not differ as they are defined by objective criteria. In particular, the duty of care and loyalty requires the board to act in the same way as a diligent and competent member would have acted in the same circumstances. Compliance with these duties is assessed by reference to an objective standard of diligence unless a member of the board is an expert in a certain field. In this case, the standard applicable to this director will be assessed by reference to a diligent and competent director with the same level of expertise in the relevant field.

Law stated - 28 March 2023

Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Except for its non-transferable and inalienable duties, the board may delegate its responsibilities to third parties, individual board members or committees, or to the management, in each case in accordance with organisational regulations issued by the board. The board, however, remains liable for the due selection, instruction and supervision of the parties to whom it has delegated responsibilities.

Law stated - 28 March 2023

Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

No. Nevertheless, for listed companies, the SIX Swiss Exchange Directive on information relating to corporate governance (DCG) contains certain disclosure obligations for non-executive members of the board, and the Swiss Code of Best Practice for Corporate Governance recommends that the majority of the board should consist of independent members, meaning non-executive members who have either never, or at least not for the past three years, been members of the management, and who have no (or comparatively minor) business relations with the company. In addition, proxy adviser guidelines often contain specific requirements regarding the independence of members of the board, typically based on years of service, the relationship with significant shareholders and commercial arrangements with the company, among other things.

Law stated - 28 March 2023

Board size and composition

How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The board must be composed of at least one member; there is no maximum number specified by law or any regulations, but the articles of association may provide for these limits. The size is determined by the shareholders' meeting electing the board members and filling vacancies. The Swiss Code of Best Practice for Corporate Governance recommends that the size of the board should match the needs of the individual company and that the board should aim for suitable diversity in its members with regard to competences, experience, gender, age, background and origin.

Only natural persons may be elected as board members, and there must be at least one Swiss resident – not necessarily also a Swiss citizen – authorised to legally bind the company (with individual signing authority), but this person does not need to be a board member.

Large listed companies that are subject to an ordinary audit and in which each gender does not make up at least 30 per cent of the board and 20 per cent of the senior management must, at the latest by the financial year 2026 and the financial year 2031, respectively, indicate in their remuneration reports the reasons why genders are not represented as required and the measures being taken to increase the representation of the less well-represented gender.

As regards disclosure, the names, functions and residences of each board member are publicly available in the commercial register. The DCG requires listed companies to disclose information on the board composition, including details on the organisation of the board and the compensation of its members.

Law stated - 28 March 2023

Board leadership

Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

The separation of the two functions of board chair and chief executive is generally considered as best practice, even though in many SMEs and even in a small minority of listed companies the board chair and CEO are the same person.

If for company-specific reasons the board decides that a single person should take both roles or the former chair of the executive board moves to the board of directors to take over the role of chair, the Swiss Code of Best Practice for Corporate Governance recommends that the board ensures appropriate controls. The board should therefore appoint an experienced, non-executive member to act as lead director. This person shall be entitled to convene and hold meetings with the independent members of the of directors independently when necessary.

Law stated - 28 March 2023

Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Non-listed companies are not required to establish any board committees. Listed companies are required to establish a compensation committee, whose members are elected by the shareholders' meeting. There are no restrictions with respect to the establishment of (additional) committees.

The Swiss Code of Best Practice for Corporate Governance recommends establishing an audit, compensation and nomination committee as well as further committees, such as committees regarding corporate governance, sustainability, digitalisation/technology, innovation, risk and investments or also ad hoc committees to assess specific transactions.

Listed companies and larger non-listed companies often establish a compensation (and nomination) committee and an audit committee, and some also a strategy committee.

Law stated - 28 March 2023

Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Unless the articles of association provide otherwise, only one board meeting per year is required (to prepare for the annual shareholders' meeting and to resolve on the agenda and the respective motions). The Swiss Code of Best Practice for Corporate Governance, however, recommends a minimum of four board meetings per year.

Law stated - 28 March 2023

Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

Non-listed companies are not required to make any such disclosure. Listed companies are required by the DCG to disclose certain board practices, in particular the allocation of tasks within the board, the members list, tasks and areas of responsibility for each board committee and the working methods of the board and its committees.

Law stated - 28 March 2023

Board and director evaluations

Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

No, there is no formal legal requirement to conduct evaluations. However, boards of larger non-listed companies and of listed companies regularly conduct an annual self-assessment. The Swiss Code of Best Practice for Corporate Governance recommends that the board should self-evaluate its own performance and that of its committees annually. Listed companies that conduct these evaluations may disclose this in their annual reports but are not obliged to make any disclosure (in particular of the results of the evaluation).

Law stated - 28 March 2023

REMUNERATION

Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors’ service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

For non-listed companies, except for the provision of the Swiss Code of Obligations, which limits the maximum duration of a director's mandate to six years, without prohibiting re-election, there is no other regulation or practice restricting the company with respect to the remuneration of directors, the length of directors' service contracts (individual terms may not exceed six years, re-election being possible), loans to directors or other transactions or compensatory arrangements between the company and a director – as long as the arm's length principle is observed. Typically, the board determines the compensation and other relevant matters itself.

For listed companies, the Swiss Code of Obligations requires an annual binding shareholder vote on the maximum amount of remuneration of the board. The articles of association must contain provisions regarding the principles governing the compensation of the board, the maximum amount of loans and similar payments made to members of the board, the permitted number of service contracts of members of the board in other companies, and the maximum term of a service contract of a member of the board, which may not exceed 12 months (re-election being possible). Renumeration matters concerning directors must be published annually in a renumeration report.

The ordinary shareholders' meeting, in which the directors are usually elected or re-elected, must be held within six months after the end of a financial year. In this regard, the Federal Supreme Court has decided in a recent judgement that the term of office of directors, whose term expires, automatically ends six months after the end of the respective financial year. If a company omits to re-elect directors, their term of office is therefore not automatically extended and ends six months after the end of the respective financial year.

Law stated - 28 March 2023

Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

For non-listed companies, there is no regulation or practice restricting the company with respect to the remuneration of senior management, the length of employment contracts, loans to senior management or other transactions or compensatory arrangements between the company and a member of senior management – as long as the arm's length principle is observed. Typically, the board determines the management's compensation and other relevant matters.

For listed companies, the Swiss Code of Obligations requires an annual binding shareholder vote on the maximum amount of remuneration of the management. The articles of association must contain provisions regarding the principles governing the compensation of the management, the permitted number of service contracts of members of the senior management in other companies, and the maximum term of employment contracts with senior management, which may not exceed 12 months; provisions regarding, inter alia, the maximum amount of loans and similar payments made to members of the management are only valid if they are included in the articles of association. Renumeration matters concerning senior management must be published annually in a renumeration report.

Law stated - 28 March 2023

Say-on-pay

Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

Yes, but only in listed companies. The Swiss Code of Obligations requires listed companies to hold an annual shareholders' vote on the maximum amount for the compensation of the members of the board, the management and the advisory board (if any). This vote is binding; that is, the company is not permitted to pay any compensation to the board, senior management or advisory board without having it approved by the shareholders' meeting. While this vote must be held annually, there is some flexibility with respect to its technicalities, in particular, whether the variable compensation is voted on separately, whether the vote is retrospective or prospective, and to which periods the vote relates (often, listed companies approve the compensation for the next business year at the ordinary shareholders' meeting held in the previous business year). In addition, most listed companies conduct an annual non-binding shareholder vote on the compensation report for the previous business year.

Law stated - 28 March 2023

DIRECTOR PROTECTIONS

D&O liability insurance

Is directors’ and officers’ liability insurance permitted or common practice? Can the company pay the premiums?

The insurance by a company of its directors and officers against directors' and officers' (D&O) liability, also including the payment of the respective premiums by the company, is generally accepted as permissible. D&O insurance is standard for listed companies and for large non-listed companies.

In addition to liability under civil law, a member of the board may also be liable under criminal law. Furthermore, the board may also be liable for social security contributions and taxes. Typically, these liabilities are excluded from D&O insurance.

Law stated - 28 March 2023

Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

It is generally considered acceptable for the company to undertake to indemnify its directors and officers for the liabilities incurred in their professional capacity, provided, however, that these liabilities were not caused by the director's or the officer's intentional or grossly negligent breach of his or her duties.

Law stated - 28 March 2023

Advancement of expenses to directors and officers

To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

Companies may advance expenses if:

- the proceedings were not caused by the director's or the officer's intentional or grossly negligent breach of his or her duties;
- the advancement complies with the rules applicable to loans made to directors or officers of the company; or
- advancement of expenses in connection with proceedings in which directors or officers will be a witness does not violate witness-tampering rules.

Law stated - 28 March 2023

Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

The Swiss Code of Obligations allows the shareholders' meeting to grant directors and officers a discharge for their past activities, which, if granted, will preclude the company and the shareholders who voted in favour of such a discharge from suing the discharged directors and officers for facts that were known at the time the discharge was granted. Shareholders who did not take part in the vote on the granting of the discharge or who voted against it must bring an action against the discharged directors and officers within the twelve months following the vote on the discharge. If they fail to do so, they will also be precluded to act against the discharged directors and officers. The shareholders' meeting may resolve to oblige the company or its management to file liability claims against directors at the cost of the company.

Owing to the lack of clear and recent case law on the topic, there is some uncertainty regarding the validity of any preclusion or limitation, in advance, of the directors' and officers' liability, whether through amendments of the articles of association or through other shareholder action.

Law stated - 28 March 2023

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

Yes, the articles of association are publicly available in the commercial register at the companies' registered offices; delivery may either be requested from the commercial registry for a low fee or they may be downloaded free of charge . However, the organisational regulations, governing the organisation of the board and the delegation to the management and its reporting, are not publicly accessible.

Listed companies typically make available their articles of association, as well as their organisational regulations, on their websites.

Law stated - 28 March 2023

Company information

What information must companies publicly disclose? How often must disclosure be made?

The publicly accessible commercial register excerpt of each company registered in Switzerland contains certain fundamental pieces of information regarding these companies, in particular their corporate purpose, their share capital, any restrictions on transfers of shares, the identity of their board members and other authorised signatories, their external auditors (if any) and information regarding their histories (such as changes in share capital, registered offices and mergers). Any commercial register filings are also published in the Swiss Official Gazette of Commerce.

Companies are required to issue an annual (financial) report. Non-listed companies must make this report available to their shareholders only, while listed companies must make it publicly available. In addition, various disclosure obligations apply to listed companies, in particular, the following:

- the obligation to make publicly available the disclosure notifications sent by significant shareholders with participations of 3 per cent or more;
- the obligation to report and disclose transactions in shares of the company by members of the board or management (management transactions);
- periodic reporting obligations obliging issuers to, inter alia, publish half-year accounts and a corporate calendar;
- the obligation to inform the market of price-sensitive facts (ad hoc publicity rule); and
- the obligation to disclose a separate corporate governance chapter in their annual reports on a comply or explain basis with information regarding, inter alia, the company's group and capital structure, its board, its management and auditors, executive compensation, shareholdings and loans, shareholders' participation rights, and change of control and defence measures.

Law stated - 28 March 2023

HOT TOPICS

Shareholder-nominated directors

Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

If any item of the agenda covers the appointment of directors, any shareholder (even if holding only one share) may nominate its own candidate by way of a motion, which may be presented either before or during the shareholders' meeting.

If none of the agenda items covers the appointment of directors, a shareholder may not nominate a director by way of a motion. He or she may, however, request an amendment of the agenda to include the appointment of his or her candidate as a director; if the requirements for such a request are fulfilled, the amendment will have to be included by the board in the invitation to the shareholders' meeting.

Law stated - 28 March 2023

Shareholder engagement

Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

In non-listed companies, beyond their involvement in shareholders' meetings, (anchor) shareholders often have their representatives on the board or at least maintain a close relationship and regular contact with the board.

In listed companies, stock exchange law, in particular insider trading rules, restricts interactions between the board and the company's shareholders. Nevertheless, boards of listed companies typically seek to regularly involve their (anchor) shareholders in strategy considerations. Given the need to avoid sharing sensitive information, any meetings among board members and shareholders are typically held following the publication of the company's financial statements, when the risk of sharing price-sensitive facts is lower.

Law stated - 28 March 2023

Sustainability disclosure

Are companies required to provide disclosure with respect to corporate social responsibility matters?

Companies of public interest that, together with their subsidiaries, have 500 annual full-time equivalent employees and exceed either a balance sheet value of CHF 20 mio Swiss francs or revenues of CHF 40 mio Swiss francs in two consecutive financial years, must report annually on non-financial aspects such as environmental matters, particularly on the company's CO_2 -targets, social matters, employee matters, compliance with human rights and anti-corruption.

Companies subject to an ordinary audit and which are either themselves or through a company that they control involved in the extraction of minerals, oil or natural gas or in the harvesting of timber in primary forests must produce a report each year on the payments they have made to state bodies and companies controlled by such state bodies. Extracting includes all activities carried out by a company in the areas of exploration, prospecting, discovery, development and extraction of minerals, oil and natural gas and the harvesting of timber in primary forests.

Companies domiciled or with their main administration located in Switzerland that are either involved in transferring minerals from conflict or high-risk regions into Switzerland or offer products or services for which there is reasonable suspicion that they have been manufactured or provided involving child labour must report on compliance with their duty of care in the supply chain.

Law stated - 28 March 2023

CEO pay ratio disclosure

Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

No.

Law stated - 28 March 2023

Gender pay gap disclosure

Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

Yes, companies with at least 100 employees must conduct an equal pay analysis every four years in accordance with the provisions of the Federal Act on Gender Equality. The results must be disclosed in writing to their employees. Listed companies must publish the results of the analysis in an annexe to their annual accounts and public sector companies must publish the results of the analysis and the audit of the analysis. A standard analysis tool is provided free of charge by the Swiss Confederation.

Law stated - 28 March 2023

UPDATE AND TRENDS

Recent developments

Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The provisions of the bill aiming to modernise Swiss corporate law have entered into force on 1 January 2023. Provisions in contracts, articles of associations and regulations of companies that do not comply with the modernised Swiss corporate law remain in force until 31 December 2024. Such provisions that are not amended during this two-year transition period will cease to be legally valid as of 1 January 2025. Provisions introduced by the bill aiming to modernise Swiss corporate law are in particular:

- new non-transferable and inalienable duties of the board of directors;
- an extension of the deadline from six to 12 months to bring an action against directors who were granted a discharge (only for shareholders who did not take part in the vote or who voted against it);
- the possibility to state the share capital of a company incorporated in Switzerland in the foreign currency that is essential for its business;
- new rules on restructuring, which, in particular, introduce illiquidity as a triggering event forcing the board to take measures;
- virtual general meetings and shareholders' resolutions by written consent;
- the shareholders' meeting may authorise the board to change the share capital within a specified range (capital band) for a period of five years;
- the shareholders' meeting may resolve to pay an interim dividend on the basis of interim financial statements; and
- the possibility to provide in the articles of association for the chair of the shareholders' meeting to cast a second vote in the event of parity of votes.

In accordance with the modernised Swiss corporate law the revised Swiss Code of Best Practice for Corporate Governance has been published on 6 February 2023.

As of the beginning of 2021 and 2022, a range of disclosure requirements for larger companies with respect to corporate social responsibility matters have entered into force, with reports required to be published for the first time for financial years 2022 and 2023, respectively.

Law stated - 28 March 2023

Jurisdictions

Australia	Kalus Kenny Intelex
Brazil	Loeser e Hadad Advogados
China	BUREN NV
France	Aramis Law Firm
Germany	POELLATH
India	Chadha & Co
Japan	Anderson Mōri & Tomotsune
Kenya	Robson Harris Advocates LLP
Malta	GVZH Advocates
Mexico	Chevez Ruiz Zamarripa
Netherlands	BUREN NV
Nigeria	Streamsowers & Köhn
South Korea	Lee & Ko
Switzerland	BianchiSchwald LLC
Thailand	Chandler MHM Limited
Turkey	Gün + Partners
USA	Sidley Austin LLP