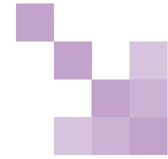
Switzerland



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CORPORATE ENTITIES

In Switzerland most businesses are conducted in the form of either a:

- Stock company (*société anonyme/Aktiengesellschaft/società anonima*). This is the most common form.
- Limited liability company (*société à responsabilité limitée/Gesellschaft mit beschränkter Haftung/società a garanzia limitata*). This is the preferred type of organisation for small and medium-sized businesses.

Private banks and mutual savings banks, insurance companies and retail distribution companies often use other corporate forms.

This chapter focuses on the stock company (company). Unless otherwise specified, the answers below relate to all sizes and all types of companies (listed or unlisted).

LEGAL FRAMEWORK

1. What is the regulatory framework for corporate governance and directors' duties?

General regulations

Corporate governance and directors' duties are mainly governed by:

- The Code of Obligations 1911 (CO) (in particular, Articles 620 to 763 relating to company law and Articles 927 to 964 relating to the Registry of Commerce, company names and commercial accounting).
- The Federal Act on Mergers, Spin-Offs, Change of Corporate Form and Transfer of Assets 2003.
- The Federal Act on the Approval and Supervision of Auditors 2005.
- The Criminal Code 1937 (CC).
- The Company's bye-laws (bye-laws).

Other specific laws and regulations apply to companies operating in the financial sector (banks, securities dealers, fund administration companies and insurance companies), which include detailed rules for corporate governance.

Listed companies

Listed companies are also governed by:

- The Federal Act on Stock Exchanges and Securities Trading 1995 (SESTA).
- The Ordinance on Stock Exchanges and Securities Trading 1996.
- The Ordinance on Stock Exchanges and Securities Trading of the Swiss Financial Market Supervisory Authority 2008.
- The Ordinance on Public Takeover Bids of the Takeover Board 2008.
- Articles 161 and 161bis of the CC on insider trading and price manipulation on stock exchanges.

The main Swiss exchange (SIX) has also issued numerous rules, directives and circulars, including:

- The Listing Rules 1996/2008.
- The Directive on Information Relating to Corporate Governance 2002/2006 (DCG), which provides for publication of information on a comply-or-explain basis.
- The Directive on Requirements for Financial Reporting 2004/2006.
- The Directive on Ad hoc Publicity 2004/2006.
- The Directive on the Disclosure of Management Transactions 2005 (DMT).

Non-binding recommendations

The following non-binding recommendations also apply:

- The Swiss Code of Best Practice for Corporate Governance 2002/2007 (SCBP) issued by economiesuisse (the umbrella organisation for Swiss businesses), together with its Annex 1 which contains ten specific recommendations on directors' and managers' compensation.

  The SCBP claims to represent the current standard of practice widely accepted by Swiss companies. Although its recommendations are mainly intended for listed companies, non-listed but economically significant entities can develop appropriate guidelines from it. Companies with active major shareholders (including listed subsidiaries), as well as

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small and medium-sized businesses, can adapt or simplify the SCBP. The main Swiss business organisations have expressly endorsed the SCBP.

- The Guidelines on Independence of the Swiss Institute of Certified Accountants 2007 (Guidelines on Independence), which are binding on the Institute's members. These are referred to in the SCBP and are of particular relevance for the auditing process (*see Questions 27 to 31*).

Most of the above rules and regulations are available in English at *www.six-swiss-exchange.com/admission/regulation_en.html* or *www.economiesuisse.ch*.

Regulatory bodies

There is no specific regulatory body responsible for the enforcement of corporate governance rules. However, the SIX, the Swiss Financial Market Supervisory Authority and the Federal Audit Oversight Authority, among other tasks, also supervise compliance by companies with regulations which apply to listed companies, or to companies active in the financial sector or to auditors.

BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

2. What is the management/board structure of a company? In particular:

- **Is there a unitary or two-tiered board structure?**
- **Who manages a company and what name is given to these managers?**
- **Who sits on the board(s)?**
- **Do employees have a right to board representation?**
- **Is there a minimum or maximum number of directors or members of the managerial and supervisory bodies?**

- **Structure.** Companies have a unitary board structure (that is, a board of directors (*conseil d'administration/Verwaltungsrat/consiglio d'amministrazione*) presided by a chairman). The board has the overall responsibility for all matters not expressly left to the shareholders (*see Question 12, Directors' powers*).

  Company law allows considerable flexibility regarding the organisation of boards and the powers which can be either allocated to directors and/or committees, or delegated to the management (*see Question 13*).

- **Management.** Directors manage the company collectively, unless the bye-laws provide otherwise. In practice, it is usual for the management and the board to be clearly separated. For large companies, management is never exercised by the (full) board but typically delegated to certain directors only (*administrateurs-délégués/Delegierte/delegati*), or to committees and/or to managers (*directeurs/Direktoren/direttori*).

  These delegations must be provided for in the bye-laws, and the board must adopt organisational regulations to determine management positions, duties and reporting requirements.

  As a rule, banks must have a management which is clearly distinct and separate from the board.

- **Board members.** Only individual persons can serve as directors.

  Directors should possess the necessary qualifications to ensure an independent decision-making process. If the company has a significant part of its operations abroad, the board should include members from abroad or having a long-standing international experience (*SCBP*).

- **Employees' representation.** Employees have no right to be represented on the board.

- **Number of directors or members.** Unless the bye-laws provide otherwise, the board can be composed of one or more directors.

  The size of the board depends on the company's needs and particulars; it should be small enough to allow an efficient decision-making process and large enough for its members to contribute experience and knowledge from different fields and to allocate management and control functions among themselves (*SCBP*).

3. Are there any age or nationality restrictions on the identity of directors?

Age restrictions

There are no age restrictions, although the bye-laws of listed companies usually provide for an age limit.

Nationality restrictions

At least one Swiss-domiciled person, be it a director or a manager, must be in a position to validly represent the company.

4. In relation to non-executive, supervisory or independent directors:

- **Are they recognised?**
- **Does a part of the board have to consist of them? If so, what proportion?**
- **Do non-executive or supervisory directors have to be independent of the company? If so, what is the test for independence or what makes a director not independent?**
- **What is the scope of their duties and potential liability to the company, shareholders and third parties?**

- **Recognition.** Listed companies must identify executive and non-executive directors and must provide information on their activities and on their vested interests outside the company. Non-executive directors must also identify their (former) connections with the company (*DCG*).

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- **Board composition.** The board does not actually manage the company (*see Question 2, Management*). According to a study, 90% of listed company directors are non-executive directors. The SCBP recommends that the majority of the board should be composed of non-executive directors.

- **Independence.** The SCBP recommends that the members of the compensation and of the audit committees be independent. A non-executive director is independent provided that he:

  - is not involved in the management of the company and that he has not been involved in the management recently (that is, up to three years ago);

  - has no (or comparatively minor) business relations with the company.

  A member of the compensation committee is not independent if he is subject to the supervision or power of a director or of an officer in another company when his compensation is discussed.

  Whenever there is a cross-membership in the board (known as interlocking directors), the independence of the respective members should be carefully checked.

  The board can add further criteria for the determination of the independence of non-executive directors.

  Additional criteria apply to banks and securities dealers.

- **Duties and liabilities.** Generally, non-executive directors are subject to the same duties and liabilities as executive directors (*see Questions 14 to 15*).

5. Are the roles of individual board members restricted? For example, can one person be the chairman and chief executive?

The board determines whether a person can simultaneously be chairman of the board and chief executive officer (CEO), based on the company's needs and the availability of senior management (*SCBP*).

If a person holds both of these functions, then the company should exercise adequate control, for example by appointing an experienced non-executive director (lead director) to (among other things) convene and chair the meetings of the board (*SCBP*).

As a rule, banks and insurance companies shall not have the same person acting as chairman and CEO.

6. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

Directors are appointed by the shareholders at shareholders' meetings (general meetings) by a majority of the votes allocated to the shares represented (majority vote), unless the bye-laws provide for a different threshold. The chairman is chosen by the board among its members (or by the shareholders, if the bye-laws so provide).

The board should set up a nomination committee setting out the governing rules for the selection of candidates and for their re-election; it should select candidates according to those rules (*SCBP*).

Removal of directors

The shareholders can remove directors at any time and without cause at general meetings by a majority vote, unless the bye-laws provide for a different threshold.

7. Are there any restrictions on a director's term of appointment?

Directors are elected for three years, unless the bye-laws provide for a different term (which cannot exceed six years). Re-election is possible.

The ordinary term should not generally exceed four years, and staggered terms are preferred (*SCBP*).

8. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Directors do not have to be (and are usually not) employed by the company.

Shareholders' inspection

The board or the general meeting can authorise shareholders to view contracts between the company and its directors, provided that commercial secrets or other interests are not jeopardised (*see Question 21*). Listed companies must disclose their directors' remunerations (*see Question 10, Disclosure*).

9. Are directors allowed or required to own shares in the company?

Directors are not required to own shares in the company.

The shares allotted to, or held by, directors of a listed company must be disclosed (*see Question 10, Disclosure*).

10. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

The board determines the directors' remuneration in compliance with general principles of company law (for example, duty of care and loyalty, and reimbursement of unjustified benefits).

The board should set up a compensation committee, which issues the rules governing directors' and senior management's remuneration and it should submit them to the board's approval (*SCBP and its Annex 1*). A consultative vote by the general meeting may be provided.

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In addition, it is recommended that (*SCBP and its Annex 1*):

- The board decide on the compensation system and determine the role and responsibility of the compensation committee.
- The compensation committee be exclusively composed of independent directors without interlinked interests but who may be, or may represent, significant shareholders.
- The overall remuneration package correspond to performance and the employment market conditions.
- The remuneration be conditional on the company's sustainable success and the individual contributions. The interests of the managers should be aligned with the interests of the company so that false incentives be avoided. The compensation system should contain both fixed and variable components; it should reward medium- and long-term achievements.
- The dilution effect caused by share option schemes for senior managers be minimised, and the conditions for exercising options should not be subsequently modified in the option-holders' favour.
- Contracts with senior managers contain provisions on termination of employment which relate to market conditions and protect the company's interests. As a rule, the company is not to grant golden parachutes or severance compensations.
- The compensation committee undertake a critical review of salary comparisons with other companies.
- The board establish a compensation report to the attention of the general meeting and involve the shareholders in the compensation system by bringing it into the discussion regarding the approval of the financial statements or by submitting it to a consultative vote at general meetings.
- The board ensure transparency, for example by providing information that is readily comprehensible.

The system of remuneration is currently being reviewed by Parliament (*see Question 36, Remuneration*).

Disclosure

Listed companies must disclose in the notes to their financial statements the remuneration of, and loans and guarantees to (*Article 663b bis, CO*):

- The directors on an individual and on an aggregate basis.
- The members of the advisory board (if any) on an individual and on an aggregate basis.
- The senior managers on an aggregate basis.
- The senior manager with the highest remuneration.
- The former directors, senior managers and members of the advisory board (under certain conditions).
- The respective relatives of (former) directors, senior managers and members of the advisory board whenever these loans and guarantees are not consistent with market practice.

All participations in the company's share capital (as well as convertibles and option rights) held by directors, senior managers and members of the advisory board (together with their respective relatives) must also be disclosed on an individual basis (*Article 663c(3), CO*).

In addition, listed companies must disclose the content of the directors' remuneration and disclose the method of computation of their compensation package, (including authority and procedure) (*DCG*).

Shareholder approval

Although it has become subject to greater shareholder scrutiny, directors' remuneration does not require shareholder approval, except in relation to:

- Profit sharing bonuses (*tantièmes/Tantiemen/partecipazione agli utili*).
- Ratification of transactions which trigger a conflict of interests (*see Question 19*).

MANAGEMENT RULES AND AUTHORITY

11. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

Internal management is mostly governed by:

- The bye-laws.
- The organisational regulations and other internal directives.
- The company's practice.

The chairman usually calls meetings, but each director can require that the chairman call a meeting at short notice.

The following non-binding provisions of company law also apply:

- Board resolutions are adopted by the majority of the votes cast.
- The chairman has a casting vote.
- There are no quorum requirements to hold a meeting or to adopt a resolution.
- Resolutions can be adopted by written consent to a proposal, unless a member requests a discussion among board members of the underlying issues.

The board determines its procedures as it deems appropriate, which nevertheless should include the following (*SCBP*):

- At least four board meetings a year (depending on the company's requirements), with additional meetings to be held at short notice, whenever necessary.
- Preparation and conduct of board meetings in the company's interests according to SCBP recommendations.

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12. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

Among other things the board has the non-delegable power and authority to:

- Decide on the company's general strategy and issue the corresponding instructions.
- Organise the company.
- Choose the accounting, financial control and financial planning methods.
- Appoint and remove the senior management and the persons who are authorised to represent the company.
- Supervise the senior management.
- Prepare the annual report, including the (consolidated) financial statements.
- Organise the general meeting and carry out its resolutions.
- Notify the courts if the company should become over-indebted (that is whenever its liabilities exceed its assets).

The following issues are exclusively reserved to the authority of the general meetings:

- The adoption of, and amendments to, the bye-laws.
- The election and removal of the directors and auditors.
- The approval of the annual report, including the (consolidated) financial statements.
- The use of the balance sheet profits and the distribution of dividends.
- The discharge to the directors.
- The decisions on other matters, that, by law or according to the bye-laws, are reserved to the general meetings.

The internal organisational structure of listed companies (for example, the allocation of tasks within the board and the method of working) and the allocation of responsibilities between the board and the management must be disclosed (*DCG*).

Restrictions

Restrictions on the powers of directors to represent the company are not enforceable against third parties acting in good faith, unless those restrictions are entered into the Registry of Commerce and either relate to the fact that:

- The company may only be validly represented collectively by several directors (usually two).
- The authority of certain directors is limited to the representation of either the principal establishment or of a given branch.

13. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

The board can delegate responsibility for preparing and executing specific issues to individual directors or committees, provided that these delegations are reported to the board.

Although the board is not required to delegate tasks, it is recommended that the board establish certain committees, including (*SCBP*):

- An audit committee.
- A compensation committee.
- A nomination committee.

Listed companies usually set up these committees.

Banks (and securities dealers whose managers and board members are not identical) must set up an audit committee whenever certain thresholds are met.

Instead of setting up committees, small and medium-sized companies can assign specific responsibilities to certain individuals or entrust the full board with these tasks (*SCBP*).

The internal organisational structure of listed companies must be disclosed (*DCG*).

DUTIES AND LIABILITIES OF DIRECTORS

14. What is the scope of a director's duties and personal liability to the company, shareholders and third parties? Please distinguish between civil and criminal liability under each of the following (if relevant):

- **General duties.**
- **Theft and fraud.**
- **Securities law.**
- **Insolvency law.**
- **Health and safety.**
- **Environment.**
- **Anti-trust.**
- **Other.**

- **General duties.** Directors (and managers) are personally liable to the company, its shareholders and creditors for damage caused by intentional or negligent violations of their duties.

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Unless the shareholders and the company's creditors suffer direct damages (this notion has been narrowly interpreted by the Swiss Supreme Court), any indemnity granted by the court shall only be paid to the company (and not the shareholders nor the company's creditors). If the company has been declared bankrupt, the trustee in bankruptcy is first entitled to assert the shareholders' and creditors' claims (they can only collectively assert their claims in situations where the trustee in bankruptcy waives its right to do so).

The CC provides for certain specific offences, including:

- filing false statements to the Registry of Commerce (*Article 153*);
- disclosing trade or commercial secrets (*Article 162*);
- fraudulently obtaining an incorrect official recording (*Article 253*);
- economic espionage (*Article 273*);
- the failure to comply with accounting regulations (*Article 325*);
- the violation of regulations pertaining to business names (*Article 326ter*).

- **Theft and fraud.** Directors can be criminally liable for fraud or theft under the general principles of law whenever they are responsible for:
  - a breach of confidence (*Article 138, CC*);
  - fraudulent representations (*Article 146, CC*);
  - embezzlement (*Article 158, CC*);
  - the forgery of documents (*Article 251, CC*).

  Generally, these breaches also trigger a civil liability.

- **Securities law.** Civil liability can arise for statements made in a prospectus offering securities or bonds (*Article 752, CO*). Generally, directors are liable for statements made in the prospectus published by the offeror or the target in the context of a public takeover offer. It is disputed whether directors can be held liable for wrongful disclosures made in ad hoc publicity (*see Question 21*).

  The following are considered as criminal offences (*CC*):
  - insider trading (*see Question 20*);
  - price manipulation on a stock exchange (*Article 161bis*);
  - false statements about commercial business (made, for example, in the prospectus for a public offer of shares) (*Article 152*);
  - under certain conditions, fraudulent representations (made, for example, in a prospectus) (*Article 146*).

  In addition, there are specific offences for (*SESTA*):
  - omitting to disclose qualified participations in the share capital of listed companies;
  - failure of the target's board to submit a report to the shareholders in the context of a public takeover offer.

- **Insolvency law.** Directors can incur civil liability whenever they fail to promptly notify the courts of the company's over-indebtedness (that is, where the company's liabilities exceed its assets).

  Criminal offences include (*CC*):
  - fraudulent bankruptcy and fraud in connection with a seizure procedure (fictitious reduction of assets or creation of debts) (*Article 163*);
  - the artificial reduction of assets to the prejudice of creditors (*Article 164*);
  - mismanagement (*Article 165*);
  - the granting of preferences to certain creditors (*Article 167*);
  - the appropriation of seized property (*Article 169*).

- **Health and safety.** Civil and criminal liability can apply for breaches of health and safety regulations or, in certain circumstances, failure to prevent those breaches.
- **Environment.** See above, *Health and safety*.
- **Anti-trust.** See above, *Health and safety*.
- **Other.** Directors may be subject to specific civil and criminal liabilities for:
  - certain specific tax contributions and tax offences of the company;
  - social security contributions which the company failed to pay;
  - money laundering offences.

15. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Directors cannot limit their responsibility unless the general meeting has granted them a full and unqualified discharge of and from personal liabilities (*décharge/Entlastungsbeschlusses/discarico*). These resolutions may only be made in relation to:

- Facts that have been disclosed to the shareholders.
- Claims of the company and those shareholders which have consented to the resolution.

Creditors' claims, shareholders' direct claims and claims in the context of a company's bankruptcy may not be restricted by de-

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cisions of general meetings. Shareholders which have not consented to given resolutions have six months to bring their claims before a court.

The responsibility of directors for properly delegated tasks is limited to using due care in selecting, instructing and supervising the delegated persons.

Within certain limits, a company can indemnify a director who has been held liable; this, however, is not possible for criminal fines or liabilities resulting from a director's gross negligence of wilful misconduct.

16. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Directors (and officers) often contract liability insurance coverage, and it is usual that the company pays the corresponding premium.

17. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

A parent company or a controlling shareholder which either directly or through representatives, intervene(s) in the company's management as if it were a director, can be regarded as a de facto director and as such may be subject to the same civil and criminal liabilities as a director.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

18. Are there general rules relating to conflicts of interest between a director and the company?

Generally, a director should not participate in a decision where he has a serious conflict of interests, and the other directors should ensure that he does not do so. Conflicts of interests should be disclosed to the board.

The SCBP sets out the procedure to be followed if a conflict of interests arises; it recommends that anyone with a permanent conflict of interests should refrain from accepting an offer to serve as a board member.

19. Are there restrictions on particular transactions between a company and its directors?

Directors have a duty of loyalty towards the company and must safeguard its interests. They are not allowed to enter into a transaction with the company except in cases where either:

- It has been approved by the board or by the general meeting.
- It does not jeopardise the company's interests.

Transactions between a director (or his relatives) and the company should be carried out at arm's length and should be approved without the participation of the person concerned (*SCBP*).

Whenever a director acts for himself (or a third party) and for the company (self-dealing), then the transaction must be documented by a written agreement except for everyday minor transaction not exceeding CHF1,000 (about US$781) (*Article 718b, CO*).

20. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Directors who use confidential information (obtained by reason of their position in the company) to trade listed shares or inform third parties (insider trading) are subject to criminal liability (*Article 161, CC*). Insider trading may also be regarded as a breach of the directors' duty of loyalty (*see Question 14*).

The board should take appropriate measures to prevent insider trading (such as setting periods of time during which the directors may not deal in the company's equity securities) in connection with, for example, takeovers, before media conferences or before announcing corporate results (*SCBP*).

Listed companies must disclose to the SIX the direct or indirect purchase or sale of company's equity securities by directors and senior managers. If a transaction or the total value of the transactions concluded by one person within one calendar month exceeds CHF100,000 (about US$78,082), the SIX makes the information publicly available (*DMT*).

DISCLOSURE OF INFORMATION

21. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

Certain information is publicly available (most of it online) from the Registry of Commerce and/or is published in the *Swiss Official Gazette of Commerce*, including:

- The purpose of the company.
- The company's share capital.
- Authorised and conditional capital increases.
- The members of the board.
- The persons who are authorised to represent the company.
- The company's bye-laws.

The board must inform in writing shareholders or creditors who can prove to have an interest worthy of protection of how the management is organised.

Shareholders may consult and/or receive a copy of the following documents at the earliest 20 days before any general meeting and one year after the approval by the general meeting at the latest:

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- The company's annual report (which includes the financial statements (that is the balance sheet, the statement of earnings and the notes) the business report and, if any, the (consolidated) financial statements).
- The auditors' report.

Within one year of approval by the general meeting creditors with an interest worthy of protection may consult:

- The (consolidated) financial statements.
- The auditors' report.

At the general meeting, directors must give to the shareholders, at their request, all information relating to the company as is necessary for the shareholders to be in a position to exercise their rights, provided, however, that such disclosure of information does not jeopardise business secrets or other company interests. Shareholders may only inspect the company's books and correspondence provided they have been authorised to do so by the general meeting or by the board.

Generally, listed companies must also:

- Publish their audited annual report and the auditors' report within four months of the end of any given business year.
- Within three months of the end of the relevant period, publish unaudited interim financial statements covering a maximum time period of six months.
- Make their annual reports, interim financial statements and auditors' reports available for five years (for example, on the company's website).
- Apply accounting standards recognised by the SIX.
- Disclose in their annual report significant participations of shareholders (usually more than 5% of the voting rights).
- Publish information on changes to shareholdings of persons or entities which directly, indirectly or in concert with third parties, have acquired or sold equity securities or financial instruments in the company and thereby attain, fall below or exceed the threshold percentages of: 3%, 5%, 10%, 15%, 20%, 25%, 33.33%, 50% or 66.66% of the company's voting rights.
- Comply with the requirement to publish ad hoc publicity (that is the company must immediately notify the market of price-sensitive facts). Postponement of ad hoc publicity is only possible whenever restrictive conditions are satisfied.
- Disclose all information required by the DCG in a separate section of the annual report. Listed companies can decide not to disclose the required information provided that they give specific reasons for the non-disclosure (comply-or-explain principle).
- Disclose all information related to executive remuneration and participations (s*ee Question 10, Disclosure*).

Specific detailed rules apply in relation to initial public offerings and public takeover offers. Banks, securities dealers and insurance companies are subject to specific rules.

COMPANY MEETINGS

22. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

An ordinary general meeting (OGM) must take place each year within six months after the end of the business year. More stringent deadlines apply to listed companies (*see Question 21*).

The following issues are considered in an OGM:

- Approval of the company's annual report.
- The use of the balance sheet profits and the distribution of dividends.
- Discharging directors from personal liability (*see Question 15*).
- Other matters which require shareholders' approval (*see Question 12, Directors' powers*).

23. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Shareholders who either represent at least 10% of the share capital or hold shares of a par value of at least CHF1 million (about US$923,719) may request that the board convene a general meeting and/or include specific items on the agenda.

The SCBP recommends that the bye-laws lower these thresholds to facilitate the exercise of shareholders' rights.

MINORITY SHAREHOLDER ACTION

24. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

A shareholder can propose that specific facts be subject to a special audit if necessary, provided that he has first made use of his right to information or inspection (*see Question 21*). If the proposal is rejected by the general meeting, then the requesting shareholder can ask the court to appoint a special auditor, provided the requesting shareholder (alone or together with other shareholders) either holds at least:

- 10% of the share capital.
- Shares with a par value of at least CHF2 million (about US$1.7 million).

Decisions of a general meeting can either be rescinded (by the board or by a shareholder) or, under restrictive conditions, treated as void. In contrast, decisions of the board cannot be rescinded but, under restrictive conditions, can be regarded as being void.

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Provided they have valid reasons shareholders representing at least 10% of the share capital may apply for the winding up the company. However, the court can choose other solutions.

Whenever the company's organisation no longer fulfils the legal requirements, then any shareholder may request the court to take the necessary measures.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

25. Are there any formal requirements or guidelines relating to the internal control of business risks?

It is part of the general duties of the board to set up an internal control system which is adequate in view of the size of the company and the type of activities in which it is engaged and covering financial and operational risks. In addition, the notes to the financial statements must disclose information regarding the implementation of risk evaluation measures.

The statutory auditors of companies which are subject to regular audits (*see Question 27*) must certify the existence of an appropriate internal control system.

The audit committee, to which the internal audit unit reports, should assess the quality of the internal control system, including risk management (*SCBP*).

Generally, banks, securities dealers and insurance companies must set up an internal control entrusted with specific duties. Compliance and risk control procedures must also be provided separately.

26. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The board must:

- Decide on the accounting methods, and on the financial controls and planning.
- Prepare the annual report.
- Submit the annual report and the auditors' report to the general meeting for approval.

Directors are liable for the company's accounts (*see Question 14, General duties*).

The audit committee should decide whether the (consolidated) financial statements can be recommended to the board for approval by the general meeting (*SCBP*). More specific rules apply to banks and securities dealers.

27. Do a company's accounts have to be audited?

There are two different sorts of audit, namely the regular audit and the limited audit, depending on the size of the company, and depending on whether the company is listed or not or whether it has issued bonds, or whether it has to establish consolidated financial statements. Shareholders representing 10% of the voting rights may request that the company be subject to a regular audit (opting-up). The shareholders of small companies having less than ten full-time employees may choose, by a unanimous vote, to ease or to waive the requirements of the limited audit (opting-down or -out).

28. How are the company's auditors appointed? Is there a limit on the length of their appointment?

Auditors are appointed by the general meeting for one to three business years and their mandate can be subsequently renewed.

For companies subject to a regular audit, the lead audit partner must rotate every seven years (it can be reappointed subsequently after an interruption of three years).

29. Are there restrictions on who can be the company's auditors?

Auditors performing regular or limited audits have to be registered with the Federal Auditing Oversight Authority (FAOA). In addition, auditors of listed companies or companies having issued bonds are supervised by the FAOA.

Auditors must be independent and fulfil certain professional requirements. The requirements are different for auditors performing regular or limited audits. Detailed rules apply, in particular with regard to (past) activities of the auditors' employees and officers.

Auditors of listed companies must have been approved by the SIX.

Special rules apply for banks, securities dealers and insurance companies.

30. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

Auditors that are performing a regular audit must not perform any work for the company which is incompatible with their auditing mandate, such as bookkeeping. Auditors that are performing a limited audit may also perform other mandates, such as bookkeeping. Chinese walls need to be provided in certain circumstances.

The audit committee must ascertain the auditors' independence and the compatibility of auditing responsibilities with any consulting mandates (*SCBP*).

The total fees for non-auditing services charged by auditors of listed companies must be disclosed (*DCG*).

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31. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

Auditors are liable to the company, its shareholders and its creditors for damages caused by an intentional or negligent breach of their duties.

Auditors may be held liable towards third parties (for example, a person who has bought shares in reliance on the auditors' report) whenever they are in a special relationship with that third party.

Auditors' liability may not be limited or excluded.

CORPORATE SOCIAL RESPONSIBILITY

32. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

There are no legal requirements or non-binding rules on these questions, but it is increasingly common for listed companies to voluntarily adopt a code of conduct and/or report on social, environmental and ethical issues.

ROLE OF COMPANY SECRETARY

33. What is the role of the company secretary in corporate governance?

Even though the company secretary does not play a formal role in corporate governance, his role has become increasingly more involved in the administrative monitoring of the board processes.

ROLE OF INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

34. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

Institutional investors and other shareholders' groups exercise an increasing influence on corporate governance mainly through the recommendation of votes, publications and reports, discussions with companies and lobbying activities. Ethos (set up by two Swiss pension funds), Philias and Acatres, are examples of active organisations in this area.

WHISTLEBLOWING

35. Is there statutory protection for whistleblowers (persons who disclose criminal activity or other serious malpractice within a company)?

There is no specific statutory protection for whistleblowers, although it is expected that they will be under the new legislation (*see Question 36, Whistleblowing*). However:

- Some Swiss companies have implemented whistleblowing procedures.
- Employees of the federal and certain cantonal administrations can report cases of fraud or bribery to the competent authority.

REFORM

36. Please summarise any impending developments or proposals for reform.

Company and accounting law

A thorough reform of company and accounting law is discussed by Parliament. The main issues relate to corporate governance, the structure of the share capital, general meetings and accounting and financial reporting requirements.

Remuneration

Parliament is to discuss a draft bill on the remuneration of directors and managers; in addition, a popular initiative proposes even more stringent requirements.

Whisteblowing

Parliament is to discuss a draft bill providing for a scheme to protect persons who internally or publicly reveal irregularities, which have been discovered at their place of work.

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Country Q&A

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