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Revision of stock corporation law

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Revision of stock corporation law

The revision of stock corporation law passed by the Swiss Parliament on 19 June 2020 shall improve the corporate governance of listed and private companies, make changes to the capital structure and the conduct of general meetings and board meetings more flexible and adapt the stock corporation law to the new accounting law. In addition, the Ordinance against Excessive Remuneration in Listed Stock Corporations ("Verordnung gegen übermässige Vergütungen bei börsenkotierten Aktiengesellschaften" or "VegüV"), which came into force in 2014, was transformed into law.

The revision of stock corporation law came into force for the most part on 1 January 2023. Since then, a two-year transition period for the amendment of a company's articles of association and regulations is running. If the articles of association contain provisions that are not compliant with the new law, they will automatically cease to apply after the expiry of this period.

The revision of stock corporation law is also relevant for limited liability companies (cf. section 3.7.).

In summary, the revision of stock corporation law provides for the following changes, among others:

- The nominal share value must only be greater than zero, which means that any nominal share value is possible (section 3.1.a).
- (Intended) acquisitions of assets in the course of an incorporation or capital increase are no longer subject to any special provisions (section 3.1.c).
- With the capital band, the general meeting can authorize the board of directors to flexibly increase and/or decrease the capital within certain limits (section 3.1.e).

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- In the case of conditional capital increases, third parties may now be designated as beneficiaries in addition to shareholders, creditors, employees and members of the board of directors (section 3.1.f).
- The share capital may also be denominated in a foreign currency (currently GBP, EUR, USD and JPY) that is material to the business (section 3.1.g).
- Profits earned during the year may be distributed as interim dividends under certain conditions (section 3.2.a).
- The articles of association of a stock corporation may, by means of an arbitration clause, submit disputes under corporate law to arbitration (section 3.3.d).
- A general meeting may be held at several locations at the same time as well as in Switzerland or/and abroad (section 3.4.e).
- The board of directors may allow shareholders to participate electronically in a physical general meeting or hold the general meeting exclusively virtually (section 3.4.f).
- Shareholders may pass their resolutions in writing or in electronic form (circular resolution) (section 3.4.g).
- The board of directors may now delegate the management of the company to managing directors even without statutory authorization (section 3.5.b).
- The board of directors may allow its members to participate electronically in a physical meeting or hold the meeting exclusively virtually (section 3.5.c).
- Resolutions of the board of directors in electronic form no longer require a signature (section 3.5.d).
- In the event of imminent insolvency, the board of directors shall take measures to ensure solvency and, if necessary, to restructure the company (section 3.6.a).

We first provide an overview of the specific changes that are already applicable since 1 January 2021 and 1 January 2022, respectively, in sections 1 and 2 below, and then about the changes that came into force on 1 January 2023 in section 3, as well as possible need for action for private companies or Swiss subsidiaries of foreign group companies. Changes and need for action for listed companies are not discussed.

1. Changes in stock corporation law as of 1 January 2021

As of 1 January 2021, the Federal Council has already put into effect a part of the revision of the stock corporation law, which is only briefly discussed hereafter:

1.1 Introduction of Transparency Rules in the Raw Materials Sector

In order to increase transparency and combat mismanagement and corruption, companies that are by law subject to an ordinary audit and are active themselves or through a company controlled by them in the extraction of minerals, oil or natural gas or the harvesting of timber in primary forests must disclose payments to government agencies of CHF 100'000 or more per financial year in connection with the extraction of raw materials and publish them in an electronic report in a national language or in English. The disclosure requirement applies for the first time to the 2022 financial year, meaning that the corresponding report must be published from 2023 onwards. The Federal Council may extend these transparency rules to commodity trading, which it has not done so far.

1.2 Commercial Register: Reduction of Fees, Expansion of Persons Entitled to File Applications and Removal of the Commercial Register Ban

The fees of the commercial register were reduced by one third to ease the burden on companies. This reduction particularly benefits the incorporation of companies and the amendment of commercial register entries.

The list of persons entitled to file commercial register applications is no longer limited to only member of the supreme management or administrative body, but all persons authorized to sign for the legal entity concerned in accordance with their signing authority. Legal provisions that lay down specific rules on signatures remain reserved (e.g., in the case of a merger, which must be registered by the supreme management or administrative body of the acquiring company as before). In addition, applications may also be signed by third parties, such as lawyers, notaries or tax experts, provided that they are authorized accordingly. The power of attorney must be enclosed with the application and does not necessarily have to be submitted in the original or as a certified copy; a simple copy of the power of attorney is sufficient.

A commercial register ban to prevent entries in the daily register can no longer be requested by a commercial register office but must be applied for at the competent court as part of an application for the granting of a superprovisional precautionary measure. A commercial register ban thus becomes more complicated and more expensive.

2. Changes in stock corporation law as of 1 January 2022

To increase transparency, large Swiss companies are required to report on the risks of their business activities in the areas of the environment, social and employee matters, human rights and the fight against corruption, as well as the measures taken against these risks.

Companies in Switzerland (regardless of their size) with risks in the sensitive areas of child labor and minerals/metals from conflict-affected areas must comply with special and extensive due diligence and reporting obligations.

These due diligence and reporting obligations will apply for the first time for fiscal year 2023, i.e., the corresponding report only has to be published in 2024.

The Federal Council has issued implementing provisions in the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labor *("Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit" or "VSoTr").*

3. Changes in stock corporation law as of 1 January 2023

3.1 Share Capital

For stock corporations, the new law leads to more flexibility in defining and changing of the capital structure as well as to more legal certainty through codification of existing practice.

a) Any nominal share value

Previously, the minimum nominal value of shares was 1 centime. Now, the nominal value only has to be greater than zero. No-par-value shares are however still not permitted. The minimum share capital of CHF 100'000 remains unchanged and shareholders must still make a contribution of no less than 20 % of the nominal value, but at least CHF 50'000.

This change brings flexibility, as any number of shares can be issued and share splits are simplified even if the minimum capital of a stock corporation stays at CHF 100'000.

b) Legal certainty in the payment of share capital

As before, shareholders can make contributions in cash (cash contribution), through assets (contribution in kind) or by offsetting them against a claim against the company (contribution by offset) in order to

pay the share capital. However, in the case of capital increases, only payment by contribution in kind previously required a qualified majority of at least two-thirds of the votes represented and a majority of the nominal value of the shares represented at the general meeting, as well as disclosure in the articles of association and in the commercial register. Both of these requirements now also apply to contribution by offset.

As before, assets contributed to a company as part of a contribution in kind must fulfill certain conditions to be eligible for such a contribution, i.e., they may be entered on the balance sheet, be freely transferable, freely available and realizable by transfer. These criteria for the eligibility as a contribution in kind, which were previously only applied in practice, have now been incorporated into the law. The asset, its valuation and the name of the contributor, the shares issued for it and any other consideration paid by the company must still be specify in the articles of association in the case of incorporations or capital increases.

If real estate property is contributed to a company by way of a contribution in kind, a single public deed executed at the registered office of the company is now sufficient, even if the real estate property is located in different cantons.

In the case of contributions by offset in the context of capital increases, the offsetting of the shareholder's payment liability with a claim against the company now also complies with the capital protection provisions if the claim is not fully covered by the company's assets and therefore has no value. This change leads to more legal certainty, especially in the case of corporate restructurings, as the legality of debt-to-equity conversions (debt/equity swaps) was previously disputed. As before, the payment of debts by offsetting them against disputed claims is still not permissible.

c) Repeal of the provisions on the (intended) acquisition in kind

The previously applicable provisions on the (intended) acquisition of assets in kind, which governed the acquisition of assets of a shareholder or a related person by the company in connection with the incorporation of the company or a capital increase, were in part unclear and provided for the invalidity of the (intended) acquisition of assets in kind in the event of their violation, which led to legal uncertainty. These provisions were therefore repealed. (Intended) acquisitions of assets are thus no longer subject to special rules. However, an

obvious disproportion between value and consideration in an acquisition of assets in kind can still lead to an action for restitution and to the liability of the corporate bodies.

However, if a contribution in kind is also accompanied by an acquisition in kind, the duty to disclose in the articles of association and in the commercial register also includes the acquisition in kind.

d) Changes to the ordinary capital increase and ordinary capital reduction

In the case of ordinary capital increases and reductions, the revision of stock corporation law leads to the incorporation of already proven practice in the law and to a few minor changes or flexibilizations of the procedure.

In particular, capital increases and reductions must now be implemented and applied for to the commercial register within six months of the resolution by the general meeting, rather than within three months as before. The registration of the capital increase or reduction in the commercial register to meet the deadline is no longer required, the filing of the application for registration is sufficient.

In the case of a capital increase, not only must shareholders no longer be unfairly favored or disadvantaged in the case of a restriction or cancellation of subscription rights, but now also in relation to the determination of the issue price.

e) Replacement of the authorized capital increase by the capital band

The system of the authorized capital increase was abolished and replaced by the new instrument of the capital band which combines the system of the authorized capital increase and of the authorized capital decrease. However, authorized capital increases that were resolved before the revision came into force remain valid.

The general meeting can now authorize the board of directors to reduce or increase the share capital within a lower and upper limit (capital band) for a period of no more than five years at its discretion and several times without further resolutions by the general meeting. The share capital registered with the commercial register may be reduced or increased by a maximum of half but may never fall below the minimum capital of CHF 100'000. Within these limits, however, the general meeting has a high degree of freedom (e.g., duration, restrictions or conditions) with regard to the authorization granted to the board of directors.

The introduction of a capital band requires a resolution of the general meeting with a qualified majority of at least two thirds of the votes represented and a majority of the nominal value of the shares represented and the inclusion of a corresponding provision in the articles of association.

The board of directors may decide on capital increases and reductions within the scope of the authorization granted by the general meeting and include the necessary provisions in the articles of association. However, a capital reduction is not possible if the company has waived a limited audit (opting-out).

In the case of capital increases within the scope of a capital band, the shareholders remain protected as before, i.e., they have a subscription right proportional to their existing shareholding for the newly issued shares. However, the subscription right can still be restricted or cancelled. In the case of capital reductions, the creditor protection provisions relating to the securing of claims, interim financial statements and audit confirmation continue to apply by analogy.

The capital band enables companies to change their equity quickly and flexibly as required (e.g., in the case of company takeovers or investments).

f) Expansion of beneficiaries in the event of conditional capital increases

Now, in addition to shareholders, creditors, employees and members of the board of directors, (non-specific) third parties can also benefit from option rights in connection with a conditional capital increase. The circle of possible beneficiaries is thus significantly expanded.

g) Share capital in foreign currency

Under current accounting law, the accounting and bookkeeping may be kept in a foreign currency if such currency is material for the business activity (functional relationship). Up until now, however, the share capital always had to be denominated in Swiss francs. The share capital can now also be denominated in a functional foreign currency. The functional foreign currency is the foreign currency that is material for the business activity, i.e., the currency of the company's main cash flows. A share capital denominated in a foreign currency provides the advantage that amounts no longer have to be converted into Swiss francs for capital-related transactions (e.g., distribution of a dividend from freely available funds). However, the conversion for tax purposes remains.

The following four requirements must be met in order to denominate the share capital in a foreign currency:

1. the foreign currency must be material to the company's business activities (functional foreign currency);

2. the provision on minimum capital must be complied with, i.e., the share capital in foreign currency must correspond to an equivalent value of at least CHF 100'000 at the time of the incorporation of a company or, in the case of existing companies, at the time of the resolution by the board of directors to execute the conversion;

3. the bookkeeping and accounting must be in the same foreign currency; and

4. the Swiss Federal Council must have qualified the chosen foreign currency as suitable.

The foreign currencies deemed suitable by the Swiss Federal Council are defined in the Commercial Register Ordinance. Currently, the following currencies are admitted: British Pound (GBP), Euro (EUR), US Dollar (USD) and the Japanese Yen (JPY).

If an existing stock corporation wishes to have its share capital denominated in a foreign currency, the general meeting must pass a resolution to this effect by a qualified majority of at least two-thirds of the votes represented and a majority of the nominal value of the shares represented. In addition, the board of directors must confirm that the four above-mentioned requirements are met and resolve to amend the articles of association accordingly. The resolutions of the general meeting and of the board of directors must be done as a public deed.

3.2 Reserves / Dividends

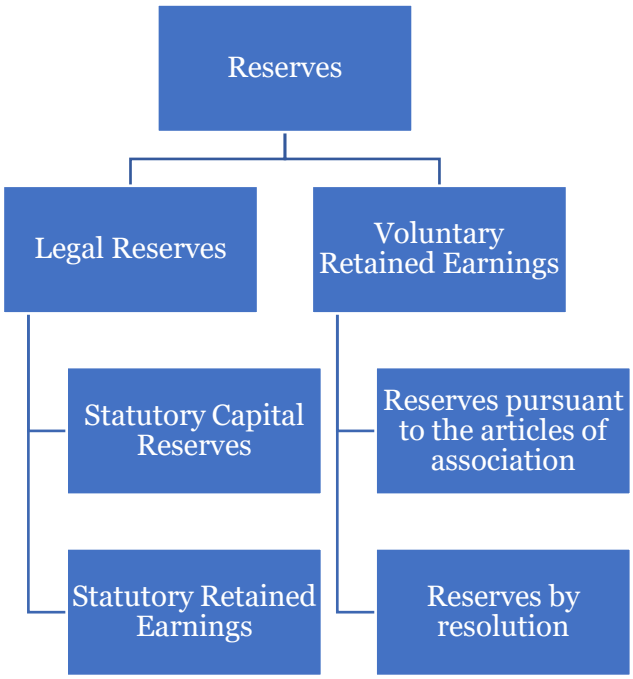
a) Interim dividends

The law now defines the conditions for the distribution of interim dividends, i.e., the distribution of dividends from profits generated during the year. The general meeting may (if the conditions for a dividend distribution are met) resolve to pay an interim dividend based on interim financial statements. A corresponding provision in the articles of association is not required. The interim financial statements must be audited by an auditor unless the company is not subject to the ordinary audit and has waived the limited audit (opting-out) or all shareholders agree to the interim dividend and the claims of creditors are

not jeopardized. The distribution of interim dividends in groups of companies is thus simplified.

b) Alignment of the types of reserves to the accounting law

The types of reserves are aligned to the accounting law and are now divided and named as follows:



c) Changes to the formation, appropriation and offsetting of reserves

Share premiums as well as other contributions and grants are to be allocated to the statutory capital reserve. It may now only be repaid to shareholders if, together with the statutory retained earnings, less the amount of any losses, it exceeds 50 % (20 % in the case of holding companies) of the share capital registered with the commercial register (and not the paid-in share capital).

5 % of the annual profit must be allocated to the statutory retained earnings, whereby any loss carried forward shall be eliminated before the allocation to the reserve. This allocation of 5 % applies until the statutory retained earnings together with the statutory capital reserve amounts to half (20 % in the case of holding companies) of the share capital registered with the commercial register. This means a tightening: a company with a fully paid-in share capital, no statutory capital reserve and minimum statutory retained earnings of (previously) 20 % of the share capital must now increase its statutory retained earnings to 50 % of the share capital. The same rules as for the statutory capital reserve apply to the repayment to shareholders. The second allocation of 10 % in the event of a distribution exceeding 5 % of the share capital has been abolished.

The formation of voluntary retained earnings is now subject to the condition that this is justified by the long-term prosperity of the company, taking the interests of all shareholders into account.

Losses must be offset according to the following order:

1. profit carried forward
2. voluntary retained earnings
3. statutory retained earnings
4. statutory capital reserve

After offsetting against the profit carried forward and the voluntary retained earnings, losses may be carried forward. Offsetting against the statutory retained earnings or the statutory capital reserve is not mandatory.

3.3 Personal Membership Rights

a) Stricter rules regarding voting representatives

The revision of stock corporation law leads to some tightening in connection with voting representatives.

In the case of non-listed companies, there was previously legal uncertainty regarding the requirements for the independence of the independent voting representative. The law now stipulates that the independence of the independent voting representative must not be compromised, either in fact or in appearance, whereby the provisions on the independence of the auditors for the ordinary audit apply *mutatis mutandis*.

If the articles of association provide that shareholders may only be represented by another shareholder, the board of directors must now appoint an independent voting representative or a corporate voting representative at the request of a shareholder.

b) Strengthening of the right to information and restrictions regarding the right to inspection

Shareholders holding at least 10 % of the voting rights or share capital may now also request information from the board of directors outside the general meeting. The board of directors must provide the information within four months, whereby the information must be made available to all shareholders at the next general meeting at the latest for the sake of equal treatment. A refusal to provide information must now be justified in writing and, as before, is only permissible if the information is not necessary for the exercise of shareholders' rights or if business secrets or other interests of the company worthy of protection are at risk.

Based on this provision, shareholders may request information regarding the (at least total) compensation paid to the board of directors and the management.

Only shareholders who hold at least 5 % of the share capital or votes can now exercise the right to inspect books and files. The board of directors now decides on the granting of the right of inspection instead of the general meeting and the shareholder is allowed to take notes but cannot make copies. A refusal is possible according to the same rules as applicable to the right to information.

c) Simplification of access to the special investigation (previously: "special audit")

The previous special audit is renamed special investigation.

As before, the special investigation may only be requested at a general meeting if the right to information or inspection has been exercised and if the special investigation is necessary for the exercise of shareholders' rights. If the general meeting approves the request, the company or any shareholder may, within 30 days, request the court to designate the experts who are to conduct the special investigation. If the general meeting rejects the request, shareholders holding at least 10 % of the share capital or votes may request the court to order a special investigation.

Applicants now only have to prove to the court that the founders or executive corporate bodies have violated the law or the articles of association and that the violation is likely to harm the company or its shareholders. An actual damage to the company or its shareholders no longer has to be demonstrated.

d) Statutory arbitration clause

The law now provides for the possibility of including an arbitration clause in the articles of association. The articles of association of a company may provide that disputes under corporate law (such as liability actions or actions for information and inspection) are to be decided by an arbitral tribunal with seat in Switzerland. Unless the articles of association provide otherwise, the company, the company's governing bodies, the members of the governing bodies and the shareholders are bound by the arbitration clause. The scope of application may be reduced, but not extended, in the articles of association.

The articles of association can regulate the details and, in particular, refer to arbitration rules (such as the Swiss Rules of International Arbitration or the ICC Rules). In addition, the articles of association must ensure that persons who may be directly affected by the legal effects of the arbitral award are informed about the initiation and termination of the proceedings.

3.4 General Meeting

As part of the revision of stock corporation law, shareholders' rights with regard to the general meeting were strengthened and the corporate body itself was modernized and made more flexible.

a) New non-transferable powers of the general meeting

The following powers have been added to the catalog of non-transferable powers of the general meeting:

1. determination of the interim dividend and approval of the interim financial statements required for this purpose (see section 3.2.a); and
2. resolution on the repayment of the statutory capital reserve.

b) Lowering of thresholds for requesting items on the agenda and making motions

As before, shareholders who together hold at least 10 % of the share capital or votes may request that a general meeting be convened. For requesting an item on the agenda or motions, the threshold is reduced from 10 % to 5 % of the share capital or votes.

c) Expansion of the catalog of resolutions requiring a qualified majority

The following additional resolutions of the general meeting now require a qualified majority of at least two thirds of the votes represented and a majority of the nominal value of the shares represented:

1. the capital increase by offset (see section 3.1.b);
2. the introduction of a capital band (see section 3.1.e);
3. the conversion of participation certificates into shares;
4. the change of the currency of the share capital (see section 3.1.g);
5. the introduction of the casting vote of the person chairing the general meeting;
6. a provision in the articles of association concerning the holding of the general meeting abroad (see section 3.4.e) below);
7. the introduction of an arbitration clause in the articles of association (see section 3.3.d); and
8. the waiver of the appointment of an independent voting representative for conducting a

virtual general meeting (see section 3.4.f) below).

d) Convening the general meeting and informing shareholders

The board of directors may now convene a general meeting exclusively in electronic form (e.g., via e-mail), if so provided for in the articles of association.

The law now specifies in detail the content of the notice convening the general meeting, in particular the date, the starting time, the form (e.g., physical, hybrid or exclusively virtual) and the location (one or more) of the general meeting, the items on the agenda and the motions of the board of directors.

When convening the general meeting, the board of directors must also adhere to the principle of unity of the subject matter (no interdependence between core resolution items) as before and must present to the general meeting all information necessary for its resolution. However, the board of directors may only summarize the items on the agenda in the notice convening the general meeting, for instance in the case of a total revision of the articles of association, if it makes further information available to the shareholders by other means (e.g., on the company's website).

It is no longer necessary to make the annual report and the audit report available and to insert a corresponding mention in the notice convening the general meeting. It is sufficient if shareholders can access the annual report and the audit report electronically (e.g., on the company's website).

Finally, any shareholder may now request that the minutes of the general meeting be made available to him/her within 30 days of the general meeting.

e) General meeting at several locations at the same time as well as in Switzerland or/and abroad

It is now possible to hold a general meeting at different locations at the same time. However, the votes of the participants must be transmitted directly to all meeting locations in sound and vision.

In addition, a general meeting may now also be held abroad if the articles of association so provide and the board of directors designates an independent voting representative in the notice convening the meeting. The board of directors may dispense with the designation of an independent voting representative if all shareholders agree.

f) Electronic participation in physical general meeting and virtual general meeting

The board of directors may now provide that shareholders who are not present at the venue of a physical general meeting may exercise their rights electronically.

In addition, it is now possible to hold a general meeting exclusively by electronic means and without a physical venue (virtual general meeting) if the articles of association so provide and the board of directors designates an independent voting representative in the notice convening the meeting. It is possible to dispense with an independent voting representative by means of a statutory provision adopted by a qualified majority.

These two types of general meetings are particularly advantageous for companies with a small group of shareholders.

The regulation on the use of electronic means is left to the board of directors. However, it must ensure that:

1. the identity of the participants has been established;
2. the votes in the general meeting are directly transmitted;
3. each participant can make motions and participate in the discussion; and
4. the voting result cannot be falsified.

If technical problems occur during the general meeting so that it cannot be conducted properly, it must be repeated. However, resolutions passed by the general meeting before the technical problems occurred remain valid.

g) Circular resolutions of the general meeting

Shareholders may now adopt resolutions in writing (in particular by way of circular resolutions) or in electronic form, provided that no shareholder or representative of a shareholder requests oral deliberation.

h) Participation of the management in the general meeting

Now, not only the members of the board of directors, but also those of the management are expressly entitled to attend the general meeting. If members of the board of directors and/or the management participate in the general meeting, they have the right to make a statement on any item on the agenda. However, only the board of directors can make

motions on items on the agenda, as before.

i) Content of the minutes of the general meeting

The minimum content of the minutes of the general meeting is partly modified and supplemented. The minutes must contain at least the following:

1. date, starting and end times as well as form and venue of the general meeting;
2. number, type, nominal value and category of shares represented, indicating the shares represented by the independent voting representative, by the corporate voting representative or by custodians acting as representatives;
3. resolutions and election results;
4. requests for information made at the general meeting and answers given thereto;
5. statements made by shareholders for the record; and
6. relevant technical problems encountered during the conduct of the general meeting (with electronic participation or in virtual form).

The minutes must be signed by the minute-taker and the person chairing the general meeting.

j) Excursus: Covid regulation concerning virtual general meeting ceased to apply as of 1 January 2023

Art. 27 para. 1 lit. a of the COVID-19 Ordinance 3 allowed the holding of virtual general meetings. This regulation ceased to apply when the revision of the stock corporation law came into force on 1 January 2023. It differed from the provisions of the new stock corporation law in that it did not require a basis in the articles of association and the board of directors did not have to designate an independent voting representative in the notice convening the meeting.

k) Excursus: No change in the rules regarding the notification of the beneficial owner

The revision of stock corporation law did not result in any change to the obligation to notify the beneficial owner and the obligation to maintain a register of beneficial owners. It is worth reminding that the membership rights (in particular the voting rights) of shareholders who have not complied with their notification obligation are suspended.

3.5 Board of Directors, Management and Auditors

a) Individual election of members of the board of directors; secretary to the board of directors no longer necessary

The members of the board of directors must now be elected individually, unless the articles of association provide otherwise or the person chairing the general meeting, with the consent of all shareholders represented, orders the election of the entire board of directors in one vote.

The board of directors is no longer required to appoint a secretary. The minutes of the meetings of the board of directors are no longer to be signed by the secretary, but by the respective minute-taker (and the chairman/chairwoman).

b) Delegation of management to managing directors does not require statutory authorization

Previously, the board of directors required a statutory authorization to delegate the management of the company to managing directors in accordance with organizational regulations. Now, the board of directors can issue organizational regulations for the delegation of the management to managing directors even without specific authorization in the articles of association.

A provision to this effect must now be included in the articles of association if the shareholders want to be able to decide on the delegation of the management to managing directors.

c) Electronic participation in physical board meetings and virtual board meetings

As with the general meeting (see section 3.4.f) the board of directors may now provide that members who are not present at the location of the board meeting may exercise their rights by electronic means.

In addition, it is now possible to hold board meetings exclusively by electronic means and without a physical meeting venue (virtual board meetings).

No statutory basis is required in either case. However, the details should be set out in the organizational regulations. For the rest, we refer to section 3.4.f).

d) No signature requirement for electronic circular resolutions

A signature is no longer required for the adoption of an electronic circular resolution. A circular resolution can now be passed by e-mail or chat,

for example. However, the board of directors can specify in writing that circular resolutions will continue to be passed only with the signature of the members of the board of directors.

It should be noted, however, that - insofar as such resolutions are relevant for the commercial register - the signature of the members of the board of directors or the drafting of proper minutes is nevertheless required.

e) Regulations in the event of conflicts of interest

The existing practice is now incorporated into law, according to which members of the board of directors and the management must inform the board of directors immediately and in full in the event of conflicts of interest, and the board of directors must take the measures necessary to safeguard the interests of the company.

3.6 Restructurings

a) Restructuring obligations in the event of imminent insolvency

The board of directors shall monitor the solvency of the company. In the event of imminent insolvency, it shall take measures without delay to secure the solvency. In addition, it must, if necessary, take restructuring measures and request the general meeting to approve such measures if they fall within its competence (e.g., capital increase). The legislator is thus incorporating in the law a practice that already applied previously.

b) Changes to the calculation of the capital loss

A capital loss now exists if, according to the last annual financial statements, the assets less the liabilities no longer cover half of the share capital and the non-distributable legal reserves. This means that a capital loss will occur later than before, as only the non-distributable legal reserves need to be considered for the calculation rather than the total legal reserves. The obligations of the board of directors in the event of a capital loss remain unchanged.

c) Duty to perform a limited audit in the event of a capital loss

A company that is not subject to the ordinary audit and has waived the limited audit (opting-out) is now required to submit the last annual financial statements to a limited audit in the event of capital loss.

d) Minor changes to the provisions on overindebtedness

In the event of imminent overindebtedness (the assets no longer

cover the liabilities), the board of directors must still prepare an interim balance sheet at going concern values and liquidation values. An interim balance sheet at liquidation values no longer has to be prepared if it can be assumed that the company will continue to operate and the interim balance sheet does not show an overindebtedness. Logically, an interim balance sheet at going concern values does not have to be prepared if it is assumed that the company will not continue to operate; in this case, an interim balance sheet at liquidation values is sufficient.

The subordination of a claim can now prevent the notification of the overindebtedness to the court only if such subordination covers not only the principal amount of the claim but also the accrued and future interest.

The conditions of a so-called silent restructuring are incorporated in the law. The board of directors may postpone the notification of the court if (i) there is a reasonable prospect that the overindebtedness can be remedied during a period of max. 90 days, and (ii) the claims of the creditors are not additionally jeopardized.

e) Removal of the auditors only for good cause

In order to protect minority shareholders, the general meeting may now only remove the auditors for good cause, which must be disclosed in the notes to the annual financial statements.

3.7 Changes in the law governing limited liability companies

The revision of stock corporation law is (contrary to what its name suggests) of great relevance not only to stock corporations, but also to limited liability companies. The changes discussed in sections 3.1 up to and including 3.6(with the exception of section 3.1.e) apply *mutatis mutandis* in principle to limited liability companies as well. In this regard, it is welcomed that quotas are now possible with a nominal value greater than zero (previously min. CHF 100).

3.8 Need for action

The revision of stock corporation law came into force for the most part on 1 January 2023. Since then, a two-year transition period for the amendment of a company's articles of association and regulations is running. If the articles of association contain provisions that are not compliant with the new law, they will automatically cease to apply

after the expiry of this period. In principle, the changes presented above do not require the mandatory amendment of the articles of association. However, we recommend that stock corporations and limited liability companies consider the revision of stock corporation law and examine whether the new changes can be used to the advantage of the company and whether the articles of association should be aligned to the new law. In doing so, we recommend in particular to consider the following:

- If a stock corporation or limited liability company already keeps its accounts in a functional foreign currency, it may be useful to keep the share capital in the same foreign currency instead of CHF (see section 3.1.g).
- For stock corporations with authorized or conditional capital, it may be appropriate to restructure the capital (e.g., creation of a capital band, changes to conditional capital and cancellation of authorized capital; see section 3.1.e).
- In most cases (in any case for group companies), any restriction on representation at the general meeting should be removed in the articles of association (see section 3.3.a).
- An arbitration clause can be introduced for disputes under corporate law (see section 3.3.d).
- Amendments might be necessary due to the lowered threshold for requesting an item to the agenda and the expansion of the catalog of resolutions requiring a qualified quorum (see sections 3.4.b) and c).
- General meetings can now be held with the option of electronic participation, completely virtually without a physical meeting venue, or abroad (see sections 3.4.e) and f).
- If the entire board of directors shall be elected by one vote in the future or if its authority to delegate the management of the company to managing directors shall be restricted, the articles of association must contain a provision to this effect (see section 3.5.a) and b).
- Board meetings can now be held exclusively by electronic means and without a physical meeting venue (virtual board meetings) (see section 3.5.c).

In certain constellations, the statutory retained earnings must be filled up before dividends can be distributed (see section 3.2.c).

It may be appropriate to revise the organizational regulations with regard to the duties of the board of directors in the event of conflicts of interest and the more

flexible options for holding board meetings now provided for by the law(see sections 3.5.c) and e).

Existing subordination agreements should be reviewed to ensure that the subordination also covers accrued and future interest.

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