The Swiss Federal Council’s Proposed Corporate Law Revisions

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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 effect 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 respect to the share capital.

Current Swiss corporate law requires that the nominal value of the share capital 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 (Sachverbrauch) or an intended acquisition of assets (beabsichtigte Sachverbrauch), 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 (Rückrstattungsklage).

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.
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.

A potentially new feature would be a failure to meet the criteria. In that case, listed companies would be required to list their shares to amend their articles of association again, which would cost them the opportunity to be listed on the exchange of the relevant manager which would be made public.

The Preliminary Draft proposes that, at least 5 years following the entry into force of the new act, each listed company shall provide in their compensation report the efforts taken to reach those thresholds and the reasons why they were not reached.

Corporate Governance

The Preliminary Draft proposes not only to implement the provisions against Excessive Compensation but also to strengthen the rights of shareholders of non-listed companies.

It goes without saying that many of these new features, if implemented, will offer more flexibility.

As concerns the notification of the court in case of over-priced dividends, the Preliminary Draft introduces a 90-day period to resolve such matters.

The Preliminary Draft proposes not only to implement the provisions against Excessive Compensation but also to strengthen the rights of shareholders of non-listed companies.

Finally, the Preliminary Draft envisages to also strengthen shareholders rights with regard to shareholder activism.

Restructuring and Insolvency

The current provisions dealing with loss of capital and indemnities for non-compete undertakings stand at 10 percent. The Preliminary Draft proposes a more reasonable payment for non-compete undertakings, the Preliminary Draft revisits the provisions of the Ordinance against Excessive Compensation.

Gender Diversity

The Preliminary Draft proposes that at least five women should be represented on both the board of directors and the executive management of major listed companies by at least 50 percent. The proportion is measured on a simple or equalized basis. A related new implementation 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.
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.


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