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An Introduction to the Law Governing the Swiss Joint Stock Corporation

Rolf Watter
Bar & Karrer in Zurich.

Nadine Faruque

David F. Kanzig

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An Introduction to the Law Governing the Swiss Joint Stock Corporation

Rolf Watter*
Nadine Faruque**
David F. Känzig***

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* Rolf Watter is a member of the Zurich Bar and is a junior partner with the law firm of Bür & Karrer in Zurich. He received his legal education in Switzerland (University of Zurich, Dr. iur.) and in the U.S. (Georgetown, LL.M.). He is an associate professor (Privatdozent) at the University of Zurich, coeditor of a Swiss law journal, Aktuelle Juristische Praxis, editor of a commentary on Swiss corporate law, and has published various books and articles in the fields of banking, corporate, and securities law.

** Nadine Faruque is a member of the Zurich and New York Bars and is currently associated with the law firm of Bür & Karrer in Zurich. She received her legal education in Switzerland and the U.S. During her studies at the University of Berne, she clerked with the special prosecutor for white collar crime, the District Court in Berne, and a law firm in Berne. After graduating, she joined the Secretariat of the Swiss Cartel Commission (Anti-trust-commission) as an attorney. After completing her LL.M. degree at Duke University, she joined the New York law firm of Reid & Priest as an associate.

*** David F. Känzig is a member of the Zurich and New York Bars and is currently associated with the law firm of Bür & Karrer in Zurich. He received his legal education in Switzerland and the U.S. After graduating from the University of Zurich, he clerked with the district attorney, the district court in Zurich, and then as an associate attorney for another law firm in Zurich. After completing the M.C.J. degree at New York University, he was an associate with Steptoe & Johnson in Washington, D.C.
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I. THE SWISS JOINT STOCK CORPORATION

The Swiss joint stock corporation is the predominant legal vehicle for any type of business activity in Switzerland. This Article sets forth the law governing Swiss stock corporations and provides a detailed overview of the formation of stock corporations in Switzerland. This Article addresses the requirements and characteristics of various features of a Swiss stock corporation, namely, the share capital requirements, the classes of shares, the rights and duties of shareholders, the accounts of the corporation, the General Meeting, the board of directors, the Auditors, equity requirements and dissolution,

mergers and takeovers, personal liability issues, and transitory provisions. This Article also provides an overview of the changes that may occur in Swiss company law upon Switzerland's admission into the European Community (EC). Upon admission to the EC, Switzerland will have to adjust its laws to European standards. This Article sets forth these potential adjustments. Finally, this Article provides a brief analysis of how Swiss company law influences the Swiss securities market.

In 1990, there were 161,964 stock corporations registered, as compared to 2756 limited liability corporations, 13,858 cooperatives, 18,772 partnerships, and 146,770 other registered business entities—most of which were owned by one person. The stock corporation is the legal entity used by large public companies, by subsidiaries of multinational corporations, by joint ventures, and also by small business units for which the legislative body initially created the form of the limited liability corporation. The stock corporation can also be used for noncommercial purposes such as nonprofit organizations.

As a general rule, the stock corporation is the legal entity that best suits the requirements of foreign business interests. No special license is required to do business, except for such areas as banking, insurance, or railways. The main features of the stock corporation are:

1. It is a legal entity distinct from its shareholders, carrying its own company name.
2. Shareholders are not personally liable for any liabilities of the company. The shareholders' only obligation is to pay-in the capital to which they subscribed. On only very rare occasions will courts allow creditors to pierce the corporate veil to satisfy their claims from the assets of shareholders.
3. A stock corporation has a stated capital of at least CHF 100,000, which is divided into shares each with a nominal value of at least CHF 10.

II. THE REFORM OF OCTOBER 4, 1991

The law governing the stock corporation has remained unchanged since 1936. Shortfalls in the law were recognized in the early 1960s, and the reform process which began in 1968 was to last an unusually long twenty-five years. The reform which occurred on October 4, 1991 was initially intended to:

1. Ensure more transparency, notably by improving accounting standards;

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2. SCHWEIZERISCHES OBLIGATIONENRECHT (SR 220), art. 620, para. 3 [hereinafter OR].
3. Id. art. 620, para. 2.
4. Id.
5. Id. art. 680.
6. CHF is an abbreviation for Swiss Francs.
7. OR art. 621.
8. Id. art. 622, para. 4.
10. For a more detailed history of the reform, see BÖCKLI, supra note 1, at 1-6.

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(2) strengthen the protection of minority shareholders by, for example, reinforcing subscription rights;
(3) improve the functioning of the governing bodies of the corporation;
(4) facilitate the raising of capital; and
(5) avoid abuses of the corporate form.11

Most of these goals have been achieved; however, transparency still falls short of European standards. Moreover, there is no efficient minority shareholder protection in case of a change of control. Criticism of a more general nature points to the fact that Swiss law still governs large public companies by the same set of rules as closely held businesses.12 It is therefore expected that further changes will become necessary.13

III. THE LAW GOVERNING STOCK CORPORATIONS

A. The Formation of the Stock Corporation14

1. The Articles15.

The formation of the stock corporation is governed by the Swiss Code of Obligations (OR), articles 629 through 646. The process of formation is usually initiated by drafting the Articles of incorporation, which must include:16

(1) The name of the corporation.17 The parties have discretion in choosing this name, provided it is distinct from other firm names, is not misleading, and does not merely serve publicity purposes. Restrictions apply to the use of geographical terms18 or descriptive terms such as "international" and "center." It is customary to register the name in three or four languages (e.g., XYZ Phantasy AG, SA, Ltd.);
(2) the domicile of the corporation.19 Generally no distinction is made between a registered office and a principal place of business, as is the case in the U.S.;
(3) the purpose or objectives20 of the corporation;
(4) the share capital,21 the minimum being CHF 100,000;22

11. Botschaft, supra note 9, at 767.
12. BÖCKLI, supra note 1, at 3-6.
13. See discussion infra part V.
15. Where capitalized, the term "Articles" means articles of incorporation or association ("Statuten," "Statuts"), as defined in OR articles 626 and 627.
16. See OR art. 626.
17. Id. art. 626, § 1. See id. arts. 944-56.
18. Id. art. 944, para. 2.
19. Id. art. 626, § 1.
20. Id. § 2.
21. Id. § 3.

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(5) the proportion of share capital that is paid-in, the minimum being twenty percent or CHF 50,000;
(6) the number, category, and nominal value of each type of share, the minimum being CHF 10 per share;
(7) rules regarding the convocation of the General Meeting and the shareholders' right to vote;
(8) rules relating to the Board of Directors and Auditors; and
(9) the form in which the corporation notifies its shareholders.

Generally, parties use a standardized form and insert the above information. Additional items may be included in the Articles, some of which are:

1. (1) A possible date of dissolution;
   (2) restrictions on the transfer of registered shares;
   (3) special rights of certain shares;
   (4) limitations on voting rights or on the right of having one's shares represented by a third party at the General Meeting;
   (5) the authorization to delegate the management of the company from the Board of Directors to individual members of the Board or to third parties—managers; and
   (6) disclosure of a contribution in-kind or of major investments made after the formation.

2. The Incorporators' Meeting

Swiss law requires that a minimum of three incorporating shareholders attend in person or by proxy. However, it is possible to use a fiduciary, such as an attorney, as the

22. Id. art. 621.
23. Id. art. 626, § 3.
24. Id. art. 632, para. 2.
25. See discussion infra part III.C.
26. OR art. 626, § 4.
27. Id. § 5. Where capitalized, the term “General Meeting” means the meeting of the shareholders of a company (“Generalversammlung,” “Assemblée générale”), as further defined in OR article 698 et seq.
28. Where capitalized, the terms “Board” or “Board of Directors” means the body formed by all directors of the company (“Verwaltungsrat,” “Conseil d'administration”), as further defined in OR art. 707 et seq.
29. OR art. 626, § 6. Where capitalized, the term “Auditors” means the auditing body of the company (“Revisionsstelle,” “Organe de révision”), as defined in OR article 727 et seq.
30. Id. art. 626, § 7.
31. Id. art. 627, § 4.
32. Id. § 8.
33. Id. § 9.
34. Id. § 10.
35. Id. § 12.
36. Id. art. 628.
37. Id. art. 625, para. 1.
incorporator. In practical terms, future directors will also act as incorporators because the law prescribes that directors be shareholders.\textsuperscript{38}

The incorporating shareholders must declare their intent to form a corporation with the Articles they have agreed upon in the presence of a notary public.\textsuperscript{39} Further, the incorporators must disclose the number of shares to which each subscribes.\textsuperscript{40} If the shares are issued for cash, the incorporators must present confirmation by a bank that the necessary amount has been deposited with such bank for account of the future corporation.\textsuperscript{41} With a contribution in-kind, for example, if a business, certain machinery, or a patent is transferred to the company for shares, the law requires a written contract between the corporation and the person contributing assets,\textsuperscript{42} a report of the incorporators which details among other points the valuation principles,\textsuperscript{43} and a verification report of the Auditors which confirms that the incorporators' report is complete and accurate.\textsuperscript{44} As mentioned above, the fact that there was a contribution in-kind must be reflected in the Articles.\textsuperscript{45} A similar regime applies if a major investment is envisioned after a formation for cash.\textsuperscript{46}

The incorporators then proceed to elect the members of the Board of Directors and the Auditors.\textsuperscript{47}

3. \textit{The Registration in the Commercial Register}\textsuperscript{48}

The corporation comes into existence upon its registration in the Commercial Register.\textsuperscript{49} However, it is possible to act on behalf of a future corporation.\textsuperscript{50} Shares issued prior to registration are void.\textsuperscript{51} The Registrar\textsuperscript{43} supervises compliance with the law; in practical terms, registration will require anywhere from eight to twenty days. The registration includes:

\begin{itemize}
\item[(1)] The date of the Articles, respectively the date of the incorporators' meeting;
\item[(2)] the name and domicile of the corporation;
\item[(3)] the purpose and, if specified, the limited duration of the company;
\item[(4)] the amount of the share capital and the amounts paid-in;
\end{itemize}

\textsuperscript{38.} Id. art. 707, para. 1.
\textsuperscript{39.} Id. art. 629, para. 1.
\textsuperscript{40.} Id. art. 629, para. 2.
\textsuperscript{41.} Id. art. 633.
\textsuperscript{42.} Id. art. 634.
\textsuperscript{43.} Id. art. 635.
\textsuperscript{44.} Id. art. 635a.
\textsuperscript{45.} Id. art. 628.
\textsuperscript{46.} Id. art. 628, para. 2.
\textsuperscript{47.} Id. art. 629, para. 1.

\textsuperscript{48.} Where capitalized, the term "Commercial Register" means the register kept on the cantonal level (often in one, sometimes in several offices), in which certain data about companies must be entered. See \textit{id. art. 927 et seq.} The Federal Commercial Register in Bern has supervisory functions.

\textsuperscript{49.} Id. art. 643.
\textsuperscript{50.} Id. art. 645.
\textsuperscript{51.} Id. art. 644.
\textsuperscript{52.} Where capitalized, the term "Registrar" means the head of a Cantonal Commercial Register.
(5) the number, the nominal value, category of the shares issued, and transfer restrictions for registered shares;
(6) information on contributions in-kind, and on bonus shares;
(7) the names of the persons authorized to represent the company;
(8) the names of the Auditors; and
(9) rules on how the company notifies its shareholders.53

This information is not only publicly available, it is also published in the Swiss Official Commercial Gazette.54 Persons dealing with the corporation are deemed to have knowledge of the registration. The law also provides for a special registration of branch offices.55

4. Tax Consequences of a Formation

Formation of a corporation triggers a three percent issuance tax, or stamp duty,56 on the consideration received by the company for the shares issued. The consideration received for the shares is often equal to the stated capital. A reduced rate of one percent (or zero percent, starting April 1, 1993) may apply for corporations formed in the course of a merger, joint venture, or reorganization.57

Further, the corporation is liable for income and net capital taxes, which on the federal level amount to a maximum of 9.8 percent on income and 0.0825 percent on net capital, including reserves.58 Cantonal income taxes vary from approximately 10 to 25 percent, capital taxes from 0.04 to 0.7 percent. Special rates apply to holding companies and companies doing business abroad.

Dividends paid to shareholders are subject to a thirty-five percent withholding tax,59 which can be reclaimed in full by Swiss residents upon filing their personal income tax forms. Foreign residents may benefit from a double taxation treaty. Dividends received by Swiss residents are fully taxed as income, with the exception of holding companies, whose income is virtually tax exempt.

53. OR art. 641, § 11.
54. The Swiss Official Commercial Gazette is the newspaper which publishes, inter alia, data registered in the Commercial Register. See id. art. 931.
55. Id. art. 642.
56. Bundesgesetz über die Stempelabgaben art. 8 (SR 641.10) [hereinafter StG].
57. StG art. 6, para. 1(a).
58. Bundesratsbeschluss über die Erhebung einer direkten Bundessteuer arts. 48-62 (SR 642.11) [hereinafter BDBSt].
59. Bundesgesetz über die Verrechnungssteuer art. 13 (SR 642.21) [hereinafter VStG].
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B. The Increase of Share Capital

1. The Ordinary Increase of Share Capital

Some of the most important changes in the new law have taken place in the area of the increase of share capital. While the General Meeting is still competent for deciding on the capital increase, it is now the Board of Directors that must implement this decision within three months.61

The shareholders' decision to increase the share capital, taken by simple majority except in the cases mentioned hereinafter, must contain the following elements:62

(1) The nominal value by which the capital is to be increased, as well as the percentage up to which the capital must actually be paid in;
(2) the number, the nominal value, and category of the shares;
(3) the issue price (consisting of the nominal value and a premium) or the authorization for the Board to fix this price;
(4) certain disclosures on contributions in-kind or major investments made in connection with the capital increase. The respective resolution must be taken by a special majority;63
(5) a restriction of transferability of the new shares, if any; and
(6) a decision on a restriction or cancellation of the subscription rights.64 Such a decision requires a special majority65 and may be challenged66 if no important grounds exist that would justify the restriction.67 The law considers such grounds to be, inter alia, a takeover of a company financed by shares or workers' participation through an increase in the share capital.

The Board of Directors will then solicit subscribers for the new shares. If the public is targeted, there is a prospectus requirement.68 The contents of such a prospectus are, however, rather limited compared to other jurisdictions. Subscribers must send in a subscription form69 which must refer to the shareholders' resolution to increase share capital.

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61. OR art. 650.
62. Id. art. 650, para. 2.
63. Id. art. 704, para. 1, § 5.
64. Id. art. 652b.
65. Id. art. 704, para. 1, § 6.
66. Id. art. 706.
67. Id. art. 652b.
68. Id. art. 652a.
69. Id. art. 652.
The consideration for the new shares issued is then paid-in according to the rules applicable to the formation.\textsuperscript{70} Subscribers for cash must therefore pay the respective amounts into a blocked bank account.\textsuperscript{71} If there is a contribution in-kind, the special disclosure requirements need to be observed and the Board needs to confirm the adequacy of the valuation in a special report, which is then verified by the Auditors.\textsuperscript{72} The corporation may also transform reserves into share capital\textsuperscript{73} and then distribute such newly created shares to its shareholders; however, Swiss federal tax law and some cantonal tax laws treat such an issue of shares as income to the shareholders.\textsuperscript{74} In order to avoid practical problems, publicly traded companies often have their capital increases underwritten by a bank which undertakes to place the shares with current shareholders or the public.

This procedure ends with a notarized resolution of the Board of Directors in which the Directors confirm that all shares have been subscribed to and the requested amounts have been transferred to the corporation.\textsuperscript{75} In the same deed, the Board amends the clause in the Articles relating to the stated capital. New shares may only be issued after registration of the increase in the Commercial Register.\textsuperscript{76}

2. The Authorized Share Capital

The General Meeting can also authorize the Board of Directors to increase the share capital within a period not exceeding two years from the date of such authorization.\textsuperscript{77} This decision requires an amendment to the Articles.

The authorized share capital may not exceed fifty percent of the current stated capital.\textsuperscript{78} The Board of Directors may issue new shares within the scope of the authorization for cash or contributions in-kind.\textsuperscript{79}

Once the Board of Directors has decided to make use of the authorized capital in total or in part, the procedure is the same as in the ordinary increase of the share capital and ruled by the same provisions,\textsuperscript{80} the Board will collect subscription forms either from current shareholders (if their subscription rights are not canceled) or from the public by means of a prospectus.\textsuperscript{81}

\textsuperscript{70} Id. art. 652c. See discussion supra part III.A.2.
\textsuperscript{71} OR art. 633.
\textsuperscript{72} Id. arts. 652e, 652f.
\textsuperscript{73} Id. art. 652d.
\textsuperscript{74} BDBSt art. 21c.
\textsuperscript{75} OR art. 652g.
\textsuperscript{76} Id. art. 652h.
\textsuperscript{77} Id. art. 651.
\textsuperscript{78} Id. art. 651, para. 2.
\textsuperscript{79} Id. art. 651, para. 4.
\textsuperscript{80} Id. arts. 651c-652h.
\textsuperscript{81} Id. art. 652a.
3. The Conditional Share Capital

The main feature of conditional share capital is that third parties, for example, holders of options or conversion rights, determine the increase by exercising their option or conversion right. Conditional share capital is created through an amendment to the Articles whereby the amount may not exceed fifty percent of the stated share capital. On this basis, bonds with conversion or option rights are issued, entitling the holders to subscribe for shares under specified terms. Options may also be granted to employees of the corporation in order to encourage their participation.

Subscription rights of current shareholders are always excluded. Shareholders are, however, entitled to a priority subscription right for the newly issued bonds, which may only be restricted or canceled on important grounds. The conversion or option rights are protected against dilution through an increase of share capital or the issue of other equity-linked bonds.

In order to exercise the conversion or option rights, the holder must turn in the securities incorporating the respective rights, together with a written declaration, at a designated bank. Further, the holder must either pay the required amount in cash, in the case of an option right, or surrender the bond, possibly with an additional cash payment in the case of a conversion right. The holder of the rights then immediately becomes a shareholder.

After each business year, a qualified Auditor verifies whether the issue of shares was made in compliance with the law and the Articles. On the basis of this report, the Board of Directors then amends the clause in the Articles relating to the stated capital, while at the same time, correspondingly reducing the amount of the conditional capital. The respective decision must be filed with the Commercial Register within three months after the end of the business year.

4. Tax Consequences of an Increase in Share Capital

The same three percent issuance tax, already discussed in connection with the formation, is levied upon an increase in stated capital.
C. The Various Classes of Shares and Their Transfer

Swiss corporate law offers the following classes of shares, all of which can exist concurrently:

1. Bearer Shares

Bearer shares offer a maximum of confidentiality to their holder since even the company has no secure knowledge of all the actual owners. Possession of such shares suffices to prove ownership. These shares are freely transferable and title passes with the transfer of possession. Such shares may only be issued if their full nominal value has been paid to the corporation.

2. Registered Shares

Registered shares confer full shareholder rights only if the owner of the share is registered in the shareholders’ register. Generally, registered shares are transferred by endorsement. Shares which are not fully paid-in may generally only be transferred upon the corporation’s approval. The corporation may only withhold its approval if the acquirer’s solvency is questionable and the security requested is not provided. Transferability may further be restricted in the Articles by requiring the company’s consent to such a transfer.


95. OR arts. 622, 683.
97. OR art. 689a, para. 2.
98. Id. art. 683, para. 1.
99. Id. arts. 622, 684-87.
100. Id. art. 686.
101. Id. art. 967, para. 2.
102. Id. art. 685, para. 2. See id. art. 687 (pursuant to which the subscriber may be held liable in certain cases for the unpaid balance of the contribution).
103. Id. art. 685a.
If its shares are not listed on a stock exchange, the company has three months after
the transfer in which to refuse to consent, thereby preventing a transfer of all rights
attached to the shares, provided the company states important grounds for its refusal. 104
The Articles must enumerate such important grounds. 105 The company may also refuse
its consent if it is ready to acquire the shares at their intrinsic value, either for its own
account or for the account of a shareholder. 106 Finally, the company may oppose the
transfer if the acquirer refuses to declare that the purchase is for its own account. 107
A special regime applies if the shares are transferred by operation of law, for example,
by devolution upon death or bankruptcy. 108 It should be noted that tax authorities may
treat the corporation’s acquisition of its own shares as a partial liquidation if the shares
are not resold within one year. 109 This may lead to income tax consequences for Swiss
shareholders and withholding taxes for foreign shareholders. 110 The basis for these taxes
is the difference between the purchase price paid by the corporation and the nominal value
of the shares. 111

If its shares are quoted on a stock exchange, the company can only refuse to consent
to a transfer if the Articles provide that a shareholder’s ownership may not exceed a
certain percentage, and if the acquirer would exceed this level after being registered. 112
Many of the listed companies are expected to adopt a three percent 113 level which also
applies to concerted actions by shareholders. Additional grounds for a refusal with respect
to banks or corporations owning real property may be found in article 4 of the Transitory
Provisions which restrict ownership in listed companies by foreigners and foreign-
controlled entities. 114 It is expected that this restriction will be abolished as the
underlying laws, namely the Federal Law on Banks and Savings Institutions 115 and the
so-called “Lex Friedrich,” 116 are changed. Again, the acquirer must declare that the pur-
chase is for their own account. As in the case of unquoted shares, a special regime
applies to transfers by operation of law. 117 The acquirer immediately becomes a share-
holder upon purchase on the exchange. 118

In off-exchange transactions, the acquirer becomes a shareholder upon notification to
the corporation. 119 The right to vote is suspended until the company accepts the

104. Id. art. 685b.
105. Id. art. 685b, para. 1.
106. Id. Pursuant to OR article 685b, only grounds regarding the composition of the group of
shareholders in view of the purpose or the economic independence of the corporation qualify as important
grounds.
107. Id. art. 685b, para. 3.
108. Id. art. 685b, para. 4; id. art. 685c, para. 2.
109. BÖCKLI, supra note 1, at 408-09.
110. Id.
111. Id. at 409.
112. OR art. 685d, para. 1.
113. BÖCKLI, supra note 1, at 202.
114. SCHLÜSSEBESTIMMUNGEN ZUM SECHSUNDZWANZIGSTEN TITEL, art. 4 (SR 220).
115. BUNDESGESETZ ÜBER DIE BANKEN UND SPARKASSEN (SR 952.0) [hereinafter BANKG].
116. BUNDESGESETZ ÜBER DEN ERWERB VON GRUNDSTÜCKEN DURCH PERSONEN IM AUSLAND (SR 211.412.41) [hereinafter BEwG].
117. OR art. 685d, paras. 2-3.
118. Id. art. 685f, para. 1.
119. Id.
acquirer; however, if the company fails to do so within twenty days, then the acquirer will be deemed accepted as a new shareholder. Registration of a shareholder may only be canceled if false information leads to the corporation’s consent to the transfer.

No transfer restrictions apply to shareholders who have refused to consent to an otherwise accepted change of the company’s purpose clause or to an introduction of supervoting shares during six-month period after publication of the respective resolution.

The discretion of the Board to refuse registration was much broader under the old law, and in certain cases this discretion will continue for an interim period of five years. Restriction on transferability was therefore an often employed and efficient defensive strategy against takeovers. It is expected that the new law will considerably reduce this possibility.

3. Preference Shares

Compared to the holders of ordinary shares, preference shares entitle the holder to certain special rights, such as higher or guaranteed minimum dividends. Preference shares enjoy those privileges expressly stated in the Articles. Their introduction, therefore, requires an amendment to the Articles. Although no special majority is required for such a resolution, the current holders of preference shares must agree to any amendment which would adversely affect their rights.

4. Nonvoting Shares (Participation Certificates)

Nonvoting shares, referred to in OR as “Participation Certificates,” are generally treated like ordinary shares with respect to such matters as issuance and transfer. However, there are some exceptions:

(1) The holder of a participation certificate lacks not only the right to vote, but also the rights attached to voting rights, such as information rights on business matters or the right to call or participate in a General Meeting. The right to call or participate in a general meeting may, however, be granted by the Articles. Despite the absence of voting rights, holders of participation certifi-
Participation certificates must be designated as such, and the nonvoting capital may not exceed 200 percent of the voting share capital. The nonvoting shares must at least have the same dividend rights as the least favored class of ordinary shares. If a shareholder's attempted resolution adversely affects the position of the holders of participation certificates, the resolutions may only be passed if the participation certificates are treated at least pari passu with the least favored class of ordinary shares.

The Articles may provide a right to holders of participation certificates to be represented on the Board. In addition, holders of participation certificates have a subscription right, which may even extend to shares in cases where only the share capital is increased.

5. **Bonus Certificates (Dividend Rights Certificates)**

Bonus certificates are typically issued to creditors or former shareholders in the context of a financial restructuring. Bonus shares have no nominal value; they usually grant a right to a share in future profits. Their issue requires authorization in the Articles. The holders of bonus certificates form a body to which the rules of the meeting of bondholders apply and who can, by resolution, waive certain rights.

6. **Interim Warrants**

Interim warrants are used only in cases where the printing of shares cannot be accomplished immediately. However, since this has become quite rare, OR article 688 is of little practical importance.
7. **Supervoting Shares**

The Articles may provide that shares of different classes all carry one vote irrespective of their nominal value.\(^{149}\) The shares with the lower nominal values may only be issued as registered shares and must be fully paid for.\(^{150}\) In the past, many companies have issued registered shares with a nominal value of CHF 100 and bearer shares with a nominal value of CHF 500, each share carrying one vote. The introduction of supervoting shares requires the consent of the majority of two-thirds of the shares and the majority of the capital represented.\(^{151}\)

The law now limits the capital ratio of supervoting to ordinary shares to 1:10 and further declares supervoting rights inapplicable under certain circumstances.\(^ {152}\) Furthermore, the law sets an indirect limit on the exercise of supervoting rights in connection with certain important resolutions;\(^ {153}\) no share may carry more than one vote.\(^ {154}\)

8. **Disclosure of Shareholding**

Shareholders of listed companies must be disclosed in the notes to the balance sheet if their holdings exceed five percent, or such lesser threshold as the Articles may provide for maximum shareholding.\(^ {155}\)

9. **The Corporation’s Purchase of Its Own Shares**

The company may purchase its own shares only if there are sufficient unrestricted reserves (capital surplus), and only up to a maximum of ten percent of the aggregate share capital.\(^ {156}\) If the company acquires shares in connection with transfer restrictions, for example, by refusing to consent to a transfer of said shares,\(^ {157}\) the limit is increased to twenty percent for an interim period of up to two years. Such “treasury shares” may not be voted.\(^ {158}\) This also applies to shares held by subsidiaries.\(^ {159}\)

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149. *Id.* art. 693, para. 1.
150. *Id.* art. 693, para. 2.
151. *See id.* art. 704, para. 1, § 2.
152. *See id.* art. 693, paras. 2-3.
153. *Id.* art. 704.
154. *Id.* art. 693, para. 1; BÖCKLI, *supra* note 1, at 93.
155. OR art. 663c. *See discussion supra* part III.C.2.
156. OR art. 659.
157. *See id.* art. 685b. *See also discussion supra* part III.C.2 (discussing the potential adverse tax consequences).
158. OR art. 659a
159. *Id.* art. 659b.
D. The Rights and Duties of Shareholders

1. The Share in Profits

The principal right of a shareholder is a proportional share in the profits and the liquidation proceeds of the corporation. This right is limited by the mandatory provisions of the law (and possibly of the Articles) regarding the creation of reserves. Furthermore, profits are only distributed to the extent that the General Meeting approves such distribution.

2. Duties of the Shareholders

Shareholders' obligations do not extend beyond the contribution of the issue price for the shares. However, the shareholders frequently agree on additional duties among themselves, subject to the framework of shareholders' agreements. In general, such agreements are not binding with respect to the relationship between the company and its shareholders. While the corporation may not obligate its shareholders to provide future funding, shareholders may agree to such contributions among themselves. Swiss corporation law does not address shareholders' agreements, but it does contain rather detailed provisions concerning shareholders who fail to pay-in capital to which they subscribed.

3. Right to Participate and Vote in the General Meeting

Shareholders may participate in the election of the Board of Directors, the Auditors, as well as in all other matters reserved to the General Meeting by exercising their voting rights in the General Meeting. In general, the voting rights are proportional to the nominal value of the shares. Unless the Articles provide otherwise, the shareholder may, by written proxy, have the shareholder's shares represented by a third person who need not be a shareholder. The company must admit all persons authorized to vote, including anyone listed in the shareholders register, any holder of a written proxy of such person, and any holder of a bearer share. The holder of bearer

161. OR arts. 660-61.
162. Id. arts. 671-74.
163. Id. art. 698, para. 2, § 4.
164. Id. art. 680.
165. Id. arts. 681-82.
166. Id. art. 698.
167. Id. art. 689.
168. Id. art. 692. But cf. discussion supra part III.C.7 (discussing supervoting shares).
169. OR art. 689, para. 2; id. art. 689a.
170. Id. art. 689a.
shares is deemed legitimate upon presentation of the shares, or as is generally the case in public companies, by a certificate of deposit issued by a bank.  

The new law contains certain proxy rules requiring the proxy holder to vote the shares according to the shareholder’s instructions. Special rules apply if the company solicits proxies on behalf of a Board member or other interested person. Additionally, other rules apply for banks or brokers regulated by the Federal Law on Banks and Savings Institutions, and for professional money managers who hold shares for their customers and intend to represent such shares at the General Meeting.

The number of proxies held by Board members; interested persons; independent representatives, in the sense of OR article 689c; and banks must be disclosed at the General Meeting. Proxies may not be given to circumvent limitations on voting rights. Resolutions of the General Meeting may be contested if such a maneuver is discovered.

4. Inspection and Control Rights

The law assures shareholders of a certain control over management by requiring that they be given access to the Business Report at least twenty days prior to the General Meeting. The Business Report is, however, sent out only to shareholders upon specific request. Publication of the Business Report is required only for companies with listed shares or outstanding bond issues, or may follow from listing requirements of the stock exchanges.

During the General Meeting, additional information may be given by the Board or the Auditors upon request of the shareholders, provided no preponderant interests of the company, including business secrets, are at stake, and the information requested is required for the exercise of shareholders’ rights. Shareholders may only obtain access to the books and correspondence of the company if authorized by the Board or a resolution of the General Meeting. Should the company refuse to provide its shareholders with pertinent information, shareholders may seek a court order to gain access to such information.

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171. See id. art. 689a, para. 2.
172. Id. art. 689b.
173. Id. art. 689c.
174. Id. art. 689d.
175. Id. art. 689c.
176. Id. art. 691.
177. Id. art. 662. Where capitalized, the term “Business Report” means the report prepared by the Board consisting of a profit and loss statement, a balance sheet with notes, and the Annual Report (“Geschäftsbericht,” “Rapport de gestion”), as further defined in OR article 662.
178. Id. art. 696.
179. Id. art. 697b.
180. Id. art. 697.
181. Id. art. 697, para. 3.
182. Id. art. 697, para. 4.
5. Right to Demand a Special Inspection

If the shareholders' inspection and information rights prove to be insufficient, a shareholder may petition the General Meeting for a special commissioner to examine certain specific transactions or any other facts in a "special inspection."\textsuperscript{183} It remains to be seen whether this new instrument of control proves effective.

If such a request is approved at the General Meeting, either the company or a shareholder may ask a judge at the company's seat to appoint a special commissioner within thirty days. Should this request be denied, shareholders whose holdings represent at least ten percent of capital or a nominal value of CHF 2 million may seek a court order for the appointment of a special commissioner.\textsuperscript{184} The judge must grant the request and appoint a commissioner\textsuperscript{185} if he finds prima facie evidence that the Board infringed the law or the Articles.\textsuperscript{186} The costs of the investigation are generally allocated to the corporation, and in exceptional cases, to the petitioner.\textsuperscript{187}

The special commissioner has unrestricted access to information\textsuperscript{188} and is under a duty of confidentiality as to all data received.\textsuperscript{189} In a report, which must first be submitted to the judge, the corporation's business secrets should be safeguarded.\textsuperscript{190} Prior to forwarding the report to the petitioner, the corporation may express any concerns regarding business secrets or other vital interests\textsuperscript{191} and the judge must then decide whether to eliminate those passages from the report. Furthermore, all parties may comment on the report and ask supplemental questions.\textsuperscript{192}

The Board of Directors then submits the report and comments to the shareholders at the next General Meeting.\textsuperscript{193} Each shareholder may request a copy of the report and the respective comments. Shareholders may then decide if the facts discovered by the special commissioner could serve as a basis for a claim based on directors' liability.\textsuperscript{194}

E. The Accounts of a Stock Corporation\textsuperscript{195}

1. In General

Swiss accounting practices lag behind European standards. Even after the 1992 reform, the balance sheet does not necessarily reflect a true and fair view of the financial

\textsuperscript{183} Id. art. 697a.
\textsuperscript{184} Id. art. 697b.
\textsuperscript{185} Id. art. 697c.
\textsuperscript{186} Id. art. 697b, para. 2.
\textsuperscript{187} Id. art. 697g.
\textsuperscript{188} Id. art. 697d.
\textsuperscript{189} Id.
\textsuperscript{190} Id. art. 697e.
\textsuperscript{191} Id. para. 2.
\textsuperscript{192} Id. para. 3.
\textsuperscript{193} Id. art. 697f.
\textsuperscript{194} Id. art. 754.
situation of the company, even though some of the generally accepted accounting principles are explicitly stated in the law. The true and fair view is not achieved because the corporation may create "hidden reserves."

The Business Report, as the law now refers to it, consists of: (1) the annual accounts, a balance sheet and a profit and loss statement, including the notes thereto; (2) the Annual Report; and (3) if required, the group accounts, including the consolidated statements.

The governing accounting principles are enumerated in OR article 662a and are comparable to International Accounting Standards (IAS). They include:

1. Completeness. It remains to be seen whether this principle will require the clear and concise disclosure of all significant accounting policies (IAS 1);
2. clarity and materiality (IAS 1, 5);
3. prudence (IAS 1). Conservative valuation is still one of the most important principles of Swiss accounting practice and is evidenced by the continuing possibility of creating hidden reserves. The legislative body thus values the principle of prudence higher than presentation of a true and fair view;
4. ongoing concern, consistency in presentation, and valuation (IAS 1). Further changes must be disclosed in the notes (IAS 1);
5. no offsetting (IAS 5, 13).

Under the new law, the company may omit statements in its Annual Report, its balance sheet, and its group accounts if such statements could be seriously detrimental to the company or the group. However, the Auditors must be informed of such omissions.

2. The Profit and Loss Statement

The law prescribes only a minimal structure for the profit and loss statement. It requires that revenues be broken down into revenues from sales and services, investment, and extraordinary income. It also requires that expenses be broken down into costs for goods and services, staff, and depreciation and amortization, thus evidencing the annual profit or loss. All figures must be accompanied by those of the previous year.

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196. OR art. 662a.
197. See id. art. 662.
198. Where capitalized, the term "Annual Report" means the annual report ("Jahresbericht," "Rapport annuel") as further defined in OR article 663d. See infra notes 214-15 and accompanying text. It should be noted that Swiss law uses the terms Annual Report and Business Report with a different connotation from other jurisdictions.
199. See OR art. 669.
200. Id. art. 662a, para. 3.
201. Id. art. 663h.
202. See id. art. 663.
3. The Balance Sheet

The minimal structure of the balance sheet\textsuperscript{203} includes the following items:

(1) Current assets, subdivided into cash, accounts receivable from sales and services rendered, other claims, and stock;
(2) long term assets, subdivided into financial investments, tangible assets, and intangible property;
(3) liabilities, consisting of debts from purchases and services, other short term liabilities, long term liabilities, and provisions; and
(4) equity, subdivided into share capital, legal\textsuperscript{204} and other reserves,\textsuperscript{205} and the annual profit.

Again, these items must be accompanied by those of the previous year. Participations, usually defined as investments granting at least twenty percent voting power,\textsuperscript{206} need only be disclosed in the aggregate; the same applies to claims and liabilities vis-à-vis group companies. Formation costs and costs relating to a capital increase may be capitalized in the balance sheet, but they may be written off over a period of five years.\textsuperscript{207}

The cost principle applies to the valuation of noncurrent assets. The valuation may not exceed historical acquisition or manufacturing costs\textsuperscript{208} less reasonable depreciation. This also applies to nonconsolidated participations. For the valuation of stock, finished goods, or work in progress, the value may not exceed the lower of fair market value or production cost.\textsuperscript{209} An exception to the cost principle applies to listed securities, for which the valuation may not exceed the average quotation during the month preceding the balance sheet date.\textsuperscript{210} A revaluation is permitted only for real property interests and participations; otherwise, the share capital would not be fully covered, thereby creating a net loss.\textsuperscript{211} In such a case, a special reserve account must be created for the revaluation amount.\textsuperscript{212}

4. The Notes

The notes, or appendix, to the accounts contain additional information necessary to present a fair picture of the company, specifically in those areas that are not directly reflected in the accounts. The law requires the following disclosures:\textsuperscript{213}

\textsuperscript{203} Id. art. 663a.
\textsuperscript{204} Id. arts. 671-71b.
\textsuperscript{205} Id. arts. 672-73.
\textsuperscript{206} See id. art. 665a, para. 3.
\textsuperscript{207} Id. art. 664.
\textsuperscript{208} Id. art. 665.
\textsuperscript{209} Id. art. 666.
\textsuperscript{210} Id. art. 667, para. 1.
\textsuperscript{211} See id. art. 670.
\textsuperscript{212} See id. art. 671b.
\textsuperscript{213} See id. art. 663b.
(1) Contingent liabilities and pledged assets;
(2) leased property;
(3) insurance value of fixed assets;
(4) obligations to pension funds;
(5) outstanding bond issues;
(6) material participations;
(7) dissolved hidden reserves to the extent they exceed newly created reserves. However, this is only mandatory if the business year would otherwise be presented significantly more favorably;
(8) revaluations;
(9) treasury shares;
(10) authorized and conditional capital; and
(11) other mandatory disclosures, such as the identity of major shareholders.214

5. The Annual Report

The Annual Report, prepared by the Board of Directors as part of the Business Report,215 describes the business activities in the past year and reports changes in share capital. Verification reports216 must be added to the report.

6. The Group Accounts

Group or consolidated accounts must be drawn up once a corporation and its subsidiaries meet certain thresholds with respect to balance sheet total, turnover, and employees.217 There must also be a report drawn up if the corporation has any of the following: (1) outstanding bond issues, (2) quoted shares, (3) group accounts are necessary to obtain an accurate view of its financial situation, and (4) shareholders representing at least ten percent of equity so request.218

Subholdings are exempt from this requirement, provided the group accounts of the ultimate holding company are made available to shareholders and creditors, and that those accounts at least meet Swiss standards.219 Again, outside shareholders representing at least ten percent of equity may request that a subholding draw up its own subgroup accounts.

Consolidation must be made in compliance with generally accepted accounting principles, and consolidation and valuation methods must be disclosed.220 These rules became effective on July 1, 1993.

214. See discussion supra part III.C.8.
215. See OR art. 716a, para. 1, § 6.
216. See id. arts. 652f, 653f.
217. Id. art. 663e.
218. Id.
219. Id. art. 663f.
220. Id. art. 663g.
F. The General Meeting

1. Competencies of the General Meeting

The law which declares the General Meeting the “supreme authority of the company” appears to confer more power on the shareholders than the Board. The shareholders’ position is further strengthened by the authority vested in the General Meeting to remove Directors at any time. In practice, however, corporations are run almost exclusively by their Boards, with shareholders exerting little influence on the management of the corporation. The new law lists those inalienable and non-transferable duties of the Board which may be delegated neither to managers nor to shareholders. This may create a greater imbalance between shareholders and the Board, even in closely held corporations where the General Meeting has so far assumed the role of “supreme authority.”

Pursuant to OR article 698, the General Meeting has the following powers: to vote on amendments to the Articles, to elect the Directors and the Auditors, to approve the Annual Report and the group accounts, to approve the annual accounts, to decide on the distribution of dividends, and to discharge the Directors. In addition, the General Meeting has further competencies in connection with the increase of capital, the special inspection, the liquidation of the corporation, and may also have certain functions according to the Articles.

2. Convening of the General Meeting

The Board of Directors, and in exceptional cases the Auditors, must invoke a formal convocation at least twenty days prior to the General Meeting in the form stipulated by the Articles. The convocation must contain the agenda, the propositions made by the Board, and motions tabled by the shareholders. No formal convocation is necessary if and when all the shares are represented at the General Meeting. Many closely held companies take advantage of this provision.

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222. OR art. 698.
223. Id. art. 705.
224. See BÖCKL, supra note 1, at 1255-56.
225. OR art. 716a.
226. See discussion supra part III.B.
227. See discussion supra part III.D.5.
228. See discussion infra part III.I.4.
229. OR art. 698, para. 2, § 6.
230. Id. art. 699, para. 1.
231. Id. art. 700, para. 1. In practice, the form of convocation is usually by written notice to registered shareholders and notice by publication to bearer bondholders.
232. Id. art. 700, para. 2.
233. Id. art. 701.
The law distinguishes between the “ordinary” General Meeting which must be held within six months after the end of the business year\(^2\) and the “extraordinary” General Meeting. The ordinary Meeting’s agenda always covers elections, approval of the accounts, decisions on the distribution of dividends, and discharges of the directors. Extraordinary Meetings are called if the Board of Directors considers them necessary. Shareholders representing at least ten percent of share capital have a right to request that a Meeting be scheduled; shareholders holding shares representing a nominal value of at least one million Swiss francs may request specific items to be included in the agenda of the next Meeting.\(^3\)

3. Decision Making in the General Meeting

Prior to the General Meeting, the Board takes the necessary measures to ensure the identity of holders or their proxies are verified and the votes are properly counted. The Board must also ascertain that minutes are kept. The minutes must disclose, inter alia, the exact number of shares represented by directors and independent, professional proxy holders.\(^6\)

Unless the Articles provide otherwise, all decisions are taken by the majority of votes represented.\(^2\) A special majority of two-thirds of the votes and (cumulatively) the majority of the nominal values represented (which, in effect, lowers the influence of supervoting shares)\(^3\) is necessary for certain important decisions,\(^2\) such as:

1. Change of the purpose clause of the company;
2. introduction of supervoting shares;
3. restriction of transferability of registered shares;
4. special forms of capital increase;
5. limitation of subscription rights;
6. transfer of the company’s seat; and
7. dissolution of the company without liquidation—merger.\(^2\)

If the shareholders wish to introduce more stringent voting requirements or a special majority for other matters, such resolutions must be adopted with this same special majority.\(^2\)

Shareholders may contest resolutions of the General Meeting within two months of the Meeting\(^2\) if the resolution deprives them of rights granted either by law or the Articles, or if they are treated unequally without justification.\(^2\) Resolutions are void,\(^2\)

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234. Id. art. 699, para. 2.
235. Id. art. 699, para. 3.
236. Id. art. 702, para. 2; id. arts. 689c, 689d. See discussion supra part III.D.3.
237. OR art. 703.
238. See discussion supra part III.C.7.
239. OR art. 704.
240. See discussion infra part III.J.
241. OR art. 704, para. 2.
242. Id. art. 706a.
243. Id. art. 706, para. 2.
meaning their nullity may be invoked even after the two-month period has elapsed, if they restrict shareholders' rights to attend the General Meeting, their voting rights, their control, their inspection rights, or if they change the basic structure of the company.244

G. The Board of Directors245

I. Election of Directors

Directors are elected by the General Meeting.246 The number of directors is often determined in the Articles or left to the discretion of the General Meeting. The term of office of a director is three years unless the Articles provide otherwise,247 which is frequently the case. A one-year term is customary and re-election of directors is permitted.248 The General Meeting, moreover, has the right to remove directors at any time.249

Directors must be shareholders,250 but this requirement is fulfilled by the transfer of one share to them on a fiduciary basis. If the shareholder is a corporation, its representatives are eligible to be directors.251

The majority of directors must be Swiss citizens residing in Switzerland.252 Foreign-controlled companies often elect fiduciaries, such as attorneys bound by contract to follow shareholders' instructions, to the Board in order to meet this requirement. The nationality and residence rule is enforced by the Commercial Register, which in extreme cases, may declare a corporation dissolved if the Board does not meet this requirement.

The Articles must also contain minority protection rules assuring that various classes of shares or shareholders are represented on the Board.253 If several classes of shares exist with respect to pecuniary or voting rights, the Articles must ensure that at least one representative of each class of shareholders be elected to the Board. While the election itself will still be carried out by the General Meeting, these special groups have a right of nomination which can only be overruled on important grounds.254

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244. Id. art. 706b.
246. OR art. 698, para. 2, § 2.
247. Id. art. 710.
248. Id. art. 710, para. 2.
249. Id. art. 705.
250. Id. art. 707, para. 1.
251. Id. art. 707, para. 3.
252. Id. art. 708, para. 1.
253. However, there is a rarely used exception which applies to certain holding companies. See id.
254. See BÖCKLI, supra note 1, at 1475.
Directors are registered in the Commercial Register, which also denotes their power to represent the company. Accordingly, the Register must be notified of their leaving office.255

2. Organization

Unless the Articles provide for election of the chairman of the Board at the General Meeting, the directors appoint the chairman from their circle.256 The Board must also elect a secretary.257

In the absence of anything to the contrary in the organizational rules set by the Board, decisions are taken by a simple majority of the votes present.258 Unless the Articles provide otherwise, the chairman has the tie breaking vote.259 Resolutions may also be taken by circular letter unless a director requests oral debate.260 Minutes of all Board meetings must be drawn up.261 The law grants each director the right to request that the chairman of the Board call such a meeting.262 Internal rules established by the Board will often detail these provisions.

During the Board meetings each director has the right to obtain information on all relevant matters.263 The members of the Board and management must disclose all relevant details and answer all questions raised.264 The right to information is somewhat limited between Board meetings since access to information on specific transactions depends upon authorization by the chairman.265 If the chairman refuses to authorize disclosure of the requested data, the Board may overrule this decision.266 The corporation’s internal organizational rules may grant additional information rights to its Board members.267

3. Duties of the Board

The law presumes that all duties not assigned to the General Meeting as a matter of law or by the Articles will be carried out by the Board.268 However, the Board may delegate most of its duties to a managing board if authorized to do so by the Articles.269

255. OR art. 711.
256. Id. art. 712.
257. Id.
258. Id. art. 713, para. 1.
259. Id.
260. Id. art. 713, para. 2.
261. Id. art. 713, para. 3.
262. Id. art. 715.
263. See id. art. 715a, para. 2.
264. Id.
265. Id. art. 715a, para. 3.
266. Id. art. 715a, para. 5.
267. Id. art. 715a, para. 6.
268. Id. art. 716.
269. Id. art. 716b.
The law further enumerates certain specific duties, such as management supervision and certain strategic functions, which the directors may not delegate.270

Most duties may be delegated to management or certain Board members, thereby creating what is known in Germany as a “two-tier board,” a system similar to that used in the U.S., providing for a chief executive officer and outside directors. Such delegation must be set out in internal organizational rules issued by the Board.271 In carrying out their duties, directors are generally under a duty of care and loyalty vis-à-vis the corporation and must ensure equal treatment of shareholders.272 However, creation of a two-tier Board will, to the extent permitted, limit the duties of the outside directors to the duty of care regarding the selection, instruction, and supervision of the persons actually in charge of managing the corporation.273

Breach of a duty may not only lead to director liability,274 but may also lead to liability of the corporation if third parties incur damages and if the breach constitutes a tort committed in the exercise of their duties.275

4. Representation of the Corporation

The Board, and other signatories appointed by the Board,276 such as managers and clerks with signatory rights (“Prokuristen”), represent the corporation vis-à-vis third parties.

Directors and managers may engage the corporation in any transaction not excluded by the purpose, or objectives, of the corporation.277 However, the signatory power may be restricted. The following two restrictions may, if entered in the Commercial Register,278 be held against bona fide third parties: the joint signature right, and the limitation of signatory power to a branch office.279 Within these limits signatories may sign any contract on behalf of the corporation; neither special Board resolutions nor a corporate seal are required to make any contracts binding.280
H. The Auditors

1. The Election of Auditors

Even though election of more than one Auditor is permitted,\(^{282}\) it is customary to elect only one firm as Auditor. Often, this is the Swiss subsidiary of one of the leading international accounting firms.\(^{283}\) The new law not only explicitly demands independence for Auditors,\(^{284}\) but also sets out a minimum professional standard\(^{285}\) and requires special professional qualifications for Auditors of listed corporations, corporations with bond outstanding issues, and large enterprises such as further defined by the law.\(^{286}\)

Auditors are elected at the General Meeting and may be removed at any time.\(^{287}\) Their term of office is specified in the Articles and is generally one year, although the law would permit a term of up to three years with re-election permitted. The new law requires registration of the Auditors in the Commercial Register.\(^{288}\) If the shareholders fail to elect an Auditor, or an Auditor with sufficient qualifications, the court, under certain circumstances, may appoint an Auditor.\(^{289}\)

2. The Duties of the Auditors

The Auditors' primary duty is to verify the financial reporting for compliance with the law and Articles.\(^{290}\) A similar duty applies with respect to consolidated accounts.\(^{291}\) The result of this verification is submitted to the shareholders in the form of the Auditors' report.\(^{292}\) This must also contain a recommendation regarding approval of the accounts by the shareholders.\(^{293}\) In the absence of such a report, no valid resolution may be taken with respect to the annual financial statements and profit allocation.\(^{294}\) In addition, the Auditors must be present at the meeting in order to respond to questions raised by the shareholders.\(^{295}\)

For those corporations which require qualified Auditors, an additional report is delivered to the Board of Directors.\(^{296}\) Should the Auditors discover a violation of

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\(^{281}\) For additional literature, see generally Hanspeter Thiel, Bestätigungsbericht der Revisionsstelle, A.J.P. 737-39 (1992).
\(^{282}\) OR art. 727.
\(^{283}\) See id. art. 727, para. 2; id. art. 727d.
\(^{284}\) Id. art. 727c.
\(^{285}\) Id. art. 727a.
\(^{286}\) Id. art. 727b.
\(^{287}\) Id. art. 727e.
\(^{288}\) Id. art. 641, § 10; id. art. 727c, para. 4.
\(^{289}\) Id. art. 727f.
\(^{290}\) Id. art. 728.
\(^{291}\) Id. art. 731a.
\(^{292}\) Id. art. 729.
\(^{293}\) Id. art. 698, para. 2, § 4.
\(^{294}\) Id. art. 729c.
\(^{295}\) But see id. art. 729c, para. 3 (allowing the General Meeting to abstain from this requirement by unanimous decision).
\(^{296}\) Id. art. 729a.
either the law or the Articles, the Board of Directors must immediately be informed. Fur-
thermore, in important cases, such as a breach of the directors' duties, the General
Meeting must also be informed. In the case of obvious overindebtedness of the cor-
poration, the Auditors are under a duty to notify the judge if the directors have failed
to do so. Additional duties of the Auditors may be defined in the Articles, although
this is rarely done in practice.

In delivering their report, the Auditors must safeguard confidential information such
as business secrets. An exception applies vis-à-vis the special commissioner.

I. Equity Requirements and Dissolution

1. Minimum Equity Requirement

The OR does not include any rules regarding the ratio between debt and equity, but
tax authorities often demand that the debt-equity ratio not exceed 6:1. The law, however,
requires a minimum share capital of at least CHF 100,000.

Furthermore, the directors must call a General Meeting and propose restructuring
measures if half the equity (capital stock plus statutory reserves) is no longer covered.
If there is reason to suspect that the company is overindebted, the Board must have an
interim balance sheet drawn up and delivered to the Auditors. Should this balance sheet
reveal that claims of creditors are no longer covered, either by using a break-up value or
by assuming the continuing existence of the company, the Board must notify the court
unless creditors agree to subordinate their claims in favor of others to the extent that
liabilities exceed assets.

The judge must declare the corporation bankrupt unless there is a reasonable chance
for a successful restructuring or upon motion of the Board or a creditor.

2. Additional Rules Protecting Equity

Indirect protection of equity is also achieved by certain other requirements, such as
prohibiting interest on share capital and requiring that dividends be paid only from profits
as shown on the balance sheet. An exception applies for interest paid during a start-
up period prior to full operation of the business.309 For similar reasons, bonus payments to directors are limited;310 however, this is widely circumvented by promising directors a fixed income. As an additional protection of equity, the law provides for restitution of certain payments,311 including payments from transactions which are not entered into at arm’s length.

3. Reduction of Share Capital

If a corporation is in financial difficulties, it may decide to reduce its share capital. For example, the corporation may conduct a partial liquidation or attract third party investment.312

A reduction of share capital requires a special report by a qualified Auditor, confirming that all the corporation’s creditors remain protected.313 As an additional protection for creditors, a notice314 inviting creditors to file their claims within two months must be published three times in the Commercial Gazette. The share capital can only be reduced if all these claims are either secured or satisfied, which must be confirmed by the General Meeting in a second authenticated deed.315 Notification of creditors is not required if no payments are made to shareholders—the reduction merely serves to eliminate a loss on the balance sheet.316

4. Dissolution of the Corporation

The corporation is generally dissolved by either a shareholders’ resolution, leading to a dissolution with317 or without liquidation,318 or by bankruptcy,319 leading to a liquidation in accordance with the Federal Law on Debt Collection and Bankruptcy.320 The law also mentions other cases of dissolution which are, however, of little practical importance, such as a fixed term of duration for the corporation as set forth in the Articles,321 or a court order based upon the request of shareholders representing at least ten percent of share capital, asserting important grounds for a dissolution of the corporation.322 In such a procedure, the judge may also grant other adequate relief,323 such as an acquisition of the minority shareholdings by the corporation or by the majority at fair market value. Additional grounds for dissolution are a lack of the required corporate

309. Id. art. 676.
310. Id. art. 677.
311. Id. arts. 678, 679.
312. See id. art. 732, para. 1.
313. Id. art. 732, para. 2.
314. Id. art. 733.
315. Id. art. 734.
316. Id. art. 735.
317. Id. art. 739 et seq.
318. Id. arts. 738, 748 et seq.
319. Id. art. 736, § 3.
320. Id. art. 740, para. 5.
321. See id. art. 627, § 4.
322. Id. art. 736, § 4. See id. art. 740, para. 4 (discussing the appointment of liquidators).
323. Id. art. 736, § 4.
bodies, noncompliance with the provision regarding domicile and nationality of directors, and failure to comply with the new law after expiration of the transition period.

A shareholders' resolution with regard to liquidation of the company does not require a special majority unless the Articles provide otherwise. The resolution must be publicly authenticated. Then, it is entered into the Commercial Register and the term “in liquidation” is added to the firm name. During the liquidation, the corporation remains a legal entity until it is deleted from the Commercial Register. The liquidators must be registered. Their powers are limited to those acts necessary for the liquidation. These liquidators may be removed at the General Meeting and, in exceptional cases, by the judge.

The liquidation process is initiated by drawing up a balance sheet. At the same time, three consecutive notices are published in the Commercial Gazette requesting creditors to file their claims. Generally, the liquidation proceeds may be distributed to the shareholders only one year after the date of publication of the last notice. The liquidators proceed to dispose of all assets, usually by auction or private sale; honor all liabilities; terminate court proceedings; settle disputes; and may even enter into new transactions if necessary for the liquidation. If the liquidation continues for more than one year, the liquidators must draw up interim balance sheets. If the liquidators should find that the assets are insufficient to cover the liabilities, they must notify the judge, who will then declare the corporation bankrupt. The liquidators must also deposit unclaimed monies and amounts necessary to cover disputed claims with the competent court, unless distribution is postponed. Upon satisfaction of all third party claims, the liquidation proceeds may be distributed to shareholders. As discussed above, this may generally only take place one year after the date of publication of the last notice. In exceptional cases, the judge may allow an earlier distribution provided a qualified Auditor confirms that no third parties' interests are at risk.
Under Swiss law, liquidation proceeds are taxed as income at the shareholder level to the extent that these proceeds exceed the nominal value of the shares. A withholding tax of thirty-five percent is also levied on this amount, although it may be reclaimed according to the rules applicable to dividends.

The company is deleted from the Commercial Register after the distribution of the liquidations proceeds. The liquidators must ensure that the books of the company are kept in a safe location, as designated by them, for another ten years.

J. Mergers and Takeovers

The law permits two Swiss corporations to merge. In such a merger, the assets and liabilities of the target company are transferred by operation of law to the surviving entity, with shareholders of the target company receiving shares of the surviving company.

A merger is initiated by a merger agreement signed by the Boards of the two companies. This agreement is subject to the approval of the shareholders of the target company. A special majority is required for this decision. The shareholders of the surviving entity need only be consulted if the share capital must be increased to ensure the exchange of shares because there is either not enough authorized share capital or no treasury shares.

The law is primarily concerned with the protection of creditors of the target company. As is the case in the liquidation of a corporation, the law requires that notification be given to the creditors by way of individual notice and publication. Additionally, the board of the surviving company is required to separately administer the assets of the two merged entities for one year or until all creditors are secured or satisfied. Mergers are also possible between stock corporations and limited share partnerships, and according to a recent court decision, between other companies. Special rules apply when a company is taken over by the government.

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343. See BdBSt art. 21, para. 1(c); H. Masshardt, Kommentar zur Direkten Bundessteuer 129 (1985).

344. See VStG art. 13, para. 1(a).

345. OR art. 746.

346. Id. art. 747.


348. OR art. 748.

349. Id. art. 704, para. 1, § 8.

350. Id. arts. 698, 704.

351. Id. art. 748, § 1.

352. Id. § 2.

353. Id. art. 750.

354. Id. art. 751.
The law also allows other types of mergers, such as the purchase of assets and liabilities, the purchase of shares against the issue of shares, and the merger of existing entities into a new corporation. However, this rarely occurs since a stamp duty of one percent (zero percent as of April 1, 1993) was levied in such cases on the combined net worth of the companies.

Takeovers are not regulated in the OR. There is, however, a new stock exchange law pending in Parliament which contains rules for takeovers, including mandatory offers to minority shareholders, and certain principles such as equal treatment of shareholders. Similar rules, which are not as far reaching, are presently in effect under the Takeover Code, which is a self-regulatory body of rules issued by the Association of Swiss Stock Exchanges.

Defensive strategies against hostile takeovers generally include transfer restrictions, requirements of a qualified majority for the change of specific clauses in the Articles relating to a takeover defense, limitations on the amount of shares that may be represented by one person in the General Meeting, and the creation of supervoting shares for white knights. Director liability claims in cases where the Board has not favored the most advantageous offer have never been tested in court, although they find support in the legal literature.

K. Personal Liability of Directors and Certain Other Persons Including Shareholders

I. General Liability

Four different cases entailing personal liability for persons performing certain duties for the corporation can be found in the OR:

(1) Pursuant to OR article 752, a purchaser of securities may base a claim on prospectus liability for any wrong, illegal, or misleading statement in a prospectus, or in other promotional material distributed in connection with the issue of securities.

(2) The corporation, its shareholders, and creditors may have a claim, based on OR article 753, against the incorporators of a corporation (incorporators' liability)

355. See id. art. 181.
356. See discussion supra part III.B.1.
357. OR art. 749.
358. STG art. 8.
361. See Peter Forstmoser, Die Aktionenrechtliche Verantwortlichkeit n.285 et seq. (1987); ROLF WATTER, UNTERNEHMENÜBERNAHME n.749 et seq. (1990)
if the disclosure required in connection with a contribution in-kind or with an important investment following the corporation’s formation was incomplete, wrong, or misleading. This provision also applies to capital increases where directors who have issued false statements\textsuperscript{363} may be the target of such a claim.

(3) Directors’ liability \textit{strictu sensu}\textsuperscript{364} applies in cases where directors, managers, or liquidators have caused damage to the corporation or its shareholders by a willful or negligent breach of their duties. In some cases, courts have extended liability to de facto directors.\textsuperscript{365} The Directors’ duty is limited to the exercise of care in the selection, instruction, and supervision of management in those cases where the Articles authorize the Board to delegate the management of the corporation to third parties pursuant to internal regulations established by the Board.\textsuperscript{366} In such cases, the managers will be the primary target of liability claims which can be brought by the corporation, its shareholders, and its creditors.

(4) An analogous claim may be filed against the Auditors,\textsuperscript{367} respectively the issuer of a verification report or a report in connection with a reduction of share capital.\textsuperscript{368}

2. \textit{Possible Claimants}

Aside from a claim based on prospectus liability, which may only be brought by the holders of securities,\textsuperscript{369} claims can be brought by either the corporation (often the receiver in bankruptcy), or a shareholder\textsuperscript{370} acting in the shareholder’s name but on behalf of the corporation.\textsuperscript{371} In the latter case, the new law provides for a special mechanism for cost allocation should the claimant lose the procedure.\textsuperscript{372} Despite the fact that in general, procedural laws in Switzerland provide for the award of legal fees and expenses to the prevailing party,\textsuperscript{373} the judge may rule that the corporation must bear all or part of the costs,\textsuperscript{374} taking into account that the claimant carries the whole procedural risk yet may only benefit proportionally from the outcome. Such procedural risk can be substantial because court costs and a party’s indemnity are based upon the amounts in litigation.
In exceptional cases, shareholders may claim damages to be paid to them directly such as the Board’s failure to distribute dividends in the face of a General Meeting resolution, or the Board’s self-interested refusal of a tender offer to the detriment of shareholders. In this context, it should also be noted that Swiss procedural laws do not permit class action suits.

Creditors have a claim only after the corporation has been declared bankrupt and after having requested and received an assignment of the corporation’s claims against the former directors. The assignment will be granted by the receiver in bankruptcy if a majority of the creditors, by resolution, decide not to pursue the claim.

3. Prerequisites for a Successful Claim

In order to ascertain the basis for a claim, the claimant may request a special report. The claimant must prove the following elements in all liability claims:

1. Damages suffered by the claimant (or the corporation, where payment is due to the corporation). The courts generally define damages as the difference between the claimant’s present net assets and the net assets as they would have been in the absence of a wrongful act by the defendants.

2. A wrongful act on the part of the defendants. Examples include false statements in a prospectus, breach of the fiduciary duties of Directors or managers (such as self dealing or transactions entered into despite an apparent conflict of interest), or the Auditors’ careless examination of the books and accounts.

3. Proximate causation of the damages by the wrongful act. This may be shown by introducing evidence that it was the wrongful act or wrongful failure to act that caused the damages.

4. Intent or negligence on the part of the defendants. In most cases this element is presumed if the other factors are established.

Claims must be brought within five years after the claimant learns of the damage and the identity of the wrongdoer, and not later than ten years after the wrongful act. The courts of the corporation’s domicile have jurisdiction, but a claimant may also choose to sue a director or other responsible person in the defendant’s domicile.
4. Joint and Several Liability

The new law limits the strict joint and several liability rule so that defendants, who often include Auditors and directors, can no longer be compelled to pay more than the amount of damages attributed to their own wrongdoing, taking into consideration their degree of fault and other relevant circumstances.\(^\text{387}\)

5. The Effect of Discharge

The granting of discharge to directors at the General Meeting bars director liability claims brought by the corporation only if the claim is based upon facts known to shareholders at the time of approval of the respective resolution.\(^\text{388}\) Those shareholders who approved the resolution, or shareholders who purchased the shares knowing of such resolution, are similarly prohibited from filing a suit.\(^\text{389}\) All other shareholders must file their suits within six months of the respective resolution.\(^\text{390}\) In practice, the granting of discharge has rarely prevented a director liability claim. It can easily be argued that all the relevant facts were not disclosed to the shareholders prior to their granting discharge.

6. Separate Liability for Social Security Contributions and for Payment of Certain Taxes

The Federal Law on Social Security Insurance provides for separate liability of the employer for unpaid social security contributions.\(^\text{391}\) Courts have interpreted this rule very broadly and imposed personal liability on directors for virtually all unpaid contributions. Certain cantonal laws and article 15 of the Federal Law on Withholding Tax impose personal liability on directors and liquidators for unpaid taxes.\(^\text{392}\)

7. Shareholder Liability: Piercing the Corporate Veil

Swiss courts have in a few cases upheld claims against the shareholder of a corporation, generally based upon a theory that it constituted an abuse by the defendant to assert that the corporation was not a distinct entity that was the alter ego of the shareholder.\(^\text{393}\)

The few examples that are available include cases in which the business of the shareholder and the corporation was not clearly separated. An impression was created that the shareholder acted on his own behalf, and where prejudice was caused to the corporation through, for example, undercapitalization. These cases may also be relevant under the theory that the shareholder acted as a de facto director, which would allow a claim based

\(^{387}\) See id. art. 759. See generally Böckli, supra note 1, at 548 n.2019 et seq.

\(^{388}\) OR art. 758, para. 1.

\(^{389}\) Id. para. 2.

\(^{390}\) See BUNDESGESETZ ÜBER DIE ALTERS- UND HINTERLASSENENVERSICHERUNG art. 52 (SR 821.10) [hereinafter AHVG].

\(^{391}\) VStG art. 15.

\(^{392}\) See, e.g., 90 BLÄTTER FÜR ZÜRCHERISCHE REICHTSSPRECHUNG 276 (1991).
on director liability. Guarantees, letters of comfort, and the like, issued by a parent company in favor of its subsidiary, lead to more common cases of contractual shareholder liability.

L. Transitory Provisions

The new law on corporations became effective on July 1, 1992 and fully applies to corporations incorporated thereafter. In principle, the new law also fully applies to corporations incorporated prior to that date, with the following exceptions:

(1) Provisions in the Articles which conflict with the new law may be maintained during a transition period of five years. These provisions must, however, be adapted within this period. However, certain rules and regulations on participation certificates apply with immediate effect, notwithstanding provisions in the Articles to the contrary.

(2) Corporations incorporated prior to January 1, 1985 which have a stated capital less than CHF 100,000 may nevertheless maintain their old capital. Furthermore, corporations may retain supervoting shares despite the ratio of aggregate nominal values of shares having a lower par value to common shares—the ones having a higher par value.

IV. EC Law Aspects

A. In General

Despite the negative result of the referendum on the European Economic Area (EEA) held on December 6, 1992, the Swiss application for membership in the European Community (EC) is currently pending. It is likely that a second referendum will be held on this issue in 1994, and that Switzerland will adjust its laws to European standards. Switzerland's membership in the EC would entail a series of changes in Swiss company law.

B. Changes Expected


The First Directive would cause the following changes in Swiss company law:

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394. See FORSTMOSER, supra note 361, at 209 n.657 et seq.
396. SCHLUSSBESTIMMUNGEN ZUM SECHSUNDZWANZIGSTEN TITEL, art. 2 (SR 220).
397. Id. art. 3.
398. Id. art. 2, para. 2.
399. Id. art. 5. See discussion supra part III.C.7.
400. 1968 O.J. (L 65/8) 41.
(1) Article 2(1)(f): Compulsory disclosure of the balance sheet and the profit and loss statement for each financial year, which presently is only required for Swiss joint stock corporations quoted at the exchange.  

(2) Article 4: Currently, Swiss law contains no rules regarding company stationery.  

(3) Article 9(1): Contracts entered into by the Board of a Swiss company are not binding if those acts do not fall under the statutory objectives of the company. Contrary to EC rules, this also applies if the third party has no knowledge of the corporation’s objectives.  

(4) Article 11(2)(f): Under the Directive, a company can only be declared null if the number of members of the company drops below two. At present, Swiss law requires three incorporators, and, upon motion of a shareholder or creditor, the judge may order the dissolution of the company if the number of shareholders drops below this threshold. However, this rule is rarely enforced.  


The Second Directive would cause the following changes to be made in Swiss law:  

(1) Article 3(j): Disclosure of the formation costs of the company.  

(2) Articles 9(1) and 26: Swiss law requires that at least twenty percent of the nominal value of the shares be paid-in, instead of the twenty-five percent prescribed by EC law.  

(3) Articles 9(2) and 27(1): The Directive requires that contributions in-kind for shares issued must be made in full within five years. Swiss law sets no time limit for such contributions.  

(4) Articles 10(2) and 27(2): The Swiss verification report must confirm only the adequacy of valuation principles. EC law requires a description of each of the assets comprising the consideration, the valuation methods used, and a statement that the values arrived at by these methods correspond at least to the nominal value of all shares issued, including the premium, if any.  

(5) Article 11: Purchases from incorporators or shareholders, if made during the two-year period subsequent to a formation or a capital increase, will need shareholder approval if the consideration exceeds ten percent of the subscribed capital. This rule would require a change in the rules concerning major investments made in connection with a formation or capital increase.  

401. See, e.g., Kotierungsreglement des Effektenbörsevereins Zürich, para. 2, § 2.2 (1991)  
402. OR art. 718a, para. 1.  
403. Id. art. 625.  
404. 1976 O.J. (L 26/1) 1.  
405. OR art. 632.  
406. Id. art. 634a.  
407. Id. art. 653f.  
408. See discussion supra part III.A.2.
(6) **Article 19:** The provisions under Swiss law are more liberal with respect to the company’s right to acquire its own shares;⁴⁰⁹ acquisitions of up to twenty percent of share capital are permitted, and no shareholder approval is required.

(7) **Article 22(2)(a):** The requirement to disclose the company’s reasons for acquisition of its own shares in the annual report must be added to present Swiss company law.

(8) **Article 23:** Swiss law does not explicitly prohibit the granting of loans or collateral of any kind for the acquisition of the company’s shares by a third party, although such transactions are partly restricted as ultra vires.⁴¹⁰

(9) **Article 25(2):** Under EC law, authorized capital can be created for a period of five years. Switzerland may consider extending the present two-year period to five years, however, the current law⁴¹¹ is in accordance with EC law.

(10) **Article 29(4):** Swiss law does not require the Board to give reasons as to why the shareholder subscription (or preemption) rights should be disallowed, or to justify the issue price. Swiss law, however, permits the General Meeting to restrict these rights, but only with justified reasons.⁴¹²

(11) **Article 29(7):** An exemption would have to be provided expressly permitting underwriting by a bank. In practice, however, banks have often underwritten shares without explicit authorization from the shareholders. Thus, an adaption to this provision would merely require incorporating an already existing practice into law.

(12) **Articles 30, 31, and 40:** At present, Swiss company law neither requires a special majority for a resolution on the reduction of share capital nor separate resolutions by the various classes of shares.⁴¹³


Swiss law contains very few rules on mergers.⁴¹⁵ In order to be implemented, the Directive on mergers would require a number of adaptations in Swiss company law. The most significant changes would relate to the following provisions of the Directive:

(1) **Articles 3 and 30:** Presently, there is no cap on the cash payment from the surviving entity to the shareholders of the transferee company.

(2) **Articles 5, 6, 9, and 10:** The Board of the surviving entity is required to provide a report on the merger only in those cases where a capital increase is necessary in order to issue the shares to be exchanged.⁴¹⁶ The Auditors

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⁴⁰⁹  See OR art. 659.
⁴¹¹  OR art. 651.
⁴¹²  Id. art. 652b.
⁴¹³  But see discussion supra part III.1.2 (discussing the detailed OR arts. 732 through 735).
⁴¹⁴  1978 O.J. (L 295) 36.
⁴¹⁵  OR arts. 748-51. See discussion supra part III.J.
⁴¹⁶  See OR art. 652e.
require verification reports only in such cases. Furthermore, the Auditors do not express a fairness opinion.\textsuperscript{417}

(3) \textit{Articles 7, 8, and 11}: At present, shareholders of the surviving entity need vote on the merger only if an increase in share capital is required in order to consummate the merger.\textsuperscript{418}

(4) \textit{Article 15}: Swiss company law does not contain any rules applying to mergers which protect the rights of holders of shares with special privileges.

(5) \textit{Articles 24 through 29}: No special rules apply to cases where the surviving entity owns at least ninety percent of the transferee company.


The Fourth Directive would necessitate the most significant changes in OR. The principle of presenting a true and fair view of the company's assets, liabilities, financial position, and profit or loss\textsuperscript{422} is presently not implemented under Swiss law, as reserves may still be created at will.\textsuperscript{423} Furthermore, the structure of a statutory balance sheet or a profit and loss statement under Swiss law is not as detailed as the EC standards.\textsuperscript{424} In this respect, the Swiss legislator could take advantage of the option allowing smaller companies to present a simplified balance sheet.\textsuperscript{425}

Disclosure requirements in the notes to the accounts will also need to be adapted to the more stringent EC standards. In particular, the following items will need to be introduced:

(1) \textit{43(1)(6)}: Amounts owed by the company due and payable after more than five years, as well as the entire debt secured by the company;

(2) \textit{43(1)(8)}: The net turnover, broken down into categories of activity and geographical markets;

(3) \textit{43(1)(10)}: Special valuations made with a view to obtaining tax relief, and influence on future taxation, if material;

(4) \textit{43(1)(11)}: The difference between tax charged and tax payable;

(5) \textit{43(1)(12)}: The emoluments granted to the members of the administrative, managerial, and supervisory bodies, to be indicated as a total for each group; and

(6) \textit{43(1)(13)}: The advances and credits granted to the members of the administrative, managerial, and supervisory bodies, indicating interest rates and principal

\textsuperscript{417} Id. art. 652f.

\textsuperscript{418} See id. art. 650.

\textsuperscript{419} 1978 O.J. (L 222) 11.

\textsuperscript{420} 1990 O.J. (L 317) 60.

\textsuperscript{421} 1990 O.J. (L 317) 57.

\textsuperscript{422} Fourth Council Directive, supra note 419, art. 2, § 3.

\textsuperscript{423} See discussion supra part III.E.I.

\textsuperscript{424} Fourth Council Directive, supra note 419, arts. 9, 10, 23.

\textsuperscript{425} See id. art. 11.
conditions. Also, enumeration of guarantees and similar commitments, with all
data aggregated for each group.

Finally, changes are necessary regarding publication, as present Swiss require-
ments do not fulfill these rules. The same applies to the necessity of including the full
text of the Auditors' report, including all qualifications.

5. Sixth Council Directive of December 17, 1982 Concerning the
Division of Companiés (82/891/EC).

Swiss law does not contain specific rules on the division of a company. Presently,
a division can be achieved by transferring part of a company's business to a newly formed
subsidiary against issue of shares. Then, distributing these shares to the shareholders.
However, as this distribution qualifies as a dividend payment, it is necessary that the
company have sufficient reserves against which the distributed shares can be offset.
In some instances, a capital reduction in the "old" company may be required as a third
step. As the first step involves a contribution in-kind, the relevant disclosure requirements
apply. Creditors of the transferred business are protected by imposing joint and
several liability on both the transferring and the new company for a two-year period.
No special protection is offered to creditors of the remaining business.

Accounts (83/349/EC).

While the number of companies required to draw up consolidated accounts would not
change substantially, implementation of the Directive would require other important
changes, many of which are already indicated by the fourth Directive:

(1) Article 16: True and fair view of the assets, liabilities, financial position, and
profit or loss of the group.

(2) Article 17: Swiss company law does not require any specific structure or layout
of the consolidated financial statements.

426. See id. art. 47.
427. Id. art. 48.
428. 1982 O.J. (L 378) 47.
429. See OR art. 628.
430. OR art. 675, para. 2.
431. See id. arts. 634-35a. See also discussion supra part III.A.2.
432. See OR art. 181. Note, however, that under Swiss law there is no obligation of the newly
formed entity to also assume the liabilities of the old company unless spelled out in the division agreement.
433. However, some protection is afforded to creditors in the case of bankruptcy of the debtor
corporation, where the division constitutes an avoidable preference (i.e., selling the key assets against
insufficient consideration). SchKG art. 285 et seq.
437. Id.
(3) **Articles 18 through 33:** Swiss law does not contain an enumeration of valuation and consolidation principles. 438

(4) **Article 34:** The contents of the notes are not enumerated in Swiss law. 439

(5) **Article 36:** At present no consolidated annual report is required. 440

(6) **Article 38:** The publication standards as set forth in this provision are presently not met. 441

7. **Eighth Council Directive of April 10, 1984 Concerning the Approval of Auditors (84/253/EC).** 442

The requirements for qualified Auditors, 443 specified in the ordinance of the Federal Council of June 15, 1992, 444 only fulfill the requirements of the Directive in part; adaptation to certain examination criteria would be necessary.


The disclosure requirements regarding branch offices are largely fulfilled in Switzerland. 446

9. **The Proposals for the Fifth, 447 Ninth, 448 Tenth 449 and Thirteenth 450 Council Directives**

At present, Swiss law offers only the monistic system described in article 21a et seq. of the present Draft for the Fifth Directive for the organization of the Board. Therefore, it will need to offer companies the choice of the dualistic system. 451 Workers' participation 452 is an additional element that will need to be introduced into Swiss law. The Directive will also require certain technical adaptations regarding the General Meeting.

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438. *Id.* at 7-11.
439. *Id.* at 11.
440. *Id.* at 13.
441. *Id.*
442. 1984 O.J. (L 126) 1.
443. OR art. 727b.
444. See VERORDNUNG ÜBER DIE FACHLICHEN ANFORDERUNGEN AN BESONDERS BEFAHIGTE REVISOREN (SR 221.302).
446. See OR art. 642.
448. Com. Dok. III/1639/84
450. 1990 O.J. (C 240) 7-30.
452. See *id.*, ch. III, § 3 et seq.; ch. IV, § 2 et seq.
If adopted in the form of the present draft, implementation of the Ninth Directive on
groups of companies\footnote{See supra note 448.} will require a completely new set of rules, as no comparable
body of law currently exists in Switzerland.

Under Swiss company law, international mergers are not possible; the implementation
of the Tenth Directive\footnote{See supra note 449.} would require significant changes in the law.

Finally, Swiss law contains no rules on takeovers.\footnote{See discussion supra part III.J.} The proposed new law for
Stock Exchanges and Securities Trading\footnote{See ENTWURF ZU EINEM BUNDESGESETZ ÜBER DIE BÖRSEN UND DEN EFFEKTENHANDEL, (1993) I
BB 1446 [hereinafter BEHG].} will, however, implement the relevant parts of the Thirteenth Directive.\footnote{See supra
note 449.}

\section*{V. THE SWISS SECURITIES MARKET}

Swiss company law heavily influences the Swiss securities markets as no district
securities laws exist other than cantonal laws regulating professional dealings in securi-
ties.\footnote{See supra note 449.} A proposal for a Federal Law on Stock Exchanges and on Securities Trading
is pending in Parliament. Under the present law, there are no reporting requirements for
securities transactions; although banks do have a duty to report the sale of registered
shares to the issuer.\footnote{See BOTSCHAFT ZUM BEHG, (1993) I BB, at 1373 et seq.}

The market capitalization of listed securities as of December 31, 1991 amounted to
$199 billion, ranking Switzerland seventh worldwide, behind the United States, Japan, the
United Kingdom, Germany, France, and Canada, but ahead of Italy, Australia, and the
Netherlands. Capitalization, however, is very concentrated. The securities of the ten
largest companies account for sixty-four percent of total equity market capitalization.

Securities trading is concentrated in the Zurich Stock Exchange, followed by the
Geneva and Basel Exchanges. The Bern, Lausanne, Neuchatel, and St. Gallen exchanges
have either been recently closed down or continue only as telephone trading systems.
Dealings on the Zurich Stock Exchange are determined by the “à la criée” system,
whereby bargaining is carried out directly and verbally between ring bank representatives.
The clerk of the Stock Exchange records all prices bid, asked, and paid during the official
trading hours. Securities dealers, including exchange members, are free to buy and sell
stocks on or off the floor at any time, including during exchange trading hours.

The implementation of the proposed national Electronic Stock Exchange (EBS, “Elek-
tronische Börse Schweiz”), expected for 1994, may further change trading in Switzerland.
An important part of the trade in blue chips has, however, moved to the London market
as a result of a securities transfer tax applied in Switzerland, partially abolished on April
1, 1993. There is also a market for securities that does not, at least as yet, meet listing
requirements (“Vorbörse”).

The clearing of securities transactions is effectuated by Schweizerische Effekten-Giro
AG (SEGA), which also acts as a depositary system. SEGA transfers shares on an
accounting-based system, which is the reason why physical delivery of shares has become the exception.

A Swiss company whose securities are to be quoted must have been in business at least five years, published its audited annual accounts as well as its business report, and have a capital of not less than CHF 5 million.

VI. CONCLUSION

This Article sets forth the general requirements for the formation of a Swiss stock corporation. It also provides a detailed description of the various characteristics of a Swiss joint stock corporation. By organizing and analyzing the law governing stock corporations, this Article provides the transnational practitioner with a wealth of knowledge regarding Swiss joint stock corporations. This Article is a useful tool for practitioners interested in Swiss corporate law because it provides them with an overview of the Swiss corporate structure. Moreover, this Article is a useful tool for practitioners already involved with Swiss corporations because it clearly sets forth the law which governs these organizations, and provides an outline of the various changes that may occur upon Switzerland’s entry into the European Community.