Guidelines 11/22

CORPORATE LAW REFORM

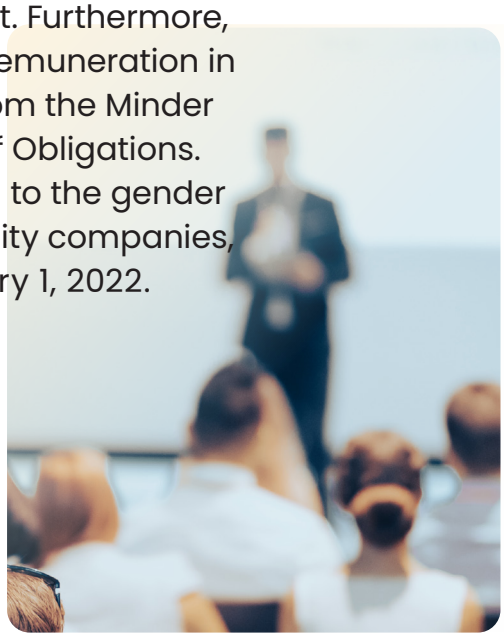
A discussion of the most important adjustments and amendments to the Swiss Stock Corporation Act[1]

[1] Refers to the provisions of the Swiss Code of Obligations (*Obligationenrecht; "OR"*) set forth in Art. 620 et seq. thereof, governing stock corporations under Swiss law

Banks and Financial Service Providers | Capital Market and Listed Companies | Competition | Compliance | Construction and Real Estate | **Corporate and Commercial Law** | Data Protection | Energy | Financing | FinTech | Foundations | Funds and Asset Management | Insurance | Intellectual Property Law | Internal and Regulatory Investigations | Labor and Employment Law | Litigation and Arbitration | Mergers and Acquisitions | Migration | **Notarial Services** | Pharma and Health Care | Private Clients and Estate Planning | Private Equity | Public Procurement | **Restructuring and Insolvency** | Taxation | Technology and Media | Venture Capital | White Collar Crime | Sports Desk | Start-up Desk |

Wenger Vieli Ltd.
Dufourstr. 56
P.O. Box
8034 Zurich
—
Metallstr. 9
P.O. Box
6302 Zug
—
+41 58 958 58 58
spotlight@
wengervieli.ch

The revised corporate law will enter into force and effect as of January 1, 2023. The revision focuses on liberalizing provisions governing the formation and capital requirements, improving corporate governance, and introducing electronic media at the general meeting. Statutory provisions governing restructuring were also rendered more precise and more flexible in the course of the corporate law reform, adding new obligations to act. Furthermore, the provisions of the Ordinance Against Excessive Remuneration in Listed Stock Corporations ("VegüV"), which arose from the Minder Initiative, will be incorporated into the Swiss Code of Obligations. Some of the new provisions, specifically with regard to the gender quota and transparency requirements for commodity companies, have already been in force and effect since January 1, 2022.



1. Introduction

This briefing is intended to provide an overview of the most important changes in the law and point to potential areas where action needs to be taken. In this briefing, we focus on changes that concern non-listed corporations; where useful, we also show the effect that those changes have on listed corporations and limited liability companies.

2. Provisions regarding capital

The corporate law reform aims at adjusting Swiss corporate law not only to current but also future needs. The provisions regarding the capital were therefore subjected to comprehensive revisions. Thus, the legislator's focus on greater flexibility extends from the formation of a company all the way to capital increases, provisions regarding reserves, and the distribution of dividends.

2.1 General adjustments to the share capital

In its endeavor to be able to guarantee greater coherence between corporate and accounting law, the legislator now provided for the possibility of carrying the share capital in a foreign currency that is essential for the company's business. The capital must correspond to the equivalent of at least CHF 100'000 at the time of incorporation or conversion (Art. 621(2) new Swiss Code of Obligations ["nCO"]). In this case, bookkeeping and accounting must also be done in that same currency. The determination of the currency of the share capital is an inalienable competence of the general meeting, which is subject to a qualified majority. The articles of association must state the amount and the chosen currency of the share capital as well as the exchange rate applied. Any change of currency can only occur as of the beginning of a new fiscal year. The respective resolution of the general meeting may either be adopted prospectively for the following fiscal year, or retrospectively for the current fiscal year. The Federal Council determines which currencies are permitted; currently, these are the British pound (GPB), the euro (EUR), the US dollar (USD) and the Japanese yen (JPY).

While the minimum capital and the payment for the shares subscribed to in a stock corporation or limited liability company, respectively, remain unchanged, the current minimum nominal value of CHF 0.01 for shares in a stock corporation or CHF 100 for shares in a limited liability company, respectively, has been abolished. The minimum nominal value must now only be greater than zero (Art. 622(4) and Art. 774(1), respectively, nCO).

2.2 Intended acquisitions in kind and definition of capability of making contributions in kind

The provisions regarding the (intended) acquisition in kind has been deleted without substitution. Where provisions regarding acquisitions in kind have been set forth in the company's articles of association, they can be revoked only after ten years, even after the new corporate law becomes effective, or by waiver of such acquisition in kind. The deletion of this qualified formation requirement means that the special provisions, such as the obligation to disclose the articles of association and the registration, the auditor's certificate and accountability in the formation or capital increase report no longer apply in case of an (intended) acquisition in kind once the revision of the Stock Corporation Act has entered into force and effect. Therefore, in the future, the question until what point in time after the formation or capital increase (in the event of an acquisition in kind) a relevant connection to the formation or the capital increase does exist, has become moot. This new rule provides greater legal certainty because until now a violation of this provision resulted in nullity.

However, the abolition of the provisions governing acquisitions in kind will not result in the loss of capital protection. Rather, the current (partially supplemented) provisions will generally provide sufficient protection. Should damage occur in the future in connection with "acquisitions in kind", specifically the elements of liability set forth in Art. 754 CO and the claim for return of benefits pursuant to Art. 678 CO will apply.

Moreover, the legislator codified the criteria for making contributions in kind, which had previously been used by

the Swiss Office of the Commercial Register. These criteria are consistent with current practice, according to which assets are considered eligible for contributions in kind if they meet the following four criteria: capable of being carried as assets (capitalizability), transferability, availability, and realizability (Art. 634 nCO).

2.3 Capital band ["*Kapitalband*"]

One of the most comprehensive elements of the corporate law reform concerns the introduction of the new legal institution referred to as the "capital band" (Art. 653s – 653v nCO), allowing for capital requirements with greater flexibility being incorporated into the legal system. This capital band can be used only by a stock corporation, not by a limited liability company or a company of any other corporate form. Under the new rule, the board of directors is authorized according to the respective provision of the articles of association to increase and/or reduce the share capital entered in the commercial register by up to 50% and can do so for a duration of no more than five years within a bandwidth determined by the general meeting. The lower limit of the capital band is in the amount of CHF 100'000.

«THE INTRODUCTION OF THE CAPITAL BAND ALLOWS FOR CAPITAL REQUIREMENTS WITH GREATER FLEXIBILITY BEING INCORPORATED INTO THE LEGAL SYSTEM.»

It is by way of the provisions contained in the articles of associations that the powers of the board of directors can be limited (or that the board of directors can be authorized to carry out only a capital increase or reduction, as the case may be) and other requirements and conditions can be adopted. For reasons of protection of creditors, the authorization to reduce the share capital can be granted to the board of directors only if the company has not waived the limited audit of the annual accounts. Where the articles of association grant the board of directors an authorization only for an increase, the capital band basically corresponds to an authorized capital increase as currently provided under the law. The authorized capital increase will become obsolete by the revision of the Stock Corporation Act.

As a rule, the capital band ceases to exist upon expiration of the authorization of the board of directors under the articles of association. The capital band also lapses if the general meeting decides during the validity of the authorization of the board of directors to cancel the capital band, to carry out an (ordinary) increase or reduction of the share capital, or to change the currency of the share capital. Finally, the capital band also expires if the upper or lower limit has been reached and there is no possibility of providing otherwise because the board of directors' authorization was only for an increase or reduction of the capital.

2.4 Abolition of "authorized share capital"

Companies still holding authorized share capital as of January 1, 2023, are entitled to dispose of it until its expiration. Once the revision has come into force and effect, no authorized share capital can be created, or existing capital adjusted any more.

2.5 Contingent share capital

The law continues to provide for capital increases by way of contingent share capital (cf. Art. 653 et seq. nCO). Contingent share capital may exist either outside the capital band or be integrated into it. If the contingent share capital is integrated into the capital band, the limits of the capital band as per the articles of association remain unchanged. A change or adjustment of the capital band is not necessary. If the contingent share capital exists outside the capital band, this will result in a dynamic increase of the lower and upper limits of the capital band (cf. Charts 1 and 2 on p. 4).

2.6 Provisions on reserves (capital reserves / revenue reserves)

The revised Stock Corporation Act adjusts the provisions governing reserves to the extent necessary to the new accounting law. As a result, reserves are subdivided into capital reserves and revenue reserves. Revenue reserves are reserves generated from the company's activities (retained profits), while the capital reserves are created from the contributions of equity providers. An amount of 5% of the annual profit must be allocated to the statutory revenue reserve until, together with the statutory capital reserve, it reaches 50% of the share capital entered in the commercial register. In the event that voluntary reserves are to be created, the general meeting may provide for this in its articles of association or by way of a shareholder resolution. However, voluntary revenue reserves may be created only if this is justified by the continued prosperity of the company and by taking all shareholder interests into account.

2.7 Interim dividend

The possibility of an interim dividend had not yet been provided under the law. Under the new rules, the general meeting may adopt a resolution to distribute an interim dividend on the basis of interim financial statements (Art. 675a nCO), which dividend will have to be distributed out of the results of the current fiscal year. This is subject to compliance with the general provisions on dividends and to the preparation of audited interim financial statements. An audit is not required if the company has waived the limited audit. There is also no need for an audit if all shareholders waived it and the claims of creditors are not jeopardized as a result (Art. 675a(2) nCO).

3. General meetings modernized and more flexible

Modernizing and making general meetings more flexible is another focus of the corporate law reform. Particular consideration is given to the new forms of holding general meetings and the use of electronic means.

3.1 Access to annual reports and audit reports

The annual report and the audit report must be submitted to the shareholders at least 20 days prior to the general meeting, with the shareholders now being able to access them by electronic means (e.g., posting on a website). If the documents are not available in electronic form, each shareholder

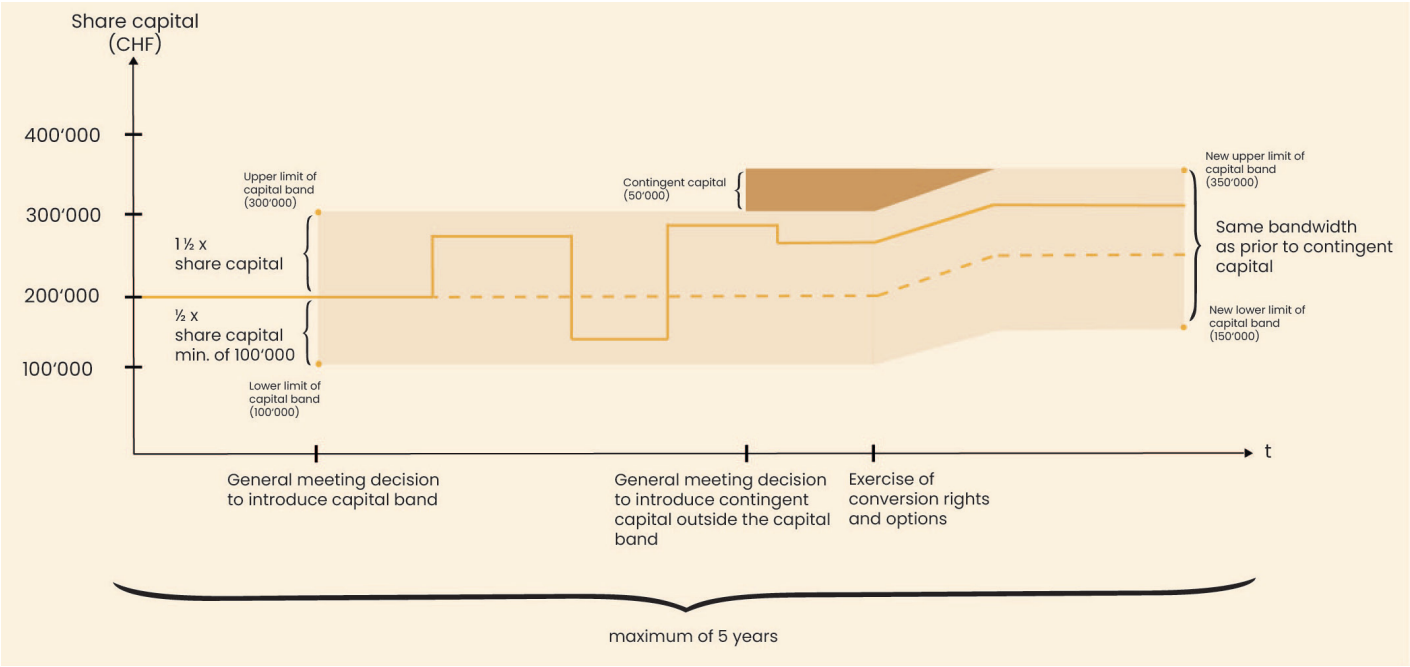


Chart 1: Contingent capital outside the capital band

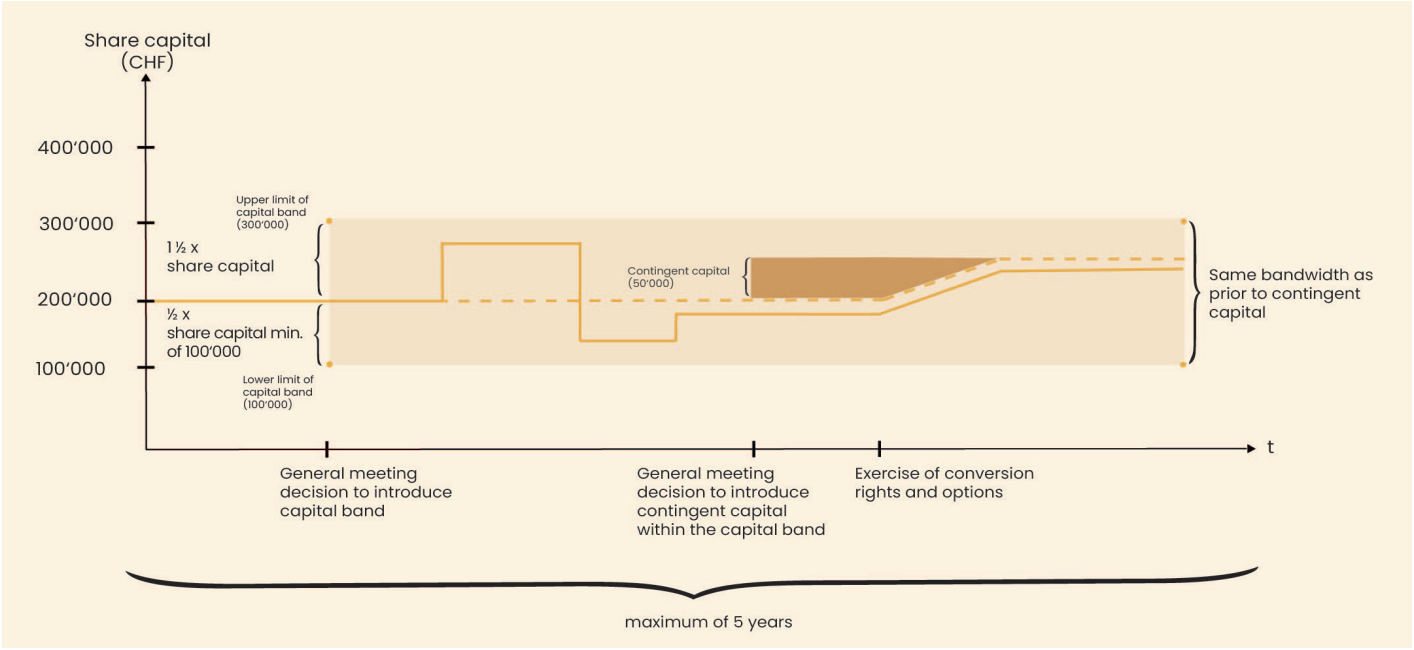


Chart 2: Contingent capital within the capital band

«MODERNIZING AND MAKING GENERAL MEETINGS MORE FLEXIBLE IS ANOTHER FOCUS OF THE CORPORATE LAW REFORM.»

may request that they be delivered to them in a timely fashion (Art. 699a(1) nCO).

3.2 Forms of the general meeting

The legislator went on to provide much more flexibility in the manner of holding general meetings by adding various other options in addition to the physical general meeting (held in Switzerland). The revised law now explicitly states that the general meeting may also be held at a location abroad, provided that this has been laid down in the articles of association and the board of directors has designated an independent proxy in the convening notice of the meeting (Art. 701b nCO). Non-listed companies have the option to dispense with the designation of an independent proxy if all shareholders agree. Holding general meetings abroad may be challenging in numerous ways, for example, when it comes to matters such as notarizations abroad or the possibility of establishing foreign jurisdiction, as well as potential fiscal consequences.

Another supplement to the provisions governing general meetings provides that those meetings may now also be held at several locations at the same time without this having to be stipulated in the articles of association. In this case, the votes of the attendees must be transmitted directly in sound and vision to all meeting locations.

A third option provides for the holding of a virtual general meeting that takes place entirely without a physical meeting location. Accordingly, the shareholders can exercise their rights electronically. Holding a virtual general meeting must be laid down in the articles of association. As a rule, an independent proxy must be designated by the board of directors, while non-listed companies may provide for a waiver of such designation of independent proxy in their articles of association.

The hybrid general meeting is a mixture between a virtual and physical general meeting. This means that the shareholders exercise their rights either at the physical location or without physical attendance by using electronic means (direct voting).

The revised law further provides for the general meeting to be held by circular letter without the need to comply with the rules applicable to the convening of meetings. In this case, the resolutions may be adopted in writing on paper or in electronic form unless any of the shareholders requests oral deliberation. This form of the meeting also does not need to be laid down in the articles of association.

A prerequisite of conducting a general meeting with the use of electronic means is the proper functioning of the technology used. The task of governing the use of electronic means falls within the province of the board of directors. The board of directors must also ensure that the identity of the attendees is established, that the votes cast in the general meeting are transmitted directly, that each attendee is in a position to submit motions and participate in the discussion, and that the result of votes cannot be falsified (Art. 701e nCO). Should technical problems on the part of the company occur during the general meeting, the vote or election must be repeated by the board of directors and the general meeting must, if need be, postponed to a later date if the problems cannot be solved immediately. All resolutions adopted by the general meeting prior to the technical problem remain valid (Art. 701f nCO). If the technical difficulties occur on the part of a shareholder, then they are within that shareholder's sphere of responsibility and this shareholder therefore bears the associated risks.

As before, shareholders do not have a right to request a certain form of holding a general meeting. The choice of the location of the meeting is up to the board of directors, who is merely responsible to ensure that the determination of such location will not unduly impede the exercise of shareholders' rights in connection with the general meeting (Art. 701a nCO).

3.3 Minutes and passing of resolutions

The minutes of the general meeting must be made available to the shareholders of non-listed companies upon request within 30 days and must satisfy the new statutory minimum requirements (Art. 702 nCO).

As regards the adoption of resolutions by the general meeting, it should also be noted that the articles of association may provide that the chairperson is to have the casting vote in the event of a tie (Art. 703(2) nCO).

4. Changes in respect of the board of directors

The provisions regarding the board of directors were also revised in the endeavor to improve corporate governance.

4.1 Adoption of resolutions by the board of directors

The board of directors has the option to adopt its resolutions also in virtual meetings. Circular resolutions can now be adopted entirely by electronic means (e.g., SMS, email, or DocuSign) without a signature being required; however, this is subject to the board of directors' right to provide otherwise in

writing (Art. 713(2) No. 3 nCO). Making use of these newly created forms may require an adjustment of the organizational rules. Minutes must be kept of the discussions and resolutions and signed by the chairperson and the secretary (Art. 713(3) nCO).

4.2 Elections and management

Another new provision explicitly provides that the members of the board of directors of non-listed companies must be elected individually unless the articles of association provide otherwise or the chairperson of the general meeting issues an order to the contrary with the consent of all shareholders represented. In the event the position of the chairperson of the board of directors becomes vacant, the board nominates a new chairperson for the remaining term of office. This applies to both listed and non-listed companies. The articles of association may provide for a different rule to remedy this organizational deficiency (Art. 712 nCO). As regards the transfer of management, the legislator has adjusted the modus operandi. In a new rule that works as a dispositive provision, the law provides that management may be delegated in accordance with organizational rules to individual members of the board of directors or to third parties unless the articles of association provide otherwise (Art. 716b(1) nCO). Prior to that change, the board of directors had to be authorized by way of a corresponding provision in the articles of association to delegate management.

4.3 Conflicts of interest

The law now stipulates explicitly that members of the board of directors and the management must notify the board of directors fully and immediately about any conflict of interest affecting them. The board of directors must then take all measures necessary to safeguard the interest of the company (Art. 717a nCO).

5. Proxy voting

One of the most elementary participation rights of each shareholder is their voting right, which they can exercise at the general meeting either personally or by proxy. The representation of the shareholder is set forth in Art. 639b et seq. nCO. These provisions are slightly adjusted as part of the revision of the Stock Corporation Act. What is more, the provisions governing the exercise of the voting right when no instructions are given to the proxy have also been amended. The applicable provisions then distinguish between listed and non-listed companies.

«CIRCULAR RESOLUTIONS CAN NOW BE ADOPTED ENTIRELY BY ELECTRONIC MEANS.»

5.1 Changes in private proxy voting

The revised Stock Corporation Act also provides both private and institutional proxy voting. While private proxy voting provides that another shareholder or a third party may act as proxy, institutional proxy voting differentiates between an independent proxy, a governing body acting as proxy, and a custodian acting as proxy.

In case of private proxy voting, the shareholder determines the person who is to represent them at the general meeting. However, whether or not that authorized third party will also be admitted to a general meeting or allowed to make the declaration of intent on behalf of the person so represented at that meeting is governed by the Stock Corporation Act.

As before, the articles of association of non-listed companies may provide that only another shareholder can be authorized to serve as proxy, which, among other things, serves the purpose of enforcing the restriction on transferability set forth in the articles of association and aims at keeping non-shareholders away from internal corporate matters (Art. 689d(1) nCO). This possibility was now abolished for listed companies under the revised law. If the articles of association of non-listed companies provide for a restriction of representation to other shareholders, the board of directors must, upon request of any shareholder, designate an independent proxy or a governing body acting as proxy, and inform the shareholders by no less than 10 days prior to the general meeting whom they can appoint to represent them. If the board of directors fails to comply with this obligation, the shareholder may appoint any third party to represent them (Art. 689d(3) nCO).

5.2 Obligation to designate an independent proxy

In cases where the general meeting takes place abroad or is held virtually, the board of directors is obligated to designate an independent proxy in the convening notice; as far as virtual general meetings of non-listed companies are concerned, this obligation may, however, be dispensed with by way of a stipulation to this effect in the articles of association (Art. 701d(2) nCO). Furthermore, non-listed companies also have the option to forgo the designation of an independent proxy for meetings held abroad if all shareholders agree (Art. 701b(2) nCO). Moreover, a shareholder of a non-listed company may, where applicable, choose to be represented by a governing body as proxy or a custodian as proxy, while this form of representation remains inadmissible for listed companies.

5.3 Authorization and independence of the proxy exercising a voting right

The independence of the proxy exercising a voting right must not be compromised, neither de facto nor to all appearances, which is why the law explicitly provides that the rules on the independence of the auditor for the ordinary audit is to be applicable here as well (Art. 689b(4) in conjunction with Art. 728(2-6) nCO). The independent proxy must provide proof of identity by submitting a power of attorney, and the board of directors has the right to create forms that must be used to grant a power of attorney and instructions (Art. 689b(3) nCO). If need be, the shareholders may grant powers of attorney and give instructions to the independent proxy also by electronic means. The board of directors is responsible for ensuring that the shareholders have, in particular, the possibility (i) to give instructions to the independent proxy regarding each motion on agenda items stated in the convening notice, and (ii) to give general instructions to the independent proxy regarding motions on agenda items that have not been notified and regarding new agenda items pursuant to Art. 704b nCO. The governing body acting as proxy, the custodian acting as proxy, and the independent proxy must abstain from voting if they have received no instructions (Art. 689b(3) nCO).

5.4 The proxy's duty to inform

The independent proxy, the governing body acting as

proxy, and the custodian acting as proxy must inform the company of the number, type, par value and class of shares represented by them (Art. 689f nCO). Failing to provide this information may result in the nullity of resolutions adopted by the general meeting. In addition, this information must also be recorded in the minutes of the general meeting. Also new is that the independent proxy of a listed company must treat the instructions received from the shareholders (but not the authorization) as confidential and may provide the company with general information on those instructions no earlier than three business days prior to the general meeting, while being obligated to provide details during the general meeting as to what information he or she communicated to the company ahead of the meeting.

6. Minority protection and strengthening of shareholders' rights

Strengthening of shareholders' rights is one of the main pillars of the current corporate law reform, where in particular the threshold values of the various participation and control rights were adjusted. The table on page 8 presents and overview of the amended threshold values.

6.1 Disclosure and inspection rights

Under the new rules, shareholders of non-listed companies may request written information from the board of directors on the company's affairs also outside the general meeting if together they represent at least 10% of the share capital or the votes (Art. 697(2) nCO). The board of directors must disclose information within four months and the answers must also be presented for inspection at the latest during the next general meeting (Art. 697(3) nCO). Furthermore, shareholders representing at least 5% of the share capital or the votes may request that the board of directors grant them the right to inspect books of account and files (Art. 697a nCO). The right to inspection must be granted by the board of directors also within four months of receipt of the request. The board of directors will have to provide written reasons for any rejection. The board of directors must grant the disclosure and the inspection rights only to the extent that this is necessary for the shareholders to exercise their rights and does not jeopardize any trade secrets or any other legitimate interests of the company. The board of directors must provide written reasons for any rejection (Art. 697(4) or Art. 697a(3), respectively, nCO).

6.2 Convening the general meeting; right to place items on the agenda and submit motions

Shareholders of a non-listed company representing 10% of the share capital or the votes may request that a general meeting be convened (Art. 699(3) nCO). If they represent only 5% of the share capital or the votes, they have at least the right to ask for an item to be placed on the agenda during the next general meeting or that motions on items of the agenda be included in the notice convening the general meeting (Art. 699b nCO). The shareholders may also add a brief statement of reasons to their motions that must be included in the notice convening the general meeting.

6.3 Special investigation

The special audit closely connected to the right to disclosure and the right to inspection has a new name, it is now referred to as *special investigation*. It allows any shareholder who has already exercised the right to disclosure and the right to inspection to file a motion in the general meeting to have certain matters investigated by independent experts to the extent that this is necessary to exercise their shareholder's rights (Art. 697c nCO). Once the motion is granted by the general meeting, each shareholder or the company may, within 30 days, file a petition with a court of law to appoint an expert to conduct the special investigation. Under the revised Stock Corporation Act, shareholders of non-listed companies whose motion was denied by the general meeting must represent 10% of the share capital or the votes in order to be able to petition a court within three months that a special investigation be conducted (Art. 697d nCO). Furthermore, it is also sufficient if the petitioners can substantiate by prima facie evidence that founders or governing bodies of the company have violated the law or the articles of association and that such violations may harm the company or the shareholders. Finally, providing evidence of damage that has already occurred is no longer required. The experts must provide the report on the results of their investigation in writing. In cases where the special investigation was ordered by the court, the experts will submit their report to the court. The board of directors submits the expert's report to the next general meeting as well as its own statement and that of the petitioners. The costs of the special investigation will be borne by the company. The court may award some or all of the costs against the petitioners if exceptional circumstances so warrant (Art. 697h^{bis}(2) nCO).

6.4 Action for dissolution

Finally, the requirements for an action for dissolution have also been amended. Until now, only shareholders representing together at least 10% of the share capital were entitled to demand such action. Now, also those shareholders who represent at least 10% of the votes will be able to request action for dissolution. However, the dissolution may still be requested only if there is good cause.

6.5 Restitution of benefits

Under the current corporate law, shareholders and the company already have the right to demand the restitution of dividends, shares of profits (paid to board members), other profit shares, interest paid to shareholders until commencement of the company's operations or other benefits from the other shareholders, members of the board of directors as well as their close associates. This was, however, subject to the defendant having received those benefits without justification and in bad faith. The revised Stock Corporation Act now also allows for the restitution of remuneration as well as statutory capital and profit reserves if those have been received merely without justification (Art. 678(1) nCO). Bad faith on the part of the recipient is no longer a prerequisite, which, in practical terms, is difficult to prove anyway. In addition, the group of persons standing to be sued is extended to include persons involved in the management of the company and members of the board of advisors and their close associates.

The above-mentioned group of persons also becomes liable to restitution if the company takes over assets from them or enters into other legal transactions with them if there is an obvious disproportion between performance and counter-performance (Art. 678(2) nCO). However, the revised Stock Corporation Act does no longer require that in addition to the obvious disproportion to the counter-performance there must also be an obvious disproportion to the economic situation of the company.

Both the company and the shareholder may only sue for payment or restitution to the company. The board of directors is primarily responsible for claiming on behalf of the company that benefits unjustly received be returned. Should the board of directors fail to act, the general meeting may also decide on

Shareholder rights	Until December 31, 2022	As of January 1, 2023	
		non-listed company	listed company
Disclosure right (outside the general meeting)	Only financial market regulations for listed companies	At least 10% of the share capital or votes	Financial market regulations, e.g., ad hoc publicity
Right to inspect the books of account	No threshold (but approval by general meeting or board of directors)	At least 5% of the share capital or votes	At least 5% of the share capital or votes
Right to convene the general meeting	At least 10% of the share capital or (according to standard practice) shares with a par value of CHF 1 million.	At least 10% of the share capital or votes	At least 5% of the share capital or votes
Right to add items to the agenda and submit motions	Shares with a nominal value of at least CHF 1 million or at least 10% of the share capital	At least 5% of the share capital or votes	At least 0.5% of the share capital or votes
Special investigation (previously *special audit*)	At least 10% of the share capital or shares with a nominal value of CHF 2 million.	At least 10% of the share capital or votes	At least 5% of the share capital or votes
Action for dissolution	At least 10% of the share capital	At least 10% of the share capital or votes	At least 10% of the share capital or votes

Table: Overview of threshold values of participation and control rights

whether to file a lawsuit (Art. 678(5) nCO). In this case, the general meeting may entrust the board of directors or a third party with the conduct of the litigation. The claim for restitution now becomes statute-barred upon expiration of three years after the company or the shareholder has become aware of it. In any event, limitation occurs ten years after the claim arose (Art. 678a nCO).

6.6 Important resolutions of the general meeting

The shareholder rights are strengthened by the extension of the catalogue of important resolutions in Art. 704 nCO that require at least two-thirds of the voting rights represented and an absolute majority of the nominal value of shares represented. Noteworthy in this respect are in particular the introduction of the capital band, the change of currency of the share capital, the provision of the articles of association allowing general meetings to be held abroad, the introduction of the casting vote of the chairperson in the general meeting, the introduction of an arbitration clause in the articles of association, the waiver of naming an independent proxy at the virtual general meeting of a non-listed company, and the delisting of securities of a listed company.

What has also been clarified in the new rules is that provisions of the articles of association that require a qualified majority in order to be adopted also require a qualified majority to be repealed or amended (Art. 704(2) nCO).

6.7 Responsibility of governing bodies

As before, any shareholder may sue for damages incurred by the company. However, in line with the provisions regarding the right to claim restitution, the general meeting may now also decide that the company file a liability action (Art. 756(2) nCO). In this case, it can entrust the board of directors or a representative to conduct the litigation. The legislator has provided for a relative limitation period of three years or an absolute limitation period of ten years, respectively, for the sake of standardization of the statute of limitations (Art. 760(1) nCO).

6.8 Introduction of an arbitration clause

The articles of association may now contain an arbitration clause stipulating that an arbitral tribunal that has its seat in Switzerland may be specified for disputes under company law (Art. 697n nCO). The proceedings before the arbitral tribunal are governed by the rules on proceedings before arbitral tribunals based in Switzerland (Art. 353 et seq. Swiss Code of Civil Procedure), while the articles of association may also refer to rules of procedure of an arbitral institution (Art. 373(1) lit. b Swiss Code of Civil Procedure). Some of the advantages of arbitral tribunal include in particular the choice of judges with specialist or industry knowledge and the exclusion of the public to the extent permitted by law.

Since the shareholders would forgo the legal protection awarded by the ordinary courts of law due to the adoption of the arbitration clause in the articles of association, the introduction of that clause in the articles requires a qualified majority (Art. 704(1) No. 14 nCO).

7. Restructuring and insolvency

If the company suffers a financial crisis, its governing bodies are responsible for taking specific action. As part of the revision of the Stock Corporation Act, some of the existing obligations of the board of directors were made more flexible, redefined with greater specificity, and renewed. Complying with its obligation to act is of fundamental importance to the board of directors because a violation of this obligation could result in liability claims.

7.1 Insolvency

The new Stock Corporation Act provides that the board of directors' obligation to monitor the company's solvency, which had previously been summarized under the financial

«THE LAW PROVIDES A CASCADING SEQUENCE OF MEASURES TO BE TAKEN BY THE BOARD OF DIRECTORS.»

planning obligation, is now explicitly anchored in the law (Art. 725(1) nCO). Accordingly, the board of directors must ensure that liquidity planning and monitoring is adapted to the size and nature of the company and its financial and economic situation. The law provides a cascading sequence of measures to be taken by the board of directors with due haste in the event of imminent insolvency: In a first step it must strive to restore the company's solvency. Should these measures be unsuccessful, the board then, in a second step, must take restructuring measures, and, as a last resort, file an application for a debt-restructuring moratorium (Art. 725(2) nCO).

The company is deemed insolvent if it is constantly unable to meeting its financial obligations that have fallen due. If the company's inability to pay its debts is only temporary in nature, then the elements of insolvency have not been met.

7.2 Loss of capital

Similar to an event of imminent insolvency, the board of directors also has to comply with a cascading sequence of rules of conduct to be fulfilled with due haste in the event of a capital loss (Art. 725a nCO). The new law provides that the board of directors must, as a first step, take measures to eliminate the capital loss, which are basically of a purely accounting nature. A second step provides for actual restructuring measures. The general meeting must be convened only if the board of directors wishes to introduce measures falling with the province of the general meeting.

When a capital loss has occurred, the annual financial statements must be subjected in any event to at least a limited audit prior to the annual general meeting by the auditor or – if there is none – by a licensed audit expert appointed ad hoc (Art. 725a(2) nCO). If the general meeting takes place without audit of the annual financial statements, the resolutions adopted therein with regard to the approval of the annual financial statement and the appropriation of retained earnings are null and void. This obligation poses a high risk, particularly for board of directors of companies having waived the limited audit since the capital loss may be recognized either too late or not at all. Only if an application for a debt-restructuring moratorium has been filed can the audit be dispensed with.

7.3 Over-indebtedness

As applicable under the current provisions of the law, the board of directors, if it has reasonable grounds for concern that the liabilities are no longer covered by the assets, must prepare interim financial statements at going concern values and interim financial statements at disposal values (Art. 725b(1) nCO). Interim financial statements at going concern values are sufficient in cases where there is a going concern assumption and the interim financial statements at going concern values do not show any over-indebtedness. Where the going concern assumption is not met, interim financial statements at disposal values are sufficient. The interim statements must be audited, also in the event a limited audit has been waived, by the auditor or a licensed audit expert respectively (Art. 725b(2) nCO).

If both interim financial statements show that the company is over-indebted, the board of directors must file for the institution of bankruptcy or for a debt-restructuring moratorium with the court. However, this can be dispensed with if either sufficient creditors of the company subordinate their claims to those of all other creditors to the extent of the over-indebtedness and defer their claims, or a silent restructuring is successful. The instrument of subordination was supplemented as part of the revision of the Stock Corporation Act to provide that now the subordination must also cover the interest claims accrued during the period of over-indebtedness. Furthermore, the practice of the Swiss Federal Supreme Court regarding silent restructuring was to a great extent enshrined in law (Art. 725b(4) No. 2 nCO). Accordingly, the notification of the court can be dispensed with for as long as there is a reasonable chance that the over-indebtedness can be eliminated within a reasonable period, but no later than 90 days after the presentation of the audited interim financial statements, and that the claims of the creditors are not exposed to any further risk.

7.4 Removal of the auditor from office

In is noteworthy in this context that the auditor may now be removed from office by the general meeting only for cause (Art. 703a (4) nCO). The reasons for the removal from office must be stated in the notes to the financial statements (Art. 959c(2) No. 14 nCO).

8. Transitional provisions and amendment of the articles of association

The transitional provisions provide for a period of two years for the adaptation of the articles of association and of regulations. Any provisions of the articles of association and of regulations that are incompatible with the new law remain in force until they have been adapted, but for no longer than two years. This may result in, among other things, certain provisions under the old version remaining applicable for another

two years, in particular participation and control rights. Once the two-year transitional period has expired, all provisions not compatible with the new law become automatically null and void.

According to an official notification of the Swiss Federal Office of the Commercial Register dated January 17, 2022, it is already possible now to make adjustments to the articles of association that are not subject to publication by means of a scheduled amendment to these articles, and to have them entered in the commercial register. The request for registration of all other amendments of the articles of association will not be possible until after the new Stock Corporation Act has entered into force and effect. However, by means of a conditional resolution to amend the articles of association, the general meeting can resolve already now to amend the articles of association in accordance with the revised Stock Corporation Act, but not register such amendment with the commercial register until after the new Stock Corporation Act has actually entered into force and effect.

The revision of the Stock Corporation Act was designed such that companies are not forced to amend their articles of association. However, in order to take advantage of the new possibilities, an amendment of or supplement to the provisions contained in the articles of association may very well become necessary. Furthermore, the question must be examined of whether other documents, such as shareholders› agreements, organizational rules as well as draft minutes of the general meeting need to be adjusted or, as is the case for forms used for the purpose of granting powers of attorney and instructions, need to be redrafted.

The team at Wenger Vieli will be happy to assist you in implementing the corporate law reform.

Marc Walter
Partner
m.walter@wengervieli.ch
+41 58 958 53 58

Michèle Joho-Menotti
Senior Associate
m.joho@wengervieli.ch
+41 58 958 58 04

Cedric Fischer
Associate
c.fischer@wengervieli.ch
+41 58 958 53 91

Janica Wyss
Associate
j.wyss@wengervieli.ch
+41 58 958 55 23

Wenger Vieli is your reliable partner in legal and tax matters. Not only do we pride ourselves on bringing outstanding professional skills, experience, and a sense of responsibility to the table, but we are also highly inquisitive! Where others see obstacles, we see opportunities, find solutions, and open up new horizons. We do this with pleasure. In Switzerland, Europe, and the rest of the world.