

# Stock Corporation Law Amendment Act 2012

The purpose of the Stock Corporation Law Amendment Act 2012 is to further develop and bring specific amendments to German stock corporation law. The Federal Government's draft bill that has now been published differs in several respects from the ministerial draft bill of 2010. It is expected that the Stock Corporation Law Amendment Act will take effect in mid-to-late 2012. The principal changes concern the issue of bearer shares, "reverse" convertible bonds, the issue of preference shares that do not give entitlement to deferred dividend payments and the introduction of a relative deadline for the filing of an action to annul.

## Issue of Bearer Shares

**Only listed companies are to have the right to issue bearer shares and (according to a clause now included in the government draft but not previously contained in the ministerial draft) such right of non-listed companies to issue bearer shares shall be conditional on such shares being held in collective safekeeping.**

According to the ministerial draft, the right to issue bearer shares was to be reserved for listed companies, while any other companies would only be allowed to issue registered shares. The ministerial draft also provided that, after a certain transition period, the making of the required entries in the commercial register would be refused in the event of non-compliance with this new rule.

That proposed restriction met with some strong criticism. It was argued, for instance, that such a restriction would seriously interfere with the freedom to draft articles of association, that even registered shares were not always an effective means for identifying investors (with contractual trust arrangements being only one example for this) and, moreover, that the cost of implementing such restrictive legislation would be considerable.

It is now stipulated in the government draft that issuing bearer shares shall also be permissible on condition of them being held in collective safekeeping. According to the

official statement of reasons published together with the government draft, a certain "trail for investigations" always exists when shares are held in collective safekeeping by a securities clearing and deposit bank. The government draft also no longer provides for any ban on the making of register entries.

## "Reverse" Convertible Bonds

**Express statutory provisions are to be introduced regarding the issue of convertible bonds that provide for a conversion right of the issuer. However, compared to the ministerial draft, the government draft substantially restricts the exceptions from the 50% rule applying in the case of a conditional capital increase.**

Up to now, only convertible bonds providing for a conversion right of the bondholder were expressly regulated by law. Such a conversion right of the issuer, i.e. the company, (existing under convertible bonds referred to as "reverse") will now be regulated by law as of the coming into effect of the Stock Corporation Law Amendment Act 2012. This will give companies greater flexibility in financing matters, especially when faced with a difficult situation. It should also be noted that even under the law as it stands, i.e. without there being any express statutory provisions on this, such a

conversion right may be provided for in the terms of issue of a convertible bond.

Under the present legislation, the amount of any conditional capital increase that may be made in view of an issue of convertible bonds must not exceed 50% of the share capital existing at the time of the capital increase resolution. While according to the ministerial draft this restriction was to be entirely abolished for "reverse" convertible bond issues, the government draft is considerably more restrictive in this respect in that it stipulates, in essence, that the said 50% limit shall only disapply in cases where a conditional capital increase is resolved solely in order to counteract a risk of insolvency that may arise in the future. The purpose of this provision is to render a "debt-to-equity-swap" possible in a crisis situation.

## Preference shares not giving entitlement to deferred dividend payments

**The possibility to issue preference shares that do not give entitlement to deferred dividend payments is to be introduced as a further measure to facilitate the capitalization of stock corporations. Voting rights are activated if no dividend is paid.**

The issue of such preference shares is to be made possible under the Stock Corporation Law Amendment Act, as a special measure to enable banks to comply with equity capital requirements. However, the issue of such preference shares does not stand in the way of issuing preference shares that entitle to deferred dividend payments.

If a company issues preference shares, voting rights will be activated if no preference dividend is paid. Regarding preference shares not giving entitlement to deferred payment of dividend, in contrast to what was stipulated in the ministerial draft, voting rights will exist until the preference dividend for any one financial year has been paid in full. Under the law as it stands, preference dividends that have accrued in past years, but have not been distributed, must be paid in full before voting rights on preference shares will again cease to exist.

## Relative Deadline for the Filing of Actions to Annul

**Under the Stock Corporation Law Amendment Act, any action to annul a shareholders' resolution that has already been challenged by an action to set aside must be filed within one month following the public announcement of the filing of the action to set aside the resolution.**

Up to now, an action to annul may be filed at any time within a period of three years, beginning on the date the relevant resolution of the general meeting is recorded in the Commercial Register (this does not apply in cases where a resolution is challenged on grounds of improper recording). However, by no means all such resolutions require registration in the Commercial Register. In the past, it frequently happened that when proceedings for the registration of a resolution in the Commercial Register despite the pendency of an action to set aside such resolution were approaching their end, another shareholder filed a new action to annul and thereby caused further delay. This practice now is to be stopped by the legislator.

Once the Amendment Act has come into force, it will no longer be possible to file an action to annul against a resolution if that resolution has already been challenged by action to set aside and if this fact has been published in the electronic Federal Gazette more than one month prior. The filing of an action to annul will thus be subject to the same relative deadline as an intervention by a third party in support of a litigant.

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